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The *Journal of International Law and International Relations* (affectionately, *JILIR*) is a joint project of the Faculty of Law and the Munk School of Global Affairs at the University of Toronto. It is our goal to facilitate and promote scholarly exploration of the nexus of international law and international relations. Our commitment to this endeavor stems from a belief in the complementarity of these fields and the value of stimulating conversation on their common themes. To see why we believe this work is of critical importance, one need only look at recent headlines.

To quote some of our predecessors: it is the blessing of Editors-in-Chief to inherit the momentum from previous years’ work and the curse to have only a fleeting window in which to build for the future success of *JILIR*. This has especially been a challenge this year. We have had much to live up to, with Volume 11.2 marking the 10th Anniversary of the Journal, and dedicated to Professor Anne Orford’s stunning address for the 2014 Katherine Baker Memorial Lecture. At the same time, that issue created both substantial interest in *JILIR* and a serious backlog.

With this in mind, we are utterly indebted to our staff this year. Make no mistake, *JILIR* is a team effort. Over sixty students in both the Juris Doctor (JD) and Master of Global Affairs (MGA) programs at the University of Toronto contributed to this volume, and we extend our deepest gratitude to each of them. From the Associate Editors to the Senior Editors to our Senior Board, the Journal simply could not exist without the time and intellect these students volunteer. We are also deeply appreciative of the team of our Business Manager, Sunita Pillai, and our Executive Editors who served so ably on this volume: Michael Stenbring, Bushra Ebadi, Colin Baulke, Daniella Quarrey, and Jane Zhang, and also the Chair of our Senior Board, Ashley Barnes. Looking forward, we also have the upmost faith that next year’s Editors-in-Chief—Moyo Arewa, Philip Omorogbe, and Jane Zhang—will continue to build on *JILIR*’s successes.
We also wish to express our deep appreciation for professors Stephen Toope, Jutta Brunnée, Audrey Macklin, and in particular Karen Knop for their guidance, and the entire Advisory Board for their time and support throughout the Journal’s run.

Our greatest acknowledgements must go to the contributors. The pages that follow are a testament to months of editorial and peer review, feedback, dialogue and revision. Through it all, these scholars have been receptive, committed and patient. We are very proud that they chose to publish their excellent scholarship in our journal (and appreciate their patience!), and hope that this issue showcases stellar work by scholars working beyond disciplinary boundaries.

Adam Barrett, Katie Reszitnyk, and Geneviève Ryan

Editors-in-Chief
Harmonizing the Law to Protect Cultural Diplomacy: The Foreign Cultural Exchange Jurisdictional Immunities Clarification Act
Emily Behzadi*

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* JD, Georgetown University Law Center, 2015. I thank Professor Anne-Marie Carstens, Georgetown University Law Center, for sharing your expertise and perspective. I thank Dean Leticia Diaz, Barry University School of Law, and Vincent Sena for your input and valuable feedback.

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I. PREAMBLE

Works of art are ageless testimonies to beauty that exist outside of time. Andre Malraux\(^1\) once commented, “there are two kinds of art: that which belongs to the country of its origin and that which belongs to mankind.”\(^2\) It is understood that art objects can serve as cultural ambassadors, which function to enlighten the world of the unique cultures and heritage of other nations.\(^3\) All over the world, people benefit from the opportunity to observe these cultural ambassadors on loan from foreign institutions. The United States has a particularly robust interest in facilitating these cultural exchanges.\(^4\)

Unfortunately, the provenance of many of these pieces is difficult to reconstruct. Voluminous ownership documents, particularly those produced before the 20\(^{th}\) century, have been damaged or vanished as a result of wars, natural disasters, and thievery.\(^5\) The illicit looting of antiquities has especially posed threats to international cultural heritage. As one can imagine, lawsuits over ownership emerge when a piece with questionable provenance shows up in an American museum. In furtherance of U.S. national interest in cultural exchanges, the State Department has regularly exerted its delegated authority to grant immunity from seizure for temporary foreign art loans.

The results of these lawsuits have exposed inconsistencies in American foreign sovereign immunity law. This Article analyzes the legislation and litigation associated with the inherent deficiencies between the Foreign Sovereign Immunity Act and the Immunity from Seizure Act. To remedy these defects in the law, Congress introduced the Foreign Cultural Exchange Jurisdictional Immunities Clarification Act. This article further supports the proposed bill for the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act and ultimately concludes that Congress should enact like legislation in order to preserve cultural heritage loans.

II. INTRODUCTION

Previously on view at the J. Paul Getty Museum was a loan from the National Archaeological Museum in Athens of a stele honoring Prokleides,
a military officer in the Athenian army. At the National Gallery of Art was a loan from the Rijksmuseum and the Amsterdam Museum of two portraits from the Dutch Golden Age, “which have been rarely seen outside the Netherlands.” At the Metropolitan Museum of Art, were three ritual vessels from the fifth century BCE, on loan from Shanghai Museum. These pieces have “never before been exhibited together outside of China.” These aforementioned international loans are only some examples of how cultural exchange affords North Americans the ability to witness the world’s most precious art close to home.

The ability to acquire artwork on loan provides extraordinary educational and historical value to the recipient museum and nations. Immunity from seizure and suit facilitates the lending of cultural property for temporary exhibitions. The benefits of this cultural exchange are important to consider in weighing the interests of foreign states versus claimants seeking recovery. Museums provide audiences with the opportunity to discover less familiar cultures through the visual arts when engaging in these types of ubiquitous exchanges. Cultural exchange can reduce provincialism and ignorance by expanding an individual’s education and historical experience. It can also enrich the viewer’s life through aesthetic and intellectual stimulation. Likewise, it promotes scholarship in artistic, historical, psychological, and philosophical studies. Cultural exchange is also a mainstay for inspiration of future artistic works. Accordingly, it is important to maintain an enduring support system for this cultural exchange to preserve these vital interests.

The value of cultural diplomacy has been acknowledged by scholars, political leaders and the international community over time. In 1948, the United States (US) Congress enacted the Information and Educational Exchange Act of 1948 to “enable the Government of the United States to promote a better understanding of the United States in other countries and to increase mutual

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6 The J Paul Getty Museum, “Relief with Antiochos and Herakles (330 BCE)” (2015), online: <http://www.getty.edu/art/exhibitions/greek_stele/> (last visited 5 February 2015). The stele is found “in [the] gallery devoted to Religious Offerings.” It is “carved in relief above a public decree . . .” It includes the “figures of Antiochos, the mythical founder of the tribe Antiochos, and his father, the Greek hero Herakles.”

7 National Gallery of Art, “Civic Pride: Group Portraits from Amsterdam” (28 February 2012), online: <http://www.nga.gov/content/ngaweb/exhibitions/2012/civic_pride.html> (last visited 5 November 2014).


9 Defining cultural diplomacy as “the fostering of understanding between citizenry of different nations through the exchange of ideas, information, art, and other influential aspects of culture.” See: Danica Curavic, “Compensating Victims of Terrorism or Frustrating Cultural Diplomacy? The Unintended Consequences of the Foreign Sovereign Immunities Act’s Terrorism Provisions” (2010) 43 Cornell Int’l LJ at 401.
understanding between the people of the United States and the people of other countries.”

In order to achieve these goals, the international exchange of persons, knowledge, and skills is imperative. The lending and borrowing of famous artworks and antiquities are at the heart of these cultural exchanges. Museums and galleries are especially situated to provide the perfect setting for cultural exchange.

When an American institution desires an exhibition or display of a cultural object from a foreign lender, it may petition the State Department for a grant of immunity under the Immunity From Seizure Act (IFSA). This immunity protects a cultural object on temporary exhibition from being seized by law enforcement or other government authorities while the art is on display in the United States. For forty years, this immunity provided foreign lenders with the security that loans of artwork, immunized by the State Department, would not serve as the basis for the jurisdiction in US courts. Although IFSA lacks language of jurisdiction, countries seemingly have operated under the assumption that this immunity protected cultural objects not only from seizure, but also from judicial authorities exercising jurisdiction on a work’s physical presence in the jurisdiction on temporary loan. However, due to the development of exceptions to foreign sovereign immunity, particularly as codified in the Foreign Sovereign Immunities Act (FSIA) and recent federal court decisions, American museums’ efforts at fostering international cultural exchange through temporary exhibitions have been impeded.

Recently, the lending of cultural objects across the United States “has been hindered and destabilized by a steep rise in third party claims.” As a result, future cultural exchanges may be seriously reduced by foreign lenders’ reluctance to authorize their cultural objects to travel to the United States. In order to preserve the cultural exchange of foreign government-owned art, Congress must clarify the relationship between IFSA and FSIA by enacting a version of the ‘Foreign Cultural Exchange Jurisdictional Immunity Clarification Act.’

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11. Curavic, supra note 9 at 401.
13. Ibid.
15. According to the American Association of Museum Directors (AAMD), the inconsistency between foreign sovereign immunity and immunity from seizure, “has in many instances, caused foreign lenders to decline to import artwork and cultural objects into the United States for temporary exhibition or display;” also Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, HR 4086 (20 March 2012), online: <http://www.gop.gov/bill/h-r-4086-foreign-cultural-exchange-jurisdictional-immunity-clarification-act/> (last visited 5 November 2014).
16. See ibid.
It is important to note the underlying premise of the causes of these actions in the United States. Around the world, looting and illicit import of antiquities have increased in an effort to raise funds for nefarious purposes. Countries have enacted legislation in an attempt to protect their cultural heritage and inhibit the export of certain types of objects. However, these attempts do not halt the enduring black market of works circumventing legitimate international channels. Therefore, it is incumbent upon countries, such as the United States and Canada, to balance the interests of facilitating cultural art exchanges with the threat of further creating a medium for persons to evade liability.

This article posits the importance of art loans for cultural exchange in the US. Part II provides context necessary to understand the inconsistencies in the law that hamper the cultural exchange program and a possible resolution to this problem. Part III argues that cultural objects should not constitute commercial activity as provided under the expropriation exception obtained in FSIA. Part IV concludes that Congress should enact the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act to allow institutions to easily import for display works of art from foreign lenders. Part V examines the reaction of the international community to immunity from seizure and jurisdiction.

III. BACKGROUND

1. The Foreign Sovereign Immunities Act (FSIA)

FSIA is an American federal statute codifying the conditions under which foreign sovereign states, and their agencies and instrumentalities, may be sued in US courts. FSIA is the sole ground for a United States court to obtain jurisdiction over foreign states. In recent years, the application of FSIA has become a controversial issue, particularly with respect to cases involving efforts to recover cultural property taken from Holocaust-era victims. The doctrine of sovereign immunity is especially important in international disputes over cultural property because “many of the objects at issue are in government-owned museums around the world.” As one court noted, “[o]ne would be hard-pressed to exaggerate the difficulty of interpreting

the [FSIA].” Sovereign immunity is extraordinarily difficult to analyze because it requires the balancing of the interest of “providing redress for citizens against the potentially adverse consequences that such suits may have on foreign relations.”

If a foreign lender is not immune, federal district courts have exclusive jurisdiction over the action. Thus, the question of immunity is a threshold issue and relates to the court’s subject matter jurisdiction. FSIA sets forth the general proposition that a “foreign state shall be immune from the jurisdiction of the courts of the United States and of the States…” However, it also provides a number of exceptions to foreign sovereign immunity. Of particular relevance to cases involving the recovery of cultural property, FSIA stipulates an exception for which “rights in property taken in violation of international law are in issue.” Under this so-called “expropriation exception” a foreign state does not qualify for immunity if

- the property at issue was taken “in violation of international law;”
- that property “is present in the US in connection with a commercial activity carried on in the US by the foreign state;”
- or in any case in which that property “is owned or operated by an agency or instrumentality of a foreign state and that agency or instrumentality is engaged in a commercial activity in the US”

This provision of FSIA can “open foreign governments up to the jurisdiction of US courts if foreign-government owned artwork is present in the United States in connection with a commercial activity and there is a claim that the artwork was taken in violation of international law.” Some federal district courts have held that the “display or exhibition of the artwork” can be “in connection with commercial activity.” This is even the case if the display

27. Ibid. §§1609-1611 (2006).
28. Ibid. § 1605(a)(3).
29. Ibid.
or exhibition is “done by a non-profit entity.” Thus, foreign-owned public museums will lack immunity when lending to institutions within the United States because of the courts’ understanding of the “commercial activity” within FSIA’s expropriation exception.

2. **Immunity from Seizure Act (IFSA)**

IFSA, enacted in 1965, provides the Executive Branch with the authority to grant protection from seizure of works owned by a foreign country on loan to a non-profit cultural institution in the United States for temporary exhibition. IFSA protects cultural objects against civil and criminal process, if certain requirements are satisfied prior to importation. In particular, Section 2459 of IFSA provides that the work must

- be for temporary exhibition or display;
- the exhibition must be not-for-profit;
- the United States Information Agency must determine that the artwork is of ‘cultural significance,’ and;
- the temporary exhibition must be in the ‘national interest.’

Congress enacted IFSA with the intent of ensuring the successful exhibition of cultural objects. IFSA is committed to encouraging the cultural and educational exchange of artwork and other culturally significant objects amongst sovereign states. Congress enacted IFSA with the intent to recognize that cultural exchange could “produce substantial benefits” to the United States, both “artistically and diplomatically.” Accordingly, loaned property immune under IFSA is not in danger of being “seized or subject to court-ordered control.” However, as discussed infra, this immunity does not protect a foreign institution from potential claims asserted in a US court.

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32. Ibid.
35. Ibid.
36. Ibid.
37. Zerbe, *supra* note 34 at 1124, n 21 (explaining the motivation behind the bill was a pending exchange between a Soviet museum and the University of Richmond, in which the loan was conditioned on protection pending valid claims against the art work).
38. Ibid. at 1124.
3. Malevicz v. City of Amsterdam. Inconsistencies Between FSIA and IFSA

The United States is widely considered a legal refuge for victims of looted art. Here, victims can take advantage of the US adversarial process against powerful foreign institutions. Absent the protections provided by IFSA, the cultural objects that foreign institutions send on loan could be seized within the US to satisfy such claims. The language in IFSA is deficient in that it provides only for waivers to prevent transparent seizures. These waivers do not prevent claimants from filing lawsuits to recover artworks. Rather, if the cultural object makes its way to the United States and one of the FSIA exceptions applies to the potential defendant, then the cultural object in question may serve as the basis for establishing jurisdiction.

An object’s immunity from seizure does not preclude the foreign state from suit; it only provides protection from seizure of the object. Instead, IFSA protects a foreign country or state-owned entity that “sends exhibits to the US in an exchange and cultural… [from being] subjected to a suit and an attachment in this country.” This protection is narrow and can still subject an entity to suit in the United States. Thus, a country may elect to not send its exhibits to the US in order to avoid this assertion of jurisdiction.

The Malevicz decision provides a great example of how immunity under IFSA does not protect a foreign institution from judicial process. In Malevicz, a group of thirty-five heirs of Kazimir Malevicz sued the city of Amsterdam in an attempt to recover artworks, which were valued at...

41 Malevicz, supra note 31 at 298.
43 Ibid.
44 See e.g. United States v Portrait of Wally, (2009) 663 F Supp 2d 232, 246 (SDNY) [Portrait of Wally] (failing to apply for protections under IFSA, allowed the New York court to seize works on loan to the New York Museum of Modern Art from the Leopold Museum in Vienna).
45 Foreign Cultural Exchange Immunity Act, supra note 4 at 5.
46 Ibid. at 2.
47 Kazimir Malevicz was a Russian painter, printmaker, decorative artist and writer of Ukrainian birth. See Museum of Modern Art (MOMA), “Kazimir Malevicz” (2014) online: <http://www.moma.org/collection/artists/3710?locale=en> (last visited 19 October 2014). He was one of the “pioneers of abstract art and a central figure in a succession of avant-garde movements during the period of the Russian revolutions of 1905 and 1917 and immediately after.” … Suprematism, the style of severe geometric abstraction with which he is most closely associated, was a leading force in the development of Russian Constructivism. Malevicz worked in a variety of styles, but his most important and famous works concentrated on the exploration of pure geometric forms (squares, triangles, and circles) and their relationships to each other and within the pictorial space.” See: The Art Story Foundation, “Kazimir Malevicz” (2014) online: <http://www.theartstory.org/artist-malevich-kasimir.htm> (last visited 19 October 2014). Malevicz profoundly influenced the evolution of modern art.
The paintings were part of an exhibition at the Solomon R. Guggenheim Museum in New York and the Menil Collection in Houston. The 14 cultural objects were part of a larger collection of some 84 paintings, gouaches, drawings, and technical drawings that were purchased by the Stedelijk Museum Amsterdam in 1958. The State Department declared that the works to be included in the Malewicz exhibitions were of “cultural significance” and “in the national interest.” As a result of such declarations, the objects received immunity from seizure from the US government.

Although the objects were immunized from seizure, and as such were able to be returned to Amsterdam, the heirs were permitted to use the exhibition to assert jurisdiction. The heirs invoked the “expropriation exception” of FSIA in order to assert jurisdiction over the otherwise immunized entity. The court held that the “happenstantial” presence of these artworks on display at a US museum satisfied the jurisdictional requirement. The court relied on precedent set in Argentina v. Weltover, Inc. to ascertain the commerciality of the loan and to determine whether the City of Amsterdam engaged in “commercial activity carried on in the United States.” The standard set forth by the court assessed whether the specific actions that the foreign government performed were similar to the types of activity “engaged by a private party.” In attempting to answer this question, the court reasoned that loaning artwork to museums in the United States constitutes typical “commercial activities” engaged in by private parties. Thus, the court concluded that this type of action meets the commercial activity component necessary to satisfy FSIA.

The Malewicz opinion is particularly important because in classifying art loans as commercial activity under FSIA, the court implicitly exposed foreign institutions to US jurisdiction despite having immunity under IFSA. Therefore, although under IFSA, the Malewicz heirs were not able to seize the artwork, they were able to use “the window of opportunity afforded by the

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48. Malewicz, supra note 31 at 303.
49. Ibid.
50. Woudenberg, supra note 30 at 173.
51. Ibid.
52. Ibid.
53. Malewicz, supra note 31 at 311.
54. The Court determined that the City of Amsterdam was clearly a “political subdivision” of the Kingdom of the Netherlands and was therefore a “foreign state” within the meaning of FSIA. Ibid. at 306.
55. Ibid. at 313.
56. Ibid.
57. Ibid. at 314.
58. Ibid. at 313.
59. Ibid. at 314.
60. See Section IV below.
Malewicz exhibition[s] as the jurisdictional hook for their claims.” 61 A “happen-
stantial” 62 presence of artwork during an exhibition in the United States or even a foreign country’s advertisement can open the door to future claimants to bring their suit in the US courts. 63 Consequently, this new development in the law may cause some foreign governments concern over possible litigation in US courts, and as a result re-evaluate whether to grant permission for their cultural objects to be placed on loan to US museums.

The US Supreme Court or Congress needs to firmly articulate their stance regarding IFSA’s position with respect to FSIA. Without such, foreign lenders are vulnerable to a particular court’s interpretation of these statutes. 64 At the present time, the requirements of IFSA do not sufficiently defend the interests of foreign states who may be subject to litigation in the United States. 65 Institutions who lend works of art for non-profit display, have asserted that a “firm guarantee against judicial seizure is an ‘essential factor’ in [their] decision to lend” artwork to foreign countries. 66

As Malewicz demonstrates, immunity from seizure of cultural objects and immunity from jurisdiction can be interlinked. Since the enactment of IFSA, immunity from seizure provided foreign states with a sense of security that immunized loans of artwork would not serve as the basis for the jurisdiction of US courts. However, Malewicz and its progeny threaten this invulnerability.

4. Foreign Cultural Exchange Jurisdictional Immunity Clarification Act

Through the enactment of IFSA, Congress recognized that the borrowing of artwork provides priceless educational and historical value to the American people. 67 Both domestic and foreign museums sought clarification of the scope of immunity available under IFSA and FSIA. In an attempt to clarify the disparities, Congress introduced the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (“2012 Clarification Bill”).

The legislation sought to amend FSIA by including language that “if the Executive Branch granted immunity from seizure under IFSA, the loan of artwork or other objects of cultural significance for temporary non-profit exhibition or display in the United States would not expose a

62. Malewicz, supra note 31 at 313.
64. Ibid. at 183.
65. Ibid.
foreign institution to the jurisdiction of US courts.” This immunity applies only to FSIA’s expropriation exception. Likewise, if artwork owned by foreign governments or institutions under their purview has not been granted immunity pursuant to IFSA, the protection provided by this legislation will not apply. Furthermore, the bill included a special exception for all claims filed by families whose artwork was expropriated by Nazis in World War II.

The 2012 Clarification Bill was surrounded with controversy and ultimately failed to pass. Opponents objected to the “narrow-tailoring of the Nazi-era exception,” however, seemingly agreed that the discrepancy between FSIA and IFSA needed to be resolved. First, opponents opposed the bill because they believed that the exception in requiring the artwork be lost to Nazi agents “excluded those families who were forced to sell their art below market value.” Opponents also argued that the exception did not include claims based on “takings from the United States’ and its allies.” Additionally, challengers to the bill contended that limiting claims to only those related to the Nazi era was severely flawed because it “failed to recognize other egregious taking claims.” Instead, opponents of the bill desired a “blanket exception to all looted art.” Its proponents “seldom defended the proposed law.” Thus, the version of the 2012 Clarification Bill that passed by the House of Representatives died in the Senate committee.

The bill to enact the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (“2014 Clarification Bill”) was reintroduced on 25 March 2014. The bill was almost identical to the version that passed in the House in 2012. On 7 May 2014, the bill passed the House of Representatives, by a margin

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69. Ibid. at 7.
70. Ibid.
71. Ibid.
73. Shield, supra note 30 at 453.
74. Ibid.
75. Ibid.
76. Ibid.
78. O’Donnell, supra note 72.
However, the 2014 Clarification Bill, which sought to restore the protections Congress meant to provide through IFSA, died in the Senate.\textsuperscript{81} The Bill was introduced again on 11 February 2015. It passed in the House on 9 June 2015, however, it has yet to be passed by the Senate. According to \textit{Govtrack}, the 2015 Bill only has a 22 per cent chance of being enacted in the near future.\textsuperscript{82}

The 2015 Clarification Bill claimed to amend FSIA “to bar all ownership claims over foreign art on loan in the United States, except for those brought by families whose art was expropriated by the Nazis during World War II.”\textsuperscript{83} Specifically, the 2015 Clarification Bill would deny application of the FSIA provision to cases meeting select criteria:

(2) \textit{Nazi-era claims}

Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

a. the property at issue is the work described in paragraph (1);

b. the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

c. the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

d. a determination under subparagraph (C) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).\textsuperscript{84}

The “covered government” as mentioned in Section 2(B) includes:

1. concerning rights in property taken in violation of international law between January 30, 1933, and May 8, 1945;

2. by the government of Germany or any government in Europe occupied, assisted, or allied by the German government;

3. the court determines that the activity associated with the exhibition or display is commercial; and


\textsuperscript{82} Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, HR Rep no. 889 (2015), online: <https://www.govtrack.us/congress/bills/114/hr889>.

\textsuperscript{83} Ibid.

\textsuperscript{84} Ibid.
4. that determination is necessary for the court to exercise jurisdiction over the foreign state.\textsuperscript{85}

The proposed legislation essentially created an “exception to an exception;” if the lending of artwork or cultural objects is considered a commercial activity, then the action of lending the piece will satisfy the expropriation exception of FSIA, and will thus trigger jurisdiction in US courts.\textsuperscript{86} The 2015 Clarification Bill would in effect overturn \textit{Malewicz} by unequivocally postulating that cultural property loans among sovereign states does not constitute “commercial activity” for purposes of FSIA.\textsuperscript{87}

\section*{IV. CULTURAL OBJECTS ON LOAN SHOULD NOT CONSTITUTE COMMERCIAL ACTIVITIES PURSUANT TO FSIA}

In order to further its goals of promoting cultural exchange, the United States should take the necessary steps to ensure that the act of loaning cultural objects does not confer jurisdiction. Although IFSA is clear in restricting immunity to art loans within the United States that are “administered, operated, or sponsored without profit,”\textsuperscript{88} the statute does not protect a lending institution from claims against them. Instead, through the use of the expropriation exception, as described above, claimants are able to use foreign loans in the United States as a basis for jurisdiction. FSIA is ambiguous as to the threshold of commercial activity needed in order to determine when jurisdiction may attach.\textsuperscript{89} The aforementioned is especially true in light of \textit{Malewicz}, which as discussed \textit{supra}, understood the lending of cultural objects to be a commercial activity.

To satisfy FSIA’s commercial activity exception, “(1) a lawsuit must be based upon an act that took place outside the territory of the United States; (2) the act must have been taken in connection with a commercial activity; and (3) the act must have caused a direct effect in the United States.”\textsuperscript{90} The Supreme Court has expressed frustration with FSIA’s ambiguous definition of commercial activity, saying the definition “leaves the critical term ‘commercial’ largely undefined,” and calling the standard “too ‘obtuse’ to be of much help.”\textsuperscript{91} The definition under FSIA makes clear that the nature rather

\begin{itemize}
\item \textsuperscript{85}Ibid.
\item \textsuperscript{86}Shield, \textit{supra} note 30 at 448-49.
\item \textsuperscript{87}O’Donnell, \textit{supra} note 72.
\item \textsuperscript{88}Immunity from Judicial Seizure Statute, \textit{supra} note 34 at § 2459(a).
\item \textsuperscript{89}See Foreign Sovereign Immunities Act, \textit{supra} note 25 at § 1605(a).
\item \textsuperscript{90}\textit{De Csepel v Republic of Hungary}, (2013) 714 F 3d 591 (DC Cir).
\item \textsuperscript{91}See \textit{Saudi Arabia v Nelson}, (1993) 507 US 349, 358 (citing \textit{Callejo v Bancomer}, (1985) 764 F 2d 1101, 1107 (5th Cir)); see also Alicia M Hilton, “Terror Victims at the Museum Gates: Testing the Commercial Activity Exception Under the Foreign Sovereign Immunities Act” (2008) 53 Vill L Rev 479 at 506 (analyzing FSIA’s “commercial activity” and “commercial use” exceptions, and concluding that these exceptions should be narrowly construed in regards to cultural property).
\end{itemize}
than purpose of the activity is what is to be used in order to determine the commerciality of a transaction. To determine whether an action constitutes a commercial activity, courts question “not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives[,]” but “whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce.”

When enacting FSIA, Congress had the intention of, in effect, creating a federal long-arm statute for suits against foreign states. Significantly, the commercial activity exception aims to create a nexus between the two potential countries. Congress intended that this nexus would reflect the requirements of minimum jurisdictional contacts and adequate notice as presented in *International Shoe v. Washington*. Activity surrounding art loans (such as, *inter alia*, shipping, couriers, and loan fees) indisputably have some features of commercial acts. This is especially true with the occurrence of “blockbuster” exhibitions, which “involve the sale of admission tickets and memorabilia that also may profit the lender.” Notwithstanding these types of exhibitions, the potential “commercial activity” of temporary art loans integrated with the fact that the foreign institution has no other commercial contacts with the US seems contrary to *International Shoe*.

Concluding that temporary cultural property loans fall under the “commercial activity” exception construes the *International Shoe* criterion too loosely. Courts treating these requirements for jurisdiction as anything less than minimum contacts has the potential effect of freezing participation in cultural exchange with the United States. The court in *Malewicz* relied on the question “whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in “trade and traffic or commerce,” to constitute commercial activity.” The court asserted that “if an act is something that a private person or entity can do, it is not ‘sovereign.’” The court seems to misconstrue the logic behind the exception. The standard should not be whether this activity is something that a private person or entity “can do,” rather, it is whether the state-owned entity

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92. *Foreign Sovereign Immunities Act*, *supra* note 20 at § 1603(d).
96. *Ibid.* at 13; under the principles articulated in *International Shoe v Washington*, a court does not exercise personal jurisdiction over a defendant unless that defendant has “sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice.” See *International Shoe v Washington*, (1945) 326 US 310, 316 [*International Shoe*].
98. *Malewicz, supra* note 31 at 313 (emphasis added).
is engaging in activity as if it was a private entity. It is commonly understood that courts “should not read a statute in a manner that would undermine the purpose of another statute if other plausible constructions were available.”

In this case, reading the “commercial activity” to include loans of art on temporary exhibition is directly contrary to the purpose of IFSA.

In Cassirer v. Kingdom of Spain, a contemporary case concerning a piece involved in a dispute within the context of FSIA, the court relied on Malewicz in concluding that a loan of paintings constituted commercial activity. The Ninth Circuit Court principally relied on isolated purchases and advertisements to the US to determined that art loans fell under the commercial activity exception. These isolated incidents are hardly enough to embody the requirements of minimum jurisdictional contacts of International Shoe. Courts seem to be focusing more on the amount of contact with the US rather than the nexus between the alleged commercial activity and the lawsuit. This is especially problematic for countries like Cuba, Iran, and North Korea who essentially have no commercial associations with the United States. Therefore, a loan of a cultural artifact could be the sole commercial activity and consequently would suffice to establish jurisdiction.

Foreign lenders do not anticipate that a loan of artwork from its immunized exhibit would be enough to satisfy the standards of the expropriation

100. Amicus Curiae Brief for the United States, supra note 66, at 17. See e.g. Digital Equipment Corp. v Desktop Direct, Inc., (1994) 511 US 863, 879 (“when possible, courts should construe statutes…to foster harmony with other statutory and constitutional law”); see also Morton v Mancari, (1974) 417 US 535, 551 (“[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”)


102. See ibid. Specifically, the Court found that the following facts were substantial enough to satisfy the exception:

…buying books, posters, and postcards; purchasing books about Nazi expropriation of works of art; selling posters and books, and licensing reproductions of images; paying United States citizens to write for exhibit catalogs; shipping gift shop items to purchasers in the United States, including a poster of the Pissarro painting; recruiting writers and speakers to provide services at the museum; permitting a program to be filmed at the museum that included the Pissarro painting and was shown on Iberia Airlines flights between Spain and the United States; placing advertisements in magazines distributed in the United States, and sending press releases, brochures, and general information to Spain’s tourism offices in the United States, at least one of which mentions the Pissarro by name; distributing the museum bulletin, ‘Perspectives,’ to individuals in the United States; borrowing and loaning artworks, though not the painting; and maintaining a website through which United States citizens sign up for newsletters, view the collection—including the Pissarro painting—and purchase advance admission tickets through links to third-party vendors.

See ibid. at 1032.

103. Especially when considered with the fact that the actual works that were the focus of the litigation had never entered the US.
exception under FSIA, especially if the exhibit is its sole contact with the US.\textsuperscript{104} IFSA “instructs courts to treat certified exhibits as if they are not present in the United States for jurisdictional purposes.”\textsuperscript{105} Hence, exposing foreign entities to US jurisdiction in this manner would dissuade foreign lenders from lending artwork to U.S, which completely thwarts the original purposes behind IFSA. As Judge Gould asserted in his dissent in \textit{Cassirer}, “two wrongs don’t make a right, so a Nazi taking in violation of international law cannot reasonably be viewed as invoking waiver of sovereign immunity.”\textsuperscript{106}

Furthermore, “in the nature of comity,” the US “should not do to other nations what we would not want other nations to do to us.”\textsuperscript{107} In an interview with \textit{Illicit Cultural Property},\textsuperscript{108} Nout van Woudenberg\textsuperscript{109} commented that

the fact that cultural objects can be important for the identity of a State, the fact that cultural objects may help to understand the culture, history and development of a State, as well as the fact that cultural objects can be used as a means in the promotion of international cultural exchanges (codified in several international agreements) and the strengthening of bilateral or multilateral diplomatic relations, makes it fair to consider these cultural objects on loan as a category of protected State property.\textsuperscript{110}

Most importantly, the concern of whether cultural objects on loan should be a category of protected State property is a public policy issue. This issue is especially significant in order to maintain trust amongst foreign sovereigns, especially in regard to the continual diplomatic exchange of these very important works of art. Any perceived erosion of that trust could take years to restore and in turn jeopardize the cultural exchange program. Action must be taken to address the harm that \textit{Malewicz} has and potentially could cause. The enactment of a bill similar to the 2012, 2014, or 2015 Clarification Bill is the adequate and appropriate redress.

\textsuperscript{104} See Amicus Curiae Brief for the United States, supra note 66 at 9-11.
\textsuperscript{105} Ibid. at 10.
\textsuperscript{106} \textit{Cassirer}, supra note 101 at 1041 (Gould, J dissenting).
\textsuperscript{107} Ibid. at 1044.
\textsuperscript{108} “Illicit Cultural Property” is a blog written by an Associate Professor of Law at South Texas College of Law. See: <http://illicitculturalproperty.com/>.
\textsuperscript{109} Nout van Woudenberg is an external researcher at the University of Amsterdam and Legal Counsel at the International Law Division of the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
\textsuperscript{110} Derek Fincham, “An Interview with Nout van Woudenberg on Immunity” \textit{Illicit Cultural Property} (May 2012), online: <http://illicit-cultural-property.blogspot.com/2012/05/interview-with-nout-van-woudenberg-on.html> (last visited 5 November 2014). Although keep in mind, the article is discussing “immunity from suit” rather than “immunity from seizure,” which as articulated throughout this article, is already codified in the United States through IFSA.
THE FOREIGN CULTURAL EXCHANGE JURISDICTIONAL IMMUNITY CLARIFICATION ACT WOULD EASE THE TENSION BETWEEN FSIA AND IFSA

As discussed above, the 2015 Clarification Bill attempted to resolve the tension between FSIA and IFSA. If enacted, the 2015 Clarification Bill will amend FSIA to clarify that where an object is immune under IFSA, its loan cannot constitute “commercial activity” as necessary to satisfy the expropriation exception.\(^{111}\) Nazi-era claims are specifically exempted.\(^{112}\) Simply stated, the 2015 Clarification Bill is a legislative overruling of Malewicz. As will be addressed below, it is imperative to enact a legislative redress, like the 2015 Clarification Bill, to mitigate the detrimental effects of this case.

1. A Clarification Bill Will Narrowly Strengthen the Ability of Museums to Borrow Foreign Art and Cultural Artifacts

The 2015 Clarification Bill is a very narrow piece of legislation, which will affect a limited number of cases. Its provisions only apply to defendants employing the expropriation exception, which is only one of many exceptions to immunity under FSIA. Moreover, the 2015 Clarification Bill provides that any object would still require the State Department’s approval in order to obtain IFSA immunity.\(^{113}\) The 2015 Clarification Bill would only divest federal jurisdiction over a particular type of dispute, such as a foreign lender that has no commercial activity in the United States but for the exhibition of the object immunized from seizure.\(^{114}\) Likewise, if the Nazis allegedly stole the work, then the status quo would remain.\(^{115}\) If the foreign sovereign or its instrumentality has commercial activity within the US, then the institution will still be subject to jurisdiction under other exceptions to FSIA.

Nicholas O’Donnell of Art Law Report exposed a probable limitation of the 2015 Clarification Bill. Under the Act of State Doctrine,\(^{116}\) foreign citizens who lost their property to a revolutionary government cannot sue in the United


\(^{112}\) Ibid.

\(^{113}\) Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, supra note 111, at 6.

\(^{114}\) Ibid.

\(^{115}\) O’Donnell, supra note 72.

States.\textsuperscript{117} However, pursuant to the 2\textsuperscript{nd} Hickenlooper Amendment,\textsuperscript{118} “the Act of State doctrine does not apply to claims concerning alleged expropriations in violation of international law.”\textsuperscript{119} The Supreme Court held in \textit{W. S. Kirkpatrick & Co. v. Environmental Tectonics Corp.},\textsuperscript{120} that when a case involves an “official act of a foreign sovereign,” the Act of State doctrine will only apply when a US court must declare such official act “invalid, and thus ineffective as a rule of decision for the courts of this country.”\textsuperscript{121} While a claim of sovereign immunity is merely a jurisdictional defense, the Act of State doctrine provides foreign states with a substantive defense on the merits.\textsuperscript{122} This limited piece of legislation may provide enough protection and security to overcome the reservations that Russia and like-minded foreign states may have before lending cultural objects to the United States.\textsuperscript{123} Senator Feinstein emphasized that “[t]his [B]ill will resolve an unsettled issue that is making it difficult for museums and universities to obtain works of art for temporary exhibition from foreign countries.”\textsuperscript{124} Foreign governments may prospectively avoid lending their cultural items to American institutions without the protections this bill would provide. If this were to occur, the American public would lose the opportunity to view and appreciate these cultural objects that help shape cultural diplomacy.

2. \textit{The Proposed Bill Does Not Encourage the Exhibition of Stolen Art}

Opponents of the bill argue that “by immunizing foreign art lenders from suit in US courts,” the 2015 Clarification Bill could “effectively permit US museums to exhibit art that they know is stolen.”\textsuperscript{125} This “opening the flood gates” hyperbole is a gross exaggeration and patently false. This proposition


\textsuperscript{118} \textit{Prohibitions against furnishing [state] assistance}, 22 USC § 2370(e)(2). Legislation requires US courts not to refuse on act of state grounds “to make a determination on the merits giving effect to the principles of international law,” in cases involving claims to property expropriated by foreign states after 1958. See “The Act of State Doctrine,” \textit{supra} note 116.

\textsuperscript{119} Ibid.

\textsuperscript{120} \textit{W. S. Kirkpatrick & Co. v Environmental Tectonics Corp.}, (1990) 493 US 400; see “The Act of State Doctrine,” \textit{supra} note 117.

\textsuperscript{121} Ibid.


\textsuperscript{123} Shield, \textit{supra} note 30 at 451.


improperly postulates that the American museum policies would permit such a consequence.\textsuperscript{126} Additionally, if US museums exhibit art with questionable provenance or looting concerns, then an objection should target IFSA, not this bill.\textsuperscript{127} If opponents desire the State Department to improve its provenance research when granting immunization of seizure under IFSA, they should petition their congressional representative to legislate such a bill. (Although this is a worthy goal, it should be saved for another day.) Accordingly, whether or not the 2015 Clarification Bill is enacted, US museums can still apply for immunity from seizure under IFSA for any object they intend to exhibit from abroad.\textsuperscript{128} Even if these objects have questionable provenance, the State Department may grant it immunity. Once this immunity is given, no matter the circumstances, the object cannot be seized while it is in the United States on loan.\textsuperscript{129} This larger program will likely remain stagnant.\textsuperscript{130}

Opponents of the bill also contend that the Act would promote an open and free exchange of looted art.\textsuperscript{131} However, it is unclear how eliminating the jurisdictional basis for foreign state entities that are immune under IFSA would “eliminate the incentive for museums and galleries to engage in minimum due diligence and provenance research.”\textsuperscript{132} The United States does not want to inadvertently immunize illegal antiquities or fine art stolen during a time of conflict.\textsuperscript{133} In granting immunity under IFSA, the State Department reasonably assesses the provenance surrounding suspicious or at-risk objects. This is evident, as the State Department requires immunity applicants to list information about provenance and potential legal claims surrounding a cultural object so that it can review this information.\textsuperscript{134} A review process of possible immunity applicants is already in place. The 2015 Clarification Bill codifies what the State Department already requires, which is a reasonable
inquiry into both the provenance and the potential legal liabilities that may be connected with this object before an immunity request is approved.\(^{135}\)

3. **Future Exchanges are Threatened by the Disconnect Between FSIA and IFSA**

The proposed bill clarifies the spirit of IFSA, which has been weakened in the last few years. The Association of Art Museum Directors (AAMD), who assisted Congress in drafting the 2014 Clarification Bill, has identified the *Malewicz* decision as a case that “has diminished the crucial legal protections immunity provides to works loaned to the United States.”\(^{136}\) Lawmakers passed IFSA with the intent to promote the importation of art. Congress wanted to assure foreign art lenders with certainty that their cultural objects would not become entangled in litigation once brought into the US. Decisions such as *Malewicz* and *Cassirer* significantly undermine this purpose.

The United States prudently articulated in its Statement of Interest in *Malewicz*, that “[t]he possibility that such a minimal level of contact will necessarily suffice to provide jurisdiction threatens to chill” the international art exchange program.\(^{137}\) Proponents of the bill suggest that “Russia’s refusal to export Russian-owned treasures for the ‘Gifts of the Sultans: The Arts of Giving at the Islamic Courts’ exhibit at the Los Angeles County Museum of Art and for planned exhibits at the Getty Museum, the National Gallery of Art, and others is a direct effect of IFSA and FSIA’s inconsistency.”\(^{138}\) Likewise, proponents assert that Russia’s withdrawal of its icons from the “Treasures from Moscow,” an exhibit at the Museum of Russian Icons in Massachusetts, was a direct consequence of the disconnect between FSIA and IFSA.\(^{139}\) Proponents further contend that another example of the detrimental effect of these lawsuits occurred in 2008 when Syria and the Metropolitan Museum of Art, fearing that IFSA immunity would not protect 55 Syrian cultural objects, cancelled the exhibition “Beyond Babylon: Art, Trade & Diplomacy in the Second Millennium, B.C.”\(^{140}\) Most recently, the Havana Museum refused to

\(^{135}\) Rick St. Hilaire, “The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (S.2212) Should Be Passed” *Cultural Heritage Lawyer* (2012), online: <http://culturalheritagelawyer.blogspot.com/2012/04/foreign-cultural-exchange.html> (last accessed 24 October 2014). Thus, if opponents have an issue with the review process under IFSA, as discussed above, it should be brought up with a potential amendment to IFSA and not this bill.

\(^{136}\) Shield, *supra* note 30 at 450.


\(^{139}\) *Ibid*.

\(^{140}\) *Ibid*. 
loan previously promised works to the McMullen Museum at Boston College after the State Department warned that Cuba’s status as a country that “supports international terrorism,” may put the pieces “at risk of being held to satisfy outstanding legal claims against US property seized by Cuba.”

A widespread decline in access to art in the US could result from this perceived threat of litigation to foreign lenders. This inhibition of access to art is troubling for many reasons. First, and most notably, our lives are greatly enriched by access to diverse art. Second, and more strategically, access to art may increase the opportunity for stolen art to be discovered and reclaimed. As such, it is foreseeable that fear of litigation may foreclose the opportunity for works of questionable provenance to be discovered in the US.

4. **The Holocaust Era Exception is Appropriate**

The potential legislation does not affect the ability of those whose artwork was taken by the Nazi government (or any Nazi ally, Nazi-occupied country, or government that cooperated with the Nazis) to seek redress in US courts. In fact, the bill would actually preserve claims of victims of the Nazi government and its allies during World War II. This precedent is absent from current cultural heritage jurisprudence. Although, there are many seizure scenarios imaginable that have no connection to the Nazis or Soviets, US courts especially provide the “last opportunity for the elderly survivors of the Holocaust to have their grievances heard in a court of law.”

The egregious chain of events that occurred during World War II is undisputable. Likewise, there is no dispute regarding the rights of ownership that Jewish families have to their ancestors’ stolen artwork. The unparalleled plundering of Europe’s art collections by the Nazis, includes more than 240,000 artworks from museums and private collections, and remains one of the greatest displacements of art to ever occur. The fact that it was the only exception does not suggest that other wars and atrocities where cultural property was stolen are not considered as important. Rather, as the AAMD

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144. See ibid.


146. See ibid.

147. Choi, supra note 63 at 167.
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has stated, this special exception is warranted because “the Holocaust was such a massive injustice that no other situation is comparable to it, and thus, warrant special handling.” This exception is included in the bill “because of the systematic looting of artwork by the Nazis in Europe during Hitler’s reign … was ‘on a historically unmatched level.’”

The resurgence of interests in Holocaust-era assets in the 1990s has brought about a significant rise in the number of Nazi-looted art claims being litigated in US courts and abroad. Contrary to what opponents of the bill contend, this bill seems to, in effect, provide an easier mechanism for Nazi-era claimants to pursue claims against foreign possessors who subject their art to temporary exhibition in the US. The current anti-seizure legislation does not provide any distinct exceptions for Nazi-looted art claims. As such, this exception provides these claimants with assurance that their cases may be heard in a US court. Likewise, Nazi-era claims, over other looting claims, are far more likely to be litigated, thus the exception is appropriate. The Conference on Jewish Material Claims Against Germany, Inc. and the American Jewish Committee have reviewed the text of this exception and had no objection to the wording.

Opponents of the bill argue that limiting the exception to only Nazi-era claims is severely flawed because it ignores other takings such as claims from the Bolshevik Revolution or Cambodian Civil War. Opponents instead desire a blanket exception for all looted art. However, a blanket exception common to all looted art would in effect exhaust the purpose of the bill. If we allow for all claims of looted art to be excluded it would not only require superfluous judicial resources of discovery (were those works actually looted) but would also make ineffectual the ability of the bill to limit the jurisdictional pull on countries whose loaned artworks do not create commercial activity.

150. Choi, supra note 63, at 180. See also David Wissbroecker, Six Klimts, a Picasso & A Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art, (2014) 14 DePaul-LCA J Art & Ent L 39 (tracing recent efforts of some of those individuals whose families’ treasures to Nazi collectors during World War II).
153. Foreign Cultural Exchange Immunity Act, supra note 5 at 7.
154. Shield, supra note 30 at 454.
Opponents further dispute that limiting the takings to only Nazis, completely disregards claims resulting from takings by agents of the Allied associated governments.\textsuperscript{155} However, on balance with the interests protected by the bill, this should not call for the rejection of the bill. This bill is an improvement on the current condition of the law. Aggressive third-party litigation, particularly after a foreign museum has been assured by the State Department that it will not be sued in a US federal court, sets a troubling precedent and will unquestionably limit the quantity and quality of artworks museum visitors will see in loaned exhibitions. Remediing unwarranted takings is a worthy goal, but stripping immunity produces uncertainty for foreign lenders of art.\textsuperscript{156} Unequivocally, the cost of this litigation is the restricted mobility of art.\textsuperscript{157} Victims of egregious takings should have their rights vindicated, but the US adversarial process may not be best remedy for past injustices in balance with other important interests.

VI. INTERNATIONAL CULTURAL COOPERATION FOR IMMUNITY FROM SUIT AND IMMUNITY FROM SEIZURE

The exchange of cultural property is an internationally recognized goal. It is a “well-established and universally shared interest to protect and enhance the cooperation of museums and other cultural institutions.”\textsuperscript{158} There is a well-established presumption in international law that State property serves a sovereign purpose.\textsuperscript{159} There are a number of international agreements that are related the topic of immunity from seizure of cultural objects belonging to foreign states.\textsuperscript{160} In particular, in 2004 the United Nations established the “United Nations Convention on Jurisdictional Immunities of States and Their

\begin{itemize}
\item \textsuperscript{155} Ibid.; see also Georgopulos, supra note 77.
\item \textsuperscript{156} Fincham, supra note 110.
\item \textsuperscript{157} Ibid.
\item \textsuperscript{158} Woudenberg, supra note 30 at 20.
\item \textsuperscript{159} Philippine Embassy Bank Account Case, Federal Republic of Germany, Federal Constitutional Court, 13 December 1977, 65 ILR 146, 186.
\item \textsuperscript{160} See e.g. Charter of the United Nations, 26 June 1945, 1 UNTS XVI, Can TS 1945 No. 7 [\textit{UN Charter}] at art 55 (which attaches importance to international cultural cooperation as helpful for the creation of conditions of stability and well-being and relations among nations); UNESCO, \textit{Agreement for the Importation of Educational, Scientific, or Cultural Objects}, 1950, 17 UST 1835, TIAS No. 6129 (which states in its preamble that “the free exchange of ideas and knowledge and, in general, the widest possible dissemination of the diverse forms of self-expressed used by civilizations are important both for intellectual progress and international understanding, and consequently for the maintenance of world peace[.]”); UNESCO, \textit{Convention on the Means of Prohibiting and Preventing the Illicit Import and Transfer of Ownership of Cultural Property}, 1970, 823 UNTS 231 (which expresses the notion that “the interchange of cultural property among nations for scientific, cultural and education purposes increases the knowledge of the civilization of man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nation.”); Woudenberg, supra note 30 at 20-22.
\end{itemize}
Property,” which addressed, among other things, immunity for cultural state property on loan.\textsuperscript{161} This convention, although not entered into force, in essence sets forth the notion that “property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale” does not constitute a commercial activity.\textsuperscript{162} Likewise, the European Union (EU) signatory states to the ‘European Convention on Culture’ assume the responsibility to “facilitate the circulation and exchange of cultural objects and take the necessary measures to grant access to cultural objects under their control.”\textsuperscript{163}

In 2012, The International Law Association (ILA) drafted the “Convention on Immunity From Suit and Seizure for Cultural Objects Temporarily Abroad for Cultural, Educational and Scientific Purposes.”\textsuperscript{164} The draft instrument provides a solution “to an important problem involving international loans of cultural material for scientific, cultural, or educational purposes, especially for temporary exhibits.”\textsuperscript{165} The fundamental purpose of the convention is to “protect the integrity of international loans and thereby encourage their role in promoting cross-cultural understanding.”\textsuperscript{166} Article 4, entitled “Immunity from suit,” provides:

1. Without prejudice to Article 5, the temporary presence of the cultural objects in the receiving state for cultural, educational or scientific purposes shall not form the basis for any legal process in the receiving state.

The United Kingdom Tribunals, Courts, and Enforcement Act 2007 inspired the implementation of this article.\textsuperscript{167} The United Kingdom, like the United States, has been confronted with the issue of immunity from seizure and jurisdiction. The United Kingdom (UK) Parliament enacted anti-seizure legislation in December 2007, which provided “immunity from seizure to art


\textsuperscript{162} Ibid. at art 21; David P Stewart, “The UN Convention on Jurisdictional Immunities of States and Their Property” (2005) 99 Am J Int’l 194 at 207.


\textsuperscript{166} Ibid.

\textsuperscript{167} Explanatory Notes, Article 5: Exception for immunity from seizure or suit, Convention On Immunity from Suit and Seizure for Cultural Objects Temporarily Abroad for Cultural, Educational or Scientific Purposes, Committee On Cultural Heritage Law, International Law Association, online: <http://www.ila-hq.org/en/committees/index.cfm/cid/13> at 8.
loans and to enhance the cross-border mobility of art for temporary public not-for-profit exhibition in the United Kingdom.\textsuperscript{168} The 2007 Act provides immunity from seizure in criminal or civil proceedings and from seizure by law enforcement authorities.\textsuperscript{169} The 2007 Act’s broad effect of the protection removes the jurisdictional basis for most actions while the object is in the UK.\textsuperscript{170} Unlike current US legislation, the 2007 Act does not provide protection to cultural objects, where the UK is required to comply with its obligations under International and European Law.\textsuperscript{171} Perhaps, this additional requirement if implemented in the United States’ 2015 clarification bill would alleviate the concerns from opponents of the bill.

Legislative efforts in the United Kingdom and the United States to protect artworks on loan inspired the adoption of immunity from seizure and immunity from suit legislation in certain countries, such as Canada.\textsuperscript{172} In the late 1970s and early 1980s, British Columbia, Ontario, Quebec, Alberta, and Manitoba, five of Canada’s thirteen provinces, adopted immunity legislation.\textsuperscript{173} These immunity from seizure statutes mirror the United States in that they require works placed or intended to be placed on public exhibit to be exempt from seizure.\textsuperscript{174} In British Columbia, the province’s particular anti-seizure statute provides automatic protection for any proceedings for seizure as well as any proceedings for possession or a property interest.\textsuperscript{175}

The protection afforded to cultural objects on temporary loan for art exhibitions is “a relatively young rule of customary international law.”\textsuperscript{176} The rule only pertains to cultural objects “in use or intended for use” by the State for governmental non-commercial purposes.\textsuperscript{177} International treaties have obligated themselves to supporting the exchange of cultural objects.\textsuperscript{178} The United States should do the same.

\section*{VII. CONCLUSION}

The proposed legislation above is of utmost importance to the preservation of cultural exchange of the arts. In the absence of this legislation, foreign lenders

\begin{thebibliography}{9}
\bibitem{168} Ibid.
\bibitem{170} Ibid.
\bibitem{172} O’Connell, \textit{supra} note 169 at 10-11.
\bibitem{173} Ibid., at 10.
\bibitem{174} Ibid.
\bibitem{175} Ibid.; see \textit{The Court Order Enforcement Act}, RSBC 1996, c 78, s 72.
\bibitem{176} Woudenberg, \textit{supra} note 30 at 21.
\bibitem{177} Ibid.
\end{thebibliography}
may consequently avoid the jurisdiction of US courts by rebuffing efforts by American institutions to exhibit these foreign entities’ temporary art loans.179 Nevertheless, without this legislation Americans will continue to be deprived of opportunities to view great works of art and cultural objects if a foreign lender believes loaning its property will expose them to litigation in the United States. There is always language in a potential law that can be strengthened. Reaching legislative perfection should not be an obstacle to the passage of the legislation such as the 2015 Clarification Bill in the Senate. Lenders need a clear and unequivocal declaration that their artworks or cultural objects on loan will not be caught up in sudden and expensive litigation merely because they chose to exhibit these objects in the US. If the United States wants to encourage foreign governments to continue to lend cultural property to American museums and educational institutions, Congress needs to act in a timely manner. The time for legislative action is past due.

Uninvited Guests: NGOs, Amicus Curiae Briefs, and the Environment in Investor-State Dispute Settlement

Kirsten Mikadze*

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I. INTRODUCTION

In 2002, a Chilean investor sues the government of Peru under the Chile-Peru Bilateral Investment Agreement when, as part of its programme to protect wetlands, marshes, and other water sources, a municipal government revokes the investor’s permit to build a pasta factory.¹ A purportedly American investor launches a claim in 2008 under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA) when it fails to gain approval of an environmental impact study required for its ongoing mining activities in El Salvador.² Then, in 2009, a Swedish company sues Germany under the Energy Charter Treaty when local opposition over potential implications for climate change and pollution of the Elbe River results in delays to and limitations upon its permits to build a coal-fired power plant in Hamburg.³

As these and many other cases demonstrate, environmental regulation is often—and, indeed, is increasingly—at the heart of investment treaty arbitration. These kinds of clashes have become more frequent as the regime sustaining the rights protecting foreign investors, enforced by a process of binding arbitration, continues to grow at what can only be described as an exponential rate. International investment agreements (IIAs)—of which it has been recently estimated there are approximately 3,000⁴—continue to swell in

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number while becoming more comprehensive and grander of scale, with recent agreements encompassing an ever wider range of parties and issue coverage. As a result of this expansion, the pressure points created where the investment regime comes into conflict with environmental regulation have also multiplied. These encounters, and the responses to them generated by the investor-state dispute settlement (ISDS) process, have led to public concern, resistance, and, with little recourse for locally affected actors to weigh in on these decision-making processes, frustration. The result is a tense yet unbalanced ‘push-pull’ dynamic at the sites of these encounters, as myriad actors and interests vie to alternatively overcome or exploit the ISDS process. These constant interactions create a complex pattern of convergences and divergences, where opposing interests (and the norms, actors, and processes that support them) are brought together in often violent and intricate ways, yet struggle to overcome the forces that pull them together. In this article broadly speaking, I delve into this complex milieu so as to shed light upon the intersections and tensions between locally-authored efforts designed to protect the environment (and the actors who would preserve them) on the one hand, and those designed to protect foreign investment (and the actors who would propagate such protection) on the other.

The unique norm-productive characteristics of the investment regime further complicate this already complex landscape. The privatized decision-making function performed by arbitration tribunals in ISDS—conducted, as it is, by ad hoc panels of private arbitrators—coupled with the investor-focused rights contained within IIAs, dispatches much of the control over the regime’s function and the production of its increasingly powerful norms to private actors. In ratifying these IIAs (particularly in such quantities), states seem to have willingly, and even enthusiastically, sponsored this arrangement. This has created something of a gap in the formal and informal infrastructure for the promulgation of the public interest relating to the environment. However, while non-state actors such as non-governmental organizations (NGOs) have attempted to play a role in filling this void, they have found themselves faced with a conundrum: the very regime that owns the processes through which efforts aimed at protecting the environment are compromised displays little interest in either exploring concerns over these impacts or permitting others to raise them.

The investment regime’s turn to ever-greater closure, and the seeming ambivalence on the part of the State to this process, have been paralleled by increasing insistence in efforts to penetrate the regime. One tool used by NGOs to force their way into the regime and highlight the environmental

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5 Recent examples include the Trans-Pacific Partnership (TPP) and the Transatlantic Trade Investment Partnership (TTIP), which are currently being negotiated, and the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), negotiations for which have recently concluded and the resulting agreement signed.
concerns at play in ISDS disputes is the *amicus curiae* brief. This practice emerges as both necessary and appropriate to the unique circumstances of international investment law in that it allows such actors to “find ways to voice their concerns in the very places where law beyond the state is made.”6 The investment regime is now less and less able to ignore the insistence of NGOs that they have a stake and a place in ISDS. It is increasingly clear that the regime needs to become more open to the involvement of such actors and more sensitive to the environmental concerns that they raise.

In this article, I explore the nexus between the investment regime, the environment, and NGOs. More specifically, I seek to unpack the relationship between the investment regime and its environmental “others,” focusing on the role of NGOs in both shaping (and compelling) these interactions and encouraging greater openness and responsiveness in the regime to environmental issues. I argue that while these collisions are inevitable, they can and ought to be rendered more productive. Then, focusing on the practice of *amicus curiae* intervention in ISDS proceedings, and drawing insights from a case study, I argue that NGOs have a crucial role in bringing about and shaping collisions between the investment regime and the environment in ways that lead to greater sensitivity to environmental concerns within the regime. This fledgling potential, however, has thus far been limited.

I proceed in four parts. After providing some introductory context in part I, my first task, in part II, is to situate the tension between the investment regime and the environment against the broader background of fragmentation in international law and to offer theoretical grounding for my hypothesis and subsequent analysis. In so doing, I build upon the literature on regime interactions in international law, developing, in particular, its limited application to the international investment regime. I then move on, in part III, to provide a more concrete sense of how and where collisions between the investment regime and the environment are taking place before discussing how NGOs are uniquely positioned to bring about more productive interactions in ISDS. I also explore the practice of, and extensive literature on, *amicus curiae* briefs in ISDS. Building on this discussion, in part IV, I consider this potential through a short case study of the *amicus curiae* submission in the *Pac Rim v El Salvador* case. I use this analysis to obtain a sense, first, of the tactics employed by NGOs in their *amicus curiae* submissions to enable more productive interactions between investment and environment and to encourage greater responsiveness in the regime to environmental concerns and, second, of the extent to which tribunals engage with these submissions in a meaningful way. Finally, in part V, I situate the findings from the case study in a broader context, canvassing trends and structures within the regime that

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might be impacting upon the capacity of NGOs to facilitate these interactions effectively to encourage transformation.

Ultimately, this article offers deeper insights into both the relationship between environmental protection and international investment law and the underexplored role of NGOs in shaping the international investment regime. It does so by applying insights from the emerging literature on regime interactions in international law while simultaneously filling a lacuna in the extensive literature on amicus curiae briefs in ISDS by examining the role of amici in regime transformation.

II. CONVERGENCES, COLLISIONS, AND COMPLEXITY: THE INVESTMENT REGIME AND THE ENVIRONMENT IN CONTEXT

In order to trace trends and changes in the regime, some background must first be explored. In this part, I first discuss some of the key features of ISDS before moving on to provide a historical and theoretical foundation for the subsequent analysis.

1. The Investment Regime, ISDS, and the Role of Non-State Actors

A “regime” in international law has been usefully described as comprising “sets of norms, decision-making procedures and organisations coalescing around functional issue-areas and dominated by particular modes of behaviour, assumptions and biases.”

The international investment regime—which could, admittedly, be construed in a number of ways, potentially encompassing a vast network of norms, institutions, and actors—can be defined by such parameters.

There is a limited literature that examines international investment law—including its influence and relationship to other arenas—from a “regime” perspective. Saverio Di Benedetto is among those who has seen the utility of this analytical perspective, though describing the investment regime as “quasi-unitary” and essentially a patchwork that includes definite, unifying elements.

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8 Other examples of investment not normally regulated by IIAs include commercial loans, foreign portfolio investment, or state-backed (official) FDI.

The IIA is the “basic building block” of the investment regime.\textsuperscript{10} The majority of these treaties are bilateral in nature, though several regional\textsuperscript{11} and multilateral\textsuperscript{12} IIAs exist as well. Indeed, the largely bilateral nature of the international investment regime is one of its unique features.\textsuperscript{13} It bears underscoring that while these agreements are negotiated between and ratified by states, their protections are offered to private entities and individuals—that is, to foreign investors who are nationals of ratifying state parties to an agreement. Many IIAs refer to similar standards of treatment owed by the Host State to a foreign investor and its investment.\textsuperscript{14} The regime’s core standards include “fair and equitable treatment” or “minimum standard of treatment;”\textsuperscript{15} “full protection and security;”\textsuperscript{16} “national treatment;”\textsuperscript{17} “most favoured nation;”\textsuperscript{18} and “protection against expropriation.”\textsuperscript{19}

The regime’s most prominent institutions are the International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL). While neither of these


\textsuperscript{11} Examples of regional agreements include the North American Free Trade Agreement, 1992, 32 ILM 289 [\textit{NAFTA}], and the Central America-Dominican Republic-United States Free Trade Agreement, 2005, 19 USCS §14011 [\textit{DR-CAFTA}].

\textsuperscript{12} \textit{The Energy Charter Treaty}, 1995, 2080 UNTS 95 [\textit{ECT}] is an example.

\textsuperscript{13} See e.g. Salacuse, \textit{supra} note 10 at 11-13.


\textsuperscript{15} Fair and equitable treatment (or minimum standard of treatment, with which it is either synonymous or at least similar in idea to) is a nebulous and contentious standard and is one that is open to multiple interpretations. When interpreted restrictively, it is often equated to the minimum standard of treatment found in customary international law—that is, treatment so bad that it amounts to bad faith, willful neglect, an outrage, or a shock to the consciousness. When interpreted expansively, it offers protection for foreign investment that exceeds—and/or stands in addition to—that offered by the customary standard. Thus interpreted, it can be understood to protect investors from treatment that is more benign than that captured by the customary standard, such as that which is improper, unfair, inequitable, or that violates legitimate investor expectations.

\textsuperscript{16} A standard that attracts varying interpretations, full protection and security can be understood to ensure as little as investor’s physical security in the host state to as much as legal security and the stability of the host state investment environment.

\textsuperscript{17} This standard is generally interpreted as either a right of entry for the foreign investor into the host state; as the investor’s right to treatment equal to that enjoyed by national investors; or as both.

\textsuperscript{18} As in the trade context, MFN treatment ensures protection for the foreign investor against treatment less favourable than that offered by the host state to investors of non-party nations to an IIA.

\textsuperscript{19} This is generally understood to include “indirect expropriations”—that is, state regulatory actions that are tantamount to takings—as well as more direct expropriations (such as direct seizure of assets).
institutions offers fora for substantive norm creation or formalized decision making in the way that many other international organizations (such as the WTO) do, both sponsor sets of widely employed procedural rules for ISDS.

ISDS is the regime’s primary decision-making vehicle. Given the narrow scope of this article, I focus on this latter element of the regime. I focus on ISDS for a number of reasons. First, in many ways, ISDS is the main crucible within which collisions between the investment regime and the environmental occur. As will be explored further below, international institutions are not the central norm-producing loci of investment regime. Nor is the regime’s authority underpinned by a single foundational document or a cluster of interlocking and complementary treaties, such as within the international trade regime. Rather, the regime coalesces weakly around a constellation of treaties of tenuous similarity and little formal connection. ISDS, then, provides the main point of entry for influence from actors—and the norms they might import—from outside the regime. It provides the main battlefield for these clashes, making it a highly appropriate aspect of the regime upon which to focus. Second, ISDS provides one of the main norm-creation fora for the regime. Once an IIA has been ratified, the unique design of these agreements transfers much of the regime’s norm-creation authority to ad hoc arbitration tribunals, brought together when disputes arise and which are expected to interpret vaguely composed investment standards so as to determine whether host state activity violates investor rights.

a. ISDS in Broad Strokes

ISDS is provided for in IIAs. It is initiated at the instigation of a foreign investor who believes that a host state has violated one of the IIA’s investment protection standards. In contrast to other international regimes such as international trade, decision making in the investment regime is, in essence, “privatized.” That is, there is no overarching international institution wherein publicly accountable representatives meet to negotiate the rules of the regime. Rather, decision making is delegated to panels of arbitrators who generally come from the ranks of elite commercial law practice or academia. This contributes to investment law’s “curious hybrid flavour,” reflected in the mix of public (e.g., treaties) and private (e.g., commercial-style arbitration) elements that constitute the regime. This is a unique and crucial feature of ISDS and of

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20. For a thorough accounting, see e.g. Salacuse, supra note 10; Sornarajah, supra note 14; Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law (Oxford: OUP, 2008); David Schneiderman, Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise (Cambridge, UK: Cambridge University Press, 2008) Ch 1 [Schneiderman, Constitutionalizing].


the regime more generally. Stephen Schill considers this to be not only “an important institutional arrangement in order to promote and protect foreign investment,” but also a form of private enforcement of public international law, empowering investors to hold states accountable for violations of public international law in a neutral forum. The perceived neutral or de-politicized forum that ISDS purports to offer through these privately constituted and ad hoc tribunals is a key component to the regime’s founding mythos.

The Host State is a defendant in these arbitrations. For states hoping to attract and preserve foreign investment, this can create an uncomfortable dilemma. States, particularly from the “developing world,” negotiate and ratify IIAs in the hope of appearing to offer an “investment-friendly” environment for foreign companies. However, through ISDS, a state may find its regulatory activity challenged by foreign investors. A defendant state may therefore be hesitant to introduce relevant policy concerns or disclose reasons for its actions if this might compromise the country’s “investment-friendly” reputation.

This has significant ramifications for the role, generally, of non-state actors in ISDS. Foreign investors, as non-state actors, are increasingly empowered to drive the evolution of investment law (and, incidentally, to alter the domestic law of host states). States, as the sponsors of this process (by signing investment treaties) have the power to temper the powers of foreign investors to this end. Practically, however, states may be hesitant (or effectively unable) to provide more than limited counterbalance to this trend given their interest in appearing to be “open for business” by continuing to participate in, or even contribute to the expansion of, the regime’s reach. This, in turn, can raise concerns for, and encourage the participation of, additional non-state actors such as NGOs in processes such as ISDS.

An additional relevant feature of ISDS is the general exclusion of non-parties from disputes. Some IIAs do include mechanisms through which

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24. See e.g. Ibrahim FI Shihata, “Towards a Greater De-politicization of Investment Disputes: The Roles of ICSID and MIGMA” in Kevin W Wu, Gero Verheyen, & Srilal M Perera, eds., Investing with Confidence: Understanding Political Risk Management in the 21st Century. (Washington, DC: World Bank, 2009) 2. This paper was derived from a conference presentation Shihata gave in 1985 (i.e., during the infancy of the investment regime). Shihata, who was the Secretary General of ICSID and the Vice President and General Counsel of the World Bank at the time, extols the virtues of ICSID’s capacity “to provide a forum for conflict resolution in a framework which carefully balances the interests and requirements of all the parties involved, and attempts in particular to ‘depoliticize’ the settlement of investment disputes” in light of the unstable history of such protection, particularly in Latin America (ibid. at 4).

25. See e.g. Amorkura Kawharu, “Participation of Non-Governmental Organizations in Investment Arbitration as Amicus Curiae” in Waibel et al., eds., supra note 23, 275 at 284 for discussion.
other state parties to an IIA may intervene in a proceeding,\textsuperscript{26} and some rules and IIAs now explicitly empower arbitrators to accept and consider non-party \textit{amicus curiae} briefs.\textsuperscript{27} The degree of participation accommodated in ISDS proceedings varies, depending upon the tribunal convened to adjudicate the claim, the rules under which it proceeds, and the IIA, among other factors. These aspects of the regime will be explored further below.

2. Clashes and Tensions in International Law

In this section, I offer a depiction of the international milieu within which clashes between the international investment regime and the environment are unfolding, grounding these tensions in a larger historical context. To analyze the trends and characteristics that define the dichotomous relationship between the investment regime and the environment—and the role that NGOs have come to play as fulcrum between the two—it is crucial to link them to this broader setting. As such, drawing from the literature on regime interactions, the following discussion will both elucidate the lines of enquiry and inform the development of the theoretical framework that will contour my subsequent analysis.

a. Functionalism, Fragmentation, and Complexity in International Law

A perceived increasing complexity and incoherence in the landscape of international law has spawned anxiety over what is seen as the growing fragmentation of international law. What was once potentially seen as a vast realm of “international law”—a relatively coherent, if not homogenous, body of law—can now be seen as a constellation of more isolated and specialized regimes, each forming and governed by its own principles of law and institutions.\textsuperscript{28} The worry, according to the ILC Study Group in its seminal report on fragmentation in international law, is that

\textsuperscript{26} See e.g. \textit{NAFTA, supra} note 11, art 1128.

\textsuperscript{27} \textit{ICSID Convention: Rules of Procedure for Arbitration Proceedings (Arbitration Rules)}, ICSID/15 (2006), c 4, art 37(2). This provision allows (but does not compel) arbitration panels to consider submissions from non-disputing parties. The same is true of the revised recently revisions to the UNICTRAL rules. See \textit{UNCITRAL Rules on Transparency in Treat-based Investor-State Arbitration}, (2014), online: <http://www.uncitralt.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf >, art 4 [UNCITRAL Rules on Transparency]. Some IIAs include similar provisions. See e.g. \textit{DR-CAFTA, supra} note 11, at art 10.20.3. This will be discussed further below.

such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.\textsuperscript{29}

This fragmentation is often attributed to modern international law’s functionalist origins, which saw various specialized international regimes form in response to discrete issues on the international plane.\textsuperscript{30} Initially, following World War I, cooperative institutional-legal responses were crafted around areas such as navigation, communications, and labour. Later international regimes coalesced around issue-areas such as public health, intellectual property, and international trade. In each instance, these specialized regimes "reflected deliberate efforts by groups of states to respond to new and emerging political, economic, and social developments [and] developed in a relatively \textit{ad hoc} and uncoordinated fashion."\textsuperscript{31} In the end, what has resulted is a body of international law consisting of various specialized regimes that link up and overlap in some instances only very weakly, if at all. Moreover, the nature of these linkages—both vertically and horizontally—is uncertain. With some exceptions,\textsuperscript{32} there exists no universally recognized hierarchy as between norms or between the regimes, nor a judicial mechanism responsible for clarifying these relationships.

International law has continued to struggle with this legacy in light of its ongoing evolution, which has been characterized by increased density, the diffusion of norm-creation authority, and, with the acceleration of globalization, increased interdependency.\textsuperscript{33} As understandings and manifestations of global issues began to challenge demarcations between individual regimes, international law found itself ill-equipped to respond effectively. International law’s functionalist origins, as expressed through the ad hoc evolution of these relatively isolated regimes, has led to an inability to respond to such global issues, which increasingly implicate an overlapping network of regimes, creating tension or “collisions” between them.

This is particularly so, perhaps, with environmental problems. In both cause and impact, many environmental problems have a tendency to defy categorizations upon which the law depends for intervention. This increasingly transnationalized and diffuse character has meant that environmental issues have found themselves entangled in a number of regimes, many of which are ill-equipped to relate to and, consequently, deal with them.

\textsuperscript{29} Ibid. at 11.
\textsuperscript{31} Dunoff, “Perplexing,” \textit{ibid}. at 16.
\textsuperscript{32} Examples of such exceptions might include the principles of \textit{erga omnes} and \textit{jus cogens}.
\textsuperscript{33} Dunoff, “Perplexing,” \textit{supra} note 30 at 18.
For example, climate change might be exacerbated by carbon dioxide emissions in one jurisdiction (say, the United States), while its impacts might be disproportionately felt elsewhere (for example, Vanuatu); legal solutions might be proposed on the basis of environmental policy (the European Union (EU) aviation carbon tax, for example), but implicate non-environmental policy areas (such as international transportation). Extricating such problems from the larger context in which they are inextricably bound up, or excluding them from regimes that are not of a purely “environmental” character, detracts from their effective management or mitigation.

Thus, as global problems, such as those relating to environmental protection, increasingly seep across or otherwise resist the categorical imperatives that international law’s functional regimes would seek to impose upon them, clashes become inevitable as individualized regimes struggle either to find ways to deal with unfamiliar issues and actors or to exclude these foreign elements from their ordinary operation. The uncertainty characterizing this fragmentation, and international law’s responses to the attendant conflict and uncertainty, has meant that how these conflicts are characterized and dealt with is, in essence, wide open to interpretation. This in turn sets the stage for competing claims of superiority between various normative projects (and the regimes that they support).

The rise of the international investment regime has transpired within this milieu. The regime’s normative roots can be traced back to eighteenth century ‘Friendship, Commerce, and Navigation’ agreements (treaties which were, in essence, trade agreements that tended to include provisions for the reciprocal protection of property for nationals of the signatory states) and customary international law rules respecting the protection of foreign investment according to a minimum standard of treatment.34 The more familiar aspects of the regime—particularly the practice of arbitration—began to take more shape during the period of European colonization that occurred in the late nineteenth to early twentieth centuries.35 With the advent of decolonization, the previously sanctioned use of force as means of protecting foreign investment in colonized territories gave way to non-violent methods of resolving disputes—usually diplomacy or, in exceptional circumstances, inter-state adjudication.36

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This was considered a generally unsatisfactory means of protecting foreign investment by both international business and powerful capital-exporting nations, leading, over the decades, to a variety of ultimately failed attempts to coordinate a multilateral agreement for investment protection. Eventually, in light of such failures, capital-exporting states began to look to bilateral agreements to perform this function. The first such agreement was signed by the Federal Republic of Germany and Pakistan in 1959.

Throughout its history, the investment regime has evolved so as to serve the purpose of protecting foreign investment from Host State expropriation. Even as the colonial era grew ever distant and international dynamics began to shift such that the line between capital-importing and capital-exporting began to blur, this general mandate strayed little from the purpose of protecting foreign investment from Host State intrusion.

The result has been a regime that has remained faithful to the singular economic purpose from which it evolved, growing ever more effective in executing its mandate. The regime’s fidelity has continued to weather shifting social realities and growing resistance to the effects of its growing reach, particularly into areas involving environmental regulation. Rather, the regime’s continued expansion has been accompanied and, perhaps, propelled along by the conviction that “protection of investor interests will invariably, without further state intervention, lead to the public good.”

Conflicts between competing regimes, and between regimes and competing values and interests, are obviously in no way exclusive to the investment context. However, as Jacob notes,

the issue rears its head rather prominently in the investment law context, given its effectiveness, the extent of modern investor protection and the frequently very deeply intertwined involvement of international investors in matters of great public interest.

With ever more extension into and overlap with other areas, conflicts with “social” areas such as the environment—along with human rights and labour,

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37. Ibid. Van Harten notes that this was a more desirable state of affairs for recently decolonized capital-importing states (ibid. at 16).

38. Ibid at 18-23. Prominent examples include the aborted Havana Charter and the spectacularly failed Multilateral Agreement on Investment.

39. Ibid at 20.


41. Jacob, supra note 22 at 42.

42. Freya Baetens, “The Kyoto Protocol in Investor-State Arbitration: Reconciling Climate Change and Investment Protection Objectives” in Marie-Claire Cordonier Segger, Markus W Gehring, &
for example—have becoming increasingly prevalent for the international investment regime.

As will be explored further below in part III, environmental regulation, in particular, is increasingly coming into conflict with the investment regime at many different points of intersection. Even where conflict is not direct—in that it does not come to a head during the course of the ISDS process—it is often not far below the surface. A subtler form of conflict that does play itself out in ISDS can be seen, for example, in concerns over the “regulatory chill” effect.\textsuperscript{43} The fact that the international investment regime and the environment are (perceived to be) pitted against one another—coupled with the fact that there is there an increasingly recognized public interest in these conflicts\textsuperscript{44}—militates in favour of a broader, more contextualized approach to understanding the investment regime’s relationship to and interactions with the environment.

b. Open, Environmentally Responsive Regimes and Productive Interactions with the Environment

With this backdrop in mind, a question emerges: how might regimes in international law such as the international investment regime cope with this reality? What kind of transformations might better equip regimes to manage the complex relationships and realities with which they are confronted?

Self-isolation will in no way eliminate collisions between regimes and “alien” issue areas. The regimes comprising international law, it would seem, have no choice but to adapt to fragmentation, complexity, and the increasingly irrelevance of the normative boundaries between issue areas. Regimes must, then, become more responsive to the shifting social context in which they continue to operate and must find ways to effectively decode and react to the signals they receive from international society by way of these interactions.

In the trade-environment context, Oren Perez usefully develops the idea of ecological “sensitivity” as a means of describing this necessary evolution. The “sensitising [of] the WTO to environmental concerns” is the ultimate result of


necessary “normative transformation.” The goal, for Perez, is not a perfect integration of environmental concerns into the institutional and normative structures of the WTO. Indeed, “[t]he search for more responsive legal structures should not be perceived … as a search for perfect ‘internalisation.’”

Parallels can perhaps be drawn with Young’s observations regarding the importance of appreciating the extent to which, and the ways in which, regimes “are removed from their social embeddedness.” The notion of “social embeddedness” was, of course, famously deployed by Karl Polanyi to describe the relationship between market economies, on the one hand, and society and social relations, on the other. In particular, the term is used to depict the tendency of markets (and the effects flowing from this tendency) to remove (or “dis-embed”) themselves from social context so as to operate unconstrained and according to their own logics, embedding within themselves (and thus subordinating to these logics) the social context and relationships they have escaped. For Young, this line of questioning is essential toward determining the extent to and manner in which the law is able to reflect international society. This accords well with Perez’s notion of regime “sensitivity.” So as to better reflect social realities and relationships, regimes must become more self-conscious of their own tendencies to dis-embed themselves from the social context in which they operate.

This would also seem to dovetail with Andreas Fischer-Lescano and Gunther Teubner’s notion of “compatibilization techniques.” Isolated regimes must uncover ways of undergoing self-transformation from within. This occurs through a process wherein a “re-entry’ of conflicting law” within a regime occurs, thereby enabling a sort of “translation” of conflicting rationalities and their compatibilization with those of the recipient regime. Fischer-Lescano and Teubner draw from the Doha Declaration on TRIPS and Public Health, which emanated from the WTO in response to concerns over the effects that TRIPS was having upon public health in the developing world, as an example of this phenomenon in action. The Doha Declaration illustrates how the economically oriented WTO regime has created an internal limitation on its own logic through the reformulation of a principle of health protection. This compatibilization technique allows to build responsive external linkages within its own perspective of economic rationality. Such a “re-entry”

46. Ibid. at 28 [emphasis in original].
47. Young, “Introduction,” supra note 7 at 11.
49. Young, “Introduction,” supra note 7 at 11.
of conflicting law within one’s own legal system allows for the translation of rationality collisions within the *quaestio iuris*...⁵¹

In essence, what must occur is the reorganization of a regime’s own internal logic in such a way that “external” rationalities are deeply integrated through a process of internalization. This kind of transformation extends beyond superficial efforts to merely accommodate, in a piecemeal or tokenistic fashion, the logics of outside issues or regimes, but rather occurs at the much deeper level of the regime’s own internal rationalities. It must come from within, not be imposed from without. As such, in the further example of the troubled relationship between the WTO and the environment,

this means that the re-entry of environmental rationalities within the self-organization of this regime should be promoted; that is, a re-entry extending far beyond the very narrow terms of Articles 7, 11 and 3.2 of the DSU [Dispute Settlement Understanding]. The reconstruction of non-WTO law within the WTO legal system would then not be an external imposition of limits but the internal achievement of the WTO regime itself and would reflect upon a process of mutual constitution.⁵²

Further insights might be draw from the literature on “reflexivity” in law.⁵³ David Schneiderman, for example, has put this theory to use in the investment context. Schneiderman tracks and examines the degree to and ways in which the investment regime responds to the social and environmental “irritants” that it comes into contact with so as to gain a sense of its “reflexivity.” He appears to examine the regime’s capacity (through its actors and rules) to respond appropriately and autonomously (that is, without political direction) to such concerns, noting only partial evidence that this is taking place.⁵⁴

So, how is this kind of transformative change effected? How do regimes become—and, importantly, how can they be encouraged to become—more environmentally responsive or sensitive? Overcoming or avoiding conflict in international law between regimes and interests or issues outside their existential preoccupation is impossible. However, this does not mean that these collisions must necessarily lead to undesirable outcomes. In fact,
counter-intuitively perhaps, it is these very conflicts that can prove to be the greatest driver in encouraging more openness in regimes.

Young provides some useful guidance in her treatment of “regime interactions.” According to Young, regimes should become more open to interaction with one another so as to better respond to the global issues that challenge the boundaries that divide them. However, these interactions have the potential to do more harm than good. Indeed, “[a]n acceptance of unchecked regime interaction risks arbitrary and undisciplined decision-making.”55 The end goal, then, is not necessarily more cohesion within the international legal order. In fact, in the context of international fragmentation, Martti Koskenniemi and Päivi Leino have argued against greater cohesion.56 Rather, for Young, what should be sought is the promotion of more “productive friction” in these interactions.57

According to Young, interactions can be shaped so that the synergies that are produced can be harnessed so as to render international law more responsive to international society. This in turn will lead to better solutions to pervasive global issues.58 Although Young’s notion of “productive friction” arises in the context of interactions between different regimes in international law, it seems applicable to the relationship between individual regimes and the alien interests with which they are faced. Such interactions play out in a manner that is similar to those occurring between separate regimes. Through conflict, they bring to isolated regimes direct awareness of the multitude of “alien” interests and processes at play within their sphere of influence and operation. They essentially force regimes to respond to shifts in on-the-ground social context, often by generating new approaches. In this way, they bring to the attention of these otherwise closed-off regimes their normative and procedural blind spots, providing them with direction for necessary adaptation and change. In turn, in line with Young’s theory, this would seem to lead towards an international legal system in which regimes are able to better respond to social realities.

Just as these collisions are inevitable, so too, it would seem, is regime transformation. As Tams and Hofmann have noted in the investment context,

[i]n engaging with ‘others,’ investment law itself changes; the traces [are] left on it by domestic law, by human rights law and by international environmental law... The investment law that reveals itself in these reactions

58. Ibid., noting that “the productive friction of ‘regime interaction’ may lead to a more responsive and effective international legal system than the sum of the constituent regimes.”
is not monolithic. In responding, it constitutes itself — but in a dynamic and atomised area of law, this is a constant process.\textsuperscript{59}

Schneiderman seems similarly to see the potential for transformation through conflict. In querying the extent of the investment regime’s “reflexivity,” for example, he tracks how responses “to the perturbations introduced by competing social sub-systems … [through] conflicts are resulting in the introduction of new limitative constitutional norms within the regime itself.”\textsuperscript{60} Increased “reflexivity” or “sensitivity” to outside concerns appears, then, to be reliant upon such collisions.

These interactions may take on a variety of forms. However, as underscored in Fischer-Lescano and Teubner’s discussion of the WTO, the DSU, and the environment, it follows that fruitful interactions entail more than a \textit{pro forma} exercise in (re-)drafting treaties and other legal documents to account for a wider array of norms an interests that exist in international law. Rather, truly productive interactions should engender and encourage transformation from within legal regimes. As noted above, these interactions should provide occasion for the “‘re-entry’ of conflicting law” within a regime, thereby enabling a sort of “translation” of conflicting rationalities and their compatibilization with those of the recipient regime.\textsuperscript{61} In this way, “productive” interactions must go beyond merely making available more adjudicative tools for those tasked with deciding between conflicting norms. Rather, they should be such that they lead to transformation within a regime—to its opening up and its reception to seemingly conflicting norms from other regimes in a way that renders the law more responsive to on-the-ground realities. Resort merely to rules of treaty application will not respond adequately to the dynamic, complex, and hierarchical nature of the relationships that define the problem.

In the investment–environment context, some have argued that the task of reconciling various normative conflicts can be accomplished by turning to rules of treaty interpretation such as Articles 31 or 32 of the Vienna Convention on the Law of Treaties (VCLT), the \textit{leges posteri ori} rule, the \textit{leges speciali} rule, or the principle of \textit{ejusdem generis}.\textsuperscript{62} The solution, it often follows, involves elaborating upon the adjudicative toolkit available to arbitrators or drafting future IIAs so as to better clarify the relationship between investment and the environment. Freya Baetens, for example, suggests that “[f]uture IIAs should include references to the social, environmental, and human rights of the State Parties.”\textsuperscript{63} Alessandra Astriti makes a similar argument, suggesting


\textsuperscript{60} Schneiderman, “Legitimacy and Reflexivity,” \textit{supra} note 54.

\textsuperscript{61} Fischer-Lescano & Teubner, \textit{supra} note at 50 at 1030.

\textsuperscript{62} See discussion in Baetens, \textit{supra} note 42.

\textsuperscript{63} \textit{Ibid.} at 705.
that drafting IIAs with more precise language could lead to more “textual determinacy” and could “contribute to clarify” the “uneasy” relationship between investment and the environment.\(^{64}\)

Such approaches, insofar as they resort to principles of international law to “resolve” conflicts by clarifying the hierarchy between investment and environmental regulation, seem to go only so far. For example, while additional references to the environment in IIAs provides some general clarity around the relationship between investment law and the environment, the ultimate determination remains within the gambit of arbitrator discretion in ISDS.\(^{65}\) While such references may make it more difficult for arbitrators to ignore environmental concerns in their decision-making, they may not reveal the entire palette of interests at play. That is, this approach does little to properly contextualize the circumstances of the dispute that extend beyond matters that the investment regime is prepared to address.

Along similar lines, Di Benedetto has identified 3 categories of “tribunal arguments and treaty-making solutions” to integrating environmental issues: internal approaches, systemic interpretive methods, and exception-based models.\(^{66}\) He notes, however, that “by suggesting an order, these categories try to rationalize what is otherwise a chaotic quantity of legal materials, with each simply following an independent, patchwork logic in relation to the instruments and cases involved.”\(^{67}\)

Rather, reconciliation may be better achieved through a process that, in essence, politicizes the processes through which these collisions occur. As Jacobs notes,

> the only possible perspective for dealing with such policy conflicts is the explicit politicization of legal norm collisions through power mechanisms, negotiations between relevant collective actors, public debate and collective decisions.\(^{68}\)

If, in the end, regimes are to be more responsive to on-the-ground environmental realities, in order to encourage deeper regime transformation,

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\(^{65}\) This is a shortcoming that has been recognized by some of these commentators. Baetens, for example, notes that “tribunals cannot be expected to solve all problems” and that it is not ideal that the development of this important part of international law [the relationship between sustainable development and investment law] depends on the goodwill of an ad hoc panel to consider objectives outside the purely investor-related context—after all, this is the context from which it derives its jurisdiction.

\(^{66}\) Di Bendetto, supra note 9 at 79.

\(^{67}\) Ibid.

\(^{68}\) Fischer-Lescano & Teubner, supra note 50 at 1003.
these interactions, too, must go further. They must provoke change within a regime’s individual “principles of vision.”\textsuperscript{69} Andrew Lang notes that

\begin{quote}
[d]ifferent international legal regimes tend to have different logics which express and embody different normative biases, so that ‘coordination’ between regimes is therefore always about hierarchising those preferences in particular contexts. Achieving ‘coherence’ in the international order means achieving a particular kind of coherence — ‘balancing’ the demands of each regime always means achieving a particular kind of balance—which inevitably favours some interests and values over others.\textsuperscript{70}
\end{quote}

What Lang appears to be hinting at is that the process of “balancing” must itself be politicized. If, in the investment context, this process is left entirely to the mechanisms, actors, and norms that already constitute the ISDS system, the regime’s inherent “normative biases” will inevitably dictate (or presuppose) the outcome of this balancing in favour of economic interests. It is these “inner logics and dynamics” of a regime that must be laid bare and transformed.\textsuperscript{71}

Perez makes a similar observation. As various complex economic systems in international law struggle to adapt to “environmental irritations,” their reactions are a result of their internal structures (and not external directives).\textsuperscript{72}
The task, he seems to propose, is one of figuring out where these systems are blind to environmental concerns and then finding ways to adjust the structure of this closure—not trying to change the structure of these systems or eliminating these blind spots altogether.\textsuperscript{73} Proposals for change cannot properly “resolve” the tensions that exist between the investment regime and the environment. Rather, they must be concerned with channeling these tensions more productively.

To recap briefly, it seems that the international investment regime will, inevitably, be faced with collisions with its “others,” such as those relating to environmental regulation. If it is to manage the complex and inevitable social and environmental realities in which it operates, so as to deal with these encounters and better respond to international society—particularly with respect to the environment—the regimen must become more open, self-aware, and environmentally sensitive. The collisions themselves will instigate and guide the regime’s necessary internal transformation. The result is a self-reinforcing process of sorts in which collisions between the environment and

\textsuperscript{69} See generally Andrew TF Lang, “Legal Regimes and Professional Knowledge: The Internal Politics of Regime Definition” in Young, ed., supra note 7.
\textsuperscript{70} Ibid. at 113.
\textsuperscript{71} See ibid. Lang appears to be emphasizing that we should be looking beyond a regime’s adjudicative processes to really see what is going on. Although he is referring to the relationship between different regimes in international law, the point bears making with reference to an individual regime’s interactions with alien issue areas more broadly.
\textsuperscript{72} Perez, supra note 45 at 22.
\textsuperscript{73} Ibid. at 28-29.
the investment regime spur on the regime’s transformative opening, which in turn ensures that these interactions become both easier and more productive.

Of course, the argument could be made that the international regime is in actuality sufficiently sensitive, and that its current structures, norms, logic, and relationship to environmental concerns in fact reflect genuinely the needs and interests of international society. However, as will become clearer below, the nature of these collisions—and the very fact of their existence and continued growth—would seem to indicate otherwise.

III. WHERE AND HOW HAVE INTERACTIONS OCCURRED BETWEEN INVESTMENT AND ENVIRONMENT?

So, how does the situation described above play out more tangibly in the international investment regime? This section explores this question by mapping out the points at which the investment regime and the environment intersect; assessing the nature of these interactions; and obtaining a sense of how NGOs might bring about more productive interactions.

1. Ever the Twain Shall Meet? The International Investment Regime and its “Others”

As an “economic” regime, ISDS has long come under scrutiny for the way in which it has encountered its social and environmental “others” in both international and domestic law. Commentators have been particularly interested in the investment regime’s relationship to human rights, and to environmental norms. My focus will be the latter.

Environmental norms and laws that have been implicated, one way or another, in ISDS include pesticide bans, laws designed to protect water bodies, the prohibition of bulk water exports, and pollution protection


76 See e.g. Lucchetti, supra note 1.

77 Sun Belt Water, Inc. v Government of Canada “Notice of Intent to Submit a Claim to Arbitration” (27 November 1998), online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/sunbelt-01.pdf>. This claim has been inactive since 1998.
Governmental activity that has attracted the ire of foreign investors includes expropriation of ecologically sensitive land to establish natural reserves, permitting for operation of landfill sites, decisions relating to water extraction, water distribution concessions or waste treatment activities, renewable energy policy, and “political” decisions around energy relating to nuclear power and fracking. Decision-making processes that have been at the centre of disputes include environmental assessments, permitting around natural resource extraction activities, and damages awarded against investors for environmental liability in judicial proceedings. Exact numbers are not available, though there is some indication that the environment is increasingly at issue in ISDS disputes.

82. See e.g. S.D. Myers, Inc. v Government of Canada [2002] 40 ILM 1408, (UNCITRAL) [SD Myers].
84. See e.g. Vattenfall AB and others v Federal Republic of Germany, ICSID Case No ARB/12/12.
85. Lone Pines Resources Inc. v Government of Canada, notice of intent of 8 November 2012 (UNCITRAL).
88. See e.g. Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador, UNCITRAL, PCA Case No 2009-23 [Chevron].
89. Viñuales, Foreign Investment, supra note 44 at 17. See also Recent Developments in Investor-State Dispute Settlement (April 2014), online: UNCTAD, IIA Issue Note, online: <http://unctad.org/en
What generally, has been the regime’s response when it has collided with environmental concerns? As noted, the investment regime inevitably changes as a result of its encounters with the environment. However, by way of preliminary observation, it appears that while these interactions have led to some opening of the regime, they remain, by and large, tentative and of limited effect.

This can be seen, in particular, in the ways in which the regime’s actors have borrowed norms from other regimes in arbitration of disputes. Under both the ICSID Convention as well as a number of IIAs, tribunals have the explicit power to apply rules from other international legal regimes. However, under ICSID, for example, the provision that thus empowers tribunals is worded vaguely and in such a way that it ultimately affords maximum arbitrator discretion in determining its applicability. Article 42(1) provides

\[
\text{The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.}^{90}
\]

As such, the scope and applicability of other norms from international law to ISDS disputes is unclear. Moreover, recent tribunal interpretation of similar provisions in IIAs reveals that tribunals may be uncomfortable taking an expansive reading of such powers when confronted with the potential applicability of outside “social” norms.\(^{91}\)

Nevertheless, tribunals do, on occasion, apply norms from outside international regimes.\(^{92}\) Much has been written,\(^{93}\) for example, about the use of the principle of proportionality from European Court of Human Rights...
(ECtHR) jurisprudence by the tribunal in *Tecmed v Mexico*. A similar turn to proportionality has since occurred in other disputes. In that tribunals have turned to an “alien” norm (from the human rights regime) in resolving a conflict between the investment regime’s own norms and environmental regulation, this would seem to be a promising move towards regime transformation. However, Alec Stone Sweet notes that the rare tribunals that have done so have tended towards a “timid” application of the principle. This seems to have been the case in *Tecmed*, where the tribunal, in ultimately determining that the measure at issue was not, in fact, proportional, “declined to provide the kind of scholastic exposition, or doctrinal justification, which a self-conscious doctrinal move toward proportionality might have generated” and failed to follow a “step-by-step procedure” as would be *de rigueur* in ECtHR jurisprudence. The principle has also not been adopted uniformly or pervasively since the *Tecmed* decision. Schneiderman makes the observation, further, that when arbitrators do draw upon norms from other regimes, they tend to look to relatively friendly, economic regimes such as WTO law. He notes that looking to norms emanating from the WTO system “is to seek out reinforcements entirely in sync with the project of spreading economic liberalism worldwide.” Put another way, by favouring the importation of norms from the WTO regime over others, the investment regime is legitimizing the normative project that underpins its own development and is bolstering the norms upon which it already relies to define itself. Conversely, incorporating norms from alien regimes might go some distance in eroding—or at least transforming—these foundations and characteristics. Additionally, even when a tribunal considers potential international environmental norms, often the approach ultimately taken in rendering a decision is purely “economic” in nature.

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95. See e.g., *Azurix Corp v The Argentine Republic*, ICSID Case No. ARB/01/12.


97. Ibid.

98. Though see its adoption in *Saluka Investments BV v The Czech Republic*, partial award of 17 March 2006 (UNCITRAL); *Continental Casualty Company v The Argentine Republic*, ICSID Case No ARB/03/9.


100. Ibid.

This apparent timidity in embracing alien norms is seen in particular in the way in which tribunals have dealt with conflict between investor rights under an IIA and State obligations under domestic or international environmental law. Tribunals have looked to environmental norms in their decision-making, though have been more likely to make mention of, as opposed to actually apply, norms from international environmental law.102

Ricardo Pavoni notes that while international environmental law is generally applicable to ISDS proceedings, its “applicability has not yet been translated into unequivocal and consistent reliance on environmental principles and rules by investment tribunals in the pertinent cases.”103 Citing the Biwater Gauff and Methanex cases, Pavoni documents several instances in which tribunals have been invited to consider the relevance of principles of environmental law or sustainable development but have shied away from doing so.104 And while it ought to be noted that the Respondent State, the US, won the Methanex dispute and no damages were awarded against the Respondent State (Tanzania) in Biwater Gauff,105 Pavoni sees more willingness by tribunals to engage with environmental norms when the dispute involves conflict with a State’s obligation under a multilateral environmental agreement.106 However, such obligations have not always provided adequate defence to derogation from the obligation to protect investor rights under IIAs. In SD Myers, for example, Canada was found in violation of NAFTA when its ban of the export of PCBs—which was done as part of its commitment under the Basel Convention107—affecting the economic activities of the claimant investor, whose business involved the disposal of PCB waste.108

Additionally, tribunals have not seemingly exercised their inherent powers to introduce these issues of their own volition. Chester Brown notes that under the principle of jura novit curia, international courts are permitted to raise points of law without a party to the proceedings having done so and reasons

102. Ibid.
103. Ibid at 528.
104. Ibid at 529.
105. Ibid at 529.
106. I thank an anonymous reviewer for making this point.
107. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989, 1673 UNTS 57. The Basel Convention prohibits the export/import of hazardous wastes, such as PCBs from and to non-parties to the convention (and the US at the time was not a party).
108. SD Myers, supra note 82. It is well documented that before prohibiting the PCB ban that attracted the Chapter 11 lawsuit, then-Minister of the Environment Sheila Copps announced in open Parliament that PCBs ought to be processed in Canada to preserve Canadian jobs rather than shipped to the US, casting doubt on the sincerity of the environmental rationale behind the ban. The Basel Convention, moreover, does permit cross-border movement of hazardous waste when environmentally sound to do so (and shipment from some Canadian sites to certain US sites posed less risk than shipment to sites further afield within Canada). These factors provided foundation, in part, for the Tribunal’s decision.
that international investment tribunals would be similarly empowered.\textsuperscript{109} While he holds this out as a potential avenue for bringing sustainable development norms and interests to the table in dispute in which they are implicated, he notes that tribunals have not, to date, seemed keen to do so.\textsuperscript{110}

A tribunal may in fact be more likely to look to environmental norms when adjudicating disputes under certain IIAs such as NAFTA, which includes explicit provisions relating to environmental protection.\textsuperscript{111} It is true that, particularly in recent years, more and more environmental references have found their way into the regime by way of incorporation in IIAs. With reference to a sample of over 1,800 IIAs, for example, Astreti documents that 9.4 per cent contain some kind of overt reference to the environment.\textsuperscript{112} However, very few of these provisions are procedural in nature, and where they do exist, they generally remain vague and aspirational in nature.\textsuperscript{113} Moreover, as Kyla Tienhaara observes, it remains ultimately at the discretion of arbitrators to interpret how and under what circumstances a state may exercise its right to regulate.\textsuperscript{114} The haziness of these provisions, coupled with the general vagueness of IIAs and the lack of procedural provisions referring to the environment, leads potentially to investment-focused decisions that “[make] extensive use of policy arguments in order to increase the level of protection granted to the investor.”\textsuperscript{115} So, while, as Astriti observes, the introduction of these environmental provisions in IIAs constitutes a significant change in the functioning of the investment regime... [t]he particular structure of the investment regime has meant that process determinacy has been accompanied by a form of decentralised production, which makes the double functions of law, predictability and stabilisation, problematic.\textsuperscript{116}

In other words, despite these hints of a growing attentiveness to environmental concerns within the regime, it has been a lukewarm transformation, impeded by the nature of the regime’s inner structure and logic.

Even given the brevity of this overview, it can be said that interactions between the investment and environmental regimes in ISDS remain tentative.

\textsuperscript{110} Ibid.
\textsuperscript{111} Ibid. at 530-532.
\textsuperscript{112} Asteriti, supra note 64 at 115-117.
\textsuperscript{113} Ibid.
\textsuperscript{114} Kyla Tienhaara, Expropriation, supra note 43 at 277.
\textsuperscript{115} Asteriti, supra note 64 at 152-153.
\textsuperscript{116} Ibid. at 154-155. She sees environmental provisions as providing something of a counter-balance to the regime’s generally open-textured nature. As noted above in part II, she suggests that more precise language in IIAs could lead to more “textual determinacy” and “contribute to clarify” the “uneasy” investment-environment relationship. Ibid. at 153.
Despite overtures in decisions and references in treaties to norms from the environmental regime, environmental norms continue to be sidelined in a weighting that would seem to privilege “economic” considerations and investor rights over other considerations. Rather, there is little evidence of genuine “re-entry” of environmental norms into the investment regime, which remains relatively closed off, self-isolating, and unresponsive to local environmental concerns. Where the regime has displayed some degree of environmental responsiveness—such as in the incorporation of environmental norms into IIAs—it is done superficially and ineffectively. Where the regime has innovated such responses, as Schneiderman remarks, it has seemingly “been encouraged or prompted by critiques issuing out of states and social movements regarding the system’s deleterious effects on state capacity and social and environmental degradation.”

That is, the regime has demonstrated little capacity or willingness to transform of its own volition.

2. NGOs in the International Investment Regime

Given the environmental unresponsiveness and closed-off nature of the investment regime, as emerges from the above depiction, it seems injudicious to expect the regime to appreciate or respond to the environmental ramifications of its interactions with locally authored regulation through ISDS. Moreover, as noted, the state may be hesitant to insist upon, or instigate, sufficient institutional or doctrinal reform for fear of appearing inhospitable to foreign investment. In this light, NGOs become crucial actors in the process not only of ensuring environmental interests are accounted for in ISDS but also of transforming the regime. It first bears exploring more generally the role of NGOs in the international investment regime, which is the subject of discussion in this section.

As hinted at in the introduction, several features of the investment regime (and of ISDS in particular) endow NGOs with an especial function. One such feature is the role and position of arbitrators in ISDS. Arbitrators have attracted criticism for a lack of independence, and biased decision-making. Also, as discussed above, arbitrators have shown little of their own initiative in drawing from environmental norms, even when adjudicating disputes in which environmental regulation is at issue or under agreements that make explicit reference to the relevance of environmental norms or


objectives. This reluctance can perhaps be explained by the culture of the international arbitration community, which seems accurately described as commercially oriented.\footnote{See for example the discussion in Tienhaara, *Expropriation*, supra note 43 at 143-144.} As Tienhaara notes, arbitrators tend to be experts in commercial law and do not, as a general rule, have much (if any) experience with environmental law.\footnote{Ibid. at 206. Her review of the CVs of the arbitrators who decided several major decisions in which environmental regulation was implicated revealed that only 2 out of the 23 arbitrators involved in these decisions appeared to have had “any significant experience with environmental law.”} Schneiderman makes a related point. The problem, he seems to say, is not that the regime is completely closed off to “external influences” \textit{per se}, but rather that

\begin{quote}
\vspace{10pt}
in so far as it is responsive to its own shortcomings[,] those responses will be determined by the regime’s own principal players (lawyers, arbitrators, academics). These actors will respond in accordance with the regime’s own embedded preferences employing the regime’s own terminology and typically not according to the logic of competing sub-systems, such as international environmental or human rights law.\footnote{Schneiderman, “Legitimacy and Reflexivity,” supra note 54 at 480.}
\end{quote}

This harkens back to Lang’s contention that it is a regime’s inner “principles of vision,” which must be confronted—a challenge, it would seem, that can only be mounted from actors that come from outside the regime—if transformation is to occur.

NGOs, then, are in a position to do this, mainly by bringing otherwise unfamiliar environmental concerns to the tribunal’s attention and offering expertise in environmental law. NGOs are uniquely situated, as well, to offer “local” expertise on the potential and actual impacts arising from a dispute.

A second feature is the unique role non-state actors play in the investment regime and in ISDS in particular. Patrick Dumberry and Erik Labelle-Eastauhg note that “[i]nternational investment law is arguably the sphere of international law in which non-state actors play the greatest role.”\footnote{Patrick Dumberry & Erik Labelle-Eastauhg, “Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration” in Jean d’Aspremont, ed., \textit{Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law} (New York: Routledge-Cavendish, 2011), 360 at 360.} As highlighted in previous sections, with limited exceptions, the investment regime grants access to the dispute settlement mechanisms embedded within international treaties exclusively to a set of non-state actors—namely foreign investors, the majority of which are large multi-national corporations (MNCs). While this unprecedented arrangement may not elevate these actors to the status of
subject in international law, it has afforded them a tremendous amount of influence in shaping the investment regime and its constitutive norms.

This feature feeds into—and is sustained by—a third feature: the role of the State in the investment regime. The operation of the regime and the powerful position it affords investors casts the traditional role of the State in protecting the public interest in a somewhat ambivalent light. While in the course of ISDS the State finds itself in the position of defending its right to craft environmental regulation most appropriate to national circumstances, in signing IIAs in the first place, it is also, to a certain extent, negotiating away its ability to do just that—potentially placing it in an awkward position.

It is, of course, important not to overgeneralize on this point. The State has by no means retreated entirely from its role in representing the public interest; neither are NGOs necessarily better positioned than the State to represent the public interest in ISDS proceedings. And the degree to which NGOs can and do offer information and expertise that states cannot (or are not willing or able to) is not always clear. However, NGOs are often plugged in to local concerns and realities and may be less encumbered by larger political concerns—or fears over impacts to FDI flows—in presenting these concerns in ISDS proceedings. At the very least, NGOs can offer a complementary perspective that strengthens the State’s position with respect to the public interest in proceedings.

These factors potentially position NGOs to fill a void in representing local environmental interests in ISDS—as both a counterbalance to powerful investor interests and in lieu of, or as spur or complement to, the state. This is augmented by the often highly localized nature of the effects of ISDS outcomes—which, as described, can affect local decision making relating to issues such as land use, environmental assessment, and pollution prevention—as they relate to the environment. The very local character of the impacts of disputes uniquely positions NGOs (particularly locally based ones) to ensure that these local interests are accounted for in ISDS proceedings. This may be particularly the case in states where democratically accountable institutions may be weak or lacking altogether.

Of course, the legitimacy of NGOs has also come into question. Despite claims to the contrary, it is not always evident that NGOs are, in fact, effectively representing local interests. Multi-national NGOs based out of the “developed” world have long come under scrutiny for imposing solutions and approaches on developing world countries and communities that poorly reflect local interests and cultures. These questions are certainly live in the context of amicus participation in ISDS, as it is often the case that such

124. See the discussion in ibid.
125. See e.g. Jacob, supra note 22, observing that BITs are drafted more by professionals than by diplomats.
126. For a TWAIL-ist perspective on this potential in the international trade context, see e.g. BS Chimni, “International institutions today: an imperial global state in the making” (2004) 15:1 EJIL 1.
efforts are undertaken by, or with the assistance of, international (usually Western-based) NGOs.\textsuperscript{127}

Overall, however, the unique makeup of the investment regime, and the particular role of NGOs within it, then, means that the involvement of these actors has two potential and interrelated effects. First, by bringing concerns related to the environment forward, NGOs force interactions between the regime and these “alien” concerns. These are concerns that might not otherwise have a channel for entry into the regime and that, as can be seen from the overview of the previous sections, the investment regime’s actors would likely otherwise forgo. NGO involvement can foster awareness of environmental concerns and local realities for decision-makers from within the investment regime and forces them to account (however weakly) for these issues. In so doing, NGOs contribute to a re-politicization, in essence, of the regime, creating openings for greater debate and negotiation over the appropriate balance between investor and environmental protection when these two sets of interests run afoul of one another in the ISDS process. Simultaneously, by finding, exploiting, and even creating points of entry for these interactions, NGOs contribute to a process of opening up within the regime. Their increasing involvement, then, makes it more difficult for the investment regime to avoid these discussions and harder for it to remain inward looking, closed off, and unresponsive to collisions with other regimes. Ultimately, these interventions have the potential to anchor “the emergence ... of the idea of civil society” in the arbitral world.\textsuperscript{128}

\textbf{a. The \textit{amicus curiae} brief in ISDS}

The foremost forum for NGOs in this activity is ISDS, and their tool the \textit{amicus curiae} brief.\textsuperscript{129} In ISDS, the first \textit{amicus curiae} applications arose under NAFTA. These first requests were made in 2000 by an international sustainable development NGO to the tribunal in \textit{Methanex v United States}. Briefly, third party involvement was not contemplated, at the time, either in NAFTA or under the rules under which the dispute was proceeding (UNCITRAL), so the \textit{Methanex} tribunal’s eventual decision to accept the submissions was path-breaking. Several subsequent NAFTA arbitrations saw non-disputing parties apply to

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{127} Such was the case, for example, in the \textit{Tunari} arbitration, supra note 81.
\item \textsuperscript{128} Francesco Francioni, “Access to Justice, Denial of Justice, and International Investment Law” in Dupuy, Francioni, & Petersmann, eds., supra note 74 at 63, 76.
\item \textsuperscript{129} There is a vast literature on the topic of \textit{amicus curiae} briefs in investment law, some of which will be touched upon below. For a good overview, see e.g. Florian Grisel & Jorge Vinuales, “\textit{L’amicus curiae dans l’arbitrage d’investissement}” (2007) 22:2 ICSID Rev 380; Christina Knahr, “The new rules on participation of non-disputing parties in ICSID arbitration: blessing or curse?” in Chester Brown & Kate Miles, eds., \textit{Evolution in Investment Treaty Law and Arbitration} (Cambridge: Cambridge University Press, 2011) Ch 15 at 335; Nigel Blackaby & Caroline Richard, “Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?” in Waibel \textit{et al.}, eds., supra note 23, Ch 10 at 254.
\end{enumerate}
\end{footnotesize}
make amicus curiae submissions. In UPS v Canada, several months after the initial Methanex ruling regarding the admission in principle of third party submissions, the Canadian Union of Postal Workers and the Council of Canadians applied both to be added as parties to the proceedings and, failing that, to be permitted to make submissions. Both requests were denied.130

More recently, however, it has become commonplace for NAFTA tribunals to accept applications from would-be amici curiae. Since the seminal decision in Methanex, tribunals have accepted applications made by various applicants, including an industry lobby group,131 unions and labour organizations,132 First Nations governments,133 and NGOs of various stripes.134 Although there is a clear pattern of allowing such interventions, some NAFTA tribunals have rejected non-party (non-state) intervention applications, particularly when the public interest in allowing such intervention was not evident.135

Following Methanex, non-NAFTA tribunals began taking their cue from this experience. Although the first request under ICSID for amicus curiae status was rejected,136 some subsequent applications were successful, beginning with the decision to allow the amicus participation of several environmental NGOs in the Suez/Vivendi arbitration against Argentina.137 A variety of NGOs,138

130 United Parcel Service of America Inc. v Government of Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amicus Curiae of 17 October 2001 (UNCITRAL). The request for party status was rejected outright. The request for amicus curiae status was determined to be, in principle, within the power of the tribunal to grant. However, the tribunal declined to do so at the jurisdictional stage of the proceedings on the basis that the interests and expertise of the amici were not such that they stood to offer assistance to the tribunal in its determination of jurisdiction. Meanwhile, the US Chamber of Commerce, a business lobby group, also applied for amicus curiae status but was rejected.

131 For example, the National Mining Association in Glamis, supra note 87.

132 Merrill & Ring Forestry LP v The Government of Canada Final Award of 31 March 2010 (UNCITRAL, ICSID Administered). The United Steel Workers; Communications, Energy and Paperworkers Union of Canada; and the British Columbia Federation of Labour were permitted to file a joint amicus submission.

133 Such as the Quechan Indian Nation in Glamis, supra note 87 and the Assembly of First Nations in Grand River Enterprises Six Nations, Ltd., et al. v United States of America (UNCITRAL).

134 Including the Sierra Club, Earthworks, and Friends of the Earth in Glamis.

135 For example, applications made by an industry lobby group, the Study Center for Sustainable Finance, and by Barry Appleton, an investment lawyer and self-proclaimed interested party and expert in investment arbitration (on behalf of himself), were recently declined by the tribunal in the ongoing Apotex v United States arbitration. See Apotex Holdings Inc. and Apotex Inc. v United States of America, ICSID Case No ARB(AF)/12/1 [Apotex v United States].

136 Tunari, supra note 78.

137 Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic, ICSID Case No. ARB/03/19, “Amicus Curiae Submission” (April 4 2007) [Suez/Vivendi amicus brief].

138 For example, in Suez/Vivendi, ibid., and Biwater Gauff (Tanzania) Limited v United Republic of Tanzania, Case No ARB/05/22 [Biwater final decision].
as well as the European Union, have since been permitted to participate as amici in various cases. However, there has been some inconsistency across tribunals in allowing such participation, and amicus applications have been rejected in a number of cases.

Consistency appears to be growing, as an evolution has also been evidenced in the procedural machinery of the investment regime over the last several years: the ICSID Rules now offer clearer rules for such non-party participation, as do a variety of IIAs. Recent changes introduced to the UNCITRAL rules similarly provide for the admission of third party briefs among other procedures. This topic will be touched upon further below.

b. Good, bad, or something in between?

These developments have generated a vast literature addressing the emergence, use, and potential of amicus curiae briefs in ISDS. It is beyond the scope of this article to survey this landscape in its entirety. What will be sketched out below are several of the prominent positions either for or against the admission of amicus curiae submissions to ISDS proceedings. This will provide a fuller picture as to how NGOs can use amicus briefs (and whether they should) to bring greater environmental consciousness to the investment regime—a topic to be addressed by way of case study in part IV.

For many commentators, what role—if any—amicus curiae participation should play in ISDS is determinable largely by looking to the benefits to be reaped for the operation and continued existence of the system itself. For most, the key benefit lies in the ability of amicus curiae to better “legitimize” ISDS. The “legitimacy crisis” to which this line of thinking is responding is rooted in public concerns over the regime’s apparent lack of transparency and accountability. This is seen, for example, in the limited degree to which the public is invited (or permitted) to participate, and the unelected and officially

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139. AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary, ICSID Case No ARB/07/22 [AES]; Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v. Romania, ICSID Case No ARB/05/20; Electrabel SA v. Republic of Hungary, ICSID Case No ARB/07/19 [Electrabel].

140. These applications were made mostly by public interest NGOs. See e.g. Chevron, supra note 88; Tunari, supra note 81; Pezold, supra note 91. Vivendi, supra note 81 was also rejected and involved an application from a group of NGOs and several named individuals.

141. ICSID Rules, supra note 27 at art 37(2). See below for discussion.

142. See e.g. DR-CAFTA, supra note 11 at art 10.20.3. For an excellent discussion of this landscape and its evolution, see generally Grisel & Vinuales, supra note 129.

143. UNCITRAL Rules on Transparency, supra note 27 at art 4. This set of rules came into effect on 1 April 2014. It should be noted that the impact of these new rules on the regime is, at least for the moment, rather limited, as they only apply where they have been incorporated into treaties concluded after 1 April 2014 or where they are otherwise expressly adopted. I thank an anonymous reviewer for this observation.

144. As a very small sample, see e.g. Charles H Brower, II, “Structure, Legitimacy, and NAFTA’s Investment Chapter,” (2003) 36 Vand J Transnat’l L 37; Susan D Franck, “The Legitimacy Crisis
unaccountable status of arbitrators, despite the potential impacts of decisions upon sovereignty and the public interest.\textsuperscript{145}

From this perspective, those who view the introduction of \textit{amicus curiae} into the ISDS process as a positive development tend to focus on the potential of this form of participation to ameliorate perceived shortcomings within the system, particularly with respect to perceptions regarding its legitimacy, transparency, and accountability. Barnali Choudhury, for example, extols the potential for \textit{amicus curiae} submissions, in increasing public participation, to cure the system’s “democratic deficit.”\textsuperscript{146} She also sees the involvement of \textit{amicus curiae} through the submission of briefs as a means of bolstering the legitimacy of ISDS.\textsuperscript{147} Many others echo this perspective.\textsuperscript{148} Anthony Van Duzer, for example, observes that its openness to \textit{amicus curiae} participation “[u]ndoubtedly … contributes to the legitimacy of NAFTA investor-state arbitration”\textsuperscript{149} and calls for greater formalization of the process in arbitration rules. Significantly, arbitration tribunals have themselves on occasion noted that \textit{amicus curiae} involvement in ISDS has a crucial role to play in enhancing the regime’s legitimacy.\textsuperscript{150}

Others in this camp are somewhat more ambivalent. Nigel Blackaby and Caroline Richard seem skeptical that the creation of processes to accommodate \textit{amicus curiae} participation will alone be enough to resolve the lack of transparency and accountability—and resulting legitimacy crisis—perceived to plague the system.\textsuperscript{151} They note, in fact, that unless accompanied by further procedural opening (such as access to the arbitration records and oral hearings, discussed further below), \textit{amici curiae} may not be able to participate meaningfully, so their participation may end up “exacerbat[ing] the democratic deficit” while providing little assistance to the tribunal.\textsuperscript{152}

Florian Grisel and Jorge Vinuales are also cautiously optimistic, seeing the potential for \textit{amicus} participation to enhance the system’s legitimacy, while also noting that many factors play into this potential success.\textsuperscript{153} For some, such as Christina Knahr, it is too early for definitive assessments given the

\begin{itemize}
    \item \textsuperscript{145} See generally, for example, Van Harten, \textit{supra} note 35.
    \item \textsuperscript{146} See e.g. Eugenia Levine, “Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party” (2011) 20 Berkeley J Int’l L 200 at 219-220.
    \item \textsuperscript{147} J Anthony Van Duzer “Enhancing Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation” (2007) 52 McGill LJ 681 at 717.
    \item \textsuperscript{148} See discussion below, \textit{infra}.
    \item \textsuperscript{150} See discussion below, \textit{infra}.
    \item \textsuperscript{151} Blackaby & Richard, \textit{supra} note 129.
    \item \textsuperscript{152} Ibid at 271.
    \item \textsuperscript{153} Grisel & Vinuales, \textit{supra} note 129.
\end{itemize}
prospective positive and negative effects of the rise of amicus curiae in ISDS.\textsuperscript{154} Her primary concern, particularly in light of recent applications by the European Commission to file amicus submissions in a number of disputes,\textsuperscript{155} appears to revolve around the potential for such amici to co-opt the ISDS process, which, from her perspective, properly belongs to the disputing parties.\textsuperscript{156}

For these and other commentators, concerns that militate against greater inclusion of amici curiae in ISDS coalesce around the potential impact of these briefs upon the continued, efficient operation of ISDS for foreign investors. For such commentators, while amicus involvement is to be welcomed insofar as it contributes to the smooth functioning of the system—potentially through its legitimization or de-mystification—vigilance must be maintained against the potential for it to otherwise affect the system.\textsuperscript{157}

Some fear that what they perceive as the non-legitimate, unaccountable, and unrepresentative character of NGOs themselves can mean that their increased involvement in ISDS actually works to undermine its legitimacy.\textsuperscript{158} Additional concerns that have been put forward along similar lines include the potential for “re-politicization” of the dispute settlement process relating to foreign investment,\textsuperscript{159} for additional costs and burdens upon the parties,\textsuperscript{160} and for the overwhelming of the system by a tsunami of would-be amici curiae (the ‘floodgates’ argument).\textsuperscript{161}

Some commentators maintain that amicus curiae participation may offer further potential benefit in terms of the quality of tribunal decision making. Although speaking mostly of the WTO context, Laurence de Boisson de Chazournes, for example, notes that amici curiae can offer a “non-economic perspective” and unique expertise,\textsuperscript{162} while fostering “creative legal thinking”

\textsuperscript{154} Knahr, supra note 129.
\textsuperscript{155} See AES, supra note 139; Electrabel, supra note 139; Micula, supra note 139.
\textsuperscript{156} Knahr, supra note 129.
\textsuperscript{157} This sentiment is well captured by Vinuales, who notes that while enhanced legitimacy has obvious benefits for ISDS, amicus participation can also become a double-edged sword in that if badly used, amicus intervention could undermine the very arbitration regime it is supposed to strengthen. Whereas amicus intervention may help legitimize the overall arbitration system, such intervention may also erode the traditional basis of arbitral proceedings, namely the consent of the parties. See Jorge E Vinuales, “Amicus Intervention in Investor-State Arbitration” (2007) 61 Dispute Resolution J 57 [emphasis added] at 75.
\textsuperscript{158} See e.g. Brower II, supra note 144; Blackaby & Richard, supra note 129 at 269.
\textsuperscript{160} See e.g. Levine, supra note 138; Rubens, ibid.
\textsuperscript{161} For a summary, see Kyla Tienhaara, “Third Party Participation in Investment-Environment Disputes: Recent Developments” (2007) 16:2 RECI EL 230 at 240 [Tienhaara, “Third Party Participation”]. This argument has seemingly fallen out of fashion more recently, perhaps as this concern has not borne itself out in either the international investment or WTO setting.
in decision making. In a similar vein, others have noted that the inclusion of amicus curiae is the best way to ensure that tribunals are made aware of the public interest that may be at stake in a dispute, therefore ensuring better decision making. Going further, Tomoko Ishikawa argues that amici can offer "more comprehensive legal arguments than the parties," can highlight the broader implications of decisions, and can bring forward issues that parties cannot or would not.

Other commentators offer arguments either for or against increased amicus involvement that go beyond purported benefit or harm to the ISDS. For example, it has been noted that third world states have generally treated amicus involvement in proceedings with suspicion—presumably concerned that these interveners, coming, as they tend to, from the ‘Global North,’ will further tip the power balance against their interests. Others see benefits that extend beyond increased legitimacy or more effective decision making in ISDS. Francesco Francioni, for example, appears to see the inclusion of amici within the ISDS process as mechanism that boosts the legitimacy of civil society actors in the investment regime while also creating access to justice opportunities for these actors within the regime that begin to parallel those enjoyed by foreign investors. Given the pressure that ISDS places upon state sovereignty over the design and implementation of public policy, he notes that amicus curiae involvement can facilitate the regime’s reach into these policy areas such that they are accounted for in decision-making processes.

Tienhaara offers cautious optimism for amicus involvement in ISDS “[f]rom an environmental perspective”—presumably in that they offer potentially some response to growing public concerns over the impact of ISDS upon environmental policy space. Like many other commentators, however, she argues that changes that have facilitated greater inclusion of amicus curiae briefs have not going far enough, particularly in terms of transparency. Brown

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165. Ishikawa, supra note 162, at 401-403.
166. See e.g. Boisson de Chazournes, supra note 163 at 336 discussing the phenomenon as it relates to the WTO.
167. Francioni, supra note 128.
168. He seems, in an indirect way, to advocate for a widening of the scope of arbitration and sees amicus curiae participation as a potential driver of this process. He notes that to the extent that amicus curiae briefs bring into the arbitral proceedings factual and legal considerations concerning the safeguarding of public goods, such as human and environmental health or the preservation of local cultural heritage, they can become a powerful tool to widen the scope of investment arbitration so as to encompass consideration of public policy concerns with regard to the adverse effects of an investment. See Francioni, “Access to Justice, Denial of Justice and International Investment Law” (2009) 20:3 EJIL 729 at 740 [Francioni, article].
makes a similar environmental argument, finding that amicus access to ISDS proceedings can be, and is increasingly, a means of bringing sustainable development issues into ISDS and the investment regime. Eric de Brabandere notes that it has enabled participation of marginalized groups (particularly First Nations). He remains fairly pessimistic, however, pointing out, quite correctly, that amicus curiae participation “is not tantamount to participation as a party in the proceedings.” Blackaby and Richard are also less convinced. They seem to question the actual benefit to the public offered by amicus participation, warning of the potential this approach has towards simply adding another partisan party into the mix without actually making disputes more open for the public. They argue further that states often do obtain public and civil society input in constructing their defence (so would-be amici already have the opportunity to weigh in on disputes through the usual democratic and lobbying channels).

Clearly, then, as this wide range of opinions demonstrates, the import and utility of amicus curiae participation in ISDS is not a given. It would certainly be incorrect to take this practice as a panacea for curing the regime’s shortcomings from the perspective of either the regimes proponents or its opponents. However, to the extent that options are limited for NGOs to participate in the investment regime’s processes, it provides a vital—and virtually exclusive—entry point. Moreover, this literature leaves uncanvassed the potential role for amici in the context of regime transformation. As will be explored in the next part, they provide a unique (if not ideal) forum for NGOs to encourage self-transformative processes within the regime.

IV. NGO EFFORTS TO BRING ENVIRONMENTAL ISSUES INTO THE INVESTMENT REGIME: PACIFIC RIM CAYMAN LLC V REPUBLIC OF EL SALVADOR

Given how weakly environmental norms and processes have penetrated the investment regime, and building upon the findings from part III, what role can and are NGOs playing in shaping the self-reinforcing push-pull dynamic between the regime and its environmental “others”? How successful have NGO efforts been? In an attempt to uncover answers for these questions, below I employ a case study to demonstrate how NGO use of amicus curiae briefs in ISDS might encourage, force, or instigate transformation in the regime by injecting environmental concerns into the process, creating (inadvertently or

172. Ibid. at 354 [emphasis in original].
174. Ibid. at 269.
intentionally) more environmental consciousness and openness for the further introduction of such concerns.

In 2008, Pac Rim Cayman LLC, a purportedly American company, filed notice of intent to bring a claim against the Republic of El Salvador under the Dominican Republic-United States-Central American Free Trade Agreement (CAFTA). It did this when, several years after discovering deposits of silver and gold on land over which it owned the right to explore, it did not receive the necessary environmental permits to begin exploitation activities. It based its claim on a long list of grounds under both CAFTA and Salvadoran investment law, including that an unlawful expropriation of its investment had occurred; that El Salvador had failed to protect its investment; that it had been denied most favoured nation and corresponding national treatment; and that it had been treated arbitrarily and discriminatorily. It made reference both to the fact that it had received no decision on its permit application as well as to the then-president of El Salvador’s public announcement of his opposition “in principle” to the granting of further mining licenses in the country until a new legislative approach to mining and environmental protection in the country had been crafted.

As the claim proceeded towards an initial decision on jurisdiction, on 2 March 2011, as provided for under CAFTA and the ICSID Arbitration Rules—and following the unusual public release of a procedural order regarding amicus curiae participation in the proceedings—an alliance of local NGOs applied for leave to submit an amicus curiae brief to the tribunal as a non-disputing party intervener. The NGO consortium received authorization to submit an

175. Prior to 2008, at which point the company reorganized under the laws of Nevada, it had been a Canadian-based company operating out of the Cayman Islands. Neither Canada nor the Cayman Islands are party to DR-CAFTA.

176. Pac Rim Cayman LLC v Republic of El Salvador, ICSID Case No ARB/09/12, Notice of Intent to Arbitrate (9 December 2008).

177. The investor contended that under Salvadoran law, by virtue of acquiring an exploration license for several packets of land in 2002, it also obtained automatically the right to eventually extract any mineral deposits found once it had obtained the necessary environmental permit. Ibid. at 7-8.

178. It demanded 77 million USD in compensation. See Pac Rim Cayman LLC v Republic of El Salvador, ICSID Case No ARB/09/12, Notice of Arbitration, (30 April 2009) [Pac Rim, arbitration notice].

179. See ibid., n 47, n 58; Pac Rim decision on jurisdiction, supra note 2 at paras 1.10—1.12

180. Ultimately, the tribunal determined it had no jurisdiction to determine the DR-CAFTA claims, though it found jurisdiction to determine the merits of the claims made under other areas of investment law. Pac Rim, decision on jurisdiction, ibid.


182. Pac Rim Cayman LLC v Republic of El Salvador, ICSID Case No ARB/09/12, “Application for Permission to Proceed as Amici Curiae” (2 March 2011) [Pac Rim permission]. The consortium, Mesa Nacional Frente a la Minería Metálica de El Salvador, was comprised of a mix of organizations whose activities encompass a range of issues, including development, human
amicus curiae brief in a procedural order released by the tribunal on 23 March 2011,\textsuperscript{183} and they did so officially on 20 May 2011.\textsuperscript{184}

1. The amicus curiae brief

The amici’s main approach with their brief appears to involve both contextualizing and redefining the dispute as something more than merely investment-related. For example, they attempt to reframe the dispute as one between the investor and the communities affected by its proposed projects—communities with otherwise little recourse for offering input into such projects—rather than as one between the investor and the government of El Salvador:

Critical to ascertaining these jurisdictional issues is an understanding that the real opposition to Pac Rim’s mining plans was not generated at the level of government ministries, but rather at the level of the local, potentially affected communities.\textsuperscript{185}

They further tie this contestation to a broader historical context. Specifically, they underscore the relevance of the country’s bloody civil war and subsequent democratization struggles, linking this context to land rights and local environmental stewardship. They note that

[...]local communities and NGOs, including amici, in reflection of their hard-fought empowerment and awareness of their own rights, and in a legitimate exercise of the democratic process in the post-Civil War political environment, refused to accept Pac Rim’s plans to dig mines under their own lawfully owned land, build dangerous waste ponds, and otherwise threaten the continuity of their environment, livelihoods, and way of life.\textsuperscript{186}

They also highlight the potential human and environmental impacts of the dispute and its outcome, emphasizing that “[t]he potentially affected local communities do matter[;] [i]t is their land, their livelihoods, their well-being

\textsuperscript{183} Pac Rim Cayman LLC \textit{v.} Republic of El Salvador, ICSID Case No ARB/09/12, Procedural Order 8 (23 March 2011) [\textit{Pac Rim} Procedural Order 8].

\textsuperscript{184} Pac Rim Cayman LLC \textit{v.} Republic of El Salvador, ICSID Case No ARB/09/12, “Submission of \textit{Amicus Curiae} Brief” (20 May 2011) [\textit{Pac Rim amicus} brief]. This submission was an edited version of the submission annexed to the March 2011 application. The edits reflect formal and substantive changes required by the tribunal in Procedural Order 8, \textit{ibid}.

\textsuperscript{185} Pac Rim amicus brief, \textit{ibid}.

\textsuperscript{186} \textit{Ibid} at 2-3.
and fundamental rights that are at stake here”\textsuperscript{187} and catalogue illegal investor activities and adverse environmental impacts.\textsuperscript{188}

An additional feature of the amici’s approach is its resistance to the investor’s characterization of the “political” dimension of the treatment it received as unlawful under international and domestic investment law. Rather, linking the events at the core of the dispute to a more general “political debate concerning sustainability, metals mining, and democracy in El Salvador,”\textsuperscript{189} the amici reject as inappropriate the interpretation of CAFTA’s investment protection such that it would render the agreement “a strict liability insurance policy guaranteeing foreign investors 100% protection against all risk … designed to stand in the way of history, or freeze public policy developments.”\textsuperscript{190} The amici employ these observations in support of their claim that the dispute is not a “legal dispute” as provided under Article 25 of ICSID, nor a “measure” under Article 10 of CAFTA (and hence that the tribunal lacks jurisdiction in its adjudication).

2. Impacts: The Tribunal’s Response to the Brief

In contrast to some earlier tribunals,\textsuperscript{191} the Pac Rim tribunal seems to actively engage with the amicus submission before it. It mentions the circumstances of the amici’s involvement and outlines the issues raised in their brief, making particular reference to arguments that depart from those offered by the respondent.\textsuperscript{192} It goes further yet, by making explicit reference to—and even drawing from—these arguments throughout the decision, seeming to indicate that many (if not all) of the amici’s arguments were given serious consideration during its decision making.

The tribunal, in fact, refers to and quotes from the amicus brief extensively. As seen with the Methanex tribunal, for example, the arguments the tribunal seems most interested in are not those relating to the unique environmental perspective that the amici attempt to bring to the table, but rather those relating to the interpretation of the treaty provisions at issue in the dispute. Specifically, the tribunal outlines the gist of the amici’s argument—alongside those of the disputing and non-disputing state parties— with respect to whether an “abuse of process” had transpired such that would require the tribunal to decline

\textsuperscript{187} Ibid. at 1.

\textsuperscript{188} Ibid. at 3. They made note, for example, of the investor trespassing and of water pollution resulting from the investor’s exploratory activities.

\textsuperscript{189} Ibid. at 14.

\textsuperscript{190} Ibid. at 6 [footnotes omitted].

\textsuperscript{191} See e.g. Methanex Corporation v United States of America, Award of 3 August 2005, UNCITRAL [Methanex]; Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic, ICSID Case No. ARB/03/19 [Suez/Vivendi final decision]; Glamis, supra note 87.

\textsuperscript{192} Pac Rim decision on jurisdiction, supra note 2 at paras 1.33—1.38.
jurisdiction.\textsuperscript{193} It takes particular interest in the arguments that differ from those offered by the respondent state—especially the amici’s argument that the investor’s attempt to relocate what was essentially a dispute between itself and locally affected communities to a forum at which they would have limited rights to participate constituted an abuse of process.\textsuperscript{194} Even though the tribunal does not ultimately adopt this line of reasoning, the fact that the amici’s arguments were addressed offers some indication of its openness to their submissions.

As a further sign of engagement, the tribunal addresses specifically (although rejects) the amici’s argument that the investor’s corporate restructuring, to the extent that it was done for the purpose of accessing investor benefits under CAFTA, constituted an abuse of process. It noted that “[hoping to access CAFTA] … is not a sufficient answer to determine the issue of Abuse of Process in this case. The Tribunal does not accept the arguments made to the contrary in the Amicus Curiae Submission.”\textsuperscript{195} Although the amici’s arguments do not figure into the tribunal’s ultimate reasoning, the tribunal’s willingness to address the substance of the amicus brief is illuminating.

Additionally, the tribunal considers the amici’s arguments with respect to El Salvador’s use of the denial of benefits clause, singling out quotations from the brief that showcase how the amici’s perspective focuses on potential negative local impacts of interpreting the substance of the clause too narrowly.\textsuperscript{196} It also makes (albeit fleeting) mention of the amici’s arguments with respect to these impacts and difficulties for the Host State in support of its decision.\textsuperscript{197}

Overall, however, while the tribunal takes care to respond, to some extent, to the submission, it does not take up the amici’s invitation to consider relevant outside environmental (and human rights) norms or concerns (such as environmental stewardship) in its decision-making. This hesitation to respond directly to concerns or to draw from or introduce “alien” norms into ISDS, despite the cogent invitation to do so from NGOs with an expertise to offer, may suggest that there is something more to this hesitancy than lack of awareness or lack of comfort with these other areas of law.

That said, although not responsive to the amici’s arguments and concerns, the tribunal demonstrates an awareness of the importance of having such participation in general. This may reflect a genuine move towards (or appreciation of the necessity of) greater openness and environmental responsiveness in the regime. Alternatively, it may merely reflect a shrewd understanding of the usefulness of such participation in creating the

\textsuperscript{193} Ibid. at paras 2.36 - 2.40.

\textsuperscript{194} Ibid. at para 2.40, citing to Pac Rim amicus brief, supra note 146 at 10.

\textsuperscript{195} Ibid. at para 2.43 [emphasis added].

\textsuperscript{196} Ibid. at paras 4.58-4.59.

\textsuperscript{197} Ibid. at para 4.85. The tribunal ultimately declined jurisdiction under DR-CAFTA (though not under Salvadoran investment law) on the grounds that El Salvador had successfully established proper use of the clause. See ibid. at para 4.92.
impression of greater openness—perhaps in response to concerns about the regime’s legitimacy or democratic deficit.

3. Conclusions from the Case Study

As has been stressed, the *Pac Rim* experience provides merely a glimpse into the role NGOs can play—and are playing—in encouraging greater environmental sensitivity in the regime. As such, definitive conclusions cannot be drawn. Moreover, given that tribunal deliberations are conducted outside of the public view, the degree to which arbitrators have been preoccupied with the concerns brought to their attention by *amici* can only be inferred from the printed page.

That said, the *Pac Rim* experience appears to reflect a generally observable trend that even when *amici* demonstrate that they have something unique, important, or representative to offer to proceedings in which the environment is implicated, *amicus curiae* briefs are generally ignored. As Blackaby and Richard have noted, “[d]espite tribunals’ professed concern with taking wider interests into account in the decision-making process, past practice shows that once amicus curiae briefs are submitted, tribunals rarely refer to them.”

198 Tribunals have repeatedly proclaimed the importance and necessity of prospective *amici* in legitimately representing the public interest in ISDS proceedings in which it is at stake. Yet, even when tribunals have acknowledged the public interest implications of a decision with which they are faced, they have tended not to consider seriously what the *amici* have to say. Rather, tribunals (such as the *Pac Rim* one) appear to adopt a strategy of what Perez, in the WTO context, dubs “incorporate but ignore,” or what Ishikawa has described as possible “lip service.” That is, rather paradoxically, tribunals have come to profess, on the one hand, an awareness of the environmental public interest implicated in the disputes over which they preside. But when, on the other hand, as in *Pac Rim*, they are presented with a unique and informed perspective on these issues, they do little more than reference a few passages from briefs (if they respond at all).


199. See e.g. *Methanex* final decision, supra note 192 at para 18; *Suez/Vivendi* final decision, supra note 192 at para 49; *Biwater* final decision, supra note 138 at para 53.

200. See, of course the above discussion on *Pac Rim*, but also e.g. *Suez/Vivendi* final decision, ibid.; *Glamis*, supra note 87; *Methanex* final decision, ibid.

201. Perez, supra note 45 at 102ff.

202. Ishikawa, supra note 162 at 408 (in reference to the tribunal’s extensive quotation of the *Biwater amici’s* brief, while ignoring the general substance of it in its actual decision making). *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, Case No ARB/05/22, [Biwater amici curiae brief].

203. For additional examples of how tribunals have reacted to *amicus* submissions in environmentally related disputes, see e.g. *Suez/Vivendi* final decision, supra note 192; *Methanex*, supra note 192; *Glamis*, supra note 87. The tribunal in *Biwater* seems to depart somewhat from
That said, direct reference to some of the content or arguments of the briefs seems, logically, to indicate that some kind of “re-entry” of environmental norms or genuine internalization (however weak) of environmental norms or concerns is occurring. Additionally, as has been stressed, and as Ishikawa notes, while “express reference ... does indicate some influence, no mention does not necessarily mean no influence.”\textsuperscript{204} It may, in other words, be difficult to detect the potentially subtle ways in which amicus curiae involvement in ISDS is influencing the regime and fostering greater environmental self-awareness. Even if the \textit{Pac Rim} tribunal ultimately did not engage with most of the amici’s arguments in its decision—particularly those that sought to introduce human rights and environmental concerns or norms into the mix—it may still have been mindful of these “alien” norms and concerns in its decision making. The amici’s very presence in the dispute, in fact, may have had this effect.

This is a point echoed, to some extent, by Moritz Renner, who implies that the very fact that such submissions are admitted by tribunals at all is an indication that a larger process of “legal-political re-embedding of market processes” is afoot.\textsuperscript{205} Ultimately, however, whatever environmental sensitivity and opening that NGO efforts, such as those of the \textit{Pac Rim} amici, have cultivated in the regime, they can at best be described as tepid and undeveloped.

\textbf{V. CONCLUSIONS}

In this article, I have sought to examine the complex relationship between the investment regime and its environmental “others.” More specifically, focusing on the use of \textit{amicus curiae} briefs in ISDS, I have explored the role that NGOs have to play in both shaping and compelling these interactions so as to foster greater environmental responsiveness in the regime. My analysis has revealed that NGOs acting as \textit{amici curiae} in ISDS do, in fact, have a crucial role in bringing about and contouring collisions between the investment regime and the environment in ways that lead to greater sensitivity to environmental concerns within the regime. However, as demonstrated by the \textit{Pac Rim} case study, this potential has not to date been completely realized; the regime’s decision making processes—its most powerful site of norm creation—remains relatively unresponsive to environmental concerns when confronted with them.

Situating these findings in a broader context, what other trends and structures can be detected within the regime that might be impacting upon the

\textsuperscript{204} Ishikawa, \textit{supra} note 162 at 409.

ability of NGOs to play this role in bringing about the regime’s transformation? And, importantly, ought the regime be concerned with change?

Certainly, the capacity of NGOs to facilitate (more productive) interactions between the environment and the investment regime depends upon more than the mere possibility of submitting of amicus curiae briefs. This is a point well-articulated by Blackaby and Richard, who argue that the regime’s current procedural rules make it doubtful that prospective amici will be able to participate meaningfully.\footnote{Renner seems to make a similar argument, noting that the “the contestation of dis-embedding movements in the arenas of transnational law can only be successful if, at the level of procedural law, these arenas are public and accessible to potential contestants.”\footnote{Procedural openness more broadly, then, is vital if NGOs are to see their efforts have effect.}} Renner seems to make a similar argument, noting that the “the contestation of dis-embedding movements in the arenas of transnational law can only be successful if, at the level of procedural law, these arenas are public and accessible to potential contestants.”

Importantly, and more specifically, securing access to the arbitration’s documentation and to oral hearings has been consistently problematic for amici curiae. While it is beyond the scope of this article to provide a detailed account of disclosure procedures within the regime,\footnote{One key feature bears noting. While awards are more and more likely to be made publicly available,\footnote{ICSID itself will generally publish awards so long as both parties agree, and even where there is a disagreement, parties are themselves free to make the awards public. Prior to the introduction of the UNCITRAL Rules on Transparency, supra note 26, under the UNCITRAL rules, the publication of awards was only done with the consent of both parties (art 34(5)). However, even then, awards were generally made public. The recently introduced UNCITRAL Rules on Transparency now make publication of awards and other tribunal orders compulsory, with some exceptions (i.e., art 3).} amici have experienced challenges in obtaining access to other documentation,\footnote{They note that “[i]t is questionable whether the admission of amicus curiae briefs alone increases the transparency and legitimacy of investment arbitration. Under the rules applied to the admission of amicus briefs, civil society groups are invited to file submissions without being able to review the parties’ pleadings or attend the oral hearings. In the absence of public access to the arbitration record or to the oral proceedings, the content of such briefs is unlikely to be focused or helpful. At worst, the presence of amicus curiae—a further partisan party advocating a position on behalf of persons to whom it is unaccountable, behind closed doors, and without being afforded a full opportunity to make a meaningful contribution—may exacerbate the democratic deficit, politicize investment disputes, and disrupt proceedings, without assisting the tribunal to decide the matters in dispute.” (Blackaby & Richard, supra note 129 at 254). Although they are speaking in terms of the potential for amicus briefs to lend greater legitimacy to the regime, a similar argument can be made regarding the possibility of these briefs to encourage better interactions and environmental responsiveness.}}

206. They note that “[i]t is questionable whether the admission of amicus curiae briefs alone increases the transparency and legitimacy of investment arbitration. Under the rules applied to the admission of amicus briefs, civil society groups are invited to file submissions without being able to review the parties’ pleadings or attend the oral hearings. In the absence of public access to the arbitration record or to the oral proceedings, the content of such briefs is unlikely to be focused or helpful. At worst, the presence of amicus curiae—a further partisan party advocating a position on behalf of persons to whom it is unaccountable, behind closed doors, and without being afforded a full opportunity to make a meaningful contribution—may exacerbate the democratic deficit, politicize investment disputes, and disrupt proceedings, without assisting the tribunal to decide the matters in dispute.” (Blackaby & Richard, supra note 129 at 254). Although they are speaking in terms of the potential for amicus briefs to lend greater legitimacy to the regime, a similar argument can be made regarding the possibility of these briefs to encourage better interactions and environmental responsiveness.

207. Renner, supra note 206 at 436 [emphasis added].

208. For a detailed overview, with particular attention paid to the role of confidentiality, though published before the recent changes to the UNCITRAL rules, see Stephen Jagush & Jeffrey Sullivan, “A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern” in Waibel et al., eds., supra note 24, 93 at 93ff.
such as the parties’ memorials. Without access to these documents, amici are working blindly and are, in essence, left to imagine the key facts of the case and the parties’ respective legal approaches. Historically, requests for disclosure have largely been denied, unless the dispute is being arbitrated under a treaty signed by state parties (such as Canada or the United States (US), for example) who themselves make awards and documents publicly available or otherwise require disclosure of such documentation. An additional, lingering problem for would-be amici is that participation is left to the discretion of arbitrators. Most treaties and rules do not offer much concrete guidance as to when arbitrators ought to accept amicus applications and the extent to which, if at all, they ought to consider or incorporate the perspectives that accepted amici bring forward.

Nevertheless, in spite what such ongoing procedural encumbrances might indicate—and despite the picture painted by the Pac Rim experience—the regime may indeed be moving towards accommodating an enhanced and more influential role for public interest amici curiae. Indeed, as discussed above in

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210. Under the revised 2006 ICSID rules, it is at the discretion of tribunals to grant requests by amici for access. Before the introduction of the UNCITRAL Rules on Transparency in April 2014, the UNCITRAL rules came much closer to imposing an actual duty of confidentiality upon parties, meaning that disclosure was even more difficult to obtain.

211. Amici have themselves underscored repeatedly how this lack of disclosure hamstring their ability to draft an effective and useful brief. See e.g., Biwater Gauff (Tanzania) Limited v United Republic of Tanzania, Case No ARB/05/22, “Petition for Amicus Curiae Status” of 27 November 2006 at section 1.3, noting that it was impossible for the amici to even fulfill the requirements for filing a petition under ICSID Rule 37(2) given the tribunal’s decision to deny them access to the arbitration record.

212. Requests were denied in Interaguas, Suez, Tunari, Biwater, AES, and Pezold. The sole exception to this trend appears to be Foresti. For discussion, see e.g. Blackaby & Richard, supra note 129 at 267.

213. While it has long been Canada’s practice to include provision for the public disclosure of documents from both parties to a dispute, the recently ratified Canada-China FIPA appears to make disclosure at the discretion of the state party, perhaps indicating a move away from this position. See Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments, 9 September 2012, Can TS 2014/26 [entered into force 1 October 2014] online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-api/china-text-chine.aspx?lang=eng>. Article 28 provides that

“Where a disputing Contracting Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, all other documents [other than a Tribunal award, which must be made publicly available] submitted to, or issued by, the Tribunal shall also be publicly available, subject to the redaction of confidential information.”

For a critical discussion, see Gus Van Harten, How Canada Got Sold Down the Yangtze: Canada’s lopsided FIPA with China (Toronto: IIAPP, 2015), Ch 22.

214. In the relatively recent Foresti dispute, for example, the tribunal issued a procedural order in which it granted access to these documents. Piers Foresti, Laura de Carli and others v. Republic of South Africa Letter of 5 October 2009, ICSID Case No. ARB(AF)/07/1. However, the case settled before the amici could file their brief.
part III, NGOs have been in large part responsible for the recent and gradual procedural changes in the regime that have led to greater openness. The most obvious example of such amicus-driven changes pertains to the materialization of increasingly formalized mechanisms for amicus involvement. Early efforts by would-be amici curiae have built momentum for a gradual but perceptible shift in the regime’s culture—a procedural opening of the regime, which can perhaps be linked to a larger trend towards transparency in the regime. By opening itself up to these actors and their concerns, the regime creates additional space for contestation.

The recent introduction of rules on transparency to the UNCITRAL rules may further signal that change is on the horizon. These rules, brought about as a result of pressure from civil society actors, compel parties to make a number of key documents available to the public. However, these disclosure requirements do not apply to “confidential or protected information.” This exemption applies to “confidential business information” as well as information otherwise protected under the provisions of the IIA, under the domestic law of the Respondent State, and, significantly, “under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information.” Similarly, while hearings are now to be made public, there is a large exception carved out for when, vaguely, “there is a need to protect confidential information or the integrity of the arbitral process,” in which case the hearing will be held behind closed doors.

It must be noted, however, that this greater openness to the inclusion of amici curiae in ISDS has not seen universal uptake across the regime. And certainly a largely inconsistent approach to amicus participation, particularly

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215 Following the request by NGOs to participate as amici in the Methanex dispute, for example, the FTC issued its seminal Statement on Non-Disputing Parties in NAFTA arbitration in 2003. See US Free Trade Commission, “Statement of the Free Trade Commission on non-disputing party participation” (Washington, DC: Department of State, 2003), online: <http://www.state.gov/documents/organization/38791.pdf>. Together with the application of further pressure of NGOs, this built momentum for revisions to both the ICSID Rules (in 2006) and now the UNCITRAL rules (in 2014), which now both provide tribunals with the power to admit third party submissions. See UNCITRAL Rules on Transparency, supra note 27, art 4.

216 For example, transparency—in terms both of the negotiation process but also of ISDS proceedings—has proven a major theme in the current TTIP negotiations.

217 UNCITRAL Rules on Transparency, ibid. at art 3(1). The documents to be made available are: the notice of arbitration; response to the notice; statement of claim; statement of defence; any further statements from parties; a table (if available) of exhibits to these documents, expert reports, and witness statements (though not the exhibits themselves); hearing transcripts; non-disputing/third party submissions; and the tribunal’s orders and decisions. Witnesses statements and expert reports and exhibits are to be made available only upon request to the tribunal (ibid. at art 3(2)).

218 Ibid. at art 7.

219 Ibid. at art 6.

220 Many recently negotiated IIAs do not feature provisions outlining how tribunals should handle such applications.
as it relates to transparency, continues to exist as between individual treaties. Moreover, emerging counterven- 
trends—such as the potential move of some ISDS proceedings to fora more traditionally preoccupied with commercial arbitration,\textsuperscript{221} and the potential turn to mediation over arbitration\textsuperscript{222}—may also 
temper some of the movement towards greater openness and transparency that is currently being witnessed.

Considering these countercurrents—and in light of what the \textit{Pac Rim} case study reveals—an obvious final enquiry emerges. Could it be reasonably 
argued that the investment regime simply may not offer the best forum for difficult conversations regarding the appropriate balance between protection of the environment, on the one hand, and protection and promotion of foreign investment, on the other?\textsuperscript{223} Certainly, as should now seem obvious, the investment regime was not designed to mediate these kinds of debates. Moreover, it is questionable that any amount of procedural tweaking will render investment tribunals well positioned to ultimately make these determinations. Additionally, of course, more access for \textit{amici curiae} alone will not necessarily lead to greater environmental sensitivity and openness. For one, there is the potential that this could lead to increased access for the “wrong” kinds of actors. Commentators have pointed to concerns around the potentially dubious legitimacy of NGOs, the tendency of some NGOs towards unhelpful “scandalisation”\textsuperscript{224} of debate over ISDS, and the potential for other actors (potentially with contrary agendas) to exploit this point of entry.\textsuperscript{225}

Additionally, it can be argued that the language of treaties themselves may provide a superior forum for the introduction of greater environmental consciousness into the regime. Treaty texts do, increasingly, reference the special relationship between investor protection and environmental (and social) regulation.\textsuperscript{226} While to date, the power of such environmental provisions is, at best, uncertain, stronger-worded provisions—ones that, perhaps, compel

\textsuperscript{221} For example, there are signs that the International Court of Commerce (ICC) is attempting to attract ISDS business and that a small but growing number of BITs employ its services for ISDS. See Lisa Bench Nieufeld, “The ICC New York Conference: Releasing a New Report” \textit{Kluwer Arbitration Blog} (17 September 2012), online: <http://kluwerarbitrationblog.com/blog/2012/09/17/the-icc-new-york-conference-releasing-a-new-report/>. The ICC, whose expertise lies in administering commercial arbitrations, does not tend to publish its decisions, as is commonplace in the tradition of commercial arbitration.


\textsuperscript{223} For a discussion on this question in the trade and environment context, see Young, \textit{Trading Fish}, \textit{supra} note 55 at 245.

\textsuperscript{224} Hofmann & Tams, \textit{supra} note 22 at 10.

\textsuperscript{225} See Knahr, \textit{supra} note 129, noting the EU’s increasing interest in intervening in proceedings.

\textsuperscript{226} For discussion of the role of environmental language in treaty texts, see Asteriti, \textit{supra} note 64.
tribunals to consider environmental concerns in their decision making—would likely prove more effective than leaving it to amici to make similar requests.\textsuperscript{227}

On a related note, states have not been oblivious or unresponsive to concerns about the investment regime, and state practice in this area has evolved to a significant extent over the last several years.\textsuperscript{228} For example, many model bilateral investment treaties (BITs) (such as those of the US and Canada) have attempted to shield environmental and other public welfare regulation from arbitration through drafting language that would limit tribunals from finding such regulation to constitute indirect expropriation.\textsuperscript{229} Australia made headlines in 2011 by announcing it would no longer sign investment treaties that included ISDS provisions\textsuperscript{230}—although it may have more recently backed away from this position.\textsuperscript{231} Other states, notably Bolivia, Ecuador, and Venezuela, have, more dramatically, taken steps to withdraw from the regime by renouncing the ICSID Convention and, at least in the case of Ecuador, withdrawing from its existing BITs. Another notable withdrawal has been that of Russia from the \textit{Energy Charter Treaty}. Nevertheless—and while it may be “too early to tell the extent to which such third-party interveners will succeed in influencing the legal outcomes of arbitrations”\textsuperscript{232}—NGOs are finding, creating, and exploiting points of entry within ISDS to bring about transformation within the investment regime and to make it more responsive.

\textsuperscript{227} I thank an anonymous reviewer for this observation.


\textsuperscript{229} For example, Annex B.13(1) of the Canadian Model BIT states:

The Parties confirm their shared understanding that:

…c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.


\textsuperscript{231} The government’s position now (at publication) appears to be that it considers inclusion of ISDS provisions on a “case-by-case basis.” Government of Australia, \textit{Trade and Investment Topics: Investor-State Dispute Settlement} (Canberra: Department of Foreign Affairs and Trade, 2016) online: <http://dfat.gov.au/trade/topics/Pages/isd.aspx>.

\textsuperscript{232} Dumberry & Labelle-Easthaugh, \textit{supra} note 123 at 366.
to environmental norms and concerns. Ultimately, from the perspective of the regime’s own logic, these incursions have the potential to improve arbitrator decision making;\textsuperscript{233} to mitigate, to some extent, the regime’s perceived “legitimacy crisis”\textsuperscript{234} and to remedy the “democratic deficit” that some believe plagues the regime’s decision-making processes.\textsuperscript{235} And in many ways, it is irrelevant that ISDS is not the best place for these debates; quite simply put, this is where the drama is unfolding. It is a reality that the regime cannot ignore. It is time for the regime to more fulsomely adapt—a process in which the assistance of NGOs should not so readily be dismissed.

\textsuperscript{233} See generally Ishikawa, \textit{supra} note 162.

\textsuperscript{234} See e.g. J Anthony Van Duzer, \textit{supra} note 149 at 717.

\textsuperscript{235} Choudhury, \textit{supra} note 74.
The Role of Information Sharing in Counter-piracy in the Horn of Africa region: A Model for Transnational Criminal Enforcement Operations

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“Add to that the improved approach of the navies, they not simply wandering round
the ocean looking for pirates [at] random as they were; there is a very much more
joined up, intelligence led antipiracy campaign that is more effective in apprehending
pirates before they go to sea or tracking them at sea.”

I. INTRODUCTION

In 2014, rates of Somali piracy were at their lowest in six years, and no new
incidents were reported in all of 2015. This is in large part due to a coordinated
improvement in the manner by which the international community has
approached the problem. The resultant response—a multipronged approach
involving discrete but fundamental aspects of nation-building in Somalia,
capacity-building in other states in the region (particularly Kenya, the
Seychelles, and Mauritius), target hardening, regional criminal prosecutions,
and naval patrols—has been undertaken by a veritable alphabet soup of
states, interest groups, and organisations. While the short-term success
of these operations is unquestionable (as evidenced by the drop in piracy
attack numbers), the time it took for these measures to generate noticeable

1 Participant Russet, Confidential Interview 8 (2013).
2 ICC International Maritime Bureau, Piracy and Armed Robbery Against Ships: Report for the Period
the Period 1 January—31 December 2015, (London: International Maritime Bureau, 2016), online:
impact—and the reports and literature detailing these efforts—suggests that the interaction between the various parties involved in this process has been occasionally dysfunctional. However, this focus on the failures and obstacles tends to obscure an important set of successes. This paper therefore seeks to examine the way in which one of these arguable successes—functional and effective information sharing regimes—has contributed to the broader effectiveness of counter-piracy measures. Our analysis will also seek to illustrate how these now effective intelligence sharing regimes might form a model that could be useful in dealing with other maritime-based transnational law enforcement operations.

II. OUTLINE

This paper will focus upon the role of information sharing in combatting the generally transnational criminal offence of piracy. This issue will be examined through several discrete legal and operational lenses, and buttressed by the empirical data gathered by a range of analyses of Somali piracy.\(^3\) The first lens is reactive direct enforcement by naval patrols and regional prosecutors. This analysis will indicate that without effective information sharing mechanisms in place, it would be nigh impossible to engage in this form of enforcement—an activity that is seen as crucial to redressing perceptions of pirate impunity in Somalia. The second lens is the role of effective information sharing in pre-emptive direct enforcement planning and coordination. This analysis will focus on the utility of bespoke, informal, flexible mechanisms—such as the Contact Group on Piracy off the Coast of Somalia (CGPCS), and the Shared Awareness and De-confliction (SHADE) coordination mechanism—as opposed to more inflexible formalised processes. This part of the analysis will also ask why the efficiency and levels of State ‘buy-in’ in respect of piracy off the coast of Somalia have been so different to a similarly informal, bespoke process (the Proliferation Security Initiative (PSI)).

\(^3\) Note: A number of the interviews and observations contained within this paper formed a part of the fieldwork conducted by one of the authors in January and February 2013. This fieldwork was subject to full ethics review by the Australian National University’s human ethics committee. All interviews and observations were confidential in nature, in accordance with this ethics approval. All observation notes and interview transcripts have been retained in accordance with the Australian National University’s ethics procedures and can be made available when necessary to confirm information contained within this article. The empirical data was gathered through observations of piracy trial (regarding the attack on the MV Super Lady), time spent with counter-piracy personnel in the Seychelles, and confidential interviews with four participants from within investigatory, prison and prosecution services regarding the way in which the law laid out in the various roles in piracy enforcement. For the sake of preserving confidentiality, in the course of this paper all participants will be referred to by female pronouns in the singular and gender neutral pronouns in the collective, regardless of actual gender.
The third lens to be considered is the role that information sharing has played in combatting piracy as an organised criminal enterprise rather than as a series of isolated maritime offences. The focus will be upon parsing the difficulties that are faced by investigators in tracing ransom money back to the organised crime group leaders in such a way that will allow for prosecutions. One conclusion that will emerge from this consideration is that the sharing of such piracy-related financial and transactional intelligence is at a far less mature stage than the sharing of operational intelligence in relation to pirate incidents themselves. The analysis will pose some possible explanations for this. The final lens will address the way in which information sharing has led to effective nation-building and capacity-building within Somalia and the Horn of Africa region, and the way in which this has contributed to piracy suppression. It is perhaps a little recognised ‘spin-off’ of transnational arrangements related to piracy prosecutions, such as prison transfer laws and agreements, that information sharing for law enforcement and sentence recognition purposes can indeed pave the way for building broader criminal justice information sharing networks and capacities.

III. LENS 1: DIRECT ENFORCEMENT AND PROSECUTION

As at May 2014, there were approximately 1,200 Somalis having been, or currently being, prosecuted, or awaiting prosecution, in 22 states. This is a significant dent in the pirate workforce, but not a debilitating one—there remains no shortage of young Somali men who are willing to try their luck in order to achieve a small share of a ransom, which would still amount to many times their probable life earnings in Somalia at current rates. Similarly, there remains no shortage of weapons, skiffs, GPS and associated marine navigation.

4 Contact Group on Piracy off the Coast of Somalia, Communique, 15th Plen Sess, 11 and 14 November 2013, online: <http://www.thecgpcs.org/plenary.do?action=plenarySub&seq=25>. Assessments of the overall effectiveness of these prosecutions as a disruption and deterrence factor are now starting to be proffered: see e.g. K Scott, “Prosecuting Pirates: Lessons Learned and Continuing Challenges” Oceans Beyond Piracy (2014) online: <http://oceansbeyondpiracy.org/sites/default/files/attachments/ProsecutingPiratesReportDigital_2.pdf>.

equipment, willing investors, and coastal launch points where the Federal or Regional Governments’ writs do not run. Somali Pirate Action Groups (PAG) still routinely put to sea. International navies still intercept PAGs and—depending upon an intricate but vital assessment of the likely admissibility and relevance of the situational evidence they can collect in relation to the likely prosecution venue—will either seize the PAG’s main pirate paraphernalia (such as boarding ladders and some types of weapons) and then send them back towards Somalia (so called ‘catch and release’), or detain the PAG, collect evidence, and then (if they do not seek to prosecute the suspects in their own courts) transfer the suspects to a third State jurisdiction (such as Kenya, Seychelles, or Mauritius). At every stage of this release or prosecute assessment, however, the role of information sharing is a—if not the—key consideration. Information may be the intelligence on PAG movements, which is used to vector a warship into position. Information may be evidence for a prosecution, such as photographs, boarding team statements, charts with positional data. Information may be vital contextual background which Judges will require, at least in their first case, such as a formal explanation of the way GPS works, and the accuracy of GPS positioning data. (Such data is generally the primary piece of information used to prove that the location the alleged


6 At least one PAG has been apprehended in 2014 and transferred for prosecution—a group of five apprehended by French warship Siroco and transferred to Seychelles on 29 January 2014: see “Suspect pirates apprehended by EU naval force flagship transferred to the Seychelles” EU NavFor (30 January 2014), online: <http://eunavfor.eu/suspect-pirates-apprehended-by-eu-naval-force-flagship-transferred-to-the-seychelles/>.

7 See e.g. UK House of Commons, “Foreign Affairs Committee—Tenth Report on Piracy off the Coast of Somalia” HC 1318 (2011) online: <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1318/1318.pdf> at para 74:

Around nine out of 10 piracy suspects detained by forces engaged in multinational operations are released without trial. The fact that most pirates are simply returned to their boats or to Somali land has engendered strong criticism from the shipping industry.

According to the Chamber of Shipping, “the repeated images of pirates being released without trial by naval forces, including by the Royal Navy, causes understandable derision.

However, Henry Bellingham warned that these release statistics can be misleading, and that most of those released were not actually captured during an attack:

It is also worth bearing in mind that most of the so-called catch and releases have been the result of disruption activities with naval vessels going in quite a lot closer to the shore and intercepting skiffs. Of the cases of actual attacks on vessels and attempted acts of piracy that resulted in capture by the Navy, very few have resulted in catch and release, because if an attack has been made on a vessel, you have the evidence.

offence was in international waters, which is a specific element of the 1982 Law of the Sea Convention definition of the offence, and of many national piracy offences.\(^8\) Our aim in this first section of the paper is therefore to illustrate how information sharing and coordination projects have actually facilitated both the apprehension and prosecution processes.

1. **The legal context of direct enforcement**

   a. The law as a facilitator of information sharing for ‘at sea’ enforcement

   The stepping off point for any analysis of information sharing for counter-piracy law enforcement purposes is the core jurisdictional fact of universal jurisdiction,\(^9\) or (perhaps more accurately) concurrent municipal jurisdiction.\(^10\) Article 105 of the Law of the Sea Convention 1982 (LOSC) reflects previous treaty-based definitions of piracy, and generally crystallises long-standing customary international law:

   **Seizure of a pirate ship or aircraft**

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[Definition of Piracy]

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).


\(^{10}\) This alternative characterisation does not in any way mitigate or attenuate the raw authority that resides in appropriately authorised state vessels (such as warships) to take initial action against suspect pirates and pirate vessels: See Tamsin Paige, *The Role of the Law in the Rise and Fall of Piracy* (Master of Philosophy Thesis), (Canberra: Australian National University, 2013); Tamsin Paige, “Piracy and Universal Jurisdiction” (2013) Macquarie LJ 131, 148–151.
On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.\(^{11}\)

The consequence, in essence, is that if a state vessel of any state (warship, marine police, coast guard—a state vessel on non-commercial service) apprehends suspected pirates, it may take those pirates to its own territory for prosecution, repatriate them to their own state of nationality for prosecution, hand them to the state whose flag the pirated vessel flies for prosecution, or transfer them to an unconnected third state for prosecution. That third state may prosecute those suspected pirates regardless of the fact that they have no other nexus to the crime—it did not take place in their territory or on a ship flying their flag; none of the suspected pirates or the victims are of their nationality; and so on. This is the power of universal jurisdiction, and explains why it is limited to only a handful of crimes. In terms of information sharing, this jurisdictional fundamental is, in many ways, even more important that the specific definition of the crime (which, as we shall note below, can differ between states in terms of how it is incorporated into their domestic systems).

The second important—but not essential—component of the capacity of the law to set the stage for, and to facilitate, information sharing for counter Somali piracy law enforcement purposes, is the series of UN Security Council Resolutions (UNSCRs) relating to the threat posed by piracy off the coast of Somalia.\(^{12}\) To some extent, the UNSCRs merely reinforce existing legal authorities, as the resolutions themselves routinely declare:

9. **Affirms** that the authorization provided in this resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law, and affirms further that this authorization has been provided only following receipt of the letter from the Permanent Representative of the Somalia Republic to the United Nations to the President

\(^{11}\) *Law of the Sea*, supra note 8 at art 105.

of the Security Council dated 27 February 2008 conveying the consent of the TFG [Transitional Federal Government]… 13

Perhaps the one area where the UNSCRs did co-create an additional or extended legal effect is the oft-quoted UNSC authority for

[7.] …States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:

(a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and

(b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery...

Yet even this grant of authority is of very limited value in terms of prosecution action: no Western state is as yet comfortable enough with the guarantee of a fair trial in any Somali justice system to directly hand over suspects apprehended within 12 nautical miles (nm) of the Somali baselines; 15 few third state courts would be comfortable asserting their own national jurisdiction over a specific incident of piracy that took place within 12nm of the Somali baselines, despite the ambiguous authority granted by the UNSC and the (then) TFG.

In fact, the primary utility and importance of the UNSCRs for information sharing is not in their legal effect; it is in their political effect. The UNSCRs encourage, for example, information sharing mechanisms and activities such as the Contact Group on Piracy off the Coast of Somalia (CGPCS; see below), 16


15. See discussion infra regarding the MV Iceberg 1 incident for an example of the reasons behind these concerns.

16. Security Council Resolution 1851 [on fighting against piracy and armed robbery at sea off the coast of Somalia], SC Res 1851, UN Doc S/RES/1851 (16 December 2008) at para 4:

Encourages all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among states, regional and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia’s coast...
and provide these informal and bespoke mechanisms with a degree of authority and political weight. This is the major contribution of the UNSCRs on Somali piracy in terms of information sharing.

The third level on which law acts as a facilitator for information sharing with a view to counter-piracy law enforcement is in terms of domestic incorporation of not only piracy offences, but also vital (and often overlooked) associated criminal procedure law reforms. With respect to domestic incorporation of piracy offences, the variety of specific formulations is very wide. Some states still do not have a specific offence of piracy on their statute books. The Somali Federal Parliament, for example, has still not passed a law criminalising piracy, although the parliaments of Puntland and Somaliland have done so. Until quite recently, a number of states involved in at sea counter-piracy law enforcement—Denmark, for example—did not have piracy offences that took account of the full suite of jurisdiction available under international law, but rather limited their reach to situations in which Danish nationals or vessels were in some way involved. Clearly, if there is no offence, or only a limited offence, on the statute books of the apprehending state, the need to share information with potential third state prosecution jurisdictions becomes even more essential, for such third states may indeed offer the only possible prosecution option.

2. **The law as a challenge to at sea enforcement capacity**

The law, however, also provides a number of challenges to the piracy prosecution project. Some of these challenges, such as the extent to which

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universal jurisdiction applies over the ‘shore-based’ aspects of the offence of piracy (such as facilitation), have clear information sharing dimensions. Often these challenges are not unique to piracy as a crime. Given that the way to collect evidence in relation to ‘pirate kingpins’ and ‘facilitators’ is to ‘follow the money,’ it is of course logical and efficient to explore using existing transnational organised crime (including terrorist) funding and financial crime laws and cooperative mechanisms, rather than recreating the wheel for a (hopefully transient) specific reincarnation of a particular form of financial crime. Some of these challenges are reflective of more generally applicable international criminal cooperation options and processes, but require specialised and bespoke implementing arrangements in the context of piracy, often because the location of apprehensions in international waters, combined with the availability of universal jurisdiction appears, in practice, to have the effect of bypassing the need for formal extradition processes. Thus, for example, the European Union (EU) has specialised counter-piracy suspect transfer arrangements with Kenya (and others), which touch upon a suite of cooperation and human rights guarantee issues.

What is hopefully clear from this brief overview is that the suite of applicable law clearly provides a number of important components that directly affect information sharing for counter-piracy prosecution purposes: a powerful jurisdictional context; a relatively settled set of elements of the crime;


22 See in general, for example, supra note 5; see also Security Council Resolution 2125 [on acts of piracy and armed robbery at sea off the coast of Somalia], SC Res 2125 (2013), UNSCOR, 2013, 68th Sess, 7061st mtg, UN Doc S/RES/2125 (18 November 2013), Preamble:

Recognizing the work of the CGPCS to facilitate the prosecution of suspected pirates and, in accordance with international law, to establish an on-going network and mechanism for sharing information and evidence between investigators and prosecutors, …and welcoming the work by Working Group 5 of the CGPCS to disrupt illicit financial flows linked to piracy…” and ‘encouraging the Indian Ocean Rim Association to pursue efforts that are complementary to and coordinated with the on-going work of the CGPCS…

See in general, Financial Action Task Force (FATF), Organised Maritime Piracy and Related Kidnapping for Ransom (July 2011), online: <http://www.fatf-gafi.org/media/fatf/documents/reports/organised%20maritime%20piracy%20and%20related%20kidnapping%20for%20ransom.pdf>. The FATF “is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering and terrorist financing. Recommendations issued by the FATF define criminal justice and regulatory measures that should be implemented to counter this problem” (ibid.).

23 See “Exchange of letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led Naval Force (EUNavFor), and seized property in the possession of EUNavFor, from EUNavFor to Kenya and for their treatment after such transfer” EC (6 March 2009) OJ L 79, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22009A0325(01)>>.
strong political statements about the need to cooperate in overcoming legal challenges to multi-state prosecution projects; general templates for dealing with the cross-cutting transnational organised crime aspects of piracy as a crime, such as financial flows; and mechanisms to negotiate arrangements to provide assurances as to treatment guarantees and systemic support in the specifically counter-piracy transnational prosecution endeavour. However, an appreciation of how these foundational information sharing ‘permissions’ work in practice is perhaps best illustrated through a specific example—in this case, evidence collection and sharing. It is to three aspects of this particular example, all taken, for the purposes of consistency, from the Kenyan context, that we now turn.

3. Some indicative information sharing and coordination responses

The first, and arguably the key, issue in information sharing for counter-piracy prosecution purposes is evidence collection and presentation.\(^{24}\) It is a statement of the obvious—but important nevertheless—that law enforcement agents are generally trained to collect and preserve evidence in accordance with their own criminal procedure requirements.\(^{25}\) But what is good evidence for a Dutch court may not necessarily be good evidence for a Kenyan court. This is not because the evidence itself is likely to be considered irrelevant or tainted; rather, the issue hinges (most often) around the formal requirements of admissibility. Some of these challenges have required substantive changes in laws or policy. For example, until recent amendments in Kenyan law, and some associated changes in Kenyan prosecution policy, securing the admissibility of photographs that were taken by a person not previously authorised by the Attorney-General could prove extremely problematic.\(^{26}\) Most of the photographic evidence, for example, was taken

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Photographic evidence—admissibility of certificate

(1) In criminal proceedings a certificate in the form in the First Schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic
by a foreign (for example, Dutch, British, French, or American) sailor at sea. Clearly, overcoming this significant procedural hurdle to the admissibility of often vital evidence (such as photographs of the Somali suspects ditching their scaling ladder—an important evidential distinguisher between a probable PAG and a skiff of fishermen) was essential to facilitate the sharing of information in the form of admissible evidence. Another example has been the need to educate international navies as to the inadmissibility of any confession statements they may have secured: Kenyan law requires that such statements are only admissible if made before a Kenyan Police Officer of the rank of Sub-Inspector or above.  

Other challenges have required cooperative initial fact-finding and negotiations, followed by the creation of ad hoc procedures, in order to facilitate efficient evidence collection and transfer. One example is the Aide Memoire developed collectively between Kenyan Prosecutors, the UNODC Counter-Piracy Programme, and major third state apprehending navies (such as the European Union (EU), United Kingdom (UK), and United States (US)) on evidence collection and chain of custody requirements for Kenyan prosecutions. Another example is the process—agreed after it became apparent that Kenyan criminal procedure required that anyone who provided a written statement that was tendered in evidence would be required to confirm

prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.

(2) The court may presume that the signature to any such certificate is genuine.

(3) When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it.

27. Ibid. at art 29:

Confessions to police officers

No confession made to a police officer shall be proved against a person accused of any offence unless such police officer is—

(a) of or above the rank of, or a rank equivalent to, sub-inspector; or

(b) an administrative officer holding first or second class magisterial powers and acting in the capacity of a police officer.


Regional States that accept the transfer of suspected pirates for prosecution such as Kenya and the Seychelles have also produced a handover guidance to naval authorities on their evidentiary requirements in order to ensure that the naval authorities collect evidence and prepare the case in a way that will ensure admissibility at trial.

their statement in court—was to limit the number of statements in evidence packs to the essential minimum (such as the Commanding Officer (overall situation), the Navigator (positional information), the Boarding Officer (initial interactions with the suspects), and the photographer). This was a departure from the general naval law enforcement practice of securing statements from all of those involved with the situation first hand, such as the observations of all members of the Boarding Team.

Yet other challenges required operational accommodations of essentially non-transgressible procedural requirements. Continuing with the Kenyan example, in Kenyan law, it is significantly more difficult to progress a prosecution if the initial constitutional requirement to bring the detained suspect before a court within 24 hours of arrest is not complied with. Clearly, a detention at sea may be followed by an interlude of several days as the warship steams to Mombasa, thus creating a major prosecution challenge if the arrest was at the point of detention. The operational solution has been that the warship emails an initial evidence packet to Kenyan Prosecutors as soon as is possible (thus giving those Prosecutors time to assess the likely evidence in advance of actually having it in their possession), and that the actual ‘arrest’ is then not effected until it is carried out by a Kenyan Police Officer on the wharf in Mombasa, at which point the 24 hours is then triggered.29

IV. LENS 2: PLANNING AND COORDINATION

Under Lens 1, we examined a number of ways in which information sharing for counter Somali piracy law enforcement purposes was central to prosecution outcomes, focusing particularly upon the issue of information as evidence. Under Lens 2, we seek to outline some indicative, more generally focused, operational information sharing mechanisms—initiatives aimed at enhancing coordination as a precursor to effective law enforcement.30 We will then comment upon some of the factors that underpin the relative success of these mechanisms, by brief comparison with a similarly informal, bespoke, procedural response to another maritime crime issue, the Proliferation Security Initiative (PSI).

   An arrested person has the right—...
   (f) to be brought before a court as soon as reasonably possible, but not later than—
   (i) twenty-four hours after being arrested; or
   (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day…’

1. **Contact Group on Piracy off the Coast of Somalia (CGPCS)**

The purpose and role of the CGPCS is perhaps best explained in its own words:

Pursuant to UN Security Council Resolution 1851 (2008), the Contact Group on Piracy off the Coast of Somalia (CGPCS) was established on January 14, 2009 to facilitate the discussion and coordination of actions among States and organizations to suppress piracy off the coast of Somalia. This international forum has brought together more than 60 States and international organizations, all working towards the prevention of piracy off the Somali coast.\(^\text{31}\)

Meeting in plenary twice yearly, with a number of issue-based working groups (covering aspects such as operational coordination, legal issues, financial flows, hostage seafarer welfare and advocacy, and industry engagement), the CGPCS has proven itself a successful counter Somali piracy coordination platform. Freed from the sometimes glacial timelines imposed by the need to achieve formal consensus approval of all outcomes (the outcomes reports of Working Group chairs, for example, are expressed to be the views of the Chair, not a formal record of consensus achieved among the participants), and from the strictures of an institutionalised negotiating and procedural paradigm (the CGPCS agenda, for example, is relatively agile and responsive), this mechanism has proven both resilient and flexible. Part of this success is clearly attributable to the fact that the CGPCS acts, first and foremost, as a clearing house for information and ideas, creating a focal point for bespoke coordination opportunities as equally as acting as a coordination mechanism in its own right. The Legal Issues Working Group, for example, dealt with topics as varied as compensation for seizure of vessels which had become pirate motherships by virtue of having been themselves pirated,\(^\text{32}\) to legislative drafting assistance for Indian Ocean states, to facilitating pirate detainee transfer and repatriation arrangements.\(^\text{33}\) The types of ‘outcomes’ this group generated were similarly diverse and flexible—from the compilation of a documentary ‘toolbox’ on Privately Contracted Armed Security Personnel in maritime contexts,\(^\text{34}\) to draft guidelines on the detention of juvenile Somali

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\(^{32}\) This issue was discussed, *inter alia*, at the Working Group 2 (WG2) meeting in Copenhagen, in April 2013 (author’s personal involvement).

\(^{33}\) The then-Chair of WG2, Danish Ambassador Thomas Winkler, was tireless in facilitating MOUs and similar arrangements to allow repatriation of convicted Somali pirate prisoners back to Puntland and Somaliland, where they could serve their sentences in closer proximity to their families, and within their cultural milieu (author’s personal involvement).

\(^{34}\) Government of Denmark, *WG2 COMPILATION: RELEVANT INFORMATION ON LAW AND RULES WITH REGARD TO PRIVATELY CONTRACTED ARMED SECURITY PERSONNEL*
pirates apprehended in PAGs at sea.\textsuperscript{35} The success to date of the CGPCS is perhaps best summed up in two UN documents. The first is the UN Secretary General’s October 2013 \textit{Report on the situation with respect to piracy and armed robbery at sea off the coast of Somalia}, where the Secretary-General reported that:

> Information-sharing and trust-building between countries and agencies involved in counter-piracy efforts is essential. I commend the efforts of the Contact Group on Piracy off the Coast of Somalia, which embraces informal partnerships between States, international and regional organizations and the private industry to address the scourge of piracy. The Contact Group continues to adapt its working methods, finding creative and practical solutions to the complex cross-cutting problems underlying piracy.\textsuperscript{36}

The second is UNSC Resolution 2125 — wherein the CGPCS is mentioned eleven times — in which the UNSC variously noted, welcomed, recognised, and commended the work of the CGPCS. The UNSC then further endorsed and empowered the CGPCS in its ongoing focus and role:

> [18.] Reiterates its decision to continue its consideration of the establishment of specialized anti-piracy courts in Somalia and other States in the region with substantial international participation and/or support, as set forth in resolution 2015 (2011), and the importance of such courts having jurisdiction over not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who plan, organize, facilitate, or illicitly finance or profit from such attack, and encourages the CGPCS to continue its discussions in this regard...

\textsuperscript{35} See e.g. Milena Sterio, “Report from the Piracy Contact Group, Working Group 2, Meeting in Copenhagen” \textit{Communis Hostis Omnium} (13 April 2013), online: <http://piracy-law.com/2013/04/13/report-from-the-piracy-contact-group-working-group-2-meeting-in-copenhagen/>. This issue was one directly mandated for continued WG2 consideration in the \textit{Report of the Secretary-General Pursuant to Security Council Resolution 2020 [2011]}, UN Doc S/2012/783 (22 October 2012) at para 80:

> The Contact Group on Piracy off the Coast of Somalia and its Working Group 2 are encouraged to maintain their strong focus on ensuring that international human rights issues related to piracy are comprehensively addressed. In particular, Member States are encouraged to continue working with the United Nations and the Contact Group on Piracy off the Coast of Somalia in ensuring that emerging issues in the area of criminal justice processes for juvenile piracy suspects are addressed.

See also Seychellois Attorney General Department, \textit{Draft Guidelines on Age Determination in Piracy Cases} (2012) (copy held by author).

\textsuperscript{36} \textit{Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia}, UNSCOR, UN Doc S/2013/623 (21 October 2013) at para 78.
[29.] Requests States and regional organizations cooperating with Somali authorities to inform the Security Council and the Secretary-General in nine months of the progress of actions undertaken in the exercise of the authorizations provided in paragraph 12 above and further requests all States contributing through the CGPCS to the fight against piracy off the coast of Somalia, including Somalia and other States in the region, to report by the same deadline on their efforts to establish jurisdiction and cooperation in the investigation and prosecution of piracy…

The CGPCS is not a flawless mechanism, but it is a relatively effective one.

2. *Shared Awareness and De-confliction (SHADE)*

Another—more narrowly focused—information sharing and coordination mechanism which has emerged from the international community’s counter Somali piracy endeavours is the Shared Awareness and De-confliction (SHADE) initiative. This mechanism commenced in 2008 as a means to share basic but vital operational information—particularly in relation to patrolling intentions and resultant gaps in Area of Operations coverage—between the myriad of sea enforcement agents operating in the Somali Piracy High Risk Area (HRA). SHADE brings together the three main multinational counter Somali piracy task forces (NATO, the EU, and the Combined Maritime Forces (CMF)) along with, on a variable basis, the so-called ‘independent deployers’ such as China, India, Japan, and Russia, and other stakeholders (such as


40. See e.g. “Indian, Chinese navies unite to tackle piracy” *The Times of India* (2 February 2012), online: <http://timesofindia.indiatimes.com/india/Indian-Chinese-navies-unite-to-tackle-piracy/articleshow/11720769.cms>:

According to Navy sources, the three countries [India, China, and Japan] are carrying out coordinated patrolling with the assistance of Shared Awareness and De-confliction (SHADE), a coordination mechanism for all counter-piracy operations which meets every three months. SHADE operates out of Bahrain.

This is the first time that India and China are coordinating in a military operation, other than their agreements for peace along the Line of Actual Control and bilateral exercises. According to Navy sources, China and Japan have two ships each deployed for patrolling
regional and force deploying states, the African Union, the Arab League, the IMO, and the UN). The purpose of SHADE is:

...to coordinate the efforts of the myriad of military forces conducting counter-piracy in the region. Tactical and operational commanders meet with their counter-parts to provide awareness of current and planned operations, discuss threat analysis, and provide feedback to the Contact Group for Piracy off the Coast of Somalia (CGPCS).⁴¹

SHADE has been quite successful. As the NGO Oceans Beyond Piracy has reported:

An important aspect of the SHADE meetings is information sharing and the exchange of views between stakeholders from force-providing nations, regional countries, international organizations and industry groups. The SHADE meetings are also used as a forum to coordinate and de-conflict ongoing military counter-piracy operations in the Gulf of Aden and the western Indian Ocean. SHADE has been used by force-providing nations and coalitions to coordinate and discuss convoys through the Internationally Recognized Transit Corridor (IRTC), options for increased coverage by maritime patrol aircraft, and the threat of piracy in the Bab el Mandeb Strait, among other things. As a result of the SHADE process, China, India and Japan in early 2012 agreed to coordinate their merchant vessel escort convoys through the Internationally Recognized Transit Corridor (IRTC) with one country being ‘reference nation’ for a period of three months on a rotational basis. In June 2012 it was announced that South Korea would join these three countries to further enhance the naval operations against pirates.⁴²

As previously noted, SHADE also coheres quite closely with the broader information sharing clearinghouse centred around the CGPCS, providing context-setting operational briefings at each CGPCS plenary, and taking an active role in those CGPCS Working Groups focused upon operational

while India has one.

SHADE has already worked out the full quarter’s deployment for the three countries and their five ships. This will help in plugging huge gaps that exist in anti-piracy patrolling, sources said. The three countries agreed to the arrangement after realizing that there were big gaps in patrolling of the area, and many merchant vessels were moving about unescorted. The gaps were also responsible for continuing piracy, sources said.


Sharing in Counter-piracy

Similarly, as with the CGPCS, the operation and role of SHADE has been expressly recognised and endorsed by the UNSC.

3. CGPCS/SHADE and the Proliferation Security Initiative (PSI) briefly compared

As mechanisms, the CGPCS/SHADE and the PSI share a great deal of contextual similarity: maritime (and especially international waters) context; transnational organised crime character; some shared paradigm-setting treaties (particularly the 1982 LOSC); analogous need for multilateral and transnational responses; explicit characterisation as an ‘activity’ or a ‘process’ rather than as an organisation; and so on. Yet the relationship between the PSI as a process and its desired outcomes was arguably much more fractious and contested that that between the CGPCS/SHADE and their outcomes. Why?

There are many reasons for these divergent levels of acceptance. We will briefly focus only upon two that tend to illustrate how and why the counter Somali piracy experience in information sharing appears to have been more successful to date. The first is that the PSI was, for many years, dogged by a persistent whiff of over-extension in terms of legitimacy and legal basis. The PSI ‘Statement of Interdiction Principles’ clearly emphasises that states should ‘[T]ake specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks...’ But lingering concern at the perceived legal and operational overreach—felt to underpin some overactive responses by the Bush Administration in the first years after the attacks of 11 September 2001—continued to cast a shadow over what was otherwise a legitimate and legal process. In this context, the initial characterisation of the purpose of the

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43. See e.g. Communique, supra note 4:

Participants received a comprehensive briefing from the European Union (EU) Naval Force ‘Operation Atalanta’ chief of staff and the NATO ‘Operation Ocean Shield’ representative on behalf of the SHADE co-chairs (EU, NATO, and CMF), who reported that while pirate activity continues to trend at the lowest levels since 2008, there has been an unexpected upsurge in pirate activity in recent weeks as pirate action groups put to sea to replenish their stocks of hostage vessels.

44. SC Res 2125, supra note 22: “...welcoming the Shared Awareness and De-Confliction Initiative (SHADE) and the efforts of individual countries, including China, India, Indonesia, Japan, Republic of Korea, Malaysia, Pakistan and the Russian Federation, which have deployed naval counter-piracy missions in the region...”

45. There is a great deal of literature on the PSI. One brief, but sound, general introduction to the PSI is: Jacek Durkalec, “The Proliferation Security Initiative: Evolution and Future Prospects” EU Non-Proliferation Consortium, Non-Proliferation Papers no.16 (June 2012) online: <http://www.sipri.org/research/disarmament/eu-consortium/publications/nonproliferation-paper-16>.


47. Ibid., Principle IV.
PSI by Undersecretary of State for Arms Control and International Security, John Bolton, as a means to ‘clarify an existing ambiguity’, and ‘fill a gap where no authority exists’ in situations ‘where authority under current national and international interpretation doesn’t exist’, and in ‘circumstances in which our authorities may be ambiguous or open to question,’ was perceived by some to disclose a desire to push beyond current legal limits. Indeed, the slow ratification rate for the effectively PSI-sponsored 2005 Protocol to the Suppression of Unlawful Activities at Sea Convention can certainly be read as evidence of a lingering concern. By marked contrast, however, the piracy context enjoys an unimpeachable jurisdictional basis for information sharing and cooperation (universal jurisdiction), and the nature and elements of the offence at the heart of the challenge are both relatively clear and of impeccable customary legal pedigree. As a consequence, there has been little scope for paradigmatic challenges in terms of the legitimacy of, and legal basis for, the coordinated counter Somali piracy effort.

A second distinguishing factor is that information sharing and coordination in counter Somali piracy operations and prosecutions requires less (but not no) reliance upon heavily ‘national security’ caveated information and capabilities (including electronic communications intercepts, indicators as to who/what is being targeted, and so on). This is especially significant in terms of sharing information to be employed as evidence in prosecutions. The PSI, however, was primarily an intelligence-led activity, thus bringing issues centred upon protecting intelligence sources, not disclosing national approaches to developing intelligence targeting policies and priorities, and protecting technical intelligence capabilities, to the very forefront as a PSI enabler. This is not to say that the counter Somali piracy information sharing project does not rub up against these information sharing obstacles—clearly, it can and does, particularly as the focus shifts to ‘following the money’ and building cases against ‘kingpins’. But insofar as the prosecution and deterrence program, the focus to date has been upon a clear and relatively unambiguous set of perpetrators (Somali pirates), a shared public venue for apprehension activities (international waters), and minimal security challenges in terms of disclosing the critical pieces of information necessary to found a piracy prosecution (such as GPS-based location data, photographs of scaling ladders and attacks on vessels, and so on). Consequently, there is less concern that information


49. See International Maritime Organization (IMO), Summary of Status of Conventions, online: <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>:

As of 31 August 2014: SUA 1988—164 ratifications/94.52 per cent of world tonnage; SUA 2005 Protocol—31 ratifications/35.76 per cent of world tonnage.

Sharing in Counter-piracy

Sharing may inadvertently expose unexpected or highly protected technical capabilities in terms of intelligence collection, or point to unanticipated and diplomatically inconvenient aspects of state sanction for, or involvement in, the conduct of the criminal activity—both of which are a potential within most PSI intelligence sharing and interdiction endeavours. One need only recall, for example, the declaration on 27 May 2009 by the Democratic People’s Republic of Korea (DPRK, or North Korea) that the Republic of Korea’s (South Korea’s) announcement that it would join the PSI constituted a breach of the 1953 Armistice, and that, consequently, the DPRK was no longer bound by the Armistice.\(^{51}\)

V. LENS 3: INFORMATION SHARING IN DEALING WITH PIRACY AS A TRANSNATIONAL ORGANISED CRIMINAL ENTERPRISE

The process of dealing with piracy is a transnational organised criminal enterprise has been significantly more difficult than dealing with the ‘at sea’ instances of high seas piracy. This is evidenced by the fact that the first (and thus far only) arrest of a high profile Somali piracy group leader has been that of Afweyne Senior by Belgian authorities in October 2013.\(^{52}\) This section of the paper will therefore examine the mechanisms in place to assist in the investigation and prosecution of piracy and associated offences, such as money laundering and arms trafficking. While some of these challenges to information sharing are legal in nature, the vast majority are grounded in logistical and infrastructure obstacles. This situation has improved since the creation of the Regional Anti-piracy Prosecution and Investigation Co-ordination Centre (RAPPICC) / Regional Fusion and Law Enforcement Centre for Safety and Security at Sea (REFLECS3) in the Seychelles, which officially opened in February 2013 (although it had been operating for some time prior to this).\(^{53}\) Improvement is also promised by the renewed focus of the CGPCS upon integrated ‘kingpin’ prosecution cooperation, via the reformed

\(^{51}\) Blaine Harden, “North Korea Disavows 1953 Armistice, Warns South Korea” (27 May 2009), online: <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052600555.html>.

\(^{52}\) Charlotte McDonald-Gibson, “The pirate who fell into a movie trap: Kingpin Mohamed. ‘Big Mouth’ Abdi Hassan arrested in Belgium after being tricked into thinking he was going to appear in a documentary” The Independent (15 October 2013) online: <http://www.independent.co.uk/news/world/africa/the-pirate-who-fell-into-a-movie-trap-kingpin-mohamed-big-mouth-abdi-hassan-arrested-in-belgium-6972811.html>.

\(^{53}\) “REFLECS3’s mandate is to act as a central hub for investigation and information sharing in relation to piracy as an organised crime enterprise and maritime-based transnational organised crime. As an organisation, it describes its legal foundations as residing in Art 19 of the United Nations Convention against Transnational Organised Crime (UNTOC).” Participant Magenta, Confidential Interview 3–4 (2013); United Nations Convention Against Transnational Organized
and renamed Working Group 5 (‘Piracy Money Flows’) — now the more holistic ‘Disrupting Pirate Networks Ashore’ Working Group, focuses upon ‘financial flows tracking and arresting piracy kingpins.’\(^5^4\) However, as we have dealt with CGPCS under the aegis of Lens 2, in Lens 3 we shall focus, where relevant, upon REFLECS3.

1. **Finding applicable laws to prosecute facilitators**

One of the key legal issues faced in combating piracy as an organised criminal enterprise has been finding national criminal offences reflective of Article 101 of the 1982 LOSC. This has been addressed by information coordination efforts through ensuring that investigators are aware of what charges can be brought in different jurisdictions to deal with financiers and facilitators of piracy.\(^5^5\) There is confidence that in the UK and the Seychelles, for example, such offenders could be prosecuted under ‘conspiracy to commit’ criminal charges.\(^5^6\) This is not the case in Kenya, where the emphasis is upon engaging in criminal activities offences,\(^5^7\) or the US, which has rejected the compatibility of ‘conspiracy to commit’ with Article 101(c) of the 1982 LOSC, but affirmed the applicability of ‘aiding and abetting.’\(^5^8\) Similarly, in Mauritius — with its mixed civil law penal code coupled with common law context and procedure — the availability of inchoate conspiracy and facilitation offences as ancillaries to the piracy offence is both contested, and yet to be tested. However, the mere fact that information sharing has enabled informed decisions on investigative and prosecution challenges and venues is itself evidence that such coordination ensures a more efficient use of resources by investigators and prosecutors within the region, thus buttressing the fight against the impunity of organised crime/piracy group leaders.

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\(^{5^5}\) Participant Magenta, supra note 53 at 4.

\(^{5^6}\) Ibid. at 2 and 4.


With a shared level of baseline knowledge in place regarding the appropriate legal framework to be used in different states to charge piracy financiers and facilitators, the question then becomes how sufficient evidence to bring prosecutions can be gathered. As noted previously, there have been suggestions that, given the monetary motivation of Somali piracy, there is a powerful opportunity to simply ‘follow the money’ in order to tie organised crime group leaders to acts of piracy.\(^{59}\) In response to such suggestions, investigators tend to reply with: ‘I wish I could.’\(^{60}\) It is this challenge that shapes information sharing activities concerning the ‘on shore’ components of piracy offences.

2. Challenges in combating piracy as an organised criminal enterprise

It has been suggested that the largest hurdles to money-laundering investigations into Somali crime group profits from piracy are inherently political. The primary argument is that there is no existing single organisation with both the means and willingness to effectively investigate the money trail back to Somali organised crime group leaders in a way that will allow prosecution.\(^{61}\) The range of engaged agencies and processes is not insignificant: FATF; UNODC; INTERPOL; CGPCS; EUROPOL; REFLECS3; and NCIS, to name but a few. However, interviews conducted since these suggestions were made tend to highlight that the problems are not so much political, but centre around infrastructure and information sharing networks.\(^{62}\)

In most states with a financial intelligence unit or financial crimes investigative capacity, an investigation into money laundering is supported by stable, well-regulated financial institutions, and legislation allowing for access to records which can help to establish a traceable money trail.\(^{63}\) Even when such institutional frameworks are in place, however, the process of following money trails remains difficult due to the responsive nature and evolving techniques of money laundering, especially with the myriad opportunities created by the digital economy.\(^{64}\) By contrast, Somalia operates an almost exclusively hawala banking system, which is highly informal and relatively unregulated.\(^{65}\) Aside from the hawala system, the Somali economy is almost

\(^{59}\) Nance & Jakobi, supra note 50 at 858.

\(^{60}\) Participant Magenta, supra note 53 at 8.

\(^{61}\) Nance & Jakobi, supra note 50 at 877–878.

\(^{62}\) Participant Magenta, supra note 53 at 6–9: “… the biggest issue for me is the complete and utter absence of any form of institutional banking, accounting or finance and sitting above that a governance structure and above that an auditing and regulatory structure.”

\(^{63}\) Ibid. at 6–7.

\(^{64}\) Nance & Jakobi, supra note 50 at 860.

\(^{65}\) Ibid. at 868. The ‘hawala’ system, as utilised in the movement of piracy ransoms, is concisely described in Pirate Trails, supra note 5, Ch 6.
completely cash-based. This leads to a reliance by investigators on human intelligence in an attempt to follow money trails.

Human intelligence has allowed investigators to ascertain what happens to the money after a ransom has been paid, and to identify, with a relatively high degree of certainty, the organised crime leaders in charge of the piracy group. What this information pathway is unable to do is draw the links between the initial allocation of cash shares from the ransom, and the organised crime group leader, in such a way as to provide admissible evidence of a direct link between the organised crime group leaders, the money, and a particular act of piracy. This is because ‘it doesn’t go through an institution where [investigators] can track it; it’s almost like putting $50,000 under the bed’. Often investigators are able to show that the suspect has clear links to piracy, and to finances beyond their legitimate means, providing an inference that the money has come from piracy; but the requirement is to prove the substantive links between these things in such a way that would satisfy the burden of proof in a criminal prosecution. While intelligence networks are clearly still lacking, this ability to identify—with a degree of certainty—organised piracy crime group leaders, even though there is not enough evidence to prosecute, is a marked improvement on the situation at piracy’s height in 2011.

3. The development of intelligence networks for counter-piracy

The development of these human intelligence networks has come about not through a ‘boots on the ground’ approach that many have suggested is necessary, but rather through diplomatic cooperation with the various governments in the region. In both Somaliland and Puntland, this has been a by-product of the prisoner transfer memorandums of understanding (MoUs). In other states, such as the Seychelles (a leader in regional counter-piracy activity), these networks have been built through highlighting the long-term, pragmatic, and political benefits of involvement in fighting transnational crime.
organised crime.\textsuperscript{75} This approach is of particular relevance given the concern that if piracy becomes too difficult to address, while the underlying criminal infrastructure remains in place, it will simply morph into a different form transnational crime—such as arms or human trafficking.\textsuperscript{76}

At the beginning of 2013, these counter-piracy networks within Somalia were described as ‘fledgling,’\textsuperscript{77} however, the fact that these networks have remained in place after some in the Somali Transitional Federal Government (TFG) declared pirates to be national heroes in 2011,\textsuperscript{78} is a remarkable feat of diplomatic engagement with the Somali regional administrations. Perhaps the most beneficial part of this fledgling intelligence network is that counter-piracy stakeholders external to Puntland and Somaliland now have a solid contact point within each of these regions regarding counter-piracy activities.\textsuperscript{79} This has included the establishment of the Somaliland Counter-Piracy Co-ordination Office by presidential decree in January 2012.\textsuperscript{80} The basis of these interactions is that of supportive nation-building and mentoring, learning from the lessons of these processes relearned (again) in Iraq and Afghanistan.\textsuperscript{81}

The substantive pillars of these relationships are autonomy and accountability.\textsuperscript{82} To this end, the UNODC and REFLECS3 have engaged with the SFG, Somaliland, and Puntland administrations to determine what it is that they require in order to function, and then to assist them in acquiring these capabilities and resources, following through in a tailored (as opposed to generic) manner.\textsuperscript{83} They have been involved in mentoring, policy drafting, procedural training, and liaising with potential donors to equip the various police and security forces to combat piracy within Somalia, rather than through externally enforced approaches.\textsuperscript{84} However, the ever-present obverse of this assistance in implementing locally-owned autonomous solutions is accountability. As a general rule, capacity-building support being provided

\textsuperscript{75} Participant Magenta, supra note 55 at 13.
\textsuperscript{76} Ibid. at 21–22. See also: Bruno Schiemsky, “Guns, drugs and terror: Somali pirates morph into polycriminals” The East African (10 January 2010), online: <http://www.theeastafrican.co.ke/news/-/2558/839124/-/pwwr7qz/-/index.html>; see also Charles Reid, “Securitization of Piracy off the Horn of Africa: Are there Implications for Maritime Terrorism?” (2011) Corbett Paper no. 5, at 5.
\textsuperscript{77} Ibid. at 18.
\textsuperscript{78} Mary Harper et al., supra note 17 at 150.
\textsuperscript{79} Participant Magenta, supra note 53 at 17.
\textsuperscript{81} Participant Magenta, supra note 53 at 18.
\textsuperscript{82} Ibid. at 18.
\textsuperscript{83} Ibid. at 18.
\textsuperscript{84} Ibid. at 18.
to the various administrations is monitored and linked with targeted outcomes.\textsuperscript{85} Should the outcomes not be met there is a clear point of contact and accountability from which the relevant bodies can seek answers.\textsuperscript{86} This is far from a panacea, however—as the recent Eritrea and Somalia Monitoring Group assessment (and subsequent UNSC resolution) on SFG non-compliance with the conditions around the lifting of the UNSC arms embargo to facilitate their rearming of their security forces, the scope for corruption, misuse, and unaccountability remains wide.\textsuperscript{87}

There is, nevertheless, some hope that this increased capacity to deal with piracy as an internal criminal matter, rather than relying on Western naval enforcement and prosecutions in Kenya, the Seychelles, and Mauritius, will facilitate—eventually—an internationally acceptable level of confidence in fair and efficient trial guarantees within the justice systems of Somalia—a concern that has been raised by the UN.\textsuperscript{88} These concerns were given substance in light of the MV \textit{Iceberg 1} prosecutions. In discussing this incident, one enforcement operative articulated her concerns regarding the pace in which the matter was handled, as the suspects were convicted and incarcerated within three days of their capture for the offence.\textsuperscript{89} While there is no readily available evidence to indicate that the accused did not receive adequate representation or a fair trial, the overwhelmingly short timeframe between arrest and incarceration raised concerns in her mind regarding the rule of law, due process, adequate

\begin{footnotes}
\item[85] Ibid. at 18.
\item[86] Ibid. at 18.

Taking note of the Somalia and Eritrea Monitoring Group’s (SEMG) 6 February 2014 report on compliance by the Federal Government of Somalia with its requirements under the terms of the partial suspension of the arms embargo on the Federal Government of Somalia;

Noting with concern the SEMG’s reports of diversions of arms and ammunition, including to Al-Shabaab, which has been cited as a potential recipient of diverted arms and ammunition, and further noting that, pursuant to paragraph 7 of resolution 1844 (2008), all Member States are required to take the necessary measures to prevent the direct or indirect supply, sale or transfer of weapons and military equipment to designated individuals and entities, which includes Al-Shabaab; and

Stressing that any decision to continue or end the partial suspension of the arms embargo on the Federal Government of Somalia will be taken in the light of the thoroughness of the Federal Government of Somalia’s implementation of its requirements as set out in this and other relevant Security Council resolutions...

The Resolution then imposes (i.e. in operative paras 6, 7, and 9) specific reporting and compliance obligations upon the Somali Federal Government.

\item[88] Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region, supra note 74 at 7 and 10.
\item[89] Participant Magenta, supra note 53 at 15.
\end{footnotes}
representation, and the right to a fair trial. Thus while the capacity to investigate and police organised crime may be increasing through the facilitation of internal organisational capacity-building, and the cultivation of criminal intelligence networks within Somalia, there is still substantial ground to cover.

VI. LENS 4: COUNTER-PIRACY AS NATION-BUILDING

Thus far, this article has suggested that effective counter Somali piracy operations have to a large extent been driven by information sharing regimes and networks. However, a significant side-effect of this information sharing focus has been capacity and nation-building in Somalia and other states within the region. One of the driving forces behind this capacity and nation-building has arguably been the detainee/prisoner transfer arrangements for the prosecution of pirates captured at sea, prisoner repatriation arrangements between prosecuting nations and Somali administrations, and associated information and military coordination efforts within the region.

While Somali pirate-apprehending nations have generally been unwilling to prosecute large groups of suspected pirates within their own justice systems (primarily for political and logistical reasons), the prisoner transfer arrangements with regional prosecuting states have ensured that pirates are unable to continue their conduct with impunity, thus contributing to the overall promotion of the rule of law within the region. The second order consequences of the various MoUs concerning the transfer of piracy suspects have included significant capacity-building within the prosecuting states. The place of information sharing regimes within this narrative is central.

1. MoUs as rule of law and information network development tools

The primary focus of the MoUs for transfers of Somali pirates to third-party states for prosecution is the preservation of respect for human rights standards in accordance with the CAT and the ICCPR (and for the EU,

90. Ibid. at 15.
the ECHR) although these treaties are not mentioned directly.\textsuperscript{94} This is not surprising, given (for example) concerns with, and evidence of, overcrowding in Kenyan prisons,\textsuperscript{95} which have been considered a driving force behind ‘catch and release’ enforcement.\textsuperscript{96} These arrangements are not necessarily considered binding in the same way as a treaty, and are often considered to be merely political commitments with no legal force (although this differs both within and between the civil law and common law jurisdictions involved),\textsuperscript{97} nor do they absolve the capturing nation of their obligations to uphold human rights standards. However, they do provide capturing nations with assurances that minimum human rights standards will be upheld, which in turn gives them some degree of domestic and international political (and legal) shielding should the prosecuting and incarcerating nation fail to uphold these standards. Further, this focus upon guarantees serves to promote the rule of law and basic human rights within the region, with the potential for Somalia to one day be in a position to provide similar assurances forming a foundational pillar of, and metric for, the rebuilding of the Somali justice system.

A second significant function of the MoUs is the provision of material support by apprehending nations to prosecuting nations. In some cases, this is simply the provision of procured evidence, the facilitation of witness statements and delivery of witnesses for trial, and the handing over of all seized property in relation to the transfer of the apprehended suspects.\textsuperscript{98} 


\textsuperscript{95} Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region, supra note 74 at 69.


\textsuperscript{98} EU-Kenya MoU, supra note 92.
other instances, the assistance provisions are much more broadly stated and provide a catch-all agreement for the provision of other forms of assistance as may be required during the life of the MoU. These broader catch-all provisions have resulted in, for example, the secondment of two British Crown Prosecutors to the Seychellois Attorney-General’s Department for the purpose of prosecuting suspected pirates in the Seychelles. They have also resulted in the creation of an EUNavFor liaison officer role focused upon the Seychelles and Mauritius, physically located within the British High Commission in Victoria, Seychelles. Further, it is arguable that these MoU arrangements have provided, at least in part, the formal impetus for UNODC capacity-building, in conjunction with UNDP and others, within the region.

The MoU provisions relating to the procuring of witness statements and delivery of witnesses to trials have evidenced significant potential to lead to improved information sharing networks throughout the region. One of the most significant issues in provision of witnesses to piracy trials is ensuring that the artisanal fishermen whose dhows have been hijacked and used as motherships are available and present for the trial. The importance of these witnesses to piracy trials resides in the gravity of their testimony, and their ability to identify the suspects with a greater degree of clarity than merchant vessel crews, due to the sustained period, and close proximity to the alleged pirates, in which they were held. This has the potential for building or enhancing regional information networks as the vast majority of these witnesses come from Pakistani, Iran or Yemen; there have been suggestions, for example, that as a condition of receiving piracy suspects for prosecution, local agents should be retained in each of the major fishing ports in order to track down these witnesses as it is nigh impossible for westerners to do so. Should this suggestion be taken on board, it clearly has the potential to build engagement and trust in the region and to improve opportunities to gain reliable information, thus facilitating broader action against piracy and other transnational maritime crime.

2. MoUs as nation and capacity-building tools

In terms of regional capacity-building, a short list of the broader consequences of specifically focused counter-piracy initiatives would clearly include: improved prison capacity and conditions; enhanced judicial capacity

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99. EU-Seychelles MoU, supra note 92 at 37 and 40; UK-Seychelles MoU, supra note 94 at 7.
100. Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region, supra note 74 at 44.
102. Counter Piracy Programme, supra note 93 at 3; UNODC 2010 Annual Report, supra note 93 at 18–19.
103. Participant Russet, supra note 1 at 3; Participant Umber, Confidential Interview 5 (2013).
104. Participant Umber, supra note 103 at 5.
105. Ibid. at 5.
and quality; improvements in law enforcement techniques by patrolling navies; and significant up-skilling of regional law enforcement. Individuals from within the Seychelles prison system, for example, have commented that the UNODC (as part of its capacity-building program aimed at enhancing Seychelles capacity to hold Somali pirates both for trial, and after conviction) have expanded the prison to accommodate these pirates, and ensured that the prison meets modern standards. The operations are regularly monitored by the UN so as to ensure that standards are maintained, and that the human and physical corrections capacities developed or expanded with international assistance are being utilised as transparently as possible. Further, UNODC has supported and assisted with facilitating educational programs for the prisoners, both Somali and local. This is beneficial on a wider level—not just for the prosecution of pirates, but also for the incarceration and rehabilitation of local offenders.

A significant hurdle to prosecutions, encountered at the outset of counter Somali piracy operations, was the lack of adequate regional legislative frameworks for the prosecution of piracy. Because of the ever-present need for regional prosecution options for captured piracy suspects, legislative reform of criminal and criminal procedure laws for states within the region has been of fundamental importance. Additionally, even once legal reform—including the creation of piracy offences, or legislative amendments allowing video-link witness testimony for often geographically-displaced merchant vessel mariners—is achieved, the need for further mentoring of judges and prosecutors within the region remains. This is central to the rule of law endeavour, as it facilitates trials and assists them to progress in a timely and efficient manner. The importance of information (and particularly experience) sharing networks to this project cannot be understated. Indeed, given that (in particular) Kenyan and Seychellois judges and prosecutors are now arguably the world’s most experienced in terms of piracy trials, the importance of ‘South-South’ regional learning exchanges and experience sharing is now arguably of ever-increasing relevance and utility than continuing an often uncoordinated smorgasbord of extra-regional training programs.

106. Participant Cobalt, Confidential Interview 1 (2013); Participant Magenta, supra note 53 at 12; Participant Umber, supra note 103 at 8.
107. Participant Cobalt, ibid. at 1–2.
108. Ibid. at 2.
109. Ibid. at 3.
112. Participant Magenta, supra note 53 at 9–11.
One major challenge faced at the commencement of counter-piracy operations was effective securing of evidence by patrolling warships. This challenge included issues surrounding chain of custody, and ensuring that evidence was secured in a manner that was tamper-proof in order that it could be uncontroversially admitted by the court. When discussing this matter, one official described the situation aptly: “navy staff are really good at driving ships and police officers are really good at investigating cases; ask a police officer to drive a ship and you’re likely headed [for] disaster and vice versa.” She then proceeded to point out that cooperation between naval forces, INTERPOL, and NCIS has led to a very different situation where evidence was now being well secured in a manner that protected its admissibility in criminal proceedings. This assessment is consistent with Beekarry’s observations regarding ‘Handover Guidance’ packets created by prosecutors in receiving states to ensure that evidence is admissible. There are, nevertheless, still concerns surrounding the inability of the vast majority of warships to engage in even the most basic forensic evidence gathering upon seized pirate vessels. These concerns are often centred upon the fact that military personnel are required to engage in some of the more technical aspects of law enforcement roles—aspects for which they are not necessarily trained. In terms of regional law enforcement, up-skilling has occurred primarily through direct training and mentoring.

The MoUs which Seychelles has entered into regarding the repatriation of convicted pirates to Somali prisons are similar to the MoUs between capturing nations and prosecuting regional states; however, they are more limited in nature. The primary content of these MoUs is the preservation of human rights during incarceration, and the continued enforcement of court-ordered prison sentences of convicted pirates upon their repatriation. The remainder of the MoU provisions generally focus upon the procedural aspects of transfers (such as medical and identity checks) and dispute settlement which, while important, are not relevant to this paper. Conspicuously absent, when compared to the MoUs between capturing nations and prosecuting nations, are provisions for assistance. The likely explanation for this is that the Somali regional administrations are receiving assistance from apprehending nations.

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113. Ibid. at 5.
114. Ibid. at 5.
115. Ibid. at 5-6.
117. Participant Russet, supra note 3 at 5; Participant Umber, supra note 103 at 3.
118. Participant Russet, supra note 3 at 5.
119. Report of the Secretary-General pursuant to Security Council resolution 1950 (2010), supra note 74 at 62; Participant Magenta, supra note 53 at 17–18; Participant Umber, supra note 103 at 2–3.
120. Memorandum of Understanding between the Republic of Somaliland and the Government of the Republic of Seychelles, supra note 74 at arts 8-9.
121. Ibid. at arts 5-7.
funneled through UNODC and other international and multilateral agencies, rather than from the regional prosecuting states.

Such MoUs provide a convenient and efficient way to engage in international cooperation in the fight against piracy. They do not attract the same level of bureaucracy and oversight as treaties. Given their non-binding nature, they can often be signed by diplomats and officials rather than Ministers of State, and they can be easily terminated when they cease to be appropriate. This is particularly evident when considering Kenya’s withdrawal from transfer agreements in 2010, due to Kenyan perceptions that adequate support was not being provided for prosecutions and subsequent incarcerations.122 (Kenya is now accepting piracy cases on an individual basis where there is a Kenyan nexus.)123 The other benefit of using MoUs over more formal treaty processes is the ability to engage in agreements with non-state, or perhaps more accurately, federally subordinate, actors—for example, the Seychelles repatriation MoUs with Somaliland (although Somaliland has claimed independence from Somalia since 1991),124 and Puntland.125

The repatriation of prisoners is crucial to continued regional counter-piracy efforts, and thus promotes continued development of information sharing networks linked to this outcome. One purely pragmatic reason is that prosecuting states are often reluctant to accept more pirates for prosecution unless they are able to repatriate an equal number of already convicted pirates, in order to free up prison capacity.126 Another important reason is that continued engagement tends to foster positive relations,127 and to encourage exchange of information in associated areas, thus contributing over time to a further reduction in the impunity still enjoyed by some organised piracy crime group leaders.128 Given the concerns surrounding infrastructure and training in the justice systems within Somaliland and Puntland, and their ability to handle serious criminal offences, including piracy,129 such agreements will

123. Ibid. at 50–51.
126. Participant Cobalt, supra note 106 at 3; Participant Magenta, supra note 53 at 12; Participant Russet, supra note 1 at 1; Participant Umber, supra note 103 at 7.
128. Participant Magenta, supra note 55 at 17–18.
129. Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region, supra note 74 at 49.
continue to play a significant role in facilitating information sharing within regional counter-piracy efforts for some time to come.

VII. OTHER APPLICATIONS

In this final section of the paper, we will briefly examine whether, and if so, how, some of the legal lessons learned from the counter Somali piracy information sharing experience are relevant for other maritime crime contexts. To this end, we shall briefly examine two other burgeoning maritime crime situations: piracy in the Gulf of Guinea, and the trafficking of Afghan opiates by sea from the Makran Coast into East Africa. The former theatre has direct subject matter transference potential, but in a different geographic content; although the latter theatre shares a venue (the Indian Ocean) with Somali piracy, it is a fundamentally different maritime crime.

1. Gulf of Guinea piracy

There are (currently) three fundamental distinctions between East African and West African piracy. The first is that whilst East African—specifically Somali—piracy centres around taking vessels and crews as hostages in order to generate ransoms, piracy in West Africa hinges around the theft from tankers and other vessels of oil and petroleum, which is then inserted (or in some cases, re-inserted) into the massive and highly lucrative oil black market. The second is that the focal point for Somali piracy is an extremely weak, and still fundamentally fractured, state (Somalia) which is still at a very early stage of re-establishing institutions and even a basic level of governance and rule of law over its territory and people. In the Gulf of Guinea, the focal point, Nigeria, is a large and well-established state with existing counter-piracy institutions such as a navy, police, laws, and courts (albeit plagued in some sectors by weakness, corruption, and demarcation disputes between agencies and ministries). Third, the very absence or debilitating weakness in Somali state and governance institutions, coupled with the fact that the UNSC is directly engaged in state-building in Somalia, have created a permissive space within which the international community has been able to take the initiative in developing, supporting, and implementing solutions—the CGPCS being

one very significant illustration of this endeavour. By contrast, the Gulf of Guinea states have, to date, shown little appetite to surrender to any degree their right and wish to create and implement their own solutions, albeit with international support. Indeed, the UNSCRs on Gulf of Guinea piracy to date focus upon regional action by regional states, relegating the international community to a supporting rather than a driving role.131

For all of these contextual differences, however, it is remarkable how relevant information sharing networks, processes, and instruments developed specifically for the counter-piracy situation in Somalia are proving for the West African situation. Some initiatives, such as the use of prisoner transfer MoUs as a criminal justice system reconstruction and capacity-building mechanism, will have little immediate relevance in West Africa, where clear and continuing sovereignties with functioning criminal justice systems already exist. There is, however, scope for detained pirate suspect transfer arrangements along the same lines as in East Africa, given that it is possible that international navies could engage in opportunistic apprehensions. In this situation, the detained suspect transfer arrangements between, for example, the EU and Kenya, could readily form a template for a similar arrangement between, for example, the EU and Ghana or Nigeria. The differences would be in detail, not in paradigm. Thus many of the associated information sharing processes and instruments that are utilised in East Africa, could readily be adapted for West Africa, taking account of course of the higher proportion of civil law as opposed to common law jurisdictions. Evidence collection guidance, use of existing money laundering and tracing networks, information sharing agencies and regimes (such as FATF, INTERPOL, and so on) all would have direct relevance. The same is true of the potential utility of regionally based information clearing houses, such as REFLECS3 in the Somali piracy context. Again, given that such mechanisms are fundamentally consensual, and can generate useful outcomes even with limited inputs (adding value through correlation and analysis) there is no obvious reason they could not be cloned for West Africa. Indeed, although it is more focused upon gathering, collating, and issuing maritime activity reports (an existing weakness in the area), the MTISC132 initiative is an evident step along this path.

2. The Indian Ocean maritime route for Afghan opiates


As the land trafficking routes for Afghan opiates have come under increased vigilance and higher levels of interdiction activity, substantial components of the trade are now being pushed south onto dhows (and also into containerised cargoes) departing from ports along the Makran Coast and headed for ports in East Africa (Tanzania, for example, has been the site of several major drug seizures) or South and South-East Asia (Sri Lanka has also seized a number of substantial cargoes). However, by far the largest seizures over the last several years have been at sea: a record single cargo of 1032 kg was seized from an unflagged dhow by an Australian warship off the coast of East Africa on 26 April 2014. Again, however, there are important contextual differences with the Somali piracy situation. The primary distinction is that drug trafficking by sea is not a crime of universal jurisdiction, and—vital—is not one of the five legal bases available under Article 110 of the 1982 LOSC (including piracy) which permit boardings without the need to first gain flag state consent. Indeed, the LOSC places maritime drug trafficking one level below the Article 110 crimes:

Article 108 - Illicit traffic in narcotic drugs or psychotropic substances

1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.

2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.

This does not mean that a warship cannot board an unflagged vessel it suspects is carrying an illicit cargo—it certainly can, as the current crop of Indian Ocean seizures indicates. But the jurisdictional basis is the fact that the vessel is unflagged, thus creating a right to check its actual flag. The five legal bases for boardings by warships in international waters, without the requirement to first secure flag state consent, are where there are reasonable grounds for suspecting that:

(a) the ship is engaged in piracy;

(b) the ship is engaged in the slave trade;

(c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;

(d) the ship is without nationality; or

(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.


134. Law of the Sea, supra note 10, at art 110(1).
drugs are seized and ditched as a legal by-product. But in the absence of universal jurisdiction, there is only limited current scope to assert a third state prosecution authority over the crew in relation to the crime of drug trafficking.

The consequence is, naturally enough, that the information sharing mechanisms established in the context of Somali piracy prosecutions support may be of less immediate relevance, given the absence of an operative, formal, and organised set of multilateral jurisdiction-sharing and coordination arrangements. The instruments that could support such regimes exist (the UNTOC, for example), but the political will to implement remains a challenge. However, the fact that most drug seizures from unflagged vessels are led by intelligence, as opposed to merely opportunistic, creates space for disruption and enforcement at sea, as opposed to prosecution-focused, information sharing regimes—a fact recognised by, for example, REFLECS3, which is consciously expanding its focus to include this challenge. Indeed, as is clear in this particular case, networks and processes established to facilitate counter Somali piracy information sharing are equally employable in information sharing for maritime counter-trafficking: the information inputs may differ, but the accompanying mechanisms for information collation, integration, and dissemination are of much broader utility.

VIII. CONCLUSION

This paper has sought to provide a succinct overview and examination of a number of information sharing regimes that have proven crucial to effective counter-piracy operations in the Horn of Africa region. These information sharing regimes have ranged from practical operational intelligence and information sharing in order to facilitate reactive enforcement, through to regional military and legal coordination through the CGPCS and SHADE frameworks, the development of on-the-ground networks within Somalia to assist with onshore operations designed to combat (at source) the transnational crime aspect of piracy, and the nation-building potential that can emerge from criminal justice system information exchange and sharing networks.

While these networks take time and resources to develop, and while they may have initially operated in a relatively unconnected and dysfunctional manner, they have over the last five years become an important and quite successful tool in the broader project of curbing Somali piracy. This paper suggests that the core features of these arrangements—the features that have made them relatively successful—include:

1. the flexible nature of the arrangements themselves; the decision to opt for regional solutions rather than more uniform global solutions;
2. an approach focusing upon engagement with and support of regional stakeholders (instead of a ‘boots on the ground’ operational approach);

3. and a focus on dealing with the source problem of information sharing, rather than simply the symptom (which is, in such cases, the incoherence that arises from a lack of co-ordination).

The flexible nature of these information sharing arrangements is evident at multiple levels. In relation to direct at sea enforcement, for example, it is evident in both the jurisdictional arrangements that underpin Article 100 of the 1982 LOSC 1982,136 and the UNSCRs.137 Both of these legal frameworks allows states to operate in an ‘opt-in’ manner in relation to the situation in Somalia, whilst giving consideration to their other domestic and international obligations in terms of ensuring that such operations do not become burdensome, or create a continuous drain upon vital—but rationed—political will. The same is true of the larger scale preventative information sharing regimes (CGPCS and SHADE, for example), which clearly operate on a bespoke, ‘opt-in’ framework with a clearly defined, flexible, and simply articulated legal mandate. This flexibility allows participating states to regularly reassess their participation, involvement, and to trade off activity against other pressures and obligations, thus allowing these mechanisms to continue operating in a constructive and positive manner, even as the specific participants, and their levels of political commitment, ebb and flow.

The MoUs used to facilitate prisoner and piracy suspect transfers, and the various nation-building and regional capacity-building initiatives which they either facilitate or advance, also highlight, and to a significant extent endorse, the very conscious decision to engage in counter-piracy operations through a flexible legal and institutional framework rather than a more rigid, formalised, and binding one. The reduced level of bureaucratic interference that accompanies this choice allows agreements—such as these MoUs—to be negotiated, implemented, used, and then withdrawn, with a greater degree of political, procedural, and legal ease. Their status also allows these instruments to be responsively adjusted so as to maintain their relevance and application. This flexibility is demonstrated by the fact that Kenya, when dissatisfied with the arrangements, was able to withdraw from them with relative ease, freeing them to ure of a piraadjust their ongoing involvement with regional counter-piracy rates to one that was more manageable within their evolving needs and capabilities.

Another key aspect of the success of these information sharing regimes within counter-piracy operations is that they have focused upon regional solutions to a regional problem. The bulk of Somali piracy prosecutions are brought to trial within East Africa and the Western Indian Ocean, with

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136. *Law of the Sea, supra* note 8 at art 100, requires states to cooperate with counter-piracy operations without imposing a positive duty in the way the Genocide Convention (for example) provides a positive duty on States to prevent genocide; see also *Convention on the Prevention and Punishment of the Crime of Genocide*, UNGAOR, GA Res 260 A (III), 78 UNTS 277 (9 December 1948), at art 1.

prisoners being repatriated (after conviction, and only if they consent and voluntarily decide not to appeal) to their homeland to serve their sentence. The main coordination centres, such as REFLECS3, are based within the region, and those Western states involved in capacity-building and operational information sharing are generally liaising with, facilitating, and supporting these local stakeholder networks and processes in generating solutions. Such regionally-based and -owned solutions are crucial as they have underpinned another key aspect of successful counter-piracy operations: engagement and support, rather than an overpowering ‘boots on the ground’ approach. This is evident across many components of counter Somali piracy operations: from cooperation amongst regional States on prosecution and prisoner repatriation; through to liaising with and supporting authorities within Somalia as they deal with some on shore aspects of Somali piracy.

The final, and perhaps key, aspect of the information sharing regimes that have underpinned successful counter Somali piracy operations is a longer-term focus on some of the root facilitators of piracy (including governance, impunity, and financial flows), rather than simply the primary symptom, the transnational criminal offence itself. This approach is only possible because of the initial decision to pursue flexible mechanisms, responsive agendas, regional solutions, and engagement with and support of local stakeholders, rather than focusing only upon the direct intervention by developed nations, which underpins the apprehension at sea regime. (It must be noted, however, that by some estimates, fully 99 per cent of the funds spent in direct response to Somali piracy have been on short-term solutions such as increased fuel consumption for higher transit speeds and patrolling warships; less than 1 per cent have been employed in more medium-term capacity-building responses.)

By casting the net more widely than just the immediate response at sea, the opportunity to use counter-piracy capacity-building as a vehicle for broader rule of law capacity-building within Somalia has been enhanced. Leveraging counter-piracy programming, ‘ink spots’ of capacity—human rights-aware custodial officers; basic investigation training for maritime police officers—have been created, and are now available for use as stepping stones in broader rule of law and reform projects. Additionally, there has been substantial capacity-building throughout the East Africa and western Indian Ocean region, aimed at better equipping a number of willing states to deal with maritime-focused transnational organised crime and leveraging counter-piracy initiatives to expand the employment of ostensibly counter-piracy funded, but more generally applicable, capacity improvements. While ongoing assessment

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138 See e.g. the most recent report from Oceans Beyond Piracy (OBP): Oceans Beyond Piracy, The Economic Cost of Somali Piracy (2012), (April 2013), online: <http://oceansbeyondpiracy.org/publications/economic-cost-somali-piracy-2012-summary>. The report assesses that less than 1 per cent of the estimated US$ 6 billion in direct response costs for 2012 was allocated for prosecutions and imprisonment outcomes, and less than 1 per cent on counter-piracy organisations.
will be required in order to determine whether or not these measures and approaches have led to sustainable improvements, reports and other evidence currently at hand suggest that—at least in the short term—they have been quite successful. There is little argument that it is, ultimately, information sharing that has underpinned this success.
On the Implications of the Use of Drones in International Law

Jaume Saura

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I. INTRODUCTION

On 23 May 2013, President Obama formally acknowledged that the United States (US) had been taking “lethal, targeted action against al-Qaeda and its associated forces, including with remotely piloted aircraft commonly referred to as drones,” and that it intended to continue doing so because these actions were “effective” and “legal.”  

When these words were pronounced, it was no secret that the US and other countries were embarked in the research, development and use of these unmanned systems. As a matter of fact, it was not the first time that high ranking officials of the US had acknowledged this, though little more was officially disclosed. After Obama’s words, opacity remains the policy concerning the frequency and scope of the use of drones by either the US or any other power that possesses them. Not only has the general public lacked enough information: “Even the other two branches of federal government … have reportedly not been fully informed of the details of the program.” Likewise, there seems to be a clear leap between what official spokespersons and apologetic scholars say on the one hand and what actually happens on the ground on the other.  

The purpose of this paper is to contextualize the challenges that drones imply for international law, particularly in the realm of international human rights law. It has been rightly said that drones are simply new weapons that, as any other, must be used in accordance with existing law. In this respect, what the current drone proliferation brings about is the questioning, or a reappraisal, of some very core international law principles and norms; principles and norms that are fully in force and must be respected whether

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3 Ibid.
one uses drones or any other armament. In this article, I shall provide an overview of current drone technology and how it is used; I shall subsequently present some of the challenges that these systems bring to international law in three arenas: the means of warfare; the prohibition of the use of force and its exceptions; and international human rights and international humanitarian law (IHL), particularly when drones are used for targeted killing.

II. DRONES: WHAT THEY ARE AND WHERE THEY ARE USED

In spite of the lack of transparency that surrounds this issue most authors coincide in the description of current and prospective drone technology as well as in its current proliferation. We know plenty of things about drones and where they are being used.

1. What are drones?

Drones are unmanned aircraft, controlled remotely and in real time by human operators. Though they are generally referred to as “unmanned aircraft vehicles” (UAV), some prefer to call them “remotely piloted aircraft systems” (RPAS): “RPAS are under control of a remote pilot-in-command for the entire flight under normal conditions and movements on the ground.” Irrespective of this terminological issue, “drones” are robot planes flown by ground-based pilots that represent the latest development so far in war-fighting technology, separating the warfighter from the consequences of his actions by as much as several thousand miles. Their nickname comes from the constant buzzing noise that some of them make in flight; they are extremely diverse: “there are currently dozens of types of drones in service, all of which differ greatly in terms of size, shape, weight, cost, range and capability.” The North Atlantic Treaty Organization (NATO) classification table shows this huge variety of UAV: Class I are those aircrafts that weigh less than 150 kg., among which there are different subtypes, including so-called “micro” UAVs with less than 2 kg that cannot fly higher than 200 feet. On the opposite side of the spectrum, Class III drones (Predators, Global Hawk, etc.) weigh more than 600 kg (usually, several tones), can fly up to 65,000 feet high and have an almost

12 Melzer, supra note 8.
unlimited mission radius. In total, the US alone may be flying 7,000 such devices during a natural year, with half-a-million-hour flight.

Drones are being used in three different ways: first, when ground troops attack, or come under attack, armed drones are called in and use bombs and missiles in a similar way to other military aircraft; second, drones are on patrol in the skies of some countries (such as Afghanistan), observing the ‘pattern of life’ on the ground 24 hours a day; and third, they are used in pre-planned missions to conduct targeted killings of suspected militants. The first of these uses makes little difference with any other weapons, including traditional manned aircraft, in terms of international law: such use will or not be legal depending on general international humanitarian law parameters. In the second use (patrolling), drones need not even be armed and play only a surveillance function. This may not have in principle any humanitarian law implication, but does concern sovereignty and privacy issues, among others. As for the third use, it seems to have become the main use of combat drones, probably given their vulnerability (as of today) in conventional air warfare, and where the focus of legality has been shed upon. To be clear, killing someone is legal or illegal (usually, illegal) irrespectively of the means used; but the fact that armed drones make it so much easier to kill people in remote areas has established a strong linkage between drones and targeted killing; a link that concerns both international human rights and humanitarian law.

2. Historical overview

The technology to fly devices without a pilot exists since the immediate post Second World War. As a matter of fact, even during World War I the US Army and US Navy experimented with a remote control system invented by Sperrey and Hewitt that allowed war planes to fly without a pilot in order to, once they were loaded with explosives, direct them against the enemy. Had the system worked (the prototypes were highly unstable) they would have been closer to cruise missiles than to current drones, but the precedent shows

14 Cole, Dobbing, & Hailwood, supra note 11 at 7.
15 Ibid. at 6.
how battlefields have been robotized the moment the adequate technology existed.\textsuperscript{19} As mentioned, actual “[d]rones were first used by the United States in the 1950s as target practice for fighter pilots. In the 1960s, they were used to spy over China and Vietnam, and also for surveillance in Bosnia and Kosovo in the 1990s.”\textsuperscript{20} Thus, during the Cold War drones were only used for surveillance purposes, but not only by the US; Israel, for instance, “used reconnaissance drones in Lebanon in 1982 and again in 1996 to guide piloted fighter bombers to targets.”\textsuperscript{21}

Although the technology was developed earlier, the use of drones as weapons rather than as surveillance devices is very much linked to the US ‘War on Terror’ following the 9/11 attacks and the appearance in this scene of a non-military actor, the US Central Intelligence Agency (CIA). Even if “[i]t was during NATO’s 1999 Kosovo campaign that Armed Forces started to think about the utility of strapping a missile to the UAV which led to the [Predator drone] armed with Hellfire missiles,”\textsuperscript{22} the fact is that “[t]he first time a missile was fired from an armed drone in an attack was in Afghanistan, less than a month after 9/11.”\textsuperscript{23} In a parallel process, during the Balkan Wars, and in order to skip the slow bureaucratic machinery of the Pentagon and its adjudicative processes, the US Government commissioned the CIA to create a surveillance drone. Even if the Gnat-750 produced by General Atomics for the CIA did not work very well, particularly in bad weather, this commission allowed the CIA to start its own relationship with the drone industry.\textsuperscript{24} In fact, “[t]he CIA allegedly carried out its first targeted drone killing in February 2002 in Afghanistan, where a strike killed three men near a former mujahedeen base called Zhawar Kili.”\textsuperscript{25} It was the beginning of a new attack vector that would become extremely popular only a few years later.

3. A Weapon of Choice

All authors agree that the Obama administration has produced a huge surge in the use of drones.\textsuperscript{26} According to different sources, when President Bush left the White House, the US had carried out at least 45 drone strikes,\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{19} Jordán & Baqués, \textit{supra} note 17 at 15-16.
\item \textsuperscript{20} Webb, Wirbel, & Sulzman, \textit{supra} note 10 at 31.
\item \textsuperscript{21} Cole, Dobbing, & Hailwood, \textit{supra} note 11 at 6.
\item \textsuperscript{22} \textit{Ibid.}
\item \textsuperscript{23} \textit{Ibid.} at 7.
\item \textsuperscript{24} Jordán & Baqués, \textit{supra} note 17, at 35.
\item \textsuperscript{26} Andrew C Orr, “Electoral Justice for Aboriginal People in Canada” (2011) 44:3 Cornell Intl LJ 729 at 730.
\end{itemize}
or up to 52,28 in Pakistan alone. Before the end of his first term in office, President Obama had more than quintupled any of these figures, again in Pakistan alone.29

But the US is not the only actor using drones, armed or not. A recent report states that “approximately 50 States currently either possess drones or are in the process of developing or acquiring them.”30 Philip Alston was mentioning “only” 40 States in 2010,31 among them: “Israel, Russia, Turkey, China, India, Iran, the United Kingdom, and France either have or are seeking drones that also have the capability to shoot laser-guided missiles.”32 Dave Webb et al. add “Belarus, Colombia, Sri Lanka, and Georgia.”33 Curiously, there is contradiction among authors on some countries. For instance, there are allegations that Germany has already used armed drones,34 while other authors state that “Germany has made a request to purchase five Reapers and four mobile ground stations for $250 million, although they will not be armed as that step is not deemed to be acceptable in Germany.”35 Also, although Spain is not mentioned in these reports, local authors state that “Spanish industry has a wide investment area and there are currently more than 50 companies developing products and innovation for drones.”36 In the European Union (EU), “Italy, the Netherlands, and Poland are among other EU member states that are seeking or considering the purchase of armed drones, and European defence consortia are exploring the possibility of manufacturing both surveillance and armed UAVs in Europe.”37 In this last respect other authors say, citing market analysis firm Visiongain, that “[t]he US dominates the UAV market as it integrates these systems into all its armed services and at different levels [while] Israel is both a leading exporter of UAVs and a key market.”38

29. Ibid. There were 300 attacks until the end of 2013, according to Jordàn & Baqués, supra note 17, at 81; then, there were no attacks for months until 12 June 2014; cf. supra note 6, online: <http://www.thebureauinvestigates.com/2014/06/12/drone-strikes-resume-in-pakistan-after-five-month-pause/> (last visited on 2 July 2015).
30. Melzer, supra note 8, at 7.
32. Ibid.
33. Webb, Wirbel, & Sulzman, supra note 10 at 32.
34. Melzer, supra note 8 at 10.
35. Webb, Wirbel, & Sulzman, supra note 10 at 33. This can be due to the ‘No Combat Drones’ campaign launched by civil society groups at the announcement of German Defense Minister Thomas de Maizière of his wish to purchase UAVs for the Bundeswehr.
38. Cole, Dobbing, & Hailwood, supra note 21 at 11.
Proliferation is not circumscribed to sovereign states. There are at least two reported cases where non-State actors have used, or tried to, armed drones. First, allegedly the private military company formerly known as Blackwater (subsequently Xe Services and Academi) was secretly hired by the CIA to target and kill Osama bin Laden and other al-Qaeda operatives in Pakistan and Afghanistan using drones. More recently, “in 2012, Hezbollah claimed responsibility for the launch of an Iranian manufactured Shahed-129 reconnaissance and combat drone, which was shot down by Israel after flying 25 miles into its territory.”

The appeal of these weapons for state and non-state actors is self-evident: they imply no physical threat for its operator, who is miles away from the theater of operations; they seem to be more precise—and often more effective—than ordinary old-fashioned manned weapons. The first assertion cannot be put into question, although the ethical implications of such “distance” has deserved specific attention. According to some, drones would “lower the barrier to the killing of individuals,” and “there is a risk of developing a ‘PlayStation’ mentality to killing,” though these assertions are controversial and other authors explain how drone operators suffer higher levels of conflict-zone trauma than regular pilots. As for the alleged higher effectiveness of drones, in fact “the precision, accuracy, and legality of a drone strike depend on the human intelligence upon which the targeting decision is based;” an intelligence that is often “faulty.” Besides, accidents have been common, and, as any other system that depends on network technology, drones “are vulnerable to exploitation through, for example, hacking,” or “being hijacked and used as weapons against other airspace users or targets on

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39. Webb, Wirbel, & Sulzman, supra note 10 at 31. According to Apuuli, “UAVs in DRC are being operated by civilian contractors who are not UN peacekeepers, which raises issues under the customary law principle of distinction.” See Apuuli, supra note 16.
40. Melzer, supra note 8 at 8.
41. Hazelton, supra note 7 at 30.
42. Dworkin, supra note 37 at 4.
44. Jordán & Baqués, supra note 17 at 156.
45. UN Human Rights Council, supra note 31 at para 82.
46. Ibid. at para 83.
47. According to Cole:

   In July 2010, the Los Angeles Times revealed that Pentagon accident reports showed that thirty-eight Predator and Reaper drones have crashed during combat missions in Afghanistan and Iraq and nine more during training on bases in the US, with each crash costing between US$ 3.7 million and $5 million. Altogether, the US Air Force says there have been 79 drone accidents costing at least US$ 1 million each.

See Cole, Dobbing, & Hailwood, supra note 11, at 14.
48. Ibid. at 14.
the ground.”

Other authors advocate that “US drone attacks exacerbate the threat of terrorism, both from a regional and global perspective, and intensely strengthen militancy and insurgency in the troubled Pak-Afghan region”. Still, other benefits of drone systems are their mission flexibility, endurance, and persistence.

Thus, drones pose a number of pressing issues for scholars and practitioners in terms of law, policy and ethics, among other areas. From the legal point of view alone, we are aware that the determination of the lawfulness of the use of drones cannot have a single, straightforward answer valid for all cases. On the contrary, such appraisal is often conditioned to the actual circumstances of each use. Notwithstanding, in the next sections of this article I shall try to provide some initial general answers to the legality of the use of drones in general, with a focus on combat drones, rather than surveillance ones.

4. Lethal autonomous weapons

Let us finish this introduction by explaining what will not be the focus of our research: lethal autonomous weapons. According to some authors, they are the inevitable next step in weapon/drone technology, and have already merited a report by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions. The existence of lethal autonomous weapons would imply that “targeting decisions would be taken by the robots themselves.”

Many processes are already automatic in the war industry, such as missile defense strikes against foreign armed attacks. The current challenge seems to be whether a robot will in the future be capable to take a human life autonomously, while at the same time respecting the limits set out by international humanitarian law, and, if so, if humanity should allow this to happen. (I believe that no automatic system will ever be able to make the fine judgments that interpretation of law, including humanitarian law, requires. Hence, for ethical but also for purely legal reasons, these weapons should be

49. European RPAS Steering Group, supra note 9 at 12.
54. Ibid. at para 27.
55. Jordán & Baqués, supra note 17 at 139.
banned all along.\textsuperscript{56} More generally, ICAO has excluded fully autonomous aircraft from their flying permits, at least for the time being:

All UA, whether remotely-piloted, fully autonomous or a combination thereof, are subject to the provisions of Article 8.\textsuperscript{57} Only the remotely-piloted aircraft (RPA), however, will be able to integrate into the international civil aviation system in the foreseeable future. The functions and responsibilities of the remote pilot are essential to the safe and predictable operation of the aircraft as it interacts with other civil aircraft and the air traffic management (ATM) system. Fully autonomous aircraft operations are not being considered in this effort, nor are unmanned free balloons nor other types of aircraft which cannot be managed on a real-time basis during flight.\textsuperscript{58}

But again, this is not the topic of this article, which is focused on weapons that are under the permanent control of an, albeit distant, individual.

\textbf{III. DRONE SYSTEMS AS MEANS OF WARFARE}

One of the core principles in the law of war, as set out in Article 35 of Protocol I to the Geneva Conventions, is that “in any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited.”\textsuperscript{59} Drones being a relatively new means of warfare, it seems relevant to check whether they meet the requirements of lawful weapons (under the Article 35 definition). As a matter of fact, there are few rules in customary international humanitarian law concerning weapons. Basically, as the International Committee of the Red Cross (ICRC) has established, humanitarian law says that the “use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited” (rule 70); and that the “use of weapons which are by nature indiscriminate is prohibited” (rule 71).\textsuperscript{60} Thus, any weapon that \textit{necessarily} causes such excessive


\textsuperscript{57} Article 8 of the ICAO Convention states: “No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization”. See Convention on International Civil Aviation, 7 December 1944, 15 UNTS 295 at art 8.


On the Implications of the Use of Drones in International Law

Injuries or suffering or cannot be addressed to a specific military target should be considered prohibited and never be used. It is important to note that for a weapon to be prohibited those negative effects must be inherent or co-natural rather than incidental.  

On top of these rather broad provisions, specific weapons usually meeting the above standards have been forbidden through specific treaties, most of which can currently be considered a part of international customary law. These include poisonous, biological and chemical weapons, expanding and explosive bullets, landmines, among others. Armed drones have not been the object of any such treaty, nor are there any common international standards about their design, manufacture or stockpiling, let alone about their actual use; this means that the only standards that can be put forward are those established in Rules 70 and 71 cited above.

It would seem hard to argue that drone systems are “indiscriminate in nature.” On the contrary, they are praised for their precision: “[u]nmanned drones provide a precise method for discriminating between the civilian population and the lawful target, thus decreasing the overall casualties of an attack;” they are “claimed to do less collateral damage.” The problem of such assertions comes when one analyses the immense percentage of erred hits by drones, that is, the amount of civilian casualties caused by drone strikes. According to a conservative estimate, “the 114 reported drone strikes in northwestern Pakistan from 2004 [to 2010] have killed between 830 and 1,210 individuals, of whom 550 to 850 were described as militants in reliable press accounts … Thus, the true civilian fatality rate since 2004 … is approximately 32 per cent.” Other sources lower the “success percentage of the US Predator strikes…to not more than six per cent” and affirm that “[w]ithout a pilot, who potentially has a better ability to distinguish between civilian and militant targets at the time of a strike, drones lack the capability to, on site, factor in the fact that civilians and militants reside co-terminously in the vicinity of the planned attack.” According to other sources, many of those “militants” were in fact civilians that the US targeted in “signature strikes” that I shall

61. Melzer, supra note 8 at 27.
62. Henckaert & Doswald-Beck, supra note 60 at Part IV.
64. Hazelton, supra note 7 at 30.
65. Bergen & Tiedemann, supra note 27 at 1, 3. Note that this is a serious, albeit very conservative estimate, of authors that claim that “Drone attacks in the tribal region seem to remain the only viable option for the United States to take on the militants based there who threaten the lives of Afghans, Pakistanis, and Westerners alike” (Bergen and Tiedemann, at 6). Thus, no ‘pacifists’ or anti-drone chums.
66. Shah, supra note 50 at 126.
67. Ibid. Improved data in the last few months seems to be due to a new cheating approach of the administration: “the current [US] administration seems to have introduced a method for counting civilian casualties which automatically presumes that all males of fighting age present
discuss later, and, in fact, “the United States does not offer clear information on how they recognize civilians and ‘combatants’ in drone strikes.” Reports by Amnesty International (on Pakistan) and Human Rights Watch (on Yemen) also show an immense ratio of civilian casualties, probably due to wrong intelligence and/or a too wide a concept of “combatant.” Authors argue that drone targeting is necessarily based on intelligence obtained on the ground, which can sometimes be biased by political rivalries alien to the goals of the attacking power: “[r]esidents in FATA also believe that informants possibly provide false information and exploit their position to settle vendettas with local rivals.” But, this is not a problem about accuracy of the weapon, but about the precision of the necessary intelligence to use it.

Likewise, as for the prohibition of excessively injurious weapons, authors tend to agree that:

Where armed drone operations have inflicted excessive harm on targeted persons, the reason lay not in the excessively injurious nature of the weapon used, but in the failure of the human planners and operators to comply with the prohibition of attacks against persons hors de combat and, thus, in a failure to respect the principle of distinction rather than the prohibition of unnecessary suffering.

Thus, as with any other “bomb,” missiles launched by drones will kill, maim, and produce other injuries on individuals that are “reasonable.” But again, there would be something unique to drones and how they are used that is “extremely insidious.” According to the NYU-Stanford ‘Living Under Drones’ project:

The presence of drones and capacity of the US to strike anywhere at any time led to constant and severe fear, anxiety, and stress, especially when taken together with the inability of those on the ground to ensure their own safety. Further, those interviewed stated that the fear of strikes undermines people’s sense of safety to such an extent that it has at times affected their willingness to engage in a wide variety of activities, including social

in the area of a planned attack are combatants, unless intelligence collected after [sic!] the attack proves otherwise.” See Melzer, supra note 61, at 25; and ICG, supra note 50 at 10.

68. Cavallaro, Sonnenberg, & Knuckey, supra note 25 at 48-52.


71. Hazleton, supra note 7 at 8.

72. ICG, supra note 50 at 11.

73. Melzer, supra note 8 at 28.
gatherings, educational and economic opportunities, funerals, and that fear has also undermined general community trust. In addition, the US practice of striking one area multiple times, and its record of killing first responders, makes both community members and humanitarian workers afraid to assist injured victims.\footnote{Cavallaro, Sonnenberg, & Knuckey, \textit{supra} note 25 at 55. Journalist David Rohde, in his account of being held hostage by the Taliban, wrote that “the buzz of a distant propeller is a constant reminder of imminent death” (quoted by ICG, \textit{supra} note 70 at 11).}

Certainly, the excessive psychological effects of drones on civilians and militants alike is not a matter of the technology itself but rather about how it is used in that particular theater of operations (specifically Federally Administered Tribal Area (FATA) regions in Pakistan). Having said that, it could be argued that since drones are used primarily in this fashion (permanent surveillance and targeted killing),\footnote{Cheri Kramer, “The Legality of Targeted Drone Attacks as US Policy” (2011) 9:2 Santa Clara J of Intl L at 380. This being so because, as mentioned earlier, current drone technology makes them very vulnerable in conventional air warfare.} they can meet the standard of customary international law as a weapon normally causing “superfluous injury or unnecessary suffering.” Although it is an interesting argument, it must be admitted that the International Court of Justice set a high standard for these considerations when it found itself incapable of determining that nuclear weapons, probably the most clear-cut example of a weapon that is indiscriminate in nature and necessarily causes superfluous injuries and unnecessary suffering, were intrinsically unlawful under international humanitarian law.\footnote{\textit{Legality of the Threat or Use of Nuclear Weapons} (Advisory Opinion) (8 July 1996), ICJ Reports 1996, 226.} Thus, it is unlikely that such reasoning would succeed before any jurisdictional forum.

In order to ascertain whether drones are \textit{per se} lawful weapons, this technology should have undergone a verification process in accordance to Article 36 of Protocol I to the Geneva Conventions:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.\footnote{ICRC, \textit{Protocol I}, \textit{supra} note 59 at art 36.}

This obligation is fairly loose. In the worst case scenario, not compliance could be considered a violation of treaty law, but the fact is that the ICRC itself has not included anything similar to this duty within its compilation of customary international humanitarian law.\footnote{\textit{Ibid.}} In particular, as the US is not
a party to the Protocol, it has no direct duties in this respect. On top of that, Jean Pictet acknowledges that this internal determination of the legality of a new weapon cannot be supervised by any international body and that even if the State finds that such new weapon is illegal under the criteria set up in Article 35, it is not obliged to disclose such information.\textsuperscript{79} In other words, the fact that there is no way to know whether the different states involved in the development of drone technology have or have not taken the features of such weapons into consideration in terms of them being necessarily indiscriminate or excessively harmful cannot be considered \textit{per se} a violation of Article 36.

Moving a step forward however, drone technology is fit to be combined with other weapons that could be prohibited.\textsuperscript{80} For instance, the UK Ministry of Defense is said of having considered the miniaturization of systems that would enable future “micro-drones” to be weaponized to act as “antipersonnel devices, presumably by way of poisonous injection.”\textsuperscript{81} We fully agree with Melzer when he argues that “the general prohibitions and restrictions of weapons law apply fully also to all types of weapons which may be mounted on drones.”\textsuperscript{82} But then again, this is nothing specific of drone technology. If a poisonous weapon, a chemical weapon, or a landmine was to be thrown from a conventional manned airplane, it would very probably be an illegal act of war, but it would not \textit{ipso facto} make the aircraft technology illegal.

\section*{IV. THE USE OF COMBAT DRONES BEYOND NATIONAL TERRITORY: CONSENT AND SELF DEFENSE}

Before moving into the specific use of drones in targeted killing, a word seems necessary about the implication of the use of drones in general international law. In principle, not much should be needed since there are little specificities in this field as compared to any other technology.

1. \textit{The role of consent of the territorial State}

The first issue, of state consent, is raised both in the context of surveillance drones, as well as drones used for targeted killings, within or without an armed conflict, as long as they happen beyond national jurisdiction. It relates to sovereignty over airspace, an area that is globally acknowledged


80. Melzer, \textit{supra} note 8 at 10.

81. \textit{Ibid.} at 9; Jordán \& Baqués, \textit{supra} note 17 at 37.

82. \textit{Ibid.} at 27.
to belong exclusively to the territorial State.\textsuperscript{83} In this respect, it is true that the international community has given itself a number of instruments that tend to fulfill the “freedom of the skies”, but such freedoms only apply for commercial aviation.\textsuperscript{84} On the contrary, “aircraft used in military, customs, and police services,” are not covered by the 1944 Chicago Convention on International Civil Aviation and require special agreement for flight.\textsuperscript{85} The non-consensual flight of any aircraft for whichever purpose over territorial airspace is a violation of State’s sovereignty, that is, the territorial State must give a “valid consent” over the flight of a drone (or any other flying device) in order for it to be lawful.\textsuperscript{86}

When we refer to combat drones using force, this alleged preclusion of wrongfulness must face the fact that Article 26 of the Draft Articles on State Responsibility limits this to acts of states which are not in violation of obligations “arising under a peremptory norm of general international law,” including the use of force.\textsuperscript{87} Notwithstanding, in the best known cases of use of drones, armed force is not used “against a State”, but against certain armed elements “within a State” that fight against its government and thus, allegedly, have its consent. For instance, in the case of Afghanistan, it has been argued that a coalition formed by Taliban and al-Qaeda elements is at war (in a non-international armed conflict) with the Afghan Government, which is supported by NATO (ISAF).\textsuperscript{88} Thus, there is ‘consent’ by the Afghan Government to foreign powers exerting force in its territory, including flying and using armed drones.\textsuperscript{89} The same seems to be applicable in other theaters since, according to some sources, US “drone operations [in Yemen] are executed in coordination with the [recognized] governments of Yemen and Saudi Arabia.”\textsuperscript{90}

However, one specific case shows the difficulties in establishing the real existence of such consent: the notorious strikes in certain remote areas of Pakistan (FATA) systematically hit by US drones since 2004. According to

\textsuperscript{85} ICAO Convention, supra note 58 at 15, art 3.
\textsuperscript{88} Kramer, supra note 75 at 382-83.
\textsuperscript{89} Obviously, the fact that the Security Council has authorized the deployment of ISAF may render the issue of consent by the Afghani Government irrelevant. But since the drone strikes seems to be carried out not by ISAF proper but directly by the US Government - and in fact not by its military, but by a civil agency (CIA) - the fact that the Afghani Government agrees on such strikes becomes important again.
\textsuperscript{90} Saiz, supra note 4.
one source, “Pakistan initially appeared to support US strikes covertly. From 2004 through at least 2007, the Pakistani government claimed responsibility for attacks that had, in fact, been conducted by the US, thus allowing the US to deny any involvement.”91 According to Amnesty International, “former President and Army Chief Pervez Musharraf acknowledged that he had given the USA qualified permission to undertake some US drone strikes in the Tribal Areas during his tenure, which ended in August 2008.”92 As strikes have increased, however, so has the Pakistani public’s opposition to them, although this has not impeded the Pakistani government to adopt a position of “tacit support” to US drone strikes.93 According to a local international lawyer, “albeit unofficially, there does exist a kind of a defective ‘go ahead.’”94 Other authors disagree:

The Prime Minister of Pakistan, Yousuf Raza Gilani, has on numerous occasions officially condemned such attacks, and has termed them a violation of the sovereignty of Pakistan and a dangerous course of action that fuels militarism. He has urged the US administration to immediately bring a halt to halt such operations.95

According to a report of the International Crisis Group, “Almost nine years after the US conducted its first drone strike in [the] FATA, Pakistan has yet to lodge a formal complaint to the UN Security Council,” and “continues to clear airspace for the drones” which “the Obama administration interprets as tacit consent.”96

Even if such “tolerance” exists, “[t]he informal go ahead is not being viewed as sufficient by international lawyers to confer ... legitimacy.”97

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91. Cavallaro, Sonnenberg, & Knuckey, supra note 25 at 15. In 2008, according to cables released by WikiLeaks, Pakistan’s Prime Minister reportedly told US Embassy officials, “I don’t care if they [conduct strikes] as long as they get the right people. We’ll protest in the National Assembly and then ignore it.” In 2009, both Pakistan’s Prime Minister and its Foreign Minister publicly celebrated the drone strike that killed Baitullah Mehsud, the alleged leader of Tehreek-e-Taliban, Pakistan (TTP), an armed group that launches terrorist attacks within Pakistan (ibid.).

92. Amnesty International, supra note 5 at 53.

93. Ibid.


95. Shah, supra note 50 at 114. Amnesty International describes also this official rejection of US policy. According to a spokesperson of the Pakistan government quoted in their report: “drone strikes are violative of Pakistan’s sovereignty and territorial integrity, are violative of international law and are counterproductive because they do not serve their purpose but create a thirst for revenge.” See Amnesty International, supra note 6, at 53.

96. ICG, supra note 52 at 5.

97. Soofi, supra note 93.
It is true that usually consent is not formalistic in international law, but sometimes it is, particularly when the Chicago Convention calls for a “special agreement,” or when we are dealing with the use of armed or police force in the territory of a third country. In respect of Article 20 of the Draft Articles on State Responsibility, the International Law Commission (ILC) has said that “certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established.” It is beyond doubt that the government’s consent requires an unambiguous, if not written and formal, agreement. This does not seem the case in Pakistan, where “while responding to reports claiming that Pakistan had privately backed such operations and allowed the use of its airfields, the Prime Minister categorically denied any such agreement between the two nations.” Moreover, it should be noted that the International Court of Justice (ICJ) has been very strict in considering the scope of a presumed “consent” to use force in one’s territory against a non-state actor. In the Congo-Uganda case, the Court draws its attention to the fact that consent “given to Uganda to place its forces in the DRC, and to engage in military operations, was not open-ended,” and that, at a certain point, “any earlier consent by the DRC to the presence of Ugandan troops on its territory” had been withdrawn.

Consent may thus be a good argument in terms of the legality of overflying someone else’s airspace and even using armed force in it, as long as it is validly and clearly expressed and covers precisely the whole range of the otherwise illegal act. This consent, however, does not validate whatever happens in such airspace and territory and, in fact, it may also imply the co-responsibility of the territorial State in whichever breaches of international law the US or another power may be committing in their territory.

2. Self-defense

This leads to the second argument and its implications: that the US, in countries such as Pakistan, Afghanistan, Yemen, and other theaters would be exercising its “inherent right to self-defense,” as set out in Article 51 of the UN Charter “against Al-Qaeda, a non-State actor.” According to President Barack Obama:

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98. Wallace and Ortega, supra note 83 at 4 and 15.
99. Draft Articles, supra note 87 at 73.
100. Shah, supra note 50 at 114. Shah adds: “The legislative Parliamentary Committee on National Strategy echoed the same sentiment, calling for an immediate end to US attacks on Pakistani soil and terming them a violation of the nation’s territorial integrity” (ibid.).
102. Per Draft Articles, supra note 87 at art 20.
103. Amnesty International, supra note 5 at 54-55.
104. Melzer, supra note 8 at 22; Andrew C Orr, “Unmanned, Unprecedented and Unresolved: The Status of American Drone Strikes in Pakistan under International Law” (2011) 44 Cornell
Under domestic law, and international law, the United States is at war with al-Qaeda, the Taliban, and their associated forces ... a war waged proportionally, in last resort, and in self-defense.105

This argument would be put forward in response to the obvious perception that the use of armed drones in third states constitutes, in itself, an act of aggression or at least an armed attack. An armed attack that (in their understanding of reality) would be justified as a response to the 9/11 attacks or to international terrorism in general, or to terrorism directed against US interests, as part of the infamous “Global War on Terror.”106 Such reasoning implies a serious misunderstanding of core norms of international law.

Bombing someplace or someone with an armed device such as drones falls fully prima facie in the definition of “aggression” agreed by the international community in UN General Assembly Resolution 3314 (XXIX) of 1974.107 Among the different acts that constitute an “aggression,” this includes: “[b]ombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.”108 More recently, an amendment to the Statute of the International Criminal Court has confirmed this wording.109 Though combat drones are not explicitly mentioned (no weapon is) their strikes clearly fall within the concept of “bombardment.” The fact that they often belong to the CIA rather than to the military does not preclude it from being considered an “act of State.” There is a strong presumption that a first use of force is illegal under contemporary international law;110 meaning that the burden of proof that such strike was justified under self-defense belongs to the State using armed force. In this respect, Resolution 3314 (XXIX) defines that “the first use of armed force by a State in contravention of the Charter shall constitute prima facie

Int'l LJ 729, at 738. The same has been argued for instance by Israel in relation to the Palestinian Occupied Territories, but the International Court of Justice rejected the argument in its Wall Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (Advisory Opinion), 9 July 2004, ICJ Reports, 136 at para 139):

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defense. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

105. Office of the Press Secretary, supra note 1 at 3.
106. Dworkin, supra note 37 at 5.
108. GA Res 3314 (XXIX), supra note 106 at art 3(b) [Annex].
109. See (the new) art 8 bis of the ICC Statute, inserted by resolution RC/Res.6 of 11 June 2010.
evidence of an act of aggression.”\textsuperscript{111} If the US truly believes that its strikes in
different theaters are acts of self-defense, it should notify the Security Council. 
According to Dinstein, following the ICJ Nicaragua-US case, “[t]he duty of 
reporting becomes a substantive condition and a limitation on the exercise 
of self-defense.”\textsuperscript{112} There is no news about the United States reporting “its 
carrying out drone attacks on Pakistani territory to the S.C. [sic] as an exercise 
of this right of self-defense as mandated by article 51.”\textsuperscript{113}

Neither the drafting history nor customary law suggests that the principle 
of self-defense could be applied to any actor different than sovereign states.  
As a matter of fact, the ICJ “has never authorized another State to intervene by 
the use of force against non-State groups in violation of another sovereign’s 
space.”\textsuperscript{114} For instance, when considering allegations of Uganda acting in 
self-defense against a non-State actor in the Congo-Uganda case, the ICJ refused 
it, for Uganda had “not ever claimed that it had been subjected to an armed 
attack by the armed forces of the DRC [or] by armed bands or irregulars sent 
by the DRC or on behalf of the DRC.”\textsuperscript{115}

Thus, there is no such thing in international law as “self-defense against 
terrorist groups,” even when territorial states are not very collaborative. In this 
respect, could anyone imagine the United Kingdom bombing the Republic of 
Ireland during the IRA years (or bombing the US, by the way, where the IRA 
used also to obtain funding); or Spain doing the same in France in the height 
of ETA’s power?

Self-defense is a\textit{ necessary and proportional} armed response to an\textit{ armed attack.}\textsuperscript{116} Even if\textit{ anticipatory} self-defense may be permissible under international 
law,\textsuperscript{117} in the sense of reacting to an attack that has already started but not yet 
hit, so-called\textit{ pre-emptive} self-defense, (attacking a State that may or may not 
carry out an attack in the future), is an act of aggression on its own.\textsuperscript{118} Whether 
they are a reprisal for the 9/11 attacks, or aimed at exterminating al-Qaeda’s 
leadership in order to prevent future terrorist attacks, US drone attacks in 
Pakistan, Yemen, and other theaters are “preemptive in nature,”\textsuperscript{119} not acts of 
self-defense. If they respond to prior or potential terrorist attacks (or “a use of 
force of lesser gravity,” in the terms used by the ICJ in the Nicaragua-US case),

\textsuperscript{111} GA Res 3314 (XXIX), supra note 106 at art 2 [Annex].
\textsuperscript{112} Yoram Dinstein,\textit{ War, Aggression and Self-Defense}, 4th ed (Cambridge: Cambridge University 
Press, 2005), at 216.
\textsuperscript{113} Shah, supra note 66 at 115.
\textsuperscript{114} Peron, supra note 68 at 88. This is acknowledged by authors like Orr, supra note 104 at 738.
\textsuperscript{115} Congo–Uganda, supra note 99 at para 146.
\textsuperscript{116} See UN Charter at art 51, as interpreted by the International Court of Justice in \textit{Military and 
Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)}, Merits, 27 
\textsuperscript{117} Orr, supra note 104 at 740.
\textsuperscript{118} Jaume Saura, “Legalidad de la Guerra moderna a propósito de la invasión de Irak” in Concha 
Roldan et al., \textit{Guerra y paz en nombre de la política} (Madrid: Calamar Ediciones, 2004) at 126-128.
\textsuperscript{119} Shah, supra note 50 at 116.
they cannot “give rise to an entitlement to take … countermeasures involving the use of force”.120

Terrorism is a matter of public order and law enforcement, which should be addressed by police means and due process;121 not of warfare.122 Transnational or international terrorism is no different, as the 13 treaties adopted under the auspices of the UN and its agencies against this phenomenon show.123 It is to be addressed via international police and judicial cooperation, not by the use of armed force, notwithstanding the gravity of the terrorist attack:124 “terrorism is best countered by rule of law both within and between countries because the global nature of terrorism requires international cooperation.”125

International terrorism is a threat to peace and security, but terrorist attacks are not armed attacks in the appropriate sense. The fight against terrorism requires international cooperation and institutional action, not self-defense. From a global perspective, UN Security Council Resolution 1269 (1999) was meant to be the roadmap of the international community to fight international terrorism and it indeed established that terrorism “endangers the lives and well-being of individuals worldwide as well as the peace and security of all states.”126 But this resolution is neither framed in Chapter VII of the UN Charter,127 nor does it refer to the right to self-defense.128 Two years later, SC Resolution 1368 (2001) condemned the 9/11 attacks “[like] any act of international terrorism, as a threat to international peace and security,” but neither this nor further Resolutions establishing international terrorism to be a “threat to international peace and security” have considered “terrorist attacks” as “armed attacks” in the sense of Article 51 of the UN Charter.129 There is little

120. Dinstein, supra note 111 at para 249.
122. Shah, supra note 50 at 128.
125. Kramer, supra note 75 at 391.
128. Saura, supra note 118 at 17.
In an unbelievable twist of the self-defense argument, certain authors and officials seem to affirm that Article 51 of the Charter—on the prior, inherent, right to self-defense—allow strikes against the specific individual who is “attacking” (or more often, is about to attack) US interests. Thus, “…The ongoing threat from militants in Pakistan also justifies the use of anticipatory force against persons planning or working towards future attacks against the United States.”

There is here a tremendous conflation between a norm of international law, dealing with international subjects, and national criminal law, where an individual can defend him or herself from the attack of a thug or “law enforcement officers [may use] lethal force when either their lives of the lives of bystanders and in immediate danger.” This is a confusion that, willingly, forgets that, if we are in the realm of national criminal law, then the matter turns to be one of “enforcement,” not of “use of force”, and thus the law of human rights is fully applicable: “the domestic criminal system of states should be employed to punish reprehensible behavior carried out by non-state actors.” In this framework, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide very reasonable guidelines, for instance that the “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.” This leads us irremediably to the discussion of the legal qualification of targeted killing.

130. Note that huge terrorist attacks committed against countries different from the US (Indonesia, 2002; Spain, 2004; UK, 2005, etc.) by foreign terrorists have never taken these countries to threat or use force against the countries from which these individuals came from or where they prepared their attacks. On the contrary, they were arrested, prosecuted and convicted in a fair trial, in accordance with domestic law.

131. Orr, supra note 104 at 741. President’s Obama address is ambiguous in this respect as he talks about targeting “al-Qaeda and its associated forces” (thus, ‘groups’), but immediately refers to ‘individuals’ and ‘terrorists’ “who pose a continuing and imminent threat to the American people.” Office of the Press Secretary, supra note 1 at 3.

132. Gross, supra 121 at 324-25.

133. According to Dworkin, “[a] possible explanation for the apparent ambiguity in the US position is that there were disagreements within the administration about the scope of the alleged armed conflict, and that the formula of alternative justifications was chosen to allow flexibility between differing views.” See Dworkin, supra note 37 at 5.

134. Others argue that “the fundamental flaw of this argument in its inherent conflation of jus ad bellum and jus in bello.” See Kramer, supra note 74 at 395.

135. Shah, supra note 50 at 128.


137. Ibid.
3. **Targeted killing by drones**

Drone technology poses a number of challenges to a wide variety of issues in international human rights, for instance for privacy, if they are used as a method of surveillance or espionage in peaceful and democratic contexts, as well as international humanitarian law for classic *jus in bello* matters, such as the compliance with the principle of distinction in specific operations. But drones have attracted media attention and become controversial for targeted killing: again, though targeted killing is neither specific nor first appeared with this technology, it has known a huge surge since the inception and development of armed drones. In Pakistan, for instance, “[t]he primary purpose of the US in carrying out these drone attacks is, as seen by many, an attempt to kill members of both al-Qaeda and Afghanistan’s Taliban leadership”. As a matter of fact, it could be argued that today’s main use of armed drones in any theater is targeted killing.

4. **The right to life**

When discussing the willful deprivation of the life of any individual committed by any Government, the first framework that should be taken into consideration is that of human rights and, in particular, the right to life. The right to a fair trial is also relevant, since often these people are killed after being unilaterally declared guilty of heinous crimes by in non-judicial instance and without any possibility of defending themselves. Due process and the right to life are acknowledged in all relevant international human rights instruments since the Universal Declaration of Human Rights (UDHR), including the International Covenant on Civil and Political Rights (ICCPR), to which the United States, Israel, all EU members, and most states possessing or seeking drone technology are Parties.

The right to life enunciated in Article 6 of the ICCPR “is the supreme right from which no derogation is permitted even in time of public emergency

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144. The exception would be China. Status and Parties to the ICCPR can be found online: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.
which threatens the life of the nation.” Nonetheless, it is not an absolute right: in spite of its “inherent” nature and the fact that life must be protected “by the law,” Article 6 of the ICCPR does not outlaw the death penalty. What it basically prohibits are “arbitrary deprivations” of life of individuals by state agents, that is “extrajudicial executions, summary executions or assassinations, all of which are, by definition, illegal.” This duty to prevent arbitrary deprivation of life includes the “duty to prevent arbitrary killing by [the State’s] own security forces,” since “the deprivation of life by the authorities of the State is a matter of the utmost gravity.”

Within this scope, “this right is a peremptory norm of international law and can never be suspended or otherwise derogated from.” Irrespective of the domestic situation that countries such as Afghanistan, Pakistan, Somalia, or Yemen may be enduring, and irrespective of the threats that jihadist terrorism may pose to the US and other Western powers, the right to life is to be respected in all circumstances. Even dealing with a terrorist threat, the European Court of Human Rights (ECHR) has affirmed that “the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill,” and found a violation of the right to life as it was “not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary.”

Additionally, Article 2.1 of the ICCPR limits the scope of the treaty to individuals “within the territory and under the jurisdiction” of State parties. Thus, territorial states consenting foreign action in their territory are clearly responsible for the violation of the right to life (as seen supra when discussing the limits of valid consent). But this cannot exclude the responsibility of the government performing the strike itself, since willfully depriving anyone’s life is an illegal action attributable to that State under Article 2 of the Draft Articles

146. The Protocol to the ICCPR banning the death penalty has a much lower number of State Parties than the Covenant itself. The US, Russia or Israel among others are not parties to it. But most European States are; and all members of the Council of Europe (again, except for Russia) are parties to Protocols 6 and 13 to the European Convention of Human Rights that abolish the death penalty in all circumstances.
149. Amnesty International, supra note 5 at 43.
151. Ibid. at para 213.
152. ICCPR, supra note 143 at art 2.1.
on State Responsibility.\textsuperscript{153} Though some consider that it is “manifestly absurd” to stretch the ICCPR jurisdiction to include “violations of rights under the Covenant which State’s agents commit upon the territory of another State,”\textsuperscript{154} other argue more rightly that under customary law and general principles of law, the obligation of states to refrain from arbitrary deprivation of life “does require that States refrain from deliberately infringing the right to life in their extraterritorial activities.”\textsuperscript{155}

5. The legal framework of targeted killing

According to Alston, “[a] targeted killing is the intentional, premeditated and deliberate use of lethal force, by states or their agents acting under colour of law … against a specific individual who is not in the physical custody of the perpetrator.”\textsuperscript{156} Gross proposes that “targeted killing consist[s] of, first, compiling lists of certain individuals who comprise specific threats and second, killing them when the opportunity presents itself.”\textsuperscript{157} The appraisal on the lawfulness of this practice must distinguish between times of peace and war, and maybe between international and non-international armed conflict.

In times of peace, targeted killing is equivalent to extrajudicial execution. It is true that the use of lethal force may be justifiable to combat crime, as long as it is absolutely necessary and proportional.\textsuperscript{158} As stated by Amnesty International, “[o]utside a situation of armed conflict, the US authorities must demonstrate, in each strike, that intentional lethal force was used when strictly unavoidable to protect life, no less harmful means such as capture or non-lethal incapacitation was possible, and the use of force was proportionate in the prevailing circumstances.”\textsuperscript{159} Rightful as they are, these words overlook the fact that targeted killing by drones is never improvised. Attacks do not “happen” by coincidence, in the midst of a “situation” where one can stop

\textsuperscript{153} See Draft Articles, supra note 87 at art 2. As we shall discuss later, in the case of drone strikes all relevant agents that intervene in the decision making and execution process (the CIA, Special Operations, the US president…) are undoubtedly “State agents” under Draft Article 2.

\textsuperscript{154} Orr, supra note 131 at 746. He criticizes a decision of the Human Rights Committee in that respect.

\textsuperscript{155} Melzer, supra note 9 at 18. Discussing the concept of “jurisdiction” under international human rights law, and different cases under the Inter-American Commission of Human Rights (Alejandre) and the European Court of Human Rights (Bankovic), Melzer argues that it would be highly controversial to consider that collective and depersonalized acts of war might give rise to “jurisdiction” over the affected persons: “Conversely, it is much more likely that individualized operations, such as the deliberate killing of selected individuals through extraterritorial drone attacks, would be considered to bring the affected persons within the jurisdiction of the operating State.”

\textsuperscript{156} UNHRC, “Report of the Special Rapporteur,” supra note 18 at para 1.

\textsuperscript{157} Gross, supra note 121 at 324.

\textsuperscript{158} UNHRC, “Report of the Special Rapporteur,” supra note 18 at para 32; Gross, supra note 116 at 323.

\textsuperscript{159} Amnesty International, supra note 6 at 43.
and reject a criminal act. Targeted killing implies an element of “intentional, premeditated, and deliberate killing by law enforcement officials,” that can simply never be lawful.\textsuperscript{160} As mentioned above, since terrorist strikes—even international or transnational—are not \textit{per se} ‘armed attacks,’ any targeted killing committed by drones within the framework of a police action against terrorism must be labeled as an extrajudicial killing: “[w]ithout due process, named killings are nothing but extra-judicial execution and murder.”\textsuperscript{161}

In time of war, be it international or non-international, the answer must be more nuanced. Obviously, the corollary of the principle of distinction is that it is lawful to kill “combatants.” In international conflicts, combatants are “members of the armed forces of a party to the conflict or participants in a \textit{levée en masse};”\textsuperscript{162} in non-international conflicts, “members of State armed forces or organized armed groups of a party to the conflict.”\textsuperscript{163} When combatants die or are wounded during hostilities, this is not “targeted killing,” because even if “lethal force” is used in an “intentional, premeditated, and deliberate” form, it is not addressed against a “specific individual.”

Thus one of the issues at stake is whether it is lawful in time of war to kill a \textit{specific} member of the enemy army outside a context of open hostilities; also, whether anyone can be targeted. Apparently, the answer would be yes: “[in] international armed conflict, combatants may be targeted at any time and any place (subject to the other requirements of IHL).”\textsuperscript{164} The last caveat (“subject to…”) is important and should be upgraded to international law in general, not just IHL. For instance, heads of State and government and foreign ministers enjoy full inviolability in all circumstances;\textsuperscript{165} it would be illegal to target them even if they are the ‘commanders-in-chief’ of their military. But beyond Alston’s precautions, his opinion, though clearly shared by a majority of authors,\textsuperscript{166} is far from unanimous. Other authors argue that “named killings” are prohibited in international humanitarian law as:

Soldiers are not criminals; they do not commit murder in the course of ordinary warfare nor can they be tried or incarcerated for their activities. At best, they

\begin{footnotes}
\footnotetext{160}{UNHRC, “Report of the Special Rapporteur,” \textit{supra} note 18 at para 33.}
\footnotetext{161}{Gross, \textit{supra} note 116 at 325.}
\footnotetext{163}{\textit{Ibid.} at 27.}
\footnotetext{164}{UNHRC, “Report of the Special Rapporteur,” \textit{supra} note 18 at para 58.}
\footnotetext{165}{\textit{Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), [2002] IC} Rep 22 at para 54:}
\begin{quote}
The Court accordingly concludes that the functions of a Minister for Foreign Affairs [even more, therefore, a head of state] are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.
\end{quote}
\footnotetext{166}{Dworkin, \textit{supra} note 37 at 748.}
\end{footnotes}
are agents of the states whose interests they fight to defend. Even in the worst of cases, when these states are blatant aggressors, soldiers retain a measure of innocence on the assumption that many may have been conscripted or, however misguided, believe in the justice of their cause.\(^\text{167}\)

In an intermediate position, Melzer argues that humanitarian law “neither provides an express right to kill, nor does it impose a general obligation to capture rather than kill,”\(^\text{168}\) but in any case “the fact alone that a capture operation would be impossible or fraught with unacceptable risk does not turn an otherwise protected civilian into a legitimate military target subject to lawful attack.”\(^\text{169}\) Still in the view of others, the “right to kill” is limited to individuals having military operational roles in the armed group:

Individuals who accompany or support an organized armed group, but whose activities are unrelated to military operations, are not lawful military targets under the laws of war. Thus members of an armed group who play a political role or a non-military logistics function cannot be targeted on that basis alone.\(^\text{170}\)

If it is at least doubtful that targeted or named killing is an option in a context of an international war, the same prudence must apply to non-international armed conflicts. Since in that context the very notion of “combatant” does not exist, at least on the side of the “rebels,” only individuals who participate directly in hostilities and are members of an armed group who have a “continuous combat function” would be targetable at all times and in all places.\(^\text{171}\) Alston has criticized the concept of “continuous combat function,” as it determines a questionable status “given the specific treaty language that limits direct participation to ‘for such time’ as opposed to ‘all the time.’”\(^\text{172}\) Besides, the very notions of direct participation in hostilities and of continuous combat functions have grey areas, in spite of the notable efforts of the ICRC to define them with precision.\(^\text{173}\)

6. **A legal assessment of the use of drones for targeted killing in practice**

Let us see now how the above legal framework compares to reality. As discussed earlier, in order to justify targeted killings with drones the US claims to be at war, be it assisting a local Government in a non-international

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\(^{167}\) Gross, *supra* note 121 at 326.

\(^{168}\) Melzer, *supra* note 8 at 28.


\(^{170}\) Human Rights Watch, *supra* note 69 at 86.

\(^{171}\) Melzer, *supra* note 153 at 66.


\(^{173}\) Melzer, *supra* note 155 at 43-68.
armed conflict or fighting terrorism in the War on Terror. As far as we know, the main theaters where drones are being used for targeted killing are Pakistan, Afghanistan, Somalia, and Yemen. None of these states participates in an international armed conflict nor does US military support or presence transform their conflicts in international ones, since the US is not at war with any of these governments. In these theaters, both a civil agency and the military of the US are gathering intelligence, defining and carrying out targeted killings with remotely-piloted aircraft systems. Other countries are known to have performed targeted killings (Russia, Sri Lanka), but only Israel and the United Kingdom have joined the US in using drones for such purpose.

Afghanistan and Somalia should be objectively considered to be in a situation of non-international armed conflict, with the US giving explicit support to both governments, particularly the Afghan one. Pakistan and Yemen are not, although in the first case, some fighting derived from the Afghan war may occur in its territory, while the second case is controversial: it can be argued that fighting between the Yemeni government and al-Qaeda in the Arabian Peninsula (AQAP) has reached the level of an armed conflict.

174. Dworkin, supra note 37 at 4-6.
175. We have mentioned strikes in Pakistan and Afghanistan in other sections of this article. As for the acknowledgement of drone action in Somalia and Yemen, see Adam Entous, “The US Acknowledges its Drone Strikes” The Wall Street Journal (15 June 2012) online: <http://online.wsj.com/article/SB1000142405270230341040577468981916011456.html> (last visited 2 July 2015). For data on strikes in Pakistan, Yemen and Somalia see The Bureau of Investigative Journalism, supra note 7.
177. UNHRC, “Report of the Special Rapporteur,” supra note 18 at paras 7, 14; Webb, Wirbel, & Sulzman, supra note 11, at 32.
178. Cole, Dobbing, & Hailwood, supra note 47 at 13. Their report confirms that British drones have fired their weapons, though it does not indicate that it has necessarily engaged in “targeted killings” with drones.
179. In Afghanistan, the fighting “between US forces (allied with Afghan government forces) and the Taliban meets de criteria for non-international armed conflict” (Amnesty International, supra note 5 at 45). In the case of Somalia, it is a non-international armed conflict that does not meet the demanding requirements of Art 1 of Protocol II to the Geneva Conventions.
180. According to Amnesty International, “this would be the case if a drone strike targets a Taliban fighter in North Waziristan who is directly participating in the non-international armed conflict in Afghanistan (to which the USA is a party).” See ibid. at 44.
182. Some authors argue that there clearly is a non-international armed conflict between the Yemeni Government, supported by the US, and AQAP; see Benjamin R. Farley, “Targeting Anwar Al-Aulaqi: A Case Study in US Drone Strikes and Targeted Killing,” (2012) 2 American University National Security Law Brief 57, at 64-69.
but even then the US government “has not claimed to be a party alongside the Yemeni government to the Yemen-AQAP conflict. [President] Obama has said instead that the US does not carry out attacks against individuals in Yemen unless they pose a direct threat to the United States or its interests.”

Thus, in Pakistan and Yemen the US is ostensibly carrying out “police” or “enforcement” actions, not military ones.

Current practice in targeted killing with drones in the above theaters includes “signature strikes” and “follow-up strikes.” There are also “kill lists” (or “personality strikes”) prepared by intelligence services.

Signature strikes are based on “pattern of life analysis” and it is particularly worrisome that the Obama administration has engaged for years in this policy, especially in the two theaters that do not meet the threshold of an “armed conflict” situation:

It has been widely reported that in both Pakistan and Yemen the US has at times carried out ‘signature strikes’ or ‘Terrorist Attack Disruption Strikes’ in which groups are targeted based not on knowledge of their identity but on a pattern of behavior that complies with a set of indicators for militant activity.

Thus, if you are a bearded male of 18-50 years of age, living in the FATA or other areas and behaving in a “suspicious” way (whatever that means) you are the ideal candidate to suffer a drone strike. Needless to say, in no case does international law, in time of peace or war, allow the targeting of individuals “based on the mere suspicion that they may qualify as a legitimate military target.” Thus, these strikes violate the right to life, and may constitute a war crime. Signature strikes are illegal in any imaginable framework.

The alternative to signature strikes are “personality strikes” that started during the Bush administration and focus targeted killings on named, allegedly high-value leaders of al Qaida or other groups. As stated earlier, most authors agree that killing specific individuals in a war context (international or

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183. Human Rights Watch, supra note 70 at 83.
184. Melzer, supra note 8 at 34-35.
185. Amnesty International, supra note 5 at 46 and 49.
186. Cavallaro, Sonnenberg, & Knuckey, supra note 25 at 12.
188. The Fact Sheet produced by the White House immediately after Obama’s speech in May 2013 shows a clear improvement in this situation when it states that “it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants.” See Office of the Press Secretary, US Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (Fact Sheet) (Washington, DC: The White House, 2013), online: <https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.
189. Melzer, supra note 8 at 24.
190. Ibid. at 36.
191. Ibid. at 34. Or, rather, a crime against humanity.
not) is lawful. Everyone, including US officials, agrees that the United States is not at war against any of the countries on which territories drones are being used. But more importantly, the United States is not at “war” with al-Qaeda, because governments do not wage wars against terrorist groups, at least not in the legal sense. The idea dropped by President Obama that “in the not-too-distant future … the fight against the al-Qaeda network will no longer qualify as an armed conflict”\textsuperscript{193} has a crucial flaw: in the eyes of the rest of the world, it has never qualified as such. Thus only in situations where the US is assisting a government fighting a non-international armed conflict, it may be arguably legal for it to target “at any time” civilians who perform “continuous combat functions.” This is clearly not the case of Pakistan, where more than 80 per cent of all US drone strikes have taken place.\textsuperscript{194}

And then, even in armed conflict situations, it is arguable whether all or most of the US targeted strikes meet the IHL requirements. Apparently, the CIA and the US Special Operations Command provide their own target lists, which are obtained through independent, parallel processes, though they often overlap.\textsuperscript{195} According to the media, President Obama supervises and authorizes each decision.\textsuperscript{196} But then again, the fact that most targeted killing are decided by the CIA is worrisome: “unlike a State’s armed forces, its intelligence agents do not generally operate within a framework which places appropriate emphasis upon ensuring compliance with IHL, rendering violations more likely.”\textsuperscript{197} In fact, personality strikes are premeditated killings that imply that no case-by-case analysis is being done of “whether those persons are taking direct part in hostilities at the time they are targeted.”\textsuperscript{198}

The CIA’s overwhelming implication in this affair leads us to another reflection, paraphrasing Gross: “only the target’s suspected criminal behavior justifies recourse to informers and collaborators”\textsuperscript{199} (thus, intelligence, as that

\textsuperscript{193} Paraphrased by Dworkin, supra note 37 at 7. In this respect, it is worrisome that the Human Rights Watch report says that “It is not evident that the US remains in an armed conflict with either Al-Qaeda or AQAP as defined by international humanitarian law.” See Human Rights Watch, supra note 174, at 91. This “remains” implicitly assumes that at some time the US was indeed in war against this terrorist organization in a legal sense, even if the organization affirms that this is not the case nowadays.

\textsuperscript{194} See data at the site of The Bureau of Investigative Journalism, supra note 6. Estimates as at 31 August 2013 calculate up to 373 attacks in Pakistan since 2004, 64 in Yemen since 2002, and 9 in Somalia since 2007.

\textsuperscript{195} Cavallaro, Sonnenberg, & Knuckey, supra note 25 at 14.

\textsuperscript{196} See “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will” The New York Times (29 May 2012), online: <http://nyti.ms/1DMdcJr> (last visited 2 July 2015). The fact that the President has the final say on this issue tries to cover the “war framework” that the US wants to give to these strikes, since the US President is the commander-in-chief of the US armed forces according to art II, s 2 of the US Constitution.

\textsuperscript{197} UNHRC, “Report of the Special Rapporteur,” supra note 18 at para 22.

\textsuperscript{198} Amnesty International, supra note 5 at 46.

\textsuperscript{199} Gross, supra note 121 at 326.
provided by the CIA); “this argument reverts to the logic of law enforcement” rather than to the paradigm of “conventional war.”

And in the context of law enforcement, “individuals cannot be targeted for lethal attack merely because of past unlawful behavior, but only for imminent or other grave threats to life when arrest is not a reasonable possibility.”

As asserted by Amnesty International, “making the civilian population or individual civilians not taking direct part in hostilities the object of an attack is a war crime.”

The more recent US policy on the use of lethal force outside areas of active hostilities does not dispel the concerns raised above. Stating that lethal force will only be used when capture is not feasible and no other reasonable alternatives exist to address the threat [against Americans ] raises at least doubts on which threshold the US will establish to determine the lack of feasibility of capture, the existence or not of alternatives and the reality, gravity, and imminence of a specific threat. Immediately before and after the disclosure of this policy:

The US government interpretation appeared to allow the killing of an individual in the absence of any intelligence about the specific planned attack, or the individual’s personal involvement in planning or carrying out a specific attack. It stretched the concept of imminence well beyond its ordinary meaning and established interpretations under the existing international law on the right of states to self-defense.

Needless to say, other alleged practices such as “follow-up strikes”, that is, conducting second attacks on wounded survivors of first attacks, or deliberately targeting rescuers at the scene of a previous drone strike, should constitute a war crime (if in war context, by principle of distinction) or otherwise an assassination.

200. Ibid.
201. Human Rights Watch, supra note 69 at 87.
203. All we know about this policy is what President Obama announced in his May 2013 speech and the “fact sheet” produced by the White House the same day; supra note 188. Both Amnesty International and Human Rights Watch have considered insufficient this disclosure of information. Amnesty has formally asked the Administration to publicize the whole of the Policy Standards. See Human Rights Watch, supra note 69 at 89; Amnesty International, supra note 5 at 51-52.
204. Dworkin, supra note 37 at 6.
205. Amnesty International, supra note 5 at 52.
206. Melzer, supra note 8 at 35.
V. FINAL REMARKS

Drones are unmanned aircraft, controlled remotely and in real time by human operators that serve multiple purposes, both peaceful and military. This article has focused its research on military drones that perform armed strikes, particularly against suspects of jihadism. As a military technology that is relatively new, their use has attracted the attention of scholars and the media on grounds of ethical, legal, and political soundness. Amnesty International has argued that the use of armed drones should be analyzed on a case-by-case basis, that it impossible to give general answers, and we agree that each and every drone strike should be scrutinized and evaluated against human rights and international humanitarian law. Unfortunately, the lack of transparency makes this scrutiny unfeasible. In the absence of a case-by-case analysis, however, some general considerations can be made.

The issue with drones is how they are used, at least in three areas: infringement of national sovereignty; respect of the laws of war; and respect of international human rights. In the first of these areas, beyond national jurisdiction, remotely-piloted aircraft (civil or military) can only fly over sovereign territories with the clear and valid consent of the State. If this consent exists, which could be the case of Afghanistan and Yemen, but not Pakistan, let alone Somalia, the local government would be co-responsible of the eventual infringements of international law attributable to the country operating the drones. On the other hand, drones can be used in self-defense, just like any other weapon, but only as long as they are used in an immediate, proportionate and necessary response to an armed attack attributable to a State, which are requirements that the ‘War on Terror’ does not meet.

When employed as means of warfare, the principle of distinction, the prohibition of perfidy, and other jus in bello norms apply to these weapons as they do to any other, but not more than to any other. Our first assessment is that, from an international legal perspective, armed drone technology is not and cannot be per se forbidden. However, if empirical evidence was to show that their raison d’être is targeted killing and that they are used more often than not in a way that necessarily violates basic principles of international humanitarian law, we may need to come back to and review this assertion. In the same line of thought, drones may perform military functions, but they should not be used in a way that terrorizes the civil population by flying constantly, threatening to launch an armed attack at any unexpected time.

Armed drones can be used in the midst of hostilities, but it is at least questionable that they target specific civilians that have risen against a foreign government. Clearly, armed drones cannot premeditatedly target and kill presumed terrorists. In international human rights law, it is always

208. Amnesty International, supra note 5 at 44; and Orr, supra note 104 at 733.
209. Amnesty International, supra note 5 at 49; and Kramer, supra note 62 at 378.
unlawful to target individuals based on the mere suspicion that they may have committed a crime in the past or may do so sometime in the future. Armed drones have become the weapon of choice in the fight of the US, with other powers potentially following, against international jihadist terrorism, in the form of “targeted” or “named” killing. The legal defense of these acts is based on the foul premise that there is a global ‘war’ against terrorism. Certainly, the line between terrorism and armed force may have become thinner in the last decades, but they are still distinct (il)legal activities,\(^\text{210}\) that imply different legal consequences. If we are ready to cross the line that separates the use of force and law enforcement, then it should be with all consequences. For instance, if “self-defense” is to be admissible against terrorist groups, this should imply that these groups have launched a prior or immediate “armed attack” (since self-defense is only permitted in such cases, according to Article 51 of the UN Charter).\(^\text{211}\) Thus, for the sake of consistency, we would have to accept that they have used “armed force,”\(^\text{212}\) which would imply that international humanitarian law would be fully applicable to both parties. This finally would mean, among many other things, that captured terrorists would have to be considered prisoners of war, not just criminals. And if there is a “Global War on Terror,” the drone operators based in US territory, some of which are civilians, would become “legal targets of attack as DPH (direct participation in hostilities).”\(^\text{213}\) If we support the idea that civilians performing “continuous combat functions” are targetable “at any time,” then these drone operators would also be, not only while they are “working,” but also when they commute to and from the office, for instance.

It is unlikely that any of the above consequences of a consistent interpretation of the current use of armed drones in the four main theaters where they have been employed by the United States would satisfy the powers that possess this technology. Thus, in being consistent it is in the best interest of the US and other powers to restrain their use of armed drones to frameworks of actual armed conflict and hostilities, against legitimate enemy combatants, and with due respect of the basic principles of international humanitarian law.


\(^{211}\) UN Charter, supra note 127 at art 51.

\(^{212}\) In principle, this would be an illegal use of force. Obviously, they would not be authorized by the Security Council to use force. But, could they claim that they are the ones acting in self-defense? If one accepts the exotic argument that States can be at “war” with non-state entities, this should work both ways and accept that not only these actors can “attack” States, but that they can be the object of an “aggression” and thus have the right to defend themselves. Does this make any sense? In any case, be it lawful or not, international humanitarian law applies to all “armed conflicts.”

\(^{213}\) Kramer, supra note 74 at 389.
Law as Deliberative Discourse: The Politics of International Legal Argument—Social Theory with Historical Illustrations

Oisin Suttle*

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Abstract: In this paper I propose a novel account of international law as a subset of international political argument, in turn understood as a practice of deliberative discourse. I draw on a Habermasian communicative framework to integrate legal and political argument, facilitating a more nuanced and more plausible understanding of how international law and politics interact. Through a detailed examination of two historical cases from the first decade of the Northern Ireland conflict, involving the United Nations and the European Convention on Human Rights respectively, I illustrate three key dimensions of this framework: the relation between legal and political argument; the relation between domestic and international argument; and the distinction between strategic and communicative uses of legal argument.

I. INTRODUCTION

On 2 October 1972, Adrian Thorpe, an official in the UK Foreign and Commonwealth Office, circulated a memorandum urging that the United Kingdom consider, as a matter of urgency, withdrawing from the European Convention on Human Rights (the ECHR), a treaty which it had negotiated two decades earlier.\(^1\)

At the forefront of Thorpe’s mind was the situation in Northern Ireland. The conflict that would become known simply as ‘the Troubles’ was entering its fourth year, and 1972 was to be its bloodiest; 479 people were killed that year, including 148 members of the security forces.\(^2\) It was, in these terms, the biggest domestic threat to any Western European state in the post-war era. As the conflict escalated, the government in Westminster had been forced into increasingly drastic responses: the deployment of British troops to maintain order in August 1969; the introduction of internment without trial in August 1971; and the suspension of devolved government in March 1972.\(^3\)

However, the memo’s focus was not the overall security situation. Rather, it was a complaint made by the Irish government under the ECHR in respect of security policy in Northern Ireland, alleging discrimination, brutality and torture of detainees. As Thorpe wrote, it seemed likely that an interfering neighbour and a legalistic convention would together see the UK denounced for officially sanctioning torture. It was, he suggested, time to re-examine the Convention’s value. It was all very well signing up to human rights standards—although these obviously did nothing to improve human rights in the country—but to be forced to defend one’s actions before an international

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tribunal and to conduct foreign policy through the medium of law was surely more than any pious human rights document was worth?\(^4\) The UK acceded to treaties because it intended to comply with them; what purpose was served by protracted argument over whether and how far it actually did so?

Such concerns are echoed in contemporary debates about the UK’s relation to the ECHR. However my interest in this episode is not as a forerunner of today’s debates. Rather, in this paper I examine the Irish ECHR complaint, together with a slightly earlier initiative at the United Nations, as case studies of the political role of international legal argument.

These are cases of politicised law, and legalised politics. As such, they highlight the limits of the dualism characterising much contemporary scholarship on the politics of international law, instead illustrating the ways that international law and international politics are mutually implicated, and mutually constructed, as aspects of a single deliberative discourse. Making sense of these interactions demands a new theoretical approach, which integrates legal and political argument, and links these to logics of political action and outcome. Articulating and applying that approach is a key task of this paper.

The next section introduces some key features of the literature on the politics of international law, criticising the existing compliance literature and various strands of constructivist discourse theory which express, in different ways, an unhelpful opposition of law and politics. Instead, I propose an integrated model of legal and political argument, building on Habermasian communicative action theory. Various scholars have hypothesised that international politics can be in part understood as communicative action, but have struggled to demonstrate such action in specific cases. I extend their approach, locating legal argument within its wider deliberative context, and suggesting how legal and non-legal logics interact, and how agents’ dual roles, participating in both international and domestic discourses, limit, without pre-empting, such international communicative action. By understanding international law and politics as thus mutually implicated we can better appreciate the ways political agents make use of, whilst being simultaneously shaped by, legal institutions and arguments.

Subsequent sections interrogate two historical cases from the Northern Ireland conflict to show these logics in action, not only as limits on agents, but as sources of action, suggesting that at various points we can identify agents revising their factual and normative understandings through communicative interaction, and thereafter acting on these revised understandings. Section 3 examines the Irish government’s unsuccessful attempts in 1969 to initiate a debate on Northern Ireland at the United Nations, first in the Security Council and subsequently in the General Assembly. While no substantive debate took

\(^4\) Similar sentiments were expressed when the UK was the subject of an interstate complaint in respect of Cyprus in 1956/57: Simpson, supra note 1 at 983.
place in either forum, the implications of action, both legal and practical, were fully canvassed by both states in the course of intensive lobbying. The complex normative questions raised, involving claims of a territorial dispute, a post-colonial situation, a domestic conflict and a human rights issue, make this an excellent case for examining legal argument within ostensibly political processes. Section 4 examines Ireland’s inter-state complaint under the ECHR. This was only the fourth inter-state case under the ECHR. Like the UN initiative, it was a response to politically sensitive developments in Northern Ireland. However, the institutional context is different. It is more explicitly legalised, and third states are less relevant. While the UN case illustrates law in the domain of politics, the ECHR case is more clearly one of politics in the domain of law. The two case studies, while closely linked, thus offer opportunities to examine the politics of international legal argument in quite different settings.

The paper makes novel contributions on a number of key questions at the boundary of international law and international relations. First, it provides a new perspective on debates about the causal role of international law, highlighting the role of invocation and argument in linking norms to actions, and providing a rare empirical examination of the claims of communicative action theory at the international level. Second, it provides an original account of the relation between specifically legal, and more general political, concerns, showing both how the turn to law restrains and empowers different agents, and the continued mutual embeddedness of legal and political discourses. Third, it moves beyond sterile debates about the priority of domestic or international factors, showing how legal and political discourses at each level interact, and how carefully examining these interactions can help us understand the limits and possibilities of international law.

II. FROM LAW AS RULES TO LAW AS DELIBERATIVE DISCOURSE

The literature on the politics of international law is vast, and summarising it is beyond the scope of this paper. Different schools of international relations theory suggest different accounts of the political significance of law, ranging from realist scepticism through institutionalists’ cautious acceptance to constructivists’ thorough embrace. However, much of this existing literature

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is characterised by an unhelpful dualism. Law and politics are understood as distinct, prompting questions about how each affects the other.\textsuperscript{7}

This is most obvious in the compliance literature, which examines whether, to what extent, and under what conditions, states comply with international law.\textsuperscript{8} The compliance question, so stated, assumes a causal relation between law and agent. Whether this is understood as expressing a logic of consequences or appropriateness, it implies that law exists apart from, and prior to, agent and action.

This, however, ignores an important feature of international legal practice, namely the way legal norms are invoked. Many—perhaps most—norms may directly and uncontroversially determine agents choices.\textsuperscript{9} But when international law becomes visible, it is because it is invoked, by specific agents, whether to justify their own behaviour, or to challenge, criticise or persuade others.\textsuperscript{10} The intersubjectivity of legal norms thus goes beyond their social constitution to include an important social quality in their operation.\textsuperscript{11} We need a model that can account for this.

This objection is not new. However, the alternative models of normative invocation and contestation that critics of compliance propose in fact reproduce this duality, albeit in different forms.

The contested compliance literature, for example, recognises the role of argument in clarifying legal norms, and thereby determining what constitutes


\textsuperscript{9} It is to these cases that Henkin refers when he suggests that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time”: Louis Henkin, How Nations Behave: law and foreign policy (New York: Praeger, 1968) at 47.


compliance or breach. Law cannot be understood as prior to interaction. However, its logic of action continues implicitly to distinguish norm (law) and agent (politics). Agents stand apart from the norms they are debating. Politics and law interact, but they do so within the domain of law. However, in the cases I examine, agents and actions, as well as norms, are objects of discursive contestation. The question ‘what does this rule require?’ is relevant only as it impacts the practical question, ‘what should I/we/you do?’; and the latter question rarely reduces to the former. Contested compliance dereifies the norm; but what is required is to dereify the agent.

Another prominent approach is Johnstone’s account of law as discourse. Johnstone characterises international law as a justificatory discourse, substantially open, but constrained by a distinctive logic that limits the moves that can be made, and the arguments that can count as legitimate. Agents use law to ‘explain, defend, justify and persuade’. However, as understood by Johnstone, legal discourse does not directly shape outcomes. Indeed, the only mechanism whereby argument might affect action is a negative one. Not all justifications will be acceptable to the relevant interpretive community, so agents committed to justifying actions are limited to those that can be justified. Legal argument is, on this account, essentially second- and third-personal; agent and audience are distinct, and it is through its


13. Kratochwil makes an analogous point, arguing that the interpretation of norms and language is an inter-subjective rather than individualist practice: Kratochwil, supra note 7 at 52.


18. Johnstone does advert to the possibility of listeners responding communicatively, but this is not pursued in subsequent discussions: Johnstone, “Security Council Deliberations”, supra note 14 at 455.
acceptability to the audience, rather than its force for the agent, that argument shapes action.\textsuperscript{19}

Legal argument thus possesses, in Johnstone’s account, an unavoidably public and performative quality. This is perhaps unsurprising, given his empirical focus on legal argument in public venues including the UN Security Council and WTO Dispute Settlement Body. However, legal argument is not limited to such contexts. Rather, while harder to observe, it forms a substantial component in the confidential bilateral interactions, negotiations and lobbying through which international politics proceeds. Some of this might be understood as negotiating ‘in the shadow of law’, but this simply begs the question against constructivist models of action. A better approach would consider, at least pending empirical resolution, whether such bilateral argument is what it appears to be: an attempt to persuade the addressee of the truth and force of some proposition, and to act accordingly.

A key issue is therefore how we should understand the link from legal argument to political action, in both first- and third-person contexts.

In the case studies that follow, I investigate the hypothesis that we can understand international legal argument as, at least in part, an example of what Habermas labels communicative action, and that we can thereby shift our focus, from agents exchanging arguments, to agents being shaped by and acting upon arguments.\textsuperscript{20} We thus move beyond the study of speech, to the relation between speech and action.


This requires introducing four concepts: communicative and strategic action; and arguing and bargaring.

Communicative action is defined as a mode of action that seeks consensus through a readiness to submit to the better argument.21 When acting communicatively, Risse suggests, ‘actors seek to challenge the validity claims inherent in any causal or normative statement and to seek a communicative consensus about their understanding of a situation as well as justifications for the principles and norms guiding action’.22 Communication is characterised by openness to changing positions based on rational argument.23 Whether, and to what extent, agents act communicatively will presumably vary across contexts.24 However, where they do, their behaviour is directly shaped by the process of argument, as they come to act towards the world in terms of changed factual and normative understandings. Action, including norm-driven action, is thus understood as rational, grounded in reasons and subject to revision based on rational argument.25 Identifying communicative action requires tracking changes in actors’ views and/or preferences, and the associated processes of persuasion and deliberation.26

Communication contrasts with strategic action, which ‘aims at making one’s own preferences prevail, using all instruments available for achieving this objective’.27 We may still observe behaviours that outwardly seem like communication and argument; but actors use these to obtain information, and to induce others to change their positions, without being themselves open to

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22 Risse, supra note 20, at 7.
24 Muller emphasises that the modes of action are ideal types, which in practice are likely to occur simultaneously: Harald Muller, “International Relations as Communicative Action”, in Karim M Fierke and Knud Erik Jorgensen, eds, Constructing International Relations: the next generation (Armonk: M.E. Sharpe, 2001) at 162.
25 This contrasts with models of norm acquisition that distinguish reasoning, understood instrumentally, from socially acquired and non-rational normative motivation (e.g. taboo). See e.g. Nina Tannenwald, The Nuclear Taboo: The United States and the non-use of nuclear weapons since 1945 (Cambridge: Cambridge University Press, 2007).
26 On the difficulties of operationalizing communicative action, Nicole Deitelhoff & Harald Muller, “Theoretical paradise; empirically lost? Arguing with Habermas”, (2005) 31 Review of International Studies 167 at 170-171. Crawford suggests that ‘[w]e can infer that … arguments were causally important if actors change their beliefs and behaviour after they have heard arguments and if other explanations fail to account for the change’: Crawford, supra note 20, at 36.
27 Muller, supra note 20, at 397. Risse further distinguishes communicative action from the logic of appropriateness, arguing that the three logics represent overlapping ideal types: Risse, supra note 20, at 22-23.
movement, except instrumentally. Hypothesizing communicative action does not mean denying the concurrent, and often predominant, role of strategic action in many cases.

Given these distinct logics of action, arguing and bargaining are in turn defined as specific types of speech act. Arguing, Muller suggests ‘proposes the truth of a factual, or the normative validity of a moral, proposition with a view to convince the target (listener, receiver) of the claim made by the speaker. Truth and normative validity are proposed by resting the proposition on a second one that is meant to prove the validity of the claim’. By contrast, ‘bargaining contains promises and threats and intends to change behaviour’. Actors seek to achieve their goals by ‘exchanging demands backed by credible promises, threats, or exit opportunities’ and communication is limited to the making of such demands. So defined, bargaining is the quintessential strategic negotiating behaviour. Neither arguing nor bargaining is necessarily limited to explicit statements; institutional actions (and indeed non-institutional actions) may also function as discrete arguments, or as part of a bargaining process.

If politics is understood as a locus of strategic and communicative action, then we might in turn understand legal argument as a distinctive sub-set of such action. Legal claims may constitute argument, in so far as they open a legal-normative discourse around the rules applicable in a given situation. However, they may also be used in a bargaining mode, in which the threat of legal action, or the possibility of conceding a legal point, constitutes a stick or carrot. In neither case should we expect to see them used to the exclusion of other, political, arguments. Where argument, legal or non-legal, is observed, this may be communicative or strategic. More likely, we will see a mix; actors might initially argue both to convince others, and to justify positions to themselves, domestic audiences, and third parties; but may subsequently, through processes of simple learning, rhetorical entrapment or communicative action, find their preferences, whether over immediate actions or long-term outcomes, change based others’ arguments.

One question raised by this turn to argument is how we should distinguish ‘legal’ from ‘non-legal’ or ‘political’ argument. For compliance theorists, law can be conceived as a body of rules distinct from political practice. Having rejected compliance’s dualism, we must instead distinguish the ‘legal’ as a

29. Muller, supra note 20, at 397. Kratochwil’s distinction between bargaining and the ‘discourse of grievances’ is similar, but not directly analogous: Kratochwil, supra note 20, at 181.
30. Risse, supra 8.
particular style of reasoning, with and about rules. Kratochwil, for example, identifies as a critical feature of legal argument ‘the principled character of application’: “‘legality’ requires the even-handed application of rules in ‘like’ situations”. Arguments in terms of generally applicable principles, rules and categories, rather than of specific instances and discretionary decisions, are distinctive of legal discourse. The emphases which legal reasoning places on precedent and analogy are specific manifestations of this ideal of principled application. Reus-Smit expresses a similar, albeit broader, idea when he characterises international law as ‘a distinctive type of argument in which principles and actions must be justified in terms of established, socially sanctioned, normative precepts’. Law thus involves, not only reasoning in terms of principle, but also appeals to the authority of particular socially mandated sources, whether this be particular documents (treaties, resolutions, legislation), practices (custom, precedent) or agents (judges, arbitrators); we need not embrace legal positivism to recognise such appeals to authority as distinctive of legal reasoning. There is no definition of ‘law’ or ‘legal’ here. However, these features suffice for my purposes, allowing me to provisionally distinguish legal argument from the broader category of political argument in my case studies.

Legal argument, then, is conceived as an aspect of deliberative discourse, linked to outcomes through logics of communicative and strategic action. Implicit in this approach is the assumption agents can evaluate alternative arguments and, in cases of conflict, determine which should prevail. In consequence, argument cannot proceed in a social or normative vacuum; even as it challenges factual and normative assumptions, it can do so only by reference to further such assumptions. Habermas labels as the ‘life-world’ the store of shared meanings and interpretations on the basis of which argument proceeds. The non-existence of such a shared life-world is a common objection to attempts to apply communicative action theory in international relations. However it is doubtful how far that objection can be sustained. The existence of a wealth of widely accepted treaties (supplemented by resolutions of international organisations), addressing issues from human rights and the non-use of force to international trade and postal cooperation, suggests there is an extensive store of at least rhetorically shared meanings and values to which

33. Kratochwil, supra note 20, at 208.
34. Ibid. at 221, 223-228. Cf. Chayes & Chayes, supra note 10, at 131-133.
35. Reus-Smit, The politics of international law, supra note 17, at 41.
36. They remain, for example, central to the leading contemporary anti-positivist theory of law: Ronald Dworkin, Laws Empire (Oxford: Hart, 1986).
38. Lose, supra note 23, at 183.
agents can appeal. Risse and Muller point variously to institutions and the diplomatic community as *foci* of overlapping life-worlds,\(^{39}\) while Risse suggests that in thinly institutionalised contexts such a life-world can be strengthened through pre-negotiation narration of ‘shared experiences, common historical memories, and the like’.\(^{40}\) Further, it may not be necessary that interests and values be shared, as opposed to merely mutually comprehensible, to ground communicative action. Actors with very different understandings of the world might still engage in, and act upon, communicative argument, provided they can recognise the values of the other, and offer accounts that relate to those values.\(^{41}\)

In the context of legal argument, the specific legal norms invoked provide a ready store of shared meanings. Rejecting compliance’s static conception of law as rules does not require jettisoning the vast corpus of existing legal texts and practices; rather, we understand these as the raw materials of deliberative discourse. As Reus-Smit argues, where actors perceive themselves as acting in a legal context they give priority to legal arguments, and legal modes of reasoning.\(^{42}\) These may not prevail to the exclusion of others, but they have a prima-facie legitimacy.\(^{43}\) Absent any deeper commonalities, we can expect argument to proceed at this level. However, where other values are shared, we may expect to see the existing legal rules, or the manner in which they are interpreted or applied in a given context, challenged by reference to such values.\(^{44}\) Argument involves not only the appeal to norms, but also the possibility of challenging normative arguments and frames by reference to other facts or values. Legal arguments may be challenged on extra-legal grounds, and normative conflict can be expected around the framing of situations, which will determine whether and how legal arguments become relevant.\(^{45}\) Challenges to the salience of legal norms may be particularly

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\(^{39}\) Different international organizations, institutionalizing different shared norms and values, may provide quite different deliberative contexts, in which different arguments will succeed or fail.

\(^{40}\) Risse, *supra* note 20, at 14-16; Muller, *supra* note 20, at 419-421.


\(^{42}\) Reus-Smit, *The politics of international law, supra* note 17, at 37.


\(^{44}\) Chayes and Chayes highlight that legal norms are not the only means of justification available: Chayes & Chayes, *supra* note 10, at 120.

prominent at moments of crisis, when the default quality of legal solutions seems less compelling. Law and politics are thus integrated as aspects of a single discursive practice; and where they are understood as distinct, we are drawn to consider the discursive constitution, maintenance and contestation of that distinction.\textsuperscript{46} The scope for legal and political considerations to interact through argument means that neither can be considered a discrete phenomenon. Rather, we must be sensitive to the interactions between legal and political arguments, and across ostensibly legal and political domains.

A related challenge is the multiple contexts in which actors participate simultaneously. Whereas diplomats may share an international diplomatic life-world, they are also deeply embedded in their domestic political cultures. Actions and arguments in the international sphere must also resonate within the domestic sphere; foreign policy constitutes a ‘two-level discourse’, and the rules and reference systems in the domestic and international discourses are likely to diverge, limiting the scope for communicative action at the international level.\textsuperscript{47} However, rather than assume that this pre-empt any potential for international communicative action, I approach these cases open to the possibility that domestic and international deliberative discourses exist in parallel. Their terms will differ. Unquestioned premises in one context may be controversial, or indeed unthinkable, in another. The need to manage this dissonance will limit the arguments that can be made, or accepted, in each. However, there may still be scope for communicative action to proceed. And indeed law may provide a shared vocabulary in which the particularistic values of domestic discourse can be translated into internationally shared, and hence mutually comprehensible, terms.\textsuperscript{48} As with the relation between legal and non-legal, we must be sensitive to the relationship between deliberative discourses at domestic and international levels, rather than assuming in advance that one trumps the other.

This model of law as communicative action goes beyond existing discursive models to hypothesise, not only the structure of argument within a given legal discourse, but also the relation between legal and non-legal argument, between domestic and international discourses, and between

\textsuperscript{46} Reus-Smit articulates this idea in terms of law’s “discourse of institutional autonomy”, albeit he places less emphasis that I do on the way that autonomy is itself subject to challenge: Reus-Smit, supra note 17, at 37.


legal argument and political action. On each dimension, it emphasises the first-person quality of legal argument, whether for speaker or listener. Legal argument, it suggests, is not just about how we explain ourselves, or evaluate others. Rather, it directly implicates our own choices and actions.

These claims cannot be readily tested by examining public statements. Such statements inevitably address audiences beyond the immediate interlocutors, making it impossible to disaggregate the effects of argument on participants from their concerns to legitimise actions in the eyes of third parties, whether domestic publics or third states. We might try to get behind them through research interviews and memoirs, but observation effects make it difficult to draw robust motivational conclusions. To address this, I rely instead on government archives, examining contemporaneous diplomatic communications and confidential analyses to trace motivations, strategies and interactions, with a view to identifying how far the hypothesised mechanisms are present in these cases. This involved an exhaustive review of files from: in Ireland, the Irish Department of External Affairs / Foreign Affairs. and Department of the Taoiseach (Prime Minister); and in the UK, the Foreign and Commonwealth Office and the Prime Minister’s Office. The archival method

49. While focusing on such third-person concerns suggests audiences are themselves open to communication, it assumes agents directly involved express only a logic of consequences. On the ontological premises of such argument: Risse, supra 8-9; Jon Elster, Strategic Uses of Argument, in Barriers to Conflict Resolution 248 (Kenneth J. Arrow, et al. eds., 1995); Muller,Arguing, Bargaining and all that, 404-407.


51. The name of this department was changed in 1971, during the period covered by these case studies.

52. Both states release almost all government files to public archives after a fixed period. The vast majority of relevant documentation for these case studies appears to be in the archives. A full list of files reviewed appears as an annex to the online version of this paper, available at http://www.jilir.org. Where archival materials are cited below, they include a file reference (e.g. “PREM/15/2141”) specifying the file in the relevant archive in which the original document is held. References including “PREM” or “FCO” refer to documents in the UK National Archives, Kew, Richmond, Surrey, TW9 4DU, United Kingdom. References including “NA” refer to documents in the National Archives of Ireland, Bishop Street, Dublin 8, Ireland.

has limits, both in the cases it can investigate and the empirical claims it can support; but more than any other technique, it allows us to look ‘inside the heads’ of political agents, and thereby opens the possibility of distinguishing between modes of action, and identifying the relations between legal argument and action. It is with this goal in mind that I now turn to my two case studies.

III. IRELAND AT THE UN SECURITY COUNCIL AND GENERAL ASSEMBLY

In August 1969, against the backdrop of sectarian rioting in Belfast and Londonderry and the deployment of British Army troops to maintain order, the Irish government took the unprecedented step of seeking to internationalise the Northern Ireland question through the political fora of the United Nations. Responding to the deteriorating security situation over previous months, this represented an attempt to assert the legitimacy of Irish interests in Northern Ireland, and to challenge UK assertions of exclusive competence. This section examines this initiative, and in particular the role of legal argument within and around the Security Council and General Assembly, in light of the framework outlined above.

The initiatives described in this Part took place within and around the two main political organs of the UN, the Security Council (SC) and General Assembly (GA). In both GA and SC, the majority of argument takes place not in public debate, but rather in informal meetings and diplomatic lobbying. Public statements in these fora are important, and merit examination in their own right, but the inter-state politics through which consensus is built and decisions reached can be understood only through examining that informal lobbying.

In both fora substantive debate was forestalled by the UK without the issue coming to a vote. The arguments and lobbying discussed below are therefore primarily addressed to the preliminary question of whether the relevant agenda item should be adopted (referred to as ‘inscription’).

prominently in legal texts, it has not been examined in detail in its political context. Cf. Adrian Guelke, Northern Ireland: the international perspective 165-167 (Dublin: Gill and Macmillan, 1988); Malcolm D. Evans & Rodney Morgan, Preventing torture: a study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Cambridge: Claernedong Press, 1998).


55. As Barnett and Finnemore note, there is a shortage of specific research on the internal politics of the UN organs. Barnett & Finnemore, supra note 52, at 52.
However, the fact that the decision is procedural should not detract from its significance; in a context of contested sovereignty, this preliminary question of whether an issue is appropriate for international rather than purely domestic consideration itself goes to the heart of the substantive disagreement between the contending states.\textsuperscript{56}

In both fora, the arguments crystallised around the implications of Article 2(7) of the UN Charter, which precludes UN intervention in ‘matters which are essentially within the domestic jurisdiction of any state’. The UK claim was that Article 2(7) precluded UN discussion of the issue, an argument which had enjoyed only limited success in other cases.\textsuperscript{57} Irish arguments challenged this claim, both by directly challenging the image of Northern Ireland as a domestic concern, and by relying on alternative legal bases, including Articles 33 and 34 (dealing with the pacific settlement of disputes), Article 55 (dealing with human rights), and GA Resolution 1514(XV) (on the granting of independence to colonial countries and peoples).

1. Northern Ireland and the United Nations: Emerging Thinking

These initiatives represent the only formal attempt by an Irish government to raise Northern Ireland at the UN.\textsuperscript{58} Given the duration of the issue, as a semi-dormant territorial claim before 1969, and as a violent sectarian conflict for almost three decades thereafter, this might seem somewhat surprising.\textsuperscript{59} A territorial claim to Northern Ireland had been a fixture in Irish political discourse since independence in 1921, and in 1937 that claim was incorporated in the state’s constitution.\textsuperscript{60} The issue had been pressed extensively, to little effect, by Irish representatives at the Council of Europe in the 1940s.\textsuperscript{61} However, while it was occasionally mentioned in Irish contributions at the UN, it was never sought to raise it formally.

This reflected a recognition on the part of successive governments that there was little which the UN could do to end partition, together with a more general reluctance to press the issue too hard.\textsuperscript{62} This point was recognised in

\textsuperscript{56} UK analyses implicitly recognised this point: Letter Crowe to Stratton (27 September 1971) Foreign and Commonwealth Office (FCO58/614/33).


\textsuperscript{58} Guelke, supra note 51, at 111-112.


1946, when joining the UN was first considered, and as late as April 1969, Minister of External Affairs Frank Aiken was arguing that ‘the adoption of a United Nations resolution would [not] contribute to the restoration of Irish unity’.\(^{63}\)

The deteriorating security situation was the catalyst for subsequent shifts in Irish government attitudes towards the UN option, and in its Northern Ireland policy generally.\(^{64}\) Public order and inter-community relations in Northern Ireland had been deteriorating over a number of years, a process stimulated by the emergence of a Catholic civil rights movement, and serious rioting had occurred on a number of occasions in 1968 and earlier in 1969.\(^{65}\) These developments were reflected in a shift in Irish government attitudes, from a conciliatory policy in the mid-1960s towards a more explicitly anti-partitionist and irredentist position.

An initial step towards internationalising the issue was taken in April 1969 when, in response to unrest and troop deployments in Northern Ireland, Aiken met with Secretary General U Thant to brief him on the situation. However, no attempt was made to raise the issue formally in any UN organ on the basis that this was unlikely to achieve meaningful international action, and would potentially jeopardise North/South relations.\(^{66}\)

Two developments occurred over the next four months which led directly to the UN initiatives. The first was the increasing linkage in Irish thinking of the short-term question of civil rights for the Catholic minority in Northern Ireland with the wider question of partition, which came to be characterised as the root cause of the civil rights problems.\(^{67}\) The second, closely linked, was a loss of confidence in the possibility of substantial reforms, and a continued reluctance on the part of the London government to engage with Dublin on the issue.\(^{68}\)

The immediate background to the decision to raise the issue at the SC was the outbreak on 12 August of the worst sectarian rioting to date, and the deployment of British Army troops to maintain order in Northern Ireland. It followed a public request, made during an emergency Irish cabinet meeting on 13 August, that the UK itself seek a UN peace-keeping force, or alternatively accept a joint British-Irish force in Northern Ireland.\(^{69}\) The urgent nature of that meeting, characterised by political divisions within the cabinet, the absence of (recently appointed) Minister for External Affairs Patrick Hillery, and reliance

\(^{63}\) Irish Parliament Dáil Debates vol. 240 col. 6 (29 April 1969).

\(^{64}\) Kennedy, supra note 51, at 301 et seq.


\(^{66}\) Kennedy, supra note 51, at 325-327; Fanning, supra note 51, at 69.

\(^{67}\) Kennedy, supra note 51, at 309, 311.

\(^{68}\) Memorandum ‘Assessment of the initiative taken in London and in the United Nations’ (9 September 1969), Department of External Affairs (NA2002/19/427).

\(^{69}\) Kennedy, supra note 51, at 336.
on limited and apparently exaggerated accounts of the situation in Northern Ireland, makes it difficult to see this move as part of a considered political strategy. Its primary purpose seems to have been to reassure both the Irish public and the cabinet themselves that the government could take effective action in respect of the Northern Ireland situation.

However, the subsequent decision to raise the issue formally at the SC, and thereafter at the GA, reflects a broader objective. The initiative at the SC was framed as a request for the despatch of a UN peace-keeping force to Northern Ireland, something which it was recognised was impossible over the objections of the UK. However, it was argued that the UN ‘was an international forum and it would be of help to have the matter discussed and considered there’. In part, no doubt, this reflects a further attempt to reassure domestic opinion. However, it also reflects an attempt to reframe the Anglo-Irish dialogue on Northern Ireland through the UN. The UK’s reluctance to discuss Northern Ireland affairs with Dublin had been an issue since earlier in the year, and would continue to be so.

When Hillery sought to discuss the deteriorating situation with UK ministers, both before and after 12 August, they made a point of arguing that Northern Ireland was a domestic matter and that, in the words of Foreign Secretary Michael Stewart, ‘there is a limit to the extent to which we can discuss with outsiders, even our nearest neighbours, this internal matter’. There is a fundamental disconnect evident in accounts of these meetings between this UK characterisation, and the Irish view that the two jurisdictions were linked, and that the Irish government had a legitimate interest in the situation. Contemporary analyses from both states highlight the extent to which the Irish saw the UN as a means of engaging the UK, and pressing them to respond to Irish concerns, whether directly or through their lobbying of third-states; and Irish accounts highlight British engagement with third-states as a significant benefit which the initiatives yielded.

70. Fanning, supra note 51, at 80.
72. Ibid.
74. Kennedy, supra note 51, at 318; Fanning, supra note 51, at 84.
initiatives represent an attempt to shift the Anglo-Irish dialogue to a different forum, where the UK could not simply refuse discussion.

2. From Domestic Discourse to International Law as Common Language

By shifting that dialogue to the UN, these initiatives also shifted it, at least in part, from the political to the legal field. How far this was the Irish objective is unclear; certainly there was a recognition that, in many respects, a political rather than a legal consideration would better serve the Irish case. However, by invoking Article 2(7), the UK characterised the Irish initiatives in legal terms; thereafter, other states also came to perceive themselves as acting within a legalised environment, and so engaged with it in those terms.

International law provided a framework of concepts within which each state sought to build support for its position. The relevant concepts, including human rights, sovereignty, territoriality and intervention, are of course also intensely political; but to the extent that states interpreted the situation in generalized terms, and advocated or opposed action on the basis of those interpretations and of their relation to Article 2(7), the discourse can be properly characterised as legal. To build support for discussion, the Irish government characterised the issue in terms of human rights, self determination and colonialism, categories which might be accepted as justifying UN involvement; while the UK characterised it as domestic, and the Irish reference as inappropriately political, in order to forestall discussion.

However, neither state could address their claims solely to the legal context of the UN organs; they were also concerned that the arguments invoked be compatible with their broader international and domestic characterisation of the issue. Arguments made in the international sphere both reflect and constitute arguments made to domestic constituents, and as such must be compatible not only with the categories adopted in the international context, but also with the overriding themes in domestic discourse. In the Irish case, this generated a tension between the human rights and political issues, while for the UK it manifested in a particular concern to stand on Article 2(7).

Both recognised that the Northern Ireland situation could be characterised in two ways: as a humanitarian issue, whether with respect to civil rights generally or to the immediate crisis; or as a political issue, involving partition and the Irish territorial claim over Northern Ireland. Both also recognised that it would be more difficult for the UK to oppose discussion of the humanitarian issue. This reflected a rapidly developing UN consensus that human rights

77 Memorandum Hillery to Lynch (26 August 1969), Department of External Affairs, (NA2002/19/427); Letter Cremin to Ronan (9 September 1969), Department of External Affairs, (NA2001/43/848).

78 Brendan O’Duffy, British-Irish relations and Northern Ireland: from violent politics to conflict regulation (Dublin: Irish Academic Press, 2007) at 76; Memorandum, ‘Background Brief on Northern Ireland’ (24 August 1972), Foreign and Commonwealth Office, (FCO58/691/38);
were an issue of legitimate international concern. However, given that at least part of the Irish objective was to reframe the debate on the political question and challenge the idea that Northern Ireland was a purely internal matter, an exclusive focus on humanitarian issues would have defeated that purpose. Further, domestic pressure from both within and outside government to raise the wider political questions was intense. A subsequent Irish analysis notes that ‘to have ignored partition altogether and dealt only with civil rights would have been a repudiation of our own beliefs, an invitation to the British to try to solve the problem without any regard to political considerations, and an admission to all the people living in [Northern Ireland] that we could contemplate an acceptable solution of their problems which did not in any way upset the constitutional arrangements existing over the past fifty years’. There was thus a divergence between the characterisation of this issue in Irish domestic thinking and the international law framework in which the case fell to be made. The Irish response was to collapse the humanitarian and constitutional questions together, building from a focus on human rights, and in the SC on international peace and security, to challenge the broader political settlement. Thus, the request for discussion in the SC highlights the connection between the outbreak of violence in the preceding days, and the ‘treatment which a high proportion of the inhabitants of the area have suffered over a period of almost fifty years’. Similarly, the GA Explanatory Memorandum argues that ‘the root cause of the demonstrations and unrest in the North is the unjust partition of Ireland’; ‘reunification … gives the only hope for the evolution of balanced political and social relations … in accordance with the principles of the Charter, the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples’. The political argument is linked inevitably to the legal bases, in terms of charter principles, human rights and decolonisation, which justify consideration by the Assembly.

Memorandum Hillery to Lynch (26 August 1969), Department of External Affairs, (NA2002/19/427).
82. Memorandum (Illegible) to Secretary, (28 October 1969), Department of External Affairs, (NA2002/19/534).
85. The rhetorical structure of this argument is highlighted in contemporary UK analyses: Telegram FCO to Monrovia (11 September 1969), Foreign and Commonwealth Office.
This attempt to link the two aspects also features prominently in Irish confidential lobbying. Thus, ahead of the SC meeting Irish representatives were arguing that the constitutional question ‘was at the root of the matter and no long term solution could be found without tackling this basic issue’.\textsuperscript{86} Hillery himself noted that ‘I have been stressing all the time [in private lobbying] that the Human Rights questions had their origin in the political and would have their solution in a political solution’.\textsuperscript{87} To argue directly for consideration of the political question would be exceptional, but by casting it in terms of human rights it is brought within an accepted basis of jurisdiction. There is evidence that a number of states were swayed by this analysis;\textsuperscript{88} and that challenging this framing was a significant focus of UK lobbying.\textsuperscript{89}

The need for coherence between the international and domestic discourses also explains why, while the Explanatory Memorandum refers to colonialism, Irish representatives did not emphasise this argument, either publicly or privately. This partly reflected doubts about the argument’s credibility; however, given the power of anti-colonial arguments in the GA in this period, this explanation is insufficient.\textsuperscript{90} More significant in Irish thinking was concern at the prejudicial effect that characterising Northern Ireland Unionists as colonists would have in domestic and North-South relations.\textsuperscript{91} A powerful international argument was discounted for domestic political reasons.

The UK, in its lobbying, stood firmly on Article 2(7), emphasising the status of Northern Ireland as an integral part of the UK. This was not simply a tactical move. Any suggestion that Northern Ireland was not an integral part of the UK has historically raised serious concerns for Northern Ireland’s Unionist community.\textsuperscript{92} Invoking Article 2(7) reflected a commitment given to the Unionist government of Northern Ireland that the UK would assert its domestic jurisdiction in all international relationships.\textsuperscript{93} In considering

\textsuperscript{86} Political Report Brussels to DEA (18 August 1969), Department of External Affairs, (NA2002/19/536).
\textsuperscript{87} Memorandum Hillery to Lynch (September 1969), Department of External Affairs, (NA2002/19/427).
\textsuperscript{88} Telegram New York to FCO (13 September 1969), Foreign and Commonwealth Office, (FCO33/773/214); Telegram Canberra to FCO (15 September 1969), Foreign and Commonwealth Office, (FCO33/773/221); Telegram New York to FCO (15 September 1969), Foreign and Commonwealth Office, (FCO33/774/237).
\textsuperscript{89} Telegram New York to FCO (17 September 1969), Foreign and Commonwealth Office, (FCO33/774/300).
\textsuperscript{90} For a colonial analysis of Northern Ireland, Stephen Howe, \textit{Ireland and empire : colonial legacies in Irish history and culture} (Oxford: Oxford University Press) at 169-192.
\textsuperscript{91} Memorandum ‘Case for raising the North of Ireland situation in the UN’ (undated), Department of External Affairs, (NA2000/19/534).
\textsuperscript{92} Paul Arthur, \textit{Special relationships : Britain, Ireland and the Northern Ireland problem} (Belfast: Blackstaff, 2000) at 29, 55.
\textsuperscript{93} UK, \textit{Text of a Communique and Declaration issued after a meeting held at 10 Downing Street on 19 August 1969}, (Cmd 4154) (London: Her Majesty’s Stationery Office, 1969).
responses to the Irish initiatives, a number were rejected on the basis that, while desirable from an international point of view, they would contradict that domestic imperative.\textsuperscript{94} Article 2(7) becomes a powerful domestic symbol, which the UK is compelled to invoke, even where doing so may undermine its international position.

In order to sustain this position on Article 2(7), UK lobbying drew a sharp distinction between the humanitarian and political aspects of the situation. The humanitarian issue, they accepted, was within the jurisdiction of the General Assembly (but not the Security Council); the political question was strictly a domestic matter.\textsuperscript{95} In order to address the humanitarian aspects, emphasis was placed on the fact that the UK was competent to restore order, while the potential colonial and self-determination arguments were forestalled by reference to Northern Ireland’s position within the UK, and Irish acceptance of partition since 1921.\textsuperscript{96} In each case, the rhetorical strategy involved the identification of Northern Ireland with, or its distinction from, a legally relevant class of situations; and the argument that this classification placed it outside the UN’s jurisdiction. A recurring theme was that action, and even consideration, by the UN was ‘neither necessary (since the UK is capable of restoring order and is in fact doing do) or appropriate (since the affairs of NI are an internal matter within the domestic jurisdiction of the UK)’;\textsuperscript{97} there were neither legal nor pragmatic grounds for the UN to become involved.

Thus, the arguments made by each state in the UN fora, both publicly and privately, reflected a tension between their domestic characterisations of the issue and the available legal concepts. They represent an attempt to translate particularist domestic perspectives, reflected in the quotes which opened this Part, into the shared normative framework of international law. The very different legal interpretations offered represent not only tactical manoeuvring at the international level, but also fundamentally different domestic political interpretations of the Northern Ireland situation.

Why does this process matter?

The importance of expressing arguments in shared legal terms lies in the fact that it is at least partly in these terms that other states came to understand,
and to respond to, the issue. Thus, for example, in discussions with the UK, Danish officials noted that Irish arguments had failed to address Article 2(7).\textsuperscript{98} Even though Denmark was traditionally very liberal on inscription, and so sympathetic to the Irish case, they still approached the issue in these terms; therefore, it was in these terms that they needed to be convinced. Conversely the Netherlands, while accepting the political and practical merit of UK arguments, sought further explanation of how what was characterised as a human rights case could legitimately be denied discussion under Article 2(7);\textsuperscript{99} only after further lobbying highlighting the distinctions between the political and humanitarian issues did they agree to support the UK position.\textsuperscript{100}

Demonstrating the significance of these legal accounts in shaping third-state attitudes is difficult. While it is possible to show states changing their positions in the course of the lobbying, it is impossible to control for extraneous factors shaping those positions.

The nuanced positions which many states adopted suggest that they were influenced by these arguments. Thus, United States representatives indicated to both delegations that they could not support discussion of the Irish request in the GA, on the basis that it emphasised the political aspect of the Northern Ireland question, and so brought it within Article 2(7). However, they indicated their position might be different if it were focussed more clearly on the humanitarian aspects.\textsuperscript{101} A number of other states took similarly nuanced positions, drawing fine distinctions over the classification of the issue as either political or humanitarian, and the appropriate treatment of it.\textsuperscript{102}

It is difficult to explain these attitudes without assuming that legal arguments carry some weight. None represents a complete acceptance and support of either state’s view. Rather, they represent reasoned understandings, suggesting that different positions will be adopted on the question, depending on how it is framed and what action the UN is asked to take. It is important to note that the inscription of a specific human rights item would still represent a defeat for the UK, against which they were lobbying hard;\textsuperscript{103} however,
whereas many states conceded the merit of the UK’s arguments against a political item, they were not prepared to oppose a human rights item. While definite evidence of the causal impact of competing arguments is unavailable, the responses of other states suggest that they were at least significant.

3. Precedent and the Dynamics of Legal Argument

Peters distinguishes two classes of discourse in modern legal systems: ‘On the one hand we have political discourses which aim at legislation—that is, at forward-looking changes in the law … On the other hand we have a multiplicity of discourses where interpretation of pre-given law is at stake’.\(^\text{104}\) In the relatively underdeveloped international legal system, the legislative and interpretive processes intersect through concerns and arguments about precedent.\(^\text{105}\) These guide specific choices, by directing attention backwards, to the context of previous situations, and forwards, to potential implications in future cases. This is not an automatic process; in the same way that common-law advocates argue over the *ratio decidendi* of a case, international actors will invoke, and distinguish, previous decisions which they argue are of a type, and draw attention to potential future decisions which might fall to be decided by analogy.\(^\text{106}\) Further, as the discussion below highlights, precedential argument is important in understanding states’ decisions, but it cannot uniquely determine these. Rather, by linking specific issues to underlying interests and values it shapes how they understand their choices.

The precedential arguments in this case can be divided into two classes, prospective and retrospective: prospective arguments invoke hypothetical future decisions; retrospective arguments reference specific prior statements, decisions and practices.

Prospective arguments may be addressed either to the special interests of particular states, or to a more diffuse sense of states’ common interests. Thus, UK arguments focussed explicitly on potential parallels with situations in other member states; the lobbying instructions at the SC suggested that representatives ‘ask whether a UN force would be welcome in some local city or area merely because of civil disturbances with which the government was quite competent to deal’.\(^\text{107}\) Prior to the GA they suggested ‘[r]efERENCE might be made to a particular minority problem in the territory of the state


\(^{105}\) Readers may object to my use of the term precedent, on the basis that binding precedent is foreign to international law. However, my concern is not whether international legal doctrine recognises such a rule, but rather how states, making political decisions, act towards their prior decisions, and anticipate the future consequences of their present actions. Cf. Kratochwil, *supra* note 20, at 223.

\(^{106}\) *Ratio decidendi* refers to the core principles which constitute the binding precedent in a case.

\(^{107}\) Telegram FCO to Certain Missions (18 August 1969), Foreign and Commonwealth Office, (FCO33/772/73).
Concerned.

Precedent serves to link disparate instances of a common kind, forcing states to consider how the present decision may impact on other cases within the relevant class. The UK thus sought to draw the relevant class as widely as possible, so emphasizing the precedent’s disruptive potential. It was framed as ‘UN intervention in cases where a home government is handling a difficult internal security problem’. It raised ‘a “minorities question” on the classical pattern’; and ‘[i]f this precedent were once to be established, there could hardly be a member of the UN who would not have a domestic problem of its own similarly eligible for examination’. A similar rhetorical strategy was evident in the SC where the UK representative argued that ‘to breach the principle of domestic jurisdiction would have most serious consequences not only for individual members of this Council but for the United Nations itself’. What is at stake is more than a narrow UK concern; it is a matter of principle on which all states share an interest.

The effectiveness of such arguments is evident from the records. Nigeria may be the clearest example; the Irish analysis notes that ‘Nigeria was standing rigidly on Article 2(7) … to prevent discussion of [the Nigeria-Biafra civil war] at the United Nations’; in these circumstances, Nigerian support for inscription was not expected. If Article 2(7) permitted discussion of the civil disturbances in Northern Ireland then a fortiori it must permit discussion of the far more serious situation in Biafra. In response to British lobbying drawing explicit parallels to Biafra, Nigeria did indeed agree to oppose inscription.

Even in states without an ongoing interest in Article 2(7), precedent featured prominently. Thus, for example, the UK concluded that, ‘because of the analogy with the South Tyrol’, Austria was unlikely support the British position; whereas Italy, on the opposite side of that dispute, argued Northern Ireland ‘should not be discussed at the UN as a question of “self-determination” because of the implications for [South Tyrol]’.

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109 This might be understood in instrumental terms, or as an effort to evoke empathy among states facing similar challenges.
111 Telegram FCO to Paris (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/34).
113 Letter Lagos to DEA (24 April 1970), Department of External Affairs, (NA2002/19/536).
115 Telegram Vienna to FCO (16 September 1969), Foreign and Commonwealth Office, (FCO33/774/267); Telegram Rome to FCO (16 September 1969), Foreign and Commonwealth Office, (FCO33/774/250). South-Tyrol was a subject of dispute between Italy and Austria for much of the post-war period. Rolf Steininger, South Tyrol: a minority conflict of the twentieth
In the view of the officials involved, a number of other states were also moved by these prospective arguments; even the United States, in subsequent discussions, placed some weight on them. One might argue that this behaviour, while it indicates the importance of precedent, does not necessarily support the importance of argument. The effect of precedent may be simply to lengthen the shadow of the future, allowing cooperation to develop on the basis of mutual self-interest. However, in this respect the process by which the precedent is defined and interpreted is important. To be concerned that a precedent may subsequently be invoked against them, an agent must first connect the specific issue under consideration both to the wider class of issues of which it forms part, and to their own particular interests. It is through the process of argument, in terms of shared international law concepts, that these links are made.

This links to another point raised earlier: it is not necessary that states share underlying values or interests, provided they share a common frame of reference, and can comprehend one another’s interests. Thus, for example, UK lobbying by reference to Biafra need not represent a common understanding of that conflict; rather, it represents a recognition that agreement could be built precisely on the basis of disparate understandings.

This point is perhaps clearest in discussions of lobbying the Soviet Union. Standing UK practice in this period was not to lobby Eastern bloc states. However, recognising that they had ‘strong feelings’ on the question of domestic jurisdiction, a decision was made to approach them in this instance. Subsequent analyses outline the thinking behind this decision. First, it was recognised that the value the Soviets placed on domestic jurisdiction might lead them to support the UK, notwithstanding the propaganda value of a UN discussion of Northern Ireland. Second, it was felt that ‘if [the Soviet Union] were to refuse to support us on this issue, we could the more easily refuse to pay regard to any representations they make to us about action taken at the...
UN over human rights questions within the USSR’;¹²⁰ ‘whatever decision they took, [Britain] could profit from it now (if they voted against inscription) or later (if they voted for inscription)’.¹²¹ The legal context of the UN, in which precedents carry significant weight, meant that the Soviets would be forced to choose between attacking the UK and supporting a principle which they valued; while the UK sought to build agreement at the level of principle despite diametrically opposed interests in the specific case. Or, putting the same point in different terms, the prevalence of precedential reasoning forces states to reconceive their interests in terms of legal principles rather than specific instances. The dilemma is political; but it is through legal discourse that the dilemma is constituted.

The second class of precedential arguments identified are retrospective, suggesting that current decisions are constrained by past practice.

These include, for example, UK concern at arguments made by the Foreign Secretary at the previous GA that ‘no country can say that the human rights of its citizens are an exclusively domestic concern. A country that denies its citizens the basic human rights is … in breach of an international obligation’. From the time UN involvement was first mooted in April 1969, UK officials recognised that this statement might pose difficulties; once having pressed this argument, it would be difficult for the UK now to oppose discussion of its own human rights issues.¹²² Irish representatives made liberal use of this precedent in lobbying at both SC and GA; and responses from other delegations suggest it carried significant weight.¹²³ The UK, on the other hand, sought to distinguish it, arguing the Irish initiatives raised a different and wider issue.¹²⁴

The logic of this point is worth highlighting. It is not simply about the UK complying with a norm that it previously espoused, although UK officials clearly felt the need to be consistent;¹²⁵ rather, other states oriented themselves towards the question by reference to previous UK views. While the UK could, and did, argue that these specific humanitarian issues should not be discussed, the perceived inconsistency reduced the force of its argument.

States can also invoke their own precedents to justify their behaviour, arguing that they are constrained by past practice. Thus, both France and the

¹²⁰ Memorandum Cambridge to Warburton (18 August 1969), Foreign and Commonwealth Office, (FCO33/772/75).
¹²⁴ Telegram New York to FCO (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/19); Telegram FCO to Paris (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/34).
US argued, prior to the SC discussion, that their positions on inscription were constrained by past practice; France was bound to oppose it, and the US to support. In both cases, these legal arguments in part served as justifications for avoiding a politically difficult issue; the legal argument inoculates these states from political pressure. The US correspondence is particularly instructive in this regard. US representatives argued their past record on inscription meant they must support the Irish item; they supported the UK politically, but this was a matter of legal principle. The UK, in response, highlighted two occasions when the US had opposed inscription of agenda items. This hardly constituted a significant practice. However, it served to disrupt the purported legal constraint on the US, shifting the question back from the legal to the political field. This argument, together with a strongly worded message from the Foreign Secretary, served to convince the US to abstain.

The precedents in these cases are not simply regulative, in the sense of guiding states to adopt particular positions; they are also constitutive, in that they define positions ‘on principle’, thereby inoculating them from political challenge. When positions are defended in these terms, it is by questioning their legal basis, rather than simply through political pressure, that they must be challenged.

4. The Limits of Law: Politics and Power

Precedent, then, ties specific instances to more general questions about the rules states want. It represents a broadening of the question to consider not only immediate implications, but also implications for other decisions that have been or will be made. However, legal principles are also interpreted, and indeed challenged, by reference not to the general but to the specific; by focussing not on the rule, but on the facts of the case at issue, and the implications action will have in that case. At the extreme, legal principles are excluded entirely, and a decision falls to be made on purely pragmatic grounds.

This interaction of legal and political arguments is prominent in both lobbying and third-state decision-making in this case. Thus, for example, in discussions with US representatives, UK officials emphasised ‘the incalculable dangers of any action which could appear to reopen the “Irish Question” after half a century’. In a subsequent appeal from the Foreign Secretary, the argument proceeded from the strictly legal claim about

126. Memorandum ‘Note on talk with French Minister of Foreign Affairs’ (20 August 1969), Department of External Affairs, (NA2002/19/536); Telegram Washington to FCO (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/22).
Article 2(7), through a precedential argument about intervening in domestic disturbances, to a broadly drawn pragmatic claim that ‘[a] debate in the Security Council at the present time will make our task of restoring law and order in Northern Ireland all the more difficult’. 130 Political values are set in opposition to any legalistic analysis which might allow discussion. This and similar arguments substantially impressed a number of governments; some appear to have focussed almost entirely on the practical issues, while others saw the two sets of arguments as complementary. 131 Irish efforts similarly emphasised the potential value, for the people of Northern Ireland, of U.N. involvement, sidestepping the legal difficulties posed by Article 2(7) by reference to the overriding humanitarian question. 132 These points illustrate the extent to which the legal and political discourses are mutually implicated. Arguments and justifications move between the two, as actors seek to build support and challenge the positions adopted by others. Legal arguments may be discounted for practical reasons; but equally the importance of principle may provide a response to practical appeals.

It is not only through recourse to non-legal argument that politics intrudes on deliberative discourse. It is also, more directly, through political influence and the explicit or implicit invocation of carrot and stick, moving from communication and argument towards strategic action and bargaining.

The archival record is of limited assistance here, as there is little direct evidence of such factors. In a few cases the possibility of an explicit quid pro quo is mentioned, and in others there are suggestions that amicable relationships may sway support one way or another. 133 This lack of evidence does not show that such considerations were not relevant. Rather, it reflects the limits of archival research, which is very effective at uncovering explicit claims

131. See e.g. Telegram Paris to FCO (18 August 1969), Foreign and Commonwealth Office, (FCO33/772/35); Telegram Algiers to FCO (18 August 1969), Foreign and Commonwealth Office, (FCO33/772/37); Telegram Rio de Janeiro to FCO (12 September 1969), Foreign and Commonwealth Office, (FCO33/772/199); Telegram Rome to FCO (16 September 1969) Foreign and Commonwealth Office, (FCO33/773/250).
132. See e.g. Political Report Brussels to DEA (18 August 1969), Department of External Affairs, (NA2002/19/536).
133. Telegram Djakarta to FCO (15 September 1969), Foreign and Commonwealth Office, (FCO33/773/214) (possibility of Indonesian support in exchange for UK support over West Irian); GA Note No 1 ‘The Situation in Northern Ireland at 24th Session of the General Assembly’ (10 September 1969), Department of External Affairs, (NA2002/19/534) (possibility of various African states’ support for Ireland in exchange for some quid pro quo); Telegram Lusaka to FCO 18 August 1969), Foreign and Commonwealth Office, (FCO33/772/23 (likelihood that Zambian solidarity with Ireland and interest in challenging UK over Rhodesia would affect attitude); Telegram Vienna to FCO (16 September 1969), Foreign and Commonwealth Office, (FCO33/774/267) (likelihood that Austrian gratitude to Ireland may affect position); Letter Lagos to DEA (24 April 1970), Department of External Affairs, (NA2002/19/536) (likelihood that Nigerian military and political dependence on the UK would affect position).
made by agents, but less effective in identifying the rationales for decisions of states other than those whose archives are examined.

By looking beyond this specific case, we can find indirect evidence that such influence was important, but not determinative.

First, having regard to UN practice in this period generally, this case stands out as a relatively rare example of a failure to have an issue inscribed.\(^\text{134}\) The exceptional nature of such cases leads Simma to explain them in terms of ‘specific political alliances’ rather than ‘principled legal assessment’.\(^\text{135}\) Both their rarity, and the fact they have generally occurred only where leading western states have opposed discussion, suggests political influence is an important explanation.

Second, potentially instructive, albeit indirect, evidence comes from a historical post-script in the UK records. Having pre-empted these initiatives, the UK continued to monitor both the situation in Northern Ireland and the mood at the UN to be prepared if a further initiative were taken.\(^\text{136}\) This seemed especially likely in the tense period following the introduction of internment in 1971, and various assessments of this possibility were prepared. These highlight three developments that suggested a new initiative might be more successful: first, a decline in UK influence at the UN generally; second, the worsening situation in Northern Ireland, and in particular border incidents and refugee flows which gave it an international quality; and third, the involvement of the UN in Bangladesh, with UK concurrence, which implied some widening of UN jurisdiction under Article 2(7).\(^\text{137}\) There is a clear recognition that the loss of influence generally might weaken the UK case, leading others to ‘reinterpret’ the Northern Ireland situation in colonial terms. However, these assessments also suggest that the legal analysis is crucial; it is not just the diminution of UK influence, but also changes in the legal background and in the legal implications of events in Northern Ireland, which are a cause for concern.

**IV. IRELAND V UNITED KINGDOM AT THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

In December 1971, the Irish government took the first steps in a case against the United Kingdom under the European Convention on Human Rights (the ECHR). The case related to the introduction of internment without


\(^{136}\) As well as the possibility of further discussion in the SC/GA, a regular series of petitions to the Human Rights Committee meant Northern Ireland was never entirely off the UN agenda.

\(^{137}\) Telegram FCO to Dublin (24 August 1971), Foreign and Commonwealth Office, (FCO58/614/3).
trial and the interrogation of terrorist suspects in Northern Ireland. It would ultimately be the subject of a report by the European Commission on Human Rights (1976) finding that the UK had engaged in torture; and a judgement by the European Court of Human Rights (1978), the first such judgement in an inter-state case, replacing that finding with one of inhuman and degrading treatment. This was the second significant attempt by an Irish government to use international institutions to intervene in Northern Ireland affairs, and the first to use explicitly judicial procedures.

1. Political Background

Individual complaints have made up the vast majority of cases under the ECHR; between 1950 and 1999 there were 53,000 individual complaints, and only 21 inter-state complaints. Many of the interstate complaints have been made in the context of wider disputes, and thus have had strong political overtones; the human rights claims have been subsumed within the wider dispute, and become instrumental to that dispute. Nine have related to territories the sovereignty of which was contested by the complaining state, and have been brought by smaller states against larger and more powerful ones.

The catalyst for Ireland’s decision to bring an interstate complaint was the introduction of internment without trial by the Northern Ireland government on 9 August 1971. The background was a rapidly deteriorating security situation in Northern Ireland over the previous two years; the re-emergence of the Irish Republican Army (IRA) as an active paramilitary organisation; and the limited success of the British Army’s counter-insurgency efforts. While internment may have temporarily strengthened the Unionist government in Northern Ireland, it further alienated the Catholic minority. The one-sided way it was implemented, initially directed entirely against members of the minority, was perhaps justified by the IRA’s position as the most active paramilitary group at the time; but it also reinforced perceptions of discrimination on the part of the security services.

In addition, allegations of brutality by army and police officers, and the use of controversial ‘deep interrogation’ techniques (known as the ‘five

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139 Id., 454. The literature on inter-state cases is limited. Two useful case studies are, on the Greek cases against the UK, Simpson, *supra*, 924-1053. and, on the first two Cypriot cases against Turkey, Van Coufoudakis, *Cyprus and the European Convention of Human Rights: The Law and Politics of Applications Cyprus v Turkey*, 6780/74 and 6950/75, (1982) 4 Human Rights Quarterly 450.


techniques’), involving hooding and the subjection of detainees to white noise and physical stress, rapidly generated public outrage within Ireland, Northern Ireland and Great Britain.\footnote{Neumann, supra note 3, at 57; Faulkner, supra note 140, at 124.} A combination of domestic public pressure and Irish diplomatic pressure led to a series of public inquiries to consider those allegations. These ultimately concluded that ill-treatment had occurred; however, the first of these, the Compton Report, went to great lengths to argue that this ill-treatment had not amounted to ‘brutality’, a conclusion heavily criticised by Lord Gardiner in his minority report for the subsequent Parker Committee.\footnote{Michael J. Cunningham, British government policy in Northern Ireland 1969-1989: its nature and execution (Manchester: Manchester University Press, 1991) at 60. Tim Pat Coogan, The Troubles: Ireland’s ordeal 1966-1995 and the search for peace (New York: Palgrave, 1995) at 128. On the UK inquiries, Evans & Morgan, supra note 51, at 32-41.}

On the same day that internment was introduced in Northern Ireland, Sean MacBride, a former Irish Minister of External Affairs and chairman of Amnesty International, wrote to Taoiseach (Prime Minister) Jack Lynch urging him to consider bringing a case under the ECHR.\footnote{Letter MacBride to Lynch (9 August 1971), Department of an Taoiseach, (NA2002/8/493).} While that letter did not refer specifically to internment, over subsequent weeks the possibility of bringing a case was repeatedly urged on the government, both publicly and privately.\footnote{See e.g. Letter Northern Ireland Civil Rights Association to Lynch (15 August 1971), Department of an Taoiseach, (NA2002/8/493); Letter Association for Legal Justice to Lynch (20 August 1971), Department of an Taoiseach, (NA2002/8/493); ‘Letters to the Editor’ Irish Times 18 August 1971, ‘Inquiry sought into torture allegations’ Irish Times 19 August 1971, ‘Priest’s account of torture allegations’ Irish Times 22 September 1971.}

The evolution of government thinking is well illustrated by the responses to this correspondence. On 12 August, Lynch wrote to MacBride indicating that, due to the perceived legal impediments, the likely delay involved, and ‘relevant political considerations’, the Government did not ‘consider that it would be advisable, at least at the present’, to bring a case.\footnote{Letter Lynch to MacBride (12 August 1971), Department of an Taoiseach, (NA2002/8/493).} This line was maintained through August and September 1971. However, by October it had shifted, with correspondence indicating that ‘the question of torture or other ill-treatment of people in the North, [was] being actively pursued by the Government’\footnote{Letter NicFhionnain to (deleted) (21 October 1971), Department of an Taoiseach, (NA2002/8/493).}. On 21 October Patrick Hillery indicated in parliament that the possibility of bringing a case was being seriously considered, but that no final decision had been reached.\footnote{Irish Parliament Dáil Debates vol.256 col.270 (21 October 1971).} However, government thinking clearly remained mixed; as late as 23 November the Tanaiste (Deputy Prime Minister) Erskine Childers was arguing that diplomatic pressure, in respect of both internment and the wider constitutional situation of Northern Ireland,
should be prioritised over the ‘lengthy and time consuming’ procedure under the ECHR.\(^{149}\)

What explains these shifting attitudes? Part of the answer lies in the failure of diplomatic approaches in respect of internment and the treatment of detainees. The draft notification of the case to the UK Government refers to previous contacts between Lynch and Prime Minister Ted Heath, and the fact that the Taoiseach ‘had hoped that his remarks on this subject … would have had the effect of eliminating the alleged behaviour’.\(^{150}\) Internment was raised with British ministers, both publicly and privately, on a number of occasions between August and November 1971, and the Irish felt that their views were not being taken on board.\(^{151}\) The procedures under the ECHR offered a chance to raise these issues in a forum where British representatives could not simply refuse discussion, and where claims of necessity could be directly challenged. However, the case was also seen as a way of raising broader political and constitutional questions, as evidenced by the argument in the same draft that ‘the fundamental causes of strife in the North will yield only to political initiatives [which] should be designed to pull the North together and to set general Anglo-Irish relations on a progressive road to a better future’. While both references were deleted from the final letter, to avoid suggesting the case was being brought as a ‘bargaining counter’, they clearly demonstrate the extent to which it did indeed represent an attempt to bring additional pressure to bear on the UK government.\(^{152}\)

A second substantial objective was to respond to domestic pressure for action on these politically contentious issues. The failure to take a successful initiative in respect of internment and human rights during the autumn of 1971 resulted in increasing pressure on the government from both opposition and media sources.\(^{153}\)

The decision to bring the case was taken on 30 November, two weeks after the publication of the Compton Report, widely regarded as a whitewash.\(^{154}\) It also came a few days after the main opposition party, Fine Gael, itself sought to raise the issue by petition to the Council of Europe. A memorandum circulated at the cabinet meeting when the decision was taken highlights

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\(^{149}\) Irish Parliament Dáil Debates vol.257 col.2 (23 November 1971).

\(^{150}\) Draft with Letter McCann to O’Sullivan (18 October 1971), Department of an Taoiseach, (NA2002/8/493).

\(^{151}\) See e.g. Memorandum ‘Report of Meeting at Home Office on 11 August 1971’ (15 August 1971), Department of Foreign Affairs, (NA2002/19/427); Letter Blatherwick to Bone (24 July 1972), Foreign and Commonwealth Office, (FCO87/140/197); Heath, Supra, 432.

\(^{152}\) Memorandum O’Sullivan to Lynch (19 October 1971), Department of an Taoiseach, (NA2002/8/493); Letter McCann to Peck (19 October 1971), Department of an Taoiseach, (NA2002/8/494).

\(^{153}\) See e.g. Irish Parliament Dáil Debates vol.257 cols.1-7 (23 November 1971).

\(^{154}\) Coogan, Supra, 129.
the diverse pressures on the government. It notes that bringing a case would likely provoke a negative response from the UK, and was unlikely to be welcomed by the members of the EEC (to which both states were in the process of acceding). On the positive side, it would ‘inevitably make the British much more careful in their handling of detainees and internees in the North’, while at the same time being popular with public opinion, both in Ireland and among the minority in Northern Ireland. There is also a suggestion that a human rights case would make a security solution to the situation in Northern Ireland less viable, and so make a political initiative more likely.

2. Translating Politics to Law

A week later, on 7 December 1972, the Irish cabinet took an informal decision on the scope of the case, determining that claims should be brought under Articles 1, 2, 3 and 14 of the ECHR. These relate, respectively, to: the obligation to secure to everyone within the jurisdiction the rights and freedoms in the ECHR; the right to life; the prohibition on torture, inhuman and degrading treatment; and the prohibition on discrimination. Claims in respect of Articles 5 and 6 relating to the deprivation of liberty and the right to a fair trial were subsequently added.

This represents a significantly broader claim than that previously canvassed in media or parliamentary debates. In shaping the case in these terms, the Irish government sought to legalise its challenge to a broad swathe of Northern Ireland policy, a point brought out in a memorandum prepared ahead of the 7 December cabinet meeting. This notes various considerations affecting whether to bring claims under particular articles. Thus, in respect of Article 2, relating to the right to life, the advantages of a claim include the fact that it is very sought after by Northern Nationalists, and that it has special appeal to the public. The popular appeal of claims is also canvassed in respect of Articles 3 (torture) and 14 (discrimination).

However, a broader interest in challenging the legitimacy of the Northern Ireland state is evident in the claim under Article 1. This claim was acknowledged as speculative and somewhat legalistic, and ultimately was rejected by both the Commission and the Court. However, including it was justified on the basis that ‘[t]he entire scope of the Special Powers Acts, with their regulations, could be opened before the Commission’, and further that it ‘demonstrates the general legal “atmosphere” which prevails’. The Special Powers Acts constituted a central plank of the security apparatus of the Northern Ireland state, and were a major grievance of the Catholic civil rights

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157. Memorandum ‘Possible applications’ (Undated), Department of an Taoiseach, (NA2002/8/495).
Therefore, the opportunity to challenge those Acts represented an opportunity to impugn the legitimacy of a major facet of the Northern Ireland state. As noted in contemporary UK analyses, the Special Powers Acts were ‘regarded in Southern mythology as the second pillar … of the Unionist state’, and as such a challenge to them constituted part of a wider effort to ‘discredit the Stormont [Northern Ireland government] system and ensure that a Stormont with control over security will never return’. By casting the claim in broad terms, the legal challenge in respect of human rights became a political challenge to the legitimacy of the Northern Ireland state.

It seems clear from this analysis that actually winning any point was of secondary importance. The Article 1 claim was recognised as somewhat speculative, with the result impossible to anticipate. No real chance of success was anticipated on Article 2, on unlawful killings. On Article 14, non-discrimination, the evidence does not seem even to have been assessed. Rather, the value of the ECHR machinery was as a forum where claims could be made, and legitimacy contested, regardless of the ultimate legal result. Law is communicative, not regulative. Further, the contest for legitimacy is not simply legal; rather, it reflects a broader opportunity to co-opt the international institutions of political legitimacy in support of Irish positions.

The interaction between the political and legal context of the case is also evident in UK analyses, and in particular in discussions about how the UK case should be presented.

This issue first arises in planning for the admissibility hearings in September 1972. The legal analysis of the British case was distinctly pessimistic, concluding that most, if not all, of the complaints would be found admissible. However, it was recognised that the rationale for making arguments at this stage extended beyond the purely legal, and that it ‘would be politically undesirable to appear to be conceding the truth of the Irish allegation by failing to contest them … [O]n balance this consideration out-weighed the disadvantage of apparently losing this stage of the argument’.

The potential

161. This point is also evident in later analyses considering whether to refer the Commission’s report to the Court or the Committee of Ministers for decision. The Attorney General argued that ‘[a] favourable decision by a political body [the Committee] confirming the legal opinion of the Commission would be more valuable than a favourable decision of the Court which might be represented as legalistic’: ‘Memorandum for Government’ Attorney General’s Office (February 1976), Department of Foreign Affairs, (NA2006/131/1422).
embarrassment of being seen to be publicly defeated was outweighed by the value of ensuring that the political arguments are fully aired.

A similar tension emerges in discussions about making politically sensitive counter-allegations in the proceedings, and in particular introducing material in the UK defence implying at least partial Irish responsibility for the emergency situation in Northern Ireland. These arguments, while legally irrelevant, were seen as potentially valuable in ‘[pinning] a share of the blame’ on the Irish government, and thereby tempering the effect of the case on international opinion. However, it was also recognised that responding to the Irish allegations in kind and doing so in a wide-ranging and emotive manner was likely to further damage Anglo-Irish relations and future cooperation in respect of a Northern Ireland settlement.

The concern that arguments made in Strasbourg would have implications for Anglo-Irish relations and stability in Northern Ireland was a recurring theme in UK thinking, significantly tempering the presentation of the UK case. Thus, for example, in planning for the first stage of substantive hearings in October 1973, internal UK correspondence expresses concerns about the possible impact on the formation of a power-sharing executive in Northern Ireland in the same period. One possibility mooted was that, to avoid these tensions, the UK would simply refuse to take part in hearings. This was rejected, however, on the basis that ‘the Commission could proceed without us [the UK] and some part of allegations against us on which we might win would go against us by default’.

This tension, between answering allegations that are made, strengthening the Anglo-Irish relationship, and reducing tensions on the ground in Northern Ireland, recurs throughout the proceedings. That there were contradictions inherent in the effort was recognised, but it was felt important that allegations made in a legal context be answered in kind. The interaction of a legal process, which requires that claims be answered, and a political context, in which strengthening relationships and reducing tensions are paramount, generates a dilemma in which neither logic can fully control either the process or the outcomes.

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163. Letter Thorpe to Blatherwick (2 June 1972), Foreign and Commonwealth Office, (FCO87/138/122); Letter Thorpe to de Winton (21 September 1972), Foreign and Commonwealth Office, (FCO87/142/324); Letter Alexander to Roberts (24 August 1973), Prime Minister’s Office, (PREM15/2141). The possibility of bringing a retaliatory case against Ireland was considered but rejected: Letter Thorpe to Cox (9 November 1972), Foreign and Commonwealth Office, (FCO87/144/409).


166. Letter Alexander to Roberts (23 May 1973), Prime Minister’s Office, (PREM15/2141).
3. **Evolving Thinking: The Threat and the Promise of Strasbourg**

Having initiated the proceedings at Strasbourg, the Irish government struggled to understand how the legal process could be brought to bear on the political situation in Northern Ireland. At the same time, UK analysis sought to understand the Irish motivations, both for bringing the case and for continuing it in the face of significant pressure, and the implications the case had from a UK perspective.

Thus, shortly after the admissibility stage, the Irish Attorney General pressed the view that the case ‘gave the Irish Government leverage in Anglo-Irish relations generally, and specifically a seat at the table in relation to discussions on the settlement of the NI difficulties’. The case, and in particular the friendly settlement procedure, presented the prospect of direct bilateral discussions about the domestic administration of Northern Ireland. The ECHR, it was hoped, could provide both a forum and a normative framework for those discussions.

The Irish government were also conscious that the case might, if allowed to run its course, yield limited practical benefit: in June 1973 Declan Costello, who had taken over as Attorney General under a Fine Gael/Labour coalition government earlier that year, noted that there were serious legal problems to be overcome, and further that ‘[e]ven if we do succeed … the result will be merely a declaration relating to a breach or breaches by the UK Government’. In these circumstances, a settlement was to be preferred if one could be obtained; and the best way to obtain such a settlement was to ensure that the case caused as much political difficulty as possible for the UK Government.

Despite this analysis, which sees the case more in terms of strategic bargaining than any reasoned discourse, the Irish government also recognised that negotiations in respect of the case must be conducted within the framework, both institutional and normative, of the ECHR itself. Thus, while referring to the case as a ‘stick’, whose principal benefit was its embarrassment to the UK in their domestic, European and foreign policies, the terms of settlement which were anticipated related to such matters as compensation for the victims of abuse, incorporation of the ECHR in the domestic law of both Ireland and Northern Ireland, and ‘[t]he setting up of an All Ireland Court (Commission) on Human Rights’. The case constituted leverage, but it was a very particular type of leverage, which could be used only to achieve very particular objectives.

The idea that the terms of settlement would need to be closely tied to the normative context of the ECHR recurs in later Irish thinking. Thus,

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167. Minute O’Suilleabhain (2 October 1972), Department of an Taoiseach, (NA2003/16/478).
immediately before the Commission issued its report, which the parties had been informed would find against the UK in respect of the torture claims but reject the broader Irish claims on internment and discrimination, Costello was still arguing that the only worthwhile settlement would be one in which the UK agreed to enact a bill of rights in Northern Irish law, and to establish an international tribunal to hear complaints under it. However, he also recognised that, if the UK were prepared to take such steps, they were more likely to be taken in the context of domestic political reform in Northern Ireland than in settlement negotiations with the Irish government. In these circumstances, pressing the case to a judgement was more valuable than any lesser settlement that might plausibly be offered.

This represents a significant shift from the initial position outlined above. The case is no longer simply a bargaining chip, to be conceded in exchange for such concessions as can be obtained. Rather, it is seen as having autonomous value; only substantial concessions would justify foregoing the significant symbolic value of a decision.

British analyses of the case focus on two issues: first, the motivations underlying the Irish position; and second, how the UK should respond.

On the first point, a recurring theme was the recognition of the powerful domestic constraints on the Irish government. These were variously attributed to pressures from media and opposition sources, from nationalist opinion in Northern Ireland, and, under the Fianna Fáil government prior to 1973, from hard-line back bench TDs (members of parliament). However, there was also a recognition that the case was, for Ireland, a way of engaging with the UK. One of the clearest UK assessments suggests seven distinct Irish objectives, of which only one related to domestic politics. The major objectives were seen as (a) discrediting the system of government in Northern Ireland and ensuring a devolved administration with control of security would not return; (b) showing up ill-treatment by Northern Irish and British security forces, and ensuring it does not recur; (c) establishing a ‘negotiating position’ vis-a-vis the UK government on Northern Ireland affairs, in the form of a ‘right to be consulted’; (d) ‘[making] public the whole dirty affair and [pricking] the consciences’ of the British public, the UK government, and world opinion.

170. Letter Costello to FitzGerald (15 August 1975), Department of an Taoiseach, (NA2005/151/715). UK arguments in the friendly settlement context were also closely tied to the specific abuses alleged: Telegram Kruger to Hayes (16 September 1975), Department of an Taoiseach, (NA2006/131/423).

171. E.g. Letter Peck to Crawford (26 June 1972), Foreign and Commonwealth Office, (FCO87/139/179); Telegram Dublin to FCO (11 August 1972), Foreign and Commonwealth Office, (FCO87/141/237); Telegram Dublin to FCO 29 September 1973), Prime Minister’s Office, (PREM15/2141).
generally; (e) affording a point of pressure against the UK Government; (f) appeasing domestic audiences; and (g) ‘giving the Brits one in the eye’. 172

Only one of these, point (e), assumes the case will be used as a bargaining chip. The rest focus on its communicative potential: conveying and supporting ethical judgements about right behaviour; legitimising an Irish input into the Northern situation; and de-legitimising the previous administration in Northern Ireland. The perceived aim is not, or at least not primarily, to secure compliance or seek a quid-pro-quo; rather, it is to change the way the UK government, and UK and world opinion, think about the Northern Ireland situation and appropriate measures to respond to it.

While the Irish government at all stages perceived significant potential value in the case, the British recognised it as potentially destabilising, but rejected the idea that it could be a source of leverage over them. This latter view is reiterated in public statements, in diplomatic correspondence, and in internal UK memoranda, in which the case is variously characterised as ‘mutually embarrassing’, an ‘irritant’ or an ‘irrelevance’. 173

However, while denying its significance, the UK was also faced with the question of how to respond to it. A range of options were canvassed at various stages, from refusing to participate in the proceedings to denouncing the ECHR as a whole. 174 There was a genuine concern that the case itself could become not only a source of friction in the Anglo-Irish relationship, but also a destabilising influence within Northern Ireland. 175 However, there was also a view, which ultimately prevailed, that Irish claims could not be allowed to go unanswered: ‘This short term necessity [to fight the case ‘every inch of the way’] would run counter to [the] long term aim of a better working relationship with the Irish, but that better relationship would be more difficult to achieve if we did not dispute the allegations in the Irish State Case at Strasbourg’. 176

This need to contest the case is variously tied to the need to uphold morale in the security services, to avoid conceding a point to Dublin, and to protect the

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UK government’s international reputation. However, what is recognised at all stages is that legal claims, by their nature, require to be answered. To argue the point and lose would be a set-back; but it would be worse still to allow the point to go by default.

4. Constructing and Contesting the Legal Sphere

As in the UN case, the relation between law and politics, and the salience of legal analysis, was itself an object of discursive contestation. The UK government sought at all times to emphasise the connection between developments within the case at Strasbourg and the wider Northern Ireland and Anglo-Irish context. Whereas the Irish account of the case sought to establish the legal and political as distinct spheres, the UK argued for a holistic view, highlighting the negative impact the legal case could have, and thereby shifting the discussion from strictly legal questions, on which their position was weak, towards a focus on shared concerns and political contexts, where they could make a stronger case.

This approach appears in the first substantial prime-ministerial correspondence about the case in May 1973. The political situation in Northern Ireland had developed significantly by this stage; the Northern Ireland parliament had been suspended the previous year, and the UK government was in the process of implementing plans, broadly supported by the Irish government, for a new devolved power-sharing administration. The Fianna Fáil government which had been in power in 1971 had been replaced by a coalition of Fine Gael and Labour, marking a shift away from the irredentist rhetoric of earlier periods. In these circumstances, it was

177. See e.g. Minute Watson to James 11 April 1975), Foreign and Commonwealth Office, (FCO87/480/51).
179. On the previous occasion when the UK was the object of an interstate case, brought by Greece over Cyprus, the case was treated purely as a legal matter: Simpson, supra note 1, at 933.
180. The case was discussed briefly and inconclusively at a prime-ministerial meeting in March 1973: Letter Alexander to Roberts (23 May 1973), Prime Minister’s Office, (PREM15/2141).
181. The framing of the legal process had previously been contested in official-level contacts and third-state diplomatic briefings: Letter Blatherwick to Bone (24 July 1972), Foreign and Commonwealth Office, (FCO87/140/W196); Telegram FCO to Certain Missions (6 December 1971), Foreign and Commonwealth Office, (FCO87/136/W47) arguing that ‘if the object of the whole exercise is to contribute to peace in Northern Ireland, Mr Lynch could have more usefully undertaken to do more to contain the IRA south of the border’.
thought worthwhile to approach the Irish government with a view to having the case withdrawn.\textsuperscript{183}

The terms in which this approach was framed illustrate the extent to which the UK sought to link the legal and political processes, and so to deny the autonomy of the legal field.\textsuperscript{184} It begins by reciting in broad terms the range of ongoing political initiatives, cast in terms of common duties and joint hopes, arguing that these developments are themselves dependent on ‘passive cooperation’ and the avoidance of ‘situations likely to bring [the] two governments into collision’. It thus seeks to reframe the adversarial structure of the legal process in cooperative political terms.

It goes on to make a number of arguments, some in legal or quasi-legal terms, and others which are firmly political and prudential.

Remaining within the terms of the legal discourse constituted by the proceedings, it argues that the effect of the suspension of the Northern Ireland government has been to implicitly vary the terms of the complaint, so that it is no longer directed against that government, which was its original target, but rather against the ministers of the London government, something which it suggests they ‘bitterly resent’. However, it is not on the justice or injustice of these allegations that the primary weight of the argument is based. Rather, it is in the consequential argument that ‘to pursue a policy of cooperation with HMG [Her Majesty’s Government] while simultaneously pursuing allegations of torture and discrimination against HMG seems to me contradictory: and—which is even more important—the contradiction will be seen, and used, by others’. The Strasbourg process runs in parallel with the reform program in Northern Ireland ‘and one cannot help but influence the other’. Contrasting the highly contentious allegations at Strasbourg with the need to reduce tensions in Northern Ireland, it suggests that ‘[the] incompatibility of the two processes is such that we should surely not allow this situation to develop’. The political and legal spheres cannot be divorced; and the vital importance of political developments means that the legal process must in these circumstances be compromised.

This rhetorical strategy, building on the idea of shared interests while denying the autonomy of the legal field, recurs in UK arguments in subsequent months and years. Thus, approaches in September 1973, with a view to initiating a friendly settlement, focussed on the stated Irish desire ‘to work for a peaceful and constructive solution in Northern Ireland’, and the risk of ‘acrimonious exchanges’, which could both upset the delicate state of affairs in Northern Ireland, and also make any subsequent settlement of the proceedings more difficult.\textsuperscript{185}

\textsuperscript{183} Letter Alexander to Roberts (23 May 1973), Prime Minister’s Office, (PREM15/2141).

\textsuperscript{184} Telegram FCO to Dublin (30 May 1973), Prime Minister’s Office, (PREM15/2141).

\textsuperscript{185} Telegram FCO to Dublin (27 September 1973), Prime Minister’s Office, (PREM15/2141).
UK arguments against the Irish decision in March 1976 to refer the Commission’s report to the Court reflect a similar structure. The failure of the power-sharing initiative mentioned above and the bleaker political situation which followed meant there was less scope for focussing on common interests and initiatives, but the denial of an autonomous legal field remained central. The UK government, it argued, had never accepted the view ‘that the state case could be kept separate from other aspects of Anglo/Irish relations’; the decision to refer the matter to the court would inevitably excite public and parliamentary opinion against the Dublin government and undermine Anglo-Irish cooperation, while at the same time strengthening the positions of extremists in both communities in Northern Ireland.186

The power of this argument lies in the way it de-legitimises the legal process by reference to an alternative, and implicitly superior, set of political values around cooperation, stability and development. By defining the legal process as a barrier to political progress, it allows extra-legal pressure to be brought to bear in response to the specifically legal arguments within the ECHR context. It ultimately found expression within the Court itself in Attorney General Sam Silkin’s argument opening the UK case before the Court; ‘Prolonged international litigation’, he argued, ‘even before this court, may impair rather than improve the protection of human rights, especially within a situation as complex, volatile and dangerous as that in Northern Ireland’187. The legal process is instrumental; its ultimate end is the improvement of the human condition, and where it ceases to serve that end, it is subject to challenge on the basis of that underlying objective.

This analysis of the relationship between the legal and political processes is not simply a rhetorical strategy; at least in the early stages of the case, it is reflected in internal UK memoranda questioning the tenability of the Irish approach, and the danger that it may have negative repercussions. As the case progressed, and did not seem to substantially impact either the security situation or the relationship between the governments, this judgement began to be questioned internally.188 However, it remained a powerful rhetorical device which continued to be used in challenging the Irish approach.

Thus, the UK’s rhetorical position on the links between the legal and political fields was clear: the two were intrinsically linked, and any attempt to disaggregate them should be strongly resisted. The Irish position, by contrast, reflected the tensions and contradictions inherent in the reasons for bringing the case. As noted above, the Strasbourg case was initially brought following the failure of diplomatic initiatives to adequately resolve the issues of internment.

186. Telegram FCO to Dublin (12 March 1976), Prime Minister’s Office, (PREM16/975).
188. Memorandum Donnelly to White (3 December 1973), Foreign and Commonwealth Office, (FCO87/279/568).
and mistreatment of prisoners. It represented, at least in part, a strategic shifting of these issues from the political to the legal field, in an effort to compel engagement and obtain a better overall outcome. However a rhetorical strategy of insulating the legal from the political began soon after; certainly, by the time of the Commission’s hearings on admissibility in October 1972, Irish diplomats were already expressing surprise at the overtly political way the case was being conducted by the UK, arguing that ‘the Irish saw the case as a legal process to establish points of law and had no intention to attack HMG’. There was, on this analysis, no contradiction between conflict within the legal sphere and cooperation outside it.

The idea that the legal sphere is a distinct field, and that moves within it need not correspond with the wider political context recurs frequently in Irish analyses of the case. It is evident, for example, in submissions to the Commission in 1973 on the timing of the merits hearings. Responding to a UK proposal that hearings be delayed to avoid exacerbating tensions at a particularly delicate moment in Northern Ireland, the Dublin government emphasised that ‘the objects for which its claim … has been brought could best be served by an early hearing of the case’. They were forced to weigh ‘the advantages which would accrue to the people of Northern Ireland by a postponement and the disadvantages which might result from the consequent delay’. While a large part of this Irish framing may have been addressed to domestic concerns, it also highlights the extent to which they sought to segregate the specifically legal aspects of the case, highlighting the distinct benefits which would flow from the legal process, and which could be jeopardised if it were subordinated to political considerations.

As between these contending accounts of the relationship between the legal and political fields, it was the Irish analysis which largely prevailed. While the UK continued to challenge the ‘schizophrenia’ of the Irish approach, the perceived autonomy of the legal sphere meant that they were eventually constrained to accept it.

From a relatively early stage, views were canvassed with the UK administration on potential ways of exerting political pressure on the Irish government to withdraw the case. Options considered ranged from threats to Irish interests in respect of Northern Ireland to retaliations in the wider Anglo-Irish relationship, including economic cooperation, nationality laws

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190. See e.g., Telegram Dublin to FCO (13 October 1973), Foreign and Commonwealth Office, (FCO87/276/454); Minute O’Suilleabhain to Taoiseach (5 December 1975), Office of an Taoiseach, (NA2005/151/701).
and EEC matters. By bringing pressure to bear outside the mechanisms of the ECHR, power resources could be deployed which were unavailable within the legal field. As reflected in the quote opening this Part, if the Irish framing in terms of a distinct and autonomous legal field were accepted, the UK would be placed at an immediate disadvantage. Strength in the wider political setting must be brought to bear to compensate for relative weakness within the legal context.

However, no such political retaliation was ever undertaken, reflecting the prevalence of an alternative view of how the case should be related to the wider political process. This latter view included a recognition that politicizing the Strasbourg case would make it more difficult for the British government to achieve its diplomatic and political objectives; that progress in resolving the political situation must take precedence over challenging the Strasbourg process; and that to a great extent, the legal process could achieve, and indeed had achieved, autonomy from the political one. While segregating the Strasbourg case limited the resources which the UK could bring to bear, it also limited the damage which the case could do. If the UK was prepared to invest significant political capital in stopping the case, this might be possible; but if it were not, there was little option but to concede the Irish argument that Strasbourg was quite apart from the rest of Northern Ireland’s problems, and that different rules did indeed apply.

5. From International Law to Domestic Narrative

The idea of a distinct legal field is also important in understanding the role of Irish domestic opinion in this case. Reference has already been made to the role of domestic pressure in initiating the case. Concern about the domestic audience, and about reactions among the minority community in Northern Ireland, remained a significant factor in Irish thinking at all stages. However, to explain the case on this basis simply begs the question of why these groups viewed it as important, particularly once many of the issues it raised had begun to be addressed. Part of the answer lies in the straightforward need of

197. See e.g. Letter Galsworthy to White (31 December 1973), Foreign and Commonwealth Office, (FCO87/279/593); Telegram Dublin to FCO (13 March 1976), Prime Minister’s Office, (PREM16/975); Telegram Dublin to FCO (13 March 1976), Prime Minister’s Office, (PREM16/975).
the Irish government to be seen to be doing something in respect of Northern Ireland, particularly in periods when progress appeared slow. However, the specific significance of the legal route still needs to be explained.

In this respect, the idea of the case as a legal process, and the underlying idea of an autonomous legal field, is relevant to the domestic debate. While a key purpose of the Irish government in bringing the case was to put political pressure on the UK, it came to be seen in Irish public discourse as having a non-instrumental value in ‘putting Britain on trial’. Thus, for example, when the Irish government agreed for at least partially strategic reasons to delay hearings on the merits, they were attacked for seeming to ‘sell out’ the Northern minority. In later thinking, a recurring concern was that any settlement would be seen as a betrayal of those on whose behalf the case was initially taken. As the case came to be identified with questions of justice, rather than of politics, it became more difficult to leverage for political purposes. The same process of segregation of the legal and political spheres which was being actively pursued at the international level had the effect of tying the government’s hands domestically. While internationally the Irish argued that, as a legal process, the case was divorced from politics, within Irish public opinion it was its identification with the law, and the values which the law purports to embody, which made it so politically difficult.

This point was recognised early in UK analyses, where discussions of settlement were conditioned on the need not only to convince the Irish government, but also to allow them to sell a settlement domestically. Even if it was possible to engage the Dublin government in a communicative process, that government was also embedded in a parallel domestic discourse, and any settlement must be justifiable in domestic terms.

There was less concern about British domestic opinion; the principal UK objective in this respect was to play down the case’s overall significance

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198. This point was clearly recognised in UK analysis: Telegram Dublin to FCO (12 November 1974), Foreign and Commonwealth Office, (FCO87/404/311).


200. See e.g. Letter Alexander to Armstrong (14 June 1973), Prime Minister’s Office, (PREM15/2141); Memorandum Secretary to Taoiseach (20 February 1976), Department of an Taoiseach, (NA2006/133/706).

201. Letter Bone to Blatherwick (14 April 1972), Foreign and Commonwealth Office, (FCO87/138/86); Letter Peck to Crawford (26 June 1972), Foreign and Commonwealth Office, (FCO87/139/179) (arguing that it was necessary ‘both to persuade [Lynch] that it is in the Irish interest to drop the case and to provide him with persuasive arguments to use against those who oppose him’).
and, where necessary, to ensure that the UK position was painted in the best possible light.\textsuperscript{202}

The Irish government, however, argued that the case could fulfil a valuable function in helping the British government to deal with its domestic constituents, and in particular the Unionist community in Northern Ireland. Thus, there are repeated references to the possibility that the case could allow the UK to go further on human rights reforms in Northern Ireland than might otherwise be possible.\textsuperscript{203} By co-opting the legitimacy of the Commission behind reform proposals, these could more easily be sold to the recalcitrant Unionist community. However, a combination of a reluctance to move in response to Irish pressure, and scepticism about the political advisability of being seen to do so, meant that this argument was never tested in practice.

\section*{V. Conclusion}

This paper began by sketching a model of international law as deliberative discourse, emphasising its communicative function, and the relations between legal and non-legal argument, and between the international and domestic discourses in which agents are simultaneously embedded. It then examined two historical cases at the law/politics boundary to illustrate the relevance of this framework. At various points, I noted aspects of the case studies that seemed particularly relevant to this model. I here bring these together, to consider how far the model is in fact borne out in the cases.

The aspect that is perhaps most clearly borne out is the mutual implication of legal and political argument. In neither case is law distinct from politics. Rather, it constitutes a mode of politics. In the UN case, we see this is in the invocation of legal arguments in the context of political lobbying, and in appeals to precedent to both inoculate and undermine politically difficult positions. In the ECHR case, we see argument in both legal and political modes; but we also, revealingly, see argument about the relation between these modes. The legal field is not only a locus of discourse: its existence is itself an object of discursive contestation. This reflects the second order nature of legal reasons, which may be pre-empted if the first-order reasons that support them do not in fact apply in a given case, particularly where that case can itself be constructed as exceptional. We thus see, in this contestation of the legal sphere, the extent to which international legal argument is simply a particular subset of, and constantly interacting with, international political argument; while at

\footnotesize{\textsuperscript{202} Memorandum ‘Implications of an adverse decision in the Irish State Case’ Donnelly to Harding (26 November 1974), Foreign and Commonwealth Office, (FCO87/404/321); Memorandum ‘Irish State Case’ Rees to Wilson (10 February 1976), Prime Minister’s Office, (PREM16/975).

\textsuperscript{203} Human rights reforms, including the incorporation of the ECHR in domestic law, were also an issue in the parallel constitutional reform processes in Northern Ireland. Cf. Sunningdale Communiqué 1973, Par.11.}
the same time recognising how understanding an issue in distinctively legal terms can lead political processes towards different conclusions.

The relation between international and domestic discourses is also clear. We thus find, in the UN case, states constrained in the arguments they can make internationally by the need to maintain certain domestic shibboleths. In the ECHR case the process runs in two directions: initially, Irish domestic narratives shape the ECHR case; but that case in turn comes to be incorporated into those domestic narratives, a kind of discursive blow-back. Further, the relation between domestic and international is not simply restrictive. Rather, we see in both cases states translating their domestic concerns into the shared language of international law. Law thus makes possible reasoned exchanges that could not proceed in purely political and particularistic terms.

The claim that legal argument plays a communicative role is less readily demonstrated. Certainly, we can identify behaviour on the part of states in both cases that seems motivated by the possibility of changing other states’ attitudes through arguments. Implicit in that behaviour is the assumption that communicative action through the medium of law is at least possible at the international level. Legal argument, and legal process, are used not simply as threats or bargaining chips, but also as vehicles for promoting and challenging normative frames and assumptions. Further, in the UN case we see various examples of third states reassessing their positions following argument, suggesting these states are engaging communicatively. This is less evident in the ECHR case, which may reflect the judicial structure of the ECHR’s institutions: legal argument is more clearly addressed to impartial decision-makers than political interlocutors. However, we do see very clearly in the ECHR case attempts, particularly by the UK, to engage the other government in a conversation about the ways shared goals and values might support particular actions. Further, we see on both sides a process of learning, and a reconstitution of positions, particularly in respect of the relation between the case and the political process. That relation is itself, as noted above, an object of discursive contestation, and it seems likely this plays at least some role in the two states’ evolving understandings of it. There is nothing that can be unequivocally identified as communicative action, but there is much that is at least suggestive of its possibility.

What does come out unequivocally from these cases is the inadequacy of international law frameworks, whether rationalist or constructivist, that seek to distinguish norm from agent, focussing on contestation around norms to the exclusion of contestation around agents. International political discourse, in which legal discourse is embedded, is in part an example of practical reasoning, hinging on the question of what I/you/we should do? Law, and social norms more generally, play an important role in answering that question, but they do so as part of a wider political process. In seeking the distinctive role of law, we must be careful not to lose sight of that embeddedness.
ANNEX: ARCHIVAL MATERIALS

This Annex includes a list of the archival materials reviewed in preparing this article.

Each of the archival sources cited in the article includes a document description (e.g. “Letter Smith to Jones, (1 January 1971)”) and a file reference (e.g. PREM/15/2141). File references identify the file, in either the United Kingdom National Archives, or the National Archives of Ireland, in which the relevant document appears. In some cases (predominantly files originating in the UK Foreign and Commonwealth Office), the file reference in the article uniquely identifies a single document within one of the files listed below. In others, the file reference identifies a file, which will contain a number of documents in rough chronological order. This reflects different file management and archiving practices in the various departments to which these files relate. The list below includes the full title of each of these files. In all cases, the combination of document description and file reference should suffice to uniquely identify a single source document.

I. UNITED KINGDOM NATIONAL ARCHIVES, KEW, RICHMOND, SURREY, TW9 4DU, UNITED KINGDOM

1. Records of the Prime Minister’s Office


PREM 17/975 “IRELAND. Irish State case before the European Commission of Human Rights at Strasbourg. 1974 Nov 22 - 1976 May 26”

2. Records of the Foreign and Commonwealth Office


204 The Prime Minister’s Office files in respect of the ECHR proceedings were withdrawn from the Public Record Office after this research was commenced. Therefore, one of these files (PREM16/975) has been reviewed only in part, and the last relevant file, (PREM16/1725) covering the period July 1976 – June 1978, was not reviewed.
FCO 33/775 “Northern Ireland and United Nations including human rights issue 1969 Jan 01-1969 Dec 31”

FCO 58/614 “Consideration of proposals for discussion on Northern Ireland at United Nations 1971 Jan 01-1971 Dec 31”

FCO 58/690 “United Nations consideration of proposals for discussion on Northern Ireland 1971 Jan 01-1972 Dec 31”

FCO 87/136 “European Court of Human Rights, Strasbourg, France: 1st Irish State Case 1972 Jan 01-1972 Dec 31”

FCO 87/137 “European Court of Human Rights, Strasbourg, France: 1st Irish State Case 1972 Jan 01-1972 Dec 31”

FCO 87/138 “European Court of Human Rights, Strasbourg, France: 1st Irish State Case 1972 Jan 01-1972 Dec 31”

FCO 87/139 “European Court of Human Rights, Strasbourg, France: 1st Irish State Case 1972 Jan 01-1972 Dec 31”

FCO 87/140 “European Court of Human Rights, Strasbourg, France: 1st Irish State Case 1972 Jan 01-1972 Dec 31”

FCO 87/141 “European Court of Human Rights, Strasbourg, France: 1st Irish State Case 1972 Jan 01-1972 Dec 31”

FCO 87/142 “European Court of Human Rights, Strasbourg, France: 1st Irish State Case 1972 Jan 01-1972 Dec 31”

FCO 87/143 “European Court of Human Rights, Strasbourg, France: 1st Irish State Case 1972 Jan 01-1972 Dec 31”

FCO 87/144 “European Court of Human Rights, Strasbourg, France: 1st Irish State Case 1972 Jan 01-1972 Dec 31”

FCO 87/145 “European Court of Human Rights, Strasbourg, France: 1st Irish State Case 1972 Jan 01-1972 Dec 31”

FCO 87/146 “European Court of Human Rights, Strasbourg, France: 1st Irish State Case 1972 Jan 01-1972 Dec 31”


FCO87/399 “Council of Europe: European Commission on Human Rights, Strasbourg; First Irish State Case 1974 Jan 01 - 1974 Dec 31”

FCO87/400 “Council of Europe: European Commission on Human Rights, Strasbourg; First Irish State Case 1974 Jan 01 - 1974 Dec 31”

FCO87/401 “Council of Europe: European Commission on Human Rights, Strasbourg; First Irish State Case 1974 Jan 01 - 1974 Dec 31”

FCO87/402 “Council of Europe: European Commission on Human Rights, Strasbourg; First Irish State Case 1974 Jan 01 - 1974 Dec 31”

FCO87/403 “Council of Europe: European Commission on Human Rights, Strasbourg; First Irish State Case 1974 Jan 01 - 1974 Dec 31”
FCO87/404 “Council of Europe: European Commission on Human Rights, Strasbourg; First Irish State Case 1974 Jan 01 - 1974 Dec 31”

FCO87/405 “Council of Europe: European Commission on Human Rights, Strasbourg; First Irish State Case 1974 Jan 01 - 1974 Dec 31”

FCO87/406 “Council of Europe: European Commission on Human Rights, Strasbourg; First Irish State Case 1974 Jan 01 - 1974 Dec 31”

FCO87/477 “Council of Europe: European Commission on Human Rights, Strasbourg; Irish State Case 1975 Jan 01 - 1975 Dec 31”

FCO87/478 “Council of Europe: European Commission on Human Rights, Strasbourg; Irish State Case 1975 Jan 01 - 1975 Dec 31”

[FCO87/479 “Council of Europe: European Commission on Human Rights, Strasbourg; Irish State Case 1975 Jan 01 - 1975 Dec 31” – *** File not released to archive – not reviewed]

FCO87/480 “Council of Europe: European Commission on Human Rights, Strasbourg; Irish State Case 1975 Jan 01 - 1975 Dec 31”

FCO87/481 “Council of Europe: European Commission on Human Rights, Strasbourg; Irish State Case 1975 Jan 01 - 1975 Dec 31”

FCO87/482 “Council of Europe: European Commission on Human Rights, Strasbourg; Irish State Case 1975 Jan 01 - 1975 Dec 31”

FCO87/483 “Council of Europe: European Commission on Human Rights, Strasbourg; Irish State Case 1975 Jan 01 - 1975 Dec 31”

[*** Relevant FCO files for 1976 not included in archive – not reviewed]

FCO87/635 “Irish State Case 1977 Jan 01 – 1977 Dec 31”

FCO87/636 “Irish State Case 1977 Jan 01 – 1977 Dec 31”

FCO87/637 “Irish State Case 1977 Jan 01 – 1977 Dec 31”

FCO87/638 “Irish State Case 1977 Jan 01 – 1977 Dec 31”

FCO87/639 “Irish State Case 1977 Jan 01 – 1977 Dec 31”

FCO87/640 “Irish State Case 1977 Jan 01 – 1977 Dec 31”

FCO87/641 “Irish State Case 1977 Jan 01 – 1977 Dec 31”

FCO87/642 “Irish State Case 1977 Jan 01 – 1977 Dec 31”

II. NATIONAL ARCHIVES OF IRELAND, BISHOP STREET, DUBLIN 8, IRELAND

1. Records of the Department of An Taoiseach


NA2002/8/495 “Ill-treatment of Northern Ireland internees, etc. 1971: proposal to refer cases to Commission of Human Rights Nov-Dec 1971

NA2003/16/475 “Ill-treatment of Northern Ireland internees, etc. 1971: proposal to refer cases to Commission of Human Rights Jan-Feb 1972; Sept 1978

NA2003/16/476 “Ill-treatment of Northern Ireland internees, etc. 1971: proposal to refer cases to Commission of Human Rights March-June 1972

[NA2003/16/477 “Ill-treatment of Northern Ireland internees, etc. 1971: proposal to refer cases to Commission of Human Rights July-September 1972][ File not available in archive – not reviewed]

NA2003/16/478 “Ill-treatment of Northern Ireland internees, etc. 1971: proposal to refer cases to Commission of Human Rights Oct-Dec 1972


NA2004/21/472 “Ill-treatment of Northern Ireland internees, etc. 1971: proposal to refer cases to Commission of Human Rights Nov-Dec 1973

NA2005/7/608 “Ill-treatment of Northern Ireland internees, etc. 1971: proposal to refer cases to Commission of Human Rights Jan-Dec 1974
NA2005/151/701 “Ill-treatment of Northern Ireland internees, etc. 1971: proposal to refer cases to Commission of Human Rights Jan-Dec 1975


2. Records of the Department of External Affairs / Department of Foreign Affairs

NA2001/42/2 “Council of Europe – Derogation from Human Rights Convention”


NA2002/19/427 “Raising of Northern Ireland Question at the Council of Europe and at the UN Commission of Human Rights Aug 1969; Jun-Dec 1971”


NA2002/19/536 “Diplomatic Initiatives in connection with the raising of the Question of the North of Ireland in the U.N. Aug 1969 – May 1970”

NA2003/17/299 “Approaches to Foreign Governments regarding the situation in Northern Ireland Feb 1972 – Oct 1972”


NA2003/17/361 “Raising of Northern Ireland at the Council of Europe and at the UN Commission for Human Rights Jan 1972 – August 1972”

205. The name of the department was changed in 1971, during the period examined.

NA2005/145/2551 “Raising of Northern Ireland at the Council of Europe and the UN Commission on Human Rights”


NA2008/79/3074 “Strasbourg Hearings – Comments from East European Countries”

Electoral Observer Missions and Foreign Interference in Haiti

Mark Phillips*


The core of this newly translated book is a personal narrative of Ricardo Seitenfus’s tenure as Organization of American States (OAS) Special Representative to Haiti during the country’s 2010 triple catastrophe: the infamous earthquake, the introduction of cholera by the UN Stabilization Mission in Haiti (MINUSTAH), and a stolen presidential election. Seitenfus exhibits a sense of powerlessness to prevent election results from being manipulated by a trio of election aid benefactors, namely Canada, France, and the United States. His personal narrative is framed by his broader historical analysis of international aid as a tool of control and exploitation in Haiti.

Seitenfus provides an insider’s view into how MINUSTAH and the OAS observer apparatus themselves were leveraged to alter the vote count of Haiti’s Provisional Electoral Council (CEP). His cavalier writing style might undermine his credibility, if his tale was not so convincingly corroborated by others. United States (US) embassy cables, for example, mirror Seitenfus’s reports of the animus that donor representatives expressed in private toward presidential candidate Jude Célestin (who was ultimately excluded) and then-President René Préval.1

Seitenfus tells of how then-MINUSTAH-head, Edmond Mulet, even sought to put Préval on a plane out of the country, cutting short his presidential mandate. The OAS mission head and President Préval himself have both

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1 See e.g. US Embassy, Port-au-Prince, “Préval Consolidating Power” (26 October 2009); “Lespwa Stalls Political Parties Law” (23 October 2009); “Donor Ambassadors Initiate Dialogue on Election Report” (12 December 2009).

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confirmed the incident. The tactic is also not unprecedented in Haiti—the United States previously ended two Haitian presidencies in this manner.

Seitenfus then describes how the OAS observers abruptly reconstituted themselves as a mission to review the CEP’s results. This re-evaluation team was controlled by Canadian, French, and United States representatives. Haiti’s constitutionally mandated CEP had determined that Célestin won second place during the first round and, as such, should participate in a run-off vote against the first-place winner, Mirlande Manigat. Seitenfus explains that, without performing a recount, the OAS mission excluded ballot boxes from its statistical analysis at a rate deliberately calculated to eliminate Célestin, reversing the CEP decision. The Center for Economic and Policy Research would find that under any plausible set of assumptions “there is no statistical basis for … the OAS … decision to reverse the results of the first round of the elections.” The donor countries finally defeated resistance they met from the CEP and the Haitian government using threats, including the cancellation of CEP members’ US travel visas.

Haitian voters’ disillusionment with what had become an OAS-dominated process was manifest—the second-round vote saw the lowest turnout for any presidential election in the western hemisphere since the Second World War. The head of the 2015 CEP has recently suggested what Haitians seemed to know all along: that Michel Martelly should not have been Haiti’s then-President, because he lost in the first round in 2010.

Seitenfus’s book offers a convenient point of departure to discuss external electoral interference in Haiti more generally, though it ultimately understates the broader pattern throughout the new millennium. His cursory treatment of Haiti’s 2006 presidential and legislative election, for example, largely fails to put them in the context of the two preceding years of political repression that were calculated to crush the Haitian poor majority’s Fanmi Lavalas (FL) movement. As the ballots were being cast, Haiti’s jails were filled with top FL members. The rate of political imprisonment exploded exactly as Canadian aid began to invest in Haitian prison expansion. MINUSTAH engaged in

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3 Daniel Fignolé in 1957 and Jean-Bertrand Aristide in 2004.


brutal repression in poor neighbourhoods that supported FL. The capital alone saw 8,000 murders and 35,000 sexual assaults, mostly at the hands of government forces.

Setting aside this context in its report, the Canadian Mission for Accompanying Haitian Elections, headed by Canada’s Chief Electoral Officer Jean-Pierre Kingsley, simply gave the 2006 election a “positive assessment”, noting a few weaknesses in passing, such as “an absence of helpful signage at polling centres.” In contrast, the legislative and presidential elections in 2000, overwhelmingly won by FL, were met with an international embargo. Seitenfus largely adopts OAS criticism of the legislative elections as his own, stating that they “excluded nearly 1.2 million voters” because eight Senate seats were awarded without holding a run-off vote. Although this criticism became pivotal in the years of crisis to follow, it is fundamentally misleading. Since voters could choose either one or several senators in their district, there was no mathematically perfect formula to calculate absolute majorities, which make run-offs unnecessary. Although the OAS had been aware the method was to be used, as it had been in the previous two Haitian elections, they made no complaint until after the return of the results.

The initial OAS report described the elections as “a great success for the Haitian population, which turned out in large and orderly numbers to choose both their local and national governments.” After learning of the FL victory, an abrupt about-face saw the OAS boycott that year’s subsequent election of Jean-Bertrand Aristide as President: it refused to send an observer mission. The opposition that then rallied around these criticisms would culminate in Aristide’s ouster in 2004 by Canada, France, and the United States. It would be a great feat, as Seitenfus observes, to reconcile such electoral interventions with the principle of non-interference guaranteed by the Inter-American Democratic Charter.

8 MINUSTAH expended over 22,000 rounds of ammunition in one attack on 6 July 2005 alone on Cité Soleil, Port-au-Prince’s poorest district. See US Embassy, Port-au-Prince, “Human Rights Groups Dispute Civilian Casualty Numbers from July 6 MINUSTAH Raid” (19 July 2005).


11 See generally Peter Hallward, Damming the Flood (London: Verso, 2007) at 76–81.


But when the vulnerable invoke them against the powerful, such international norms lose their effect, with Haiti serving as the paradigmatic example. This unwritten principle of international law is illustrated by the first ever Inter-American Court of Human Rights (IACHR) case to involve Haiti, in 2008. The case challenged the surge in political imprisonment that followed the 2004 coup. The named plaintiff, former FL Prime Minister Neptune, had been jailed without charge following calls for his arrest by a discredited, Canadian-funded NGO. The IACHR would find that Neptune had been “detained unlawfully and arbitrarily”, and order systemic remedies targeting Haiti’s prison system as a whole. The judgment was simply ignored by the Haitian government of the day, and by Canada’s foreign policy scholars and popular press, despite that Canadian aid had helped to manufacture the problem.

The goal of Haiti’s international benefactors has remained to discredit and undermine Haitian popular movements unwilling to adapt the country to the donors’ strategic and business needs, while maintaining a bare pretense of democracy. Liberal international legal scholars are right, I believe, to suggest that “a state’s behaviour in the international sphere is significantly influenced by the type of political regime that prevails within it.” For those who are interested in a just world for Haitians, Seitenfus’s book underscores the need for an honest study into the mechanisms within the donor countries’ political and legal cultures that permit such unlawful and unjust interference to persist.

15. Neptune v Haiti, Inter-Am Ct HR (Ser C) No 180 [Neptune].
THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY
HILMI M. ZAWATI*


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I. INTRODUCTION

Pursuant to Article 17 of the Rome Statute of the International Criminal Court (ICC), where the provisions of the complementarity regime have been enshrined, the Pre-Trial Chamber I (PTCI) and the Appeals Chamber (AC) of the ICC have respectively declared the case against Abdullah al-Senussi, the former chief of Libyan intelligence, inadmissible and thus subject to domestic proceedings conducted by the competent Libyan authorities. The PTCI judges added that Libya is willing and able genuinely to prosecute and investigate this case. They asserted that their decision had been taken in accordance with the principle of complementarity, incorporated in the Rome Statute of the ICC.

On 28 July 2015, the Appeals Court of Tripoli handed down its judgement in case no. 630/2012, sentencing Abdullah al-Senussi, Saif al-Islam Gaddafi, and seven other former regime high-ranking officials to death by firing squad.

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2 Prosecutor v Saif Al-Islam Gaddafi & Abdullah Al-Senussi, Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, Case No. ICC-01/11-01/11 (11 October 2013) [PTCI’s Inadmissibility Decision of the Case against Al-Senussi] at para 311.
4 PTCI’s Inadmissibility Decision of the Case against Al-Senussi, supra note 2.
5 Rome Statute of the ICC, supra note 1.
The trial, which was critically undermined by serious due process violations, has underlined the failure of the Libyan transitional justice system to offer fair trials to defendants, and to deliver justice in post-Gaddafi-era. This perversion of justice has infringed the principles of fundamental justice—which imply insuring the defendant’s right to fair trial and sentence—and put the ICC’s complementarity regime on the horns of a dilemma.

Despite being a fundamental principle open to interpretation, complementarity served as a keyword in the establishment of the ICC. While ensuring States Parties’ sovereignty, complementarity constitutes a substantial element in determining the relationship between the ICC, as a court of last resort, and national criminal accountability mechanisms. This simply means that only perpetrators of serious international crimes would be prosecuted at the Court. This is compatible with the provisions of the Rome Statute, which provide that States should take measures at the national level to ensure the online: <http://www.npwj.org/ICC/Libya%E2%80%99s-missed-opportunity-flawed-penalties-follow-flawed-trials.html?utm_source=CICC+Newsletters&utm_/campaign=eea8b9ee067_31_15_GlobalJustice_Weekly&utm_medium=email&utm_term=0_68df9c5182-eea8b9ee06408795633&ct=t(7_31_15_GlobalJustice_Weekly)>; Yvonne McDermott, “How Libya Became the International Criminal Court’s Latest Failure,” The Conversation (6 August 2015), online: <http://theconversation.com/how-libya-became-the-international-criminal-courts-latest-failure-45389>.


8 Hilmi M Zawati, Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals (New York: Oxford University Press, 2014) 19 [Zawati].

9 Abdullah al-Senussi and Saif al-Islam Gaddafi have simultaneously received the same sentence, by the same Libyan court, at the same aggravated atmosphere. However, the prosecutor of the ICC has ignored calls from legal scholars, international lawyers, and human rights groups to request the Court to review the inadmissibility decision of the case against al-Senussi under Article 19(10) of the Rome Statute and to refer Libya to the UN Security Council under Article 87—which permits the Court to issue a finding of non-compliance—to oblige the Libyan Government to surrender him together with Saif al-Islam to the ICC. Instead, she submitted a request to the PTCI of the ICC on 30 July 2015 to order Libya to: (a) Refrain from carrying out the death sentence handed down to Mr. Gaddafi; (b) Surrender Mr. Gaddafi forthwith to the Court; and (c) Inform the United Nations Security Council of the death sentence handed down to Mr. Gaddafi by the Tripoli Court of Appeal. See Prosecutor v Saif Al-Islam Gaddafi, Prosecution Request for an Order to Libya to Refrain from Executing Saif Al-Islam Gaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council, Pre-Trial Chamber I, Case No. ICC-01/11-01/11 (30 July 2015) at para 7.

10 In this respect, William A Schabas argues that complementarity is the cornerstone of the ICC regime, and without it the Rome Statute could not have been adopted, see William A Schabas, The International Criminal Court: A Commentary on the Rome Statute (Oxford: Oxford University Press, 2010) 506 [Schabas].

investigation, prosecution, and punishment of such crimes. In other words, the international community counts on national criminal systems to bring perpetrators to justice and to combat the culture of impunity.

It is worth noting that the Rome Statute—unlike statutes of the Ad Hoc international criminal tribunals for the former Yugoslavia and Rwanda, which include the principle of the superiority of international jurisprudence, so they could exercise their jurisdiction to prosecute suspected crimes—has recognized national proceedings as a barrier to the admissibility of a case before the ICC, leaving the latter to decide on the genuineness of such proceedings. Nonetheless, the failure of the complementarity regime to recognize the primacy of international jurisdiction leads to concession to national sovereignty, which, no doubt, has weakened the performance of the Court.

However, this arguable principle is the central objective of The International Criminal Court and Complementarity: From Theory to Practice, a critical and timely work, edited by Carsten Stahn, professor of international criminal law and global justice at Leiden University, and Mohamed M. El Zeidy, legal officer at the Pre-Trial Chamber II of the ICC. This multidisciplinary work is grounded on theoretical inquiries and practical experiences, written by prominent legal scholars and senior actors in the international criminal judicial system. It consists mostly of scholarly contributions initially presented and discussed at the International Conference on the ICC and Complementarity, held at the Peace Palace and The Hague Campus of Leiden University between 15–16 September 2009.

The reviewed work examines the conceptual foundations and practical applications of the principle of complementarity in judicial contexts, whether in international judicial bodies or in national courts exercising universal jurisdiction. Moreover, this collective work underlines the historical understanding of complementarity in connection with its contemporary applications. It also explores the main aspects of interpreting complementarity and its implications. In addressing the above objectives, the editors arranged the contributed chapters under six central themes, including: reflections from inside the Court; the chronicle development of the principle

12 Rome Statute of the ICC, supra note 1, “Preamble.”
14 Rome Statute of the ICC, supra note 1 at art 17.
of complementarity; analytical dimensions of complementarity; statutory interpretation and application of complementarity; complementarity in perspective; and the application of the principle of complementarity in certain situations before the Court, to which we now turn.

To introduce this voluminous work, Stahn eloquently recalls the title of a famous American lyrical poem by Paul Simon, *Bridge over Troubled Water*, indicating that the conversations and debates will cover the broad implications of the arguable principle of complementarity. Before reflecting on the contributions, he points to the prominent role played by the principle of complementarity in creating a convergence between two traditionally discordant systems of justice—the international and the domestic, which are distinct but increasingly interdependent, like ‘yin and yang.’

The complementarity regime functions beyond its formal role in organizing the regulation of the Court’s jurisdiction under the Rome Statute. It determines various relations between the ICC and national courts, and between the *Ad Hoc* tribunals, including the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL), and domestic jurisdiction. Notwithstanding this fundamental function inside and outside the Court, as one of the key instruments to further a new system of justice, complementarity implementation encounters several challenges on statutory and practical levels. The concept enshrined in the provisions of Article 17 of the Rome Statute endures a considerable degree of ambiguity, thereby leaving a sweeping space for interpretation. On the other hand, Stahn reveals that existing practice at the Court shows inconsistency between intent and results. For example, he adds, it is impracticable and unreasonable to postulate that the ICC will perpetually be able and willing to investigate and prosecute all crimes falling under its jurisdiction.

However, despite the bleak picture that has been painted for the Court and for the future of the international criminal justice by some legal scholars, Stahn argues that the international criminal system is in a stage of transition, with the principle of complementarity is a catalyst of this transmutation. Moreover, the early practice of the Court, with self-referral from different countries, shows interaction between domestic and international justice.

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is counted on to change the current orientation of the international criminal justice approach from a top-down to bottom-up perspective, by providing the means to reconsider international settings and facilitate decentralization of justice mechanisms through encouraging the development of regional courts, and bridging the gaps between the eagerness to see justice being done and the cognizance that justice is seen and felt to be done.\textsuperscript{22} As has already been pointed out, this voluminous work highlights six overarching core themes, which emerge across the following chapters.

\section*{II. GENERAL REFLECTIONS}

This introductory section comprises three contributions submitted by actors in the international criminal justice system, namely the Office of the Prosecutor (OTP) and the Registrar’s Office of the ICC. As Stahn provides, the chapters present an ‘insider’s perspective’ on the complementarity regime, exploring how it goes beyond a multi-jurisdictional concept, to a system that affects all aspects of the jurisprudential process of the Court.\textsuperscript{23}

The opening chapter by Luis Moreno-Ocampo, the former Prosecutor of the ICC, outlines complementarity dimensions and discusses the policies and practice of the OTP on the complementarity regime under the Rome Statute.\textsuperscript{24} It also emphasizes that the main goal of the ICC is to establish a global criminal justice system, to end the culture of impunity for the most serious crimes and contribute to their prevention. In this chapter, Ocampo specifies two dimensions of the concept of complementarity found in the Rome Statute: the admissibility test, which is enshrined in the provisions of Article 17(1)(a)(b) and (c),\textsuperscript{25} and ‘positive complementarity,’ instituted in Article 93(10). The admissibility test determines whether a state is willing and able to genuinely investigate and prosecute cases selected or considered for selection by the OTP, while ‘positive complementarity’ provides that the ICC may, upon their request, provide the state with assistance.\textsuperscript{26}

Moreover, Ocampo outlines the OTP policy and practices on complementarity, listed in the OTP’s September 2003 policy paper.\textsuperscript{27} Accordingly, over the past decade or so, under Article 93(10) of the Rome Statute, the OTP provided

\begin{thebibliography}{9}
\bibitem{22}
Ibid. at 17.

\bibitem{23}
Ibid. at 4.

\bibitem{24}

\bibitem{25}
\textit{Rome Statute of the ICC, supra} note 1 at art 17(1)(a)(b) and (c).

\bibitem{26}
Ibid. at art 93(10).

\bibitem{27}
\end{thebibliography}
information to national judicial bodies upon their request; developed a network of law enforcement agencies; contributed to national efforts to build expertise and capacities; and provided information to those involved in mediation and accountability efforts.

Finally, Ocampo concludes by emphasizing that what he has claimed at the outset of the chapter is that the complementarity regime incorporated in the provisions of the Rome Statute has established a global system to curb most serious international crimes. Under the complementarity regime, the OTP provided substantial judicial assistance to states upon their request and served “as a central hub within a global criminal justice system.”

On the other hand, Juan E. Méndez, special advisor to the Prosecutor of the ICC, explores the impact of the international criminal justice mechanisms, particularly the ICC, on the prevention of the commission of international core crimes. He argues that the prospect and certainty of punishment through law have had a considerable effect on the prevention of such crimes rather than the punishment itself. Focusing on the tool of complementarity, Méndez highlights preventive effects made by various international criminal mechanisms, including the ICC. He concludes by confirming that the Rome Statute has provided the basis for action to bring perpetrators of mass atrocity to justice, which will hinder the occurrence of similar crimes in the future. Moreover, he asserts that understanding the relationship between justice and criminal behaviour would improve the ability and increase effectiveness of preventing crimes of mass atrocity.

Finally, in this section, Silvana Arbia and Giovanni Bassy underline the significance of proactive ‘positive’ complementarity, manifested in the Court’s enhancement of the capacity of national judicial bodies to prosecute the international criminal core crimes incorporated in the norms of the Rome Statute of the ICC. Emphasizing the capability of each organ of the Court to play a certain role in this task, the authors consider a number of seminal approaches that the Registry of the ICC can undertake to further national

29. Ibid. at 27.
30. Ibid.
31. Ibid. at 28.
32. Ibid. at 32.
34. Ibid. at 38.
35. Ibid. at 51.
capacity to deliver fair trials. Furthermore, they assert in their conclusion that the effective reality of the Rome Statute depends on developing a strategy to empower the national capacity to prosecute and punish serious atrocities at national judicial bodies.

III. ORIGIN AND GENESIS OF COMPLEMENTARITY

This section considers the historical development of the principle of complementarity in the norms of international criminal law, and tries to determine whether complementarity is a deeply-rooted legal principle or a statutory innovation that emerged during the early and subsequent drafts of the Rome Statute of the ICC. Mohamed M. El Zeidy cuts the Gordian knot! Unlike many other legal scholars, who believe that complementarity is a novel concept egressed with the early drafts of the Rome Statute of the ICC, he argues that this concept had existed, in the modern sense of the term, in 1919, some seventy-nine years before the adoption of the Rome Statute. In constructing his argument, El Zeidy identifies four models of complementarity. The first model emerged from the 1937 League of Nations Convention, the 1941 London International Assembly, the 1943 UN War Crimes Commission, the 1951 and 1953 Committees on International Criminal Jurisdiction, and the 1990, 1992, and 1993 International Law Commission (ILC) Working Groups. This optional complementarity model is based on state consent to relinquish its jurisdiction voluntary. The second complementarity model is presented in the charters of the Nuremberg International Military Tribunal (IMT) and the Tokyo International Military Tribunal for the Far East (IMTFE). This is an amicable model, which concentrates on the division of responsibilities between domestic and international jurisdictions. The third model is based on both ILC Working Group’s Report and the 1994 ILC Draft Statute of the International Criminal Court. This model combines the first and the second models. The fourth complementarity model is represented in the 1998 Rome Statute.

37. Ibid. at 57.
38. Ibid. at 66.
40. Ibid. at 91.
41. Ibid. at 100.
42. Ibid. at 104.
43. Ibid. at 107.
44. Ibid. at 114.
45. Ibid. at 122.
46. Ibid. at 124.
47. Ibid. at 126
48. Ibid. at 128.
Statute of the ICC.\textsuperscript{49} This model is generally based on theories featuring the first and third complementarity models.

On the other hand, Mauro Politi looks into the complementarity regime in the provisions of the Rome Statute from a drafter’s standpoint.\textsuperscript{50} He observes three substantive ideas governing the complementarity regime during the Rome Conference negotiations, and addresses the participating states’ concerns: (1) the interdependent relations between the Court and the national jurisdictions; (2) the states’ understanding of their duties to investigate, and prosecute serious crimes incorporated in the Rome Statute; and (3) empowerment of the ICC to assess the requirements under the Rome Statute (although some elements were intentionally left to the ICC judges’ discretion).\textsuperscript{51} However, the Court declaring a case inadmissible should not lead to impunity on the State’s part. Finally, in this section, William A. Schabas examines the concept of complementarity in theory and practice.\textsuperscript{52} He observes a variance between the theoretical concept of complementarity in the Rome Statute and its practical application in the Court. Schabas argues that as far as ‘self-referral’ and ‘inactivity’ dominate the agenda of the Court, the latter will continue delivering inconsistent messages.\textsuperscript{53} This might be a short-term strategy to combat the culture of impunity, and to emphasize that the Court should concentrate its work in difficult situations, particularly where states are reluctant to conduct investigations or do not welcome the Court’s intervention.\textsuperscript{54}

\section*{IV. ANALYTICAL DIMENSIONS OF COMPLEMENTARITY}

This section underlines a number of contradictory interpretations of complementarity, introduced as a direct result of the Court’s socio-political integration and involvement in national jurisdictions. The following chapters examine the opposing theoretical and practical applications of complementarity, both locally and in supranational relations.\textsuperscript{55} Christoph Burchard argues that the traditional understanding of the complementarity regime of the ICC lacks significant theoretical and practical

\textsuperscript{49} Ibid. at 129.
\textsuperscript{51} Ibid. at 147.
\textsuperscript{53} Ibid. at 164.
\textsuperscript{54} Ibid.
\textsuperscript{55} Stahn, supra note 17 at 7.
aspects.\textsuperscript{56} He reveals that the ICC, unlike any ordinary criminal court, is not only a mechanism to prosecute international crimes, but also in general and with complementarity in particular “part of a more comprehensive, multileveled, polycentric, and actor-open enforcement regime of international criminal law.”\textsuperscript{57} Accordingly, he believes that complementarity should be understood within the framework of global governance theory.\textsuperscript{58}

On the other hand, Mark Drumbl notes that much of scholarly work on complementarity focuses on micro issues by examining its implications in individual cases.\textsuperscript{59} He argues that despite the importance of such studies, it diverts attention from considering the macro-level effects of complementarity.\textsuperscript{60} In undertaking this notion, Drumbl examines the macro conceptual structure of the effects of complementarity on the meaning of post-conflict justice, and concludes that a more flexible approach to complementarity would enable the Court to recognize diverse methods of dispute resolution.\textsuperscript{61}

The Rome Statute’s traditionally classified complementarity models—classical and positive—are the subject of an analysis by Carsten Stahn.\textsuperscript{62} Notwithstanding the fact that these models constitute an integral part of the Rome Statute, they lack development in their content. Moreover, they are often misunderstood or used to justify certain policy agendas.\textsuperscript{63} Despite the fact that the complementarity regime is the cornerstone of the ICC, Stahn argues that problem-solving based on understandings of complementarity requires greater attention to the substantial objectives of the ICC, namely: judicial independence,\textsuperscript{64} effective justice,\textsuperscript{65} fairness,\textsuperscript{66} and sustainability.\textsuperscript{67}

Examining debates over the legality of self-referrals from a contextual viewpoint, Payam Akhavan finds righteousness in the fragile State’s


\textsuperscript{57} Ibid.

\textsuperscript{58} Ibid. at 169.


\textsuperscript{60} Ibid. at 198.

\textsuperscript{61} Ibid. at 232.


\textsuperscript{63} Ibid.

\textsuperscript{64} Ibid. at 274.

\textsuperscript{65} Ibid. at 276.

\textsuperscript{66} Ibid. at 278

\textsuperscript{67} Ibid. at 280.
relinquishment of jurisdiction to the Court,\textsuperscript{68} considering the increase of violence by non-State actors’ and the failure of national and regional judicial bodies to prosecute and punish human rights violations.\textsuperscript{69} He adds that self-referrals under Article 14 of the Rome Statute are imperative in the following situations: (a) a divided nation in need of impartial judicial intervention;\textsuperscript{70} (b) where ongoing or imminent violence prevents a secure trial;\textsuperscript{71} and (c) a state unable to afford a costly and complex trial.\textsuperscript{72}

Michael A. Newton critically underlines the ‘competitive vs. cooperative’ relationship between the ICC and State Parties.\textsuperscript{73} This relationship may jeopardize the entire judicial process. For example, the Rome Statue compels state parties to cooperate fully with the Court in terms of investigating and prosecuting core crimes—but it does not—on reciprocal bases, and obliges the Court’s Prosecution Office or the Registry to consult with those states.\textsuperscript{74} He adds that partnership based on mutual respect between the Court and domestic judicial mechanisms would effectively combat the culture of impunity, the principal objective of the Court.\textsuperscript{75}

William W. Burke-White highlights the importance of complementarity as a means to preserve the sovereignty of state parties.\textsuperscript{76} In his contribution, he suggests ways in which complementarity can help the Court to select cases and cooperate with domestic jurisdictions.\textsuperscript{77} Taking the United States (US) federal criminal justice system as a reasonable model, Burke-White emphasizes the necessity of reframing positive complementarity to rationalize the ICC’s prosecution policies.\textsuperscript{78}

Finally, Frédéric Mégret looks into the domestic implementation of the ICC’s complementarity regime.\textsuperscript{79} He explores several ways wherein domestic

\textsuperscript{69} Ibid. at 284.
\textsuperscript{70} Ibid. at 299.
\textsuperscript{71} Ibid.
\textsuperscript{72} Ibid. at 300.
\textsuperscript{74} Ibid.
\textsuperscript{75} Ibid.
\textsuperscript{77} Ibid.
\textsuperscript{78} Ibid. at 353.
\textsuperscript{79} Frédéric Mégret, “Too Much of a Good Thing? Implementation and the Uses of Complementarity,” in Carsten Stahn & Mohamed M El Zeidy, eds., The International Criminal
implementation of complementarity is being used to complement national laws with the norms of the Rome Statute.\textsuperscript{80} He stresses that complementarity should be understood in the context of a broad variety of approaches to the domestic implementation of the Rome Statute.\textsuperscript{81}

V. INTERPRETATION AND APPLICATION

While the previous section of this work concentrates on complementarity as a legal theory, elucidating its concepts and models, this section considers the interpretation and application of the norms of the Rome Statute on complementarity, particularly Article 17 and other relevant articles.\textsuperscript{82} The following contributions bring to light the dilemma of abstractness and lack of a precise definition of certain notions in the provisions of the Rome Statute, for instance, the silence of the latter on providing a clear definition of the relationship between admissibility and the notions of “situation” and “case.”\textsuperscript{83} This dilemma has already been raised by the reviewer in an earlier work, providing that the Rome Conference, which was convened in strained circumstances, had failed to answer several substantial issues debated in the ‘PrepCom’ meetings during the two years preceding the Conference, including a sophisticated text of the proposed statute containing 116 articles with approximately 1,400 words in brackets.\textsuperscript{84}

However, the first chapter in this section by Héctor Olásolo and Enrique Carnero Rojo highlights how the ICC’s different Chambers have interpreted the distinction between the notions of ‘situation’ and ‘case’ embedded in the provisions of the Rome Statute.\textsuperscript{85} Moreover, it looks into the notion of ‘admissibility of situation’ vs. ‘admissibility of cases’ as interpreted in the case law of the Court.\textsuperscript{86}


\textsuperscript{80} Ibid.

\textsuperscript{81} Ibid. at 364

\textsuperscript{82} \textit{Rome Statute of the ICC}, supra note 1 at art 17.

\textsuperscript{83} Stahn, supra note 17 at 9.


\textsuperscript{86} Ibid. at 402.
Rod Rastan underscores the parameters of a number of terms relevant to the operation of the Court’s complementarity regime. This includes the notions of ‘situation,’ ‘case,’ ‘investigate,’ and ‘prosecution.’ He also examines their procedural application under Articles 17–19 of the Rome Statute.

Darryl Robinson, who served as a midwife in the birth of Article 17 of the Rome Statute as its drafter and coordinator of the experts group on “complementarity in practice,” examines the provisions of this article and its implications. Unlike other commentators, he argues that Article 17 explicitly provides a two-step test, not a one-step test—one is based on the famous “unwilling or unable” criteria, and another on the question whether a state is investigating or prosecuting the same case as the one before the ICC.

The ICC’s admissibility procedures were the subject of a contribution by Jo Stigen. He argues that the complementarity procedures strike a balance between the ICC’s need to confirm its effectiveness and the necessity to ensuring a state’s sovereignty. Furthermore, he observes that despite the complexity of the ICC’s procedure, it is regulated when it comes to complementarity.

Similarly, Ben Batros underlines the jurisprudential procedure of complementarity. In undertaking this issue, he examines three appeal judgements on admissibility that were delivered or became open to public between September 2008 and September 2009. Batros concludes that not all of the substantive issues were resolved by the jurisprudence on complementarity. This includes the interpretation and application of “unwillingness” and “inability.”

Ignaz Stegmiller for his part discusses the notion of ‘gravity,’ which is embedded in Article 17 of the Rome Statute, and never officially considered a component of the complementarity regime. He argues that despite the fact that gravity is essential for the prosecutor to select situations or cases, the

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88. Ibid.
90. Ibid. at 502.
92. Ibid. at 539.
93. Ibid. at 511.
95. Ibid. at 596.
Prosecution Office and Chambers have failed to arrive at a comprehensive interpretative approach for this criteria.97

The abstractness and ambiguity of different norms and concepts enshrined in the provisions of the Rome Statute constitute a challenge to the whole legal process and lead to inconsistent decisions. Megan Fairlie and Joseph Powderly survey the current jurisprudence of the Court on burden of proof.98 They argue that Article 17 of the Rome Statute, which presents the principle of complementarity, has not adequately addressed, inter alia, the standard of proof, a key issue for the Court to determine whether a state is “unwilling” or “unable” to carry out an investigation or prosecution.99

The following contributions in this section, including a chapter by Harmen van der Wilt, look into complementarity from different perspectives which have not yet been adequately evaluated and debated academically.100 Wilt brings to light how the standards of the European Court of Human Rights (ECHR) to declare member states as ‘underachievers’ could be useful to the ICC in its assessment of states’ “unwillingness” and “inability.” He concludes that the standards of the ECHR on procedural obligations could present the ICC with a highly useful frame of reference for the assessment of the admissibility of a case in the light of its complementarity regime.101

Jann K. Kleffner underlines the unique issue of the implications of criminal proceedings conducted by organized non-State actors’ groups on admissibility.102 Norms of international criminal law oblige parties, including non-State actors, to an armed conflict to suppress international core crimes and refer them to a competent authority for investigation and prosecution in line with the doctrine of command responsibility employed in national and cross borders conflict. Such proceedings should not obstruct the admissibility of a case in the Court.103

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97. Ibid. at 606.
99. Ibid. at 645.
101. Ibid. at 706.
103. Ibid. at 7.
Roger S. Clark considers the applicability of complementarity to the crime of aggression within the jurisdiction of the Rome Statute of the ICC. Clark underlines issues that the ICC’s complementarity regime would encounter when exercising its jurisdiction over the crime of aggression.

Interrelations between complementarity and alternative justice mechanisms provided by states are the subject of an inquiry by Gregory Gordon. While existing literature provides only general suggestions to the Court to determine whether alternative mechanisms cause a case to become inadmissible under the complementarity regime, he provides five conclusive categories that the Court can use to formulate the admissibility test.

Focusing on a particular feature of the relationship between complementarity and cooperation, Federica Gioia examines so called ‘reverse cooperation’, which entitles the Court to provide assistance to both Party and non-Party States to investigate and prosecute crimes within the jurisdiction of the Court pursuant to Article 93(10) of the Rome Statute. She also provides that ‘reverse cooperation’ lies between complementarity, the centrepiece of the Rome Statute, and cooperation, the key instrument to the latter’s efficient operating. So, ‘reverse cooperation’ should be seen in the centre of complementarity, and as a catalyst to enhance states’ availability to investigate and prosecute core crimes under its jurisdiction.

Finally, in this section, Olympia Bekou underlines the relationship between complementarity and national implementing legislation. She explores the connection between states’ expectations and the consideration of different national visions on complementarity. She argues that national implementing legislation offers an invaluable insight into how states appreciate complementarity in practice.

104. Rome Statute of the ICC, supra note 1 at art 8 bis (this article has been inserted in the Rome Statute pursuant to the Review Conference Resolution 6 of 11 June 2010).
107. Ibid. at 775.
109. Ibid. at 829.
111. Ibid. at 850.
VI. COMPLEMENTARITY IN PERSPECTIVE

Chapters in this section examine the existence and development of the complementarity regime in contexts outside the ICC setting. This includes interstate relations and domestic jurisdictions, and the jurisprudence of a number of international criminal tribunals and courts, namely the ICTY, the International Criminal Tribunal for Rwanda (ICTR), and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The first contribution of this section by Cedric Ryngaert examines whether the principle of complementarity presides over national prosecutions of international crimes, on the bases of universal jurisdiction and deference by ‘bystander’ states to other states that are directly connected with the situation that are able and willing to investigate and prosecute these crimes. The author concludes by asserting that the application of horizontal complementarity is desirable for many reasons, including encouraging states to conduct genuine investigations and prosecutions, a central objective of the principle of complementarity incorporated in Article 17 of the Rome Statue.

Nonetheless, David Tolbert & Aleksandar Kontić underline judicial relations between the ICTY and the republics of former Yugoslavia, particularly Bosnia-Herzegovina. This relationship includes, inter alia, the transfer of cases and logistics to domestic judicial bodies, namely the Bosnian State Court and the State Prosecutor’s Office. They argue that the ICC should adopt this positive approach of complementarity to assist national judicial systems. This approach would give the Court a historic opportunity to support transitional justice and post-war judicial system in war-torn countries.

Similarly, Fidelma Donlon focuses on positive complementarity in the ICTY’s practice, mainly on Rule 11 bis and the use of the evidence collected by the tribunal in the Srebrenica Trials before the Bosnian War Crimes Chamber. She maintains that the principle of classical complementarity embodied in Article 17 of the Rome Statute is clearly reflected in the ICTY Rule 11 bis. Moreover, the successful cooperation between the ICTY and the Chambers

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113. Ibid at 887.


115. Ibid. at 919.

serve as a catalyst to reinforce the ICC positive complementarity regime and presents a valuable model for the future of the international criminal justice.\textsuperscript{117}

Finally, in this section Tarik Abdulhak examines the effect of complementarity on the judicial process in hybrid criminal courts.\textsuperscript{118} Focussing on the experience of the ECCC, he underlines the continued need for cooperation between such courts and the ICC, the matter that would effectively participate in the advancement of transitional justice and the rule of law.\textsuperscript{119}

\section*{VII. COMPLEMENTARITY IN PRACTICE}

Chapters in this section look into the case law of the ICC and examine its jurisprudence on the applicability of the principle of complementarity in particular contexts. These contributions reveal that the Court, in the early years of operating, had dealt with ongoing conflicts more than dealing with post-conflict situations, the matter that has been reflected in the ICC’s relations with national judicial systems.\textsuperscript{120}

The first contribution in this section by Paul Seils argues that the impact of the ICC on national proceedings has been marginal.\textsuperscript{121} While not placing all of the blame on the Court, the analysis specifies four basic problems that have rigorously affected the ICC’s impact on national proceedings.\textsuperscript{122} The chapter concludes by emphasizing that the coming years will be of considerable importance in determining the effectiveness of the principle of complementarity.\textsuperscript{123}

Christopher K. Hall considers the practical side of the positive complementarity.\textsuperscript{124} He argues that to put an end to impunity for perpetrators of international core crimes, the OTP should take the responsibility to seriously investigate such crimes and encourage states to take responsibility to investigate and prosecute international crimes which are beyond the Court’s

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\textsuperscript{117} Ibid. at 954.
\textsuperscript{119} Ibid. at 986.
\textsuperscript{120} Stahn, supra note 17 at 13.
\textsuperscript{122} Ibid. at 991.
\textsuperscript{123} Ibid. at 1013.
\end{footnotesize}
capabilities. Moreover, in this respect, the OTP must encourage states to ratify the Rome Statute and implement the Court’s crimes in their national laws.\textsuperscript{125}

On the other hand, Morten Bergsmo, Olympia Bekou, and Annika Jones underline the relationship between complementarity and the construction of national ability.\textsuperscript{126} They examine the accentuation of the Rome Statute on the role of domestic judicial bodies in investigating and prosecuting core crimes, and explore the importance of such practice with reference to the principle of complementarity.\textsuperscript{127} Moreover, they draw attention to difficulties that may encounter the work of these judicial institutions in fulfilling their role under the Court’s complementary regime.\textsuperscript{128}

Kai Ambos reviews the Colombian peace process under the crucial Law 975 of 2005 versus its obligations under Article 17 of the Rome Statute.\textsuperscript{129} Applying the Complementarity test enshrined in the above Article to the Colombian situation,\textsuperscript{130} Ambos argues that the latter is different from other situations, and that there is little doubt to justify the Court’s intervention on the basis of “unwillingness” and “inability.”\textsuperscript{131}

The following chapter by Robert Cryer discusses the Darfur situation under the ICC’s complementarity regime.\textsuperscript{132} It reveals that Darfur was the most challenging situation to the Court and to its complementarity principle.\textsuperscript{133} The lack of will by the international community to oblige Sudan to investigate and prosecute core crimes perpetrated against civilians in that region (or to surrender the indicted people to the ICC, particularly Sudanese President Omar al-Bashir), has put the Court and the entire international criminal system in a dilemma.\textsuperscript{134}

However, Sarah Nouwen, and later Marieke Wierda and Michael Otim, consider the principle of complementarity and the situation in Uganda in two consecutive chapters. Nouwen considers the ICC’s complementarity...
regime and its effects on the Ugandan criminal justice system, particularly on the Ugandan International Criminal Act and on the preparation for the establishment of the Ugandan War Crimes Court. She concluded that complementarity had played a prominent role in the Juba peace talks by putting accountability on the table. On the other hand, Marieke Wierda and Michael Otim argue that any challenge to the jurisdiction of the Court in Uganda is groundless. They agree with Sarah Nouwen that the complementarity regime of the ICC had a fundamental part at the Juba peace talks and demonstrate how the legal principle can affect the domestic legal system by operating in practice. They believe that the Juba peace process was a test case for Uganda’s commitment for criminal justice, as well as for the Court.

Phil Clark examines the political implementation of the ICC’s principle of complementarity and the politics of state referral in the cases of the Democratic Republic of Congo (DRC) and Uganda. In this case study, which is based on four years of fieldwork and over 400 interviews with international and domestic actors in the criminal justice system, Clark highlights the necessity of rethinking complementarity, theoretically and practically, especially in countries undergoing armed conflict or national legal reform.

Marlies Glasius explores the ICC’s capability to combat the culture of impunity and bring perpetrators to justice in the DRC and the Central African Republic (CAR) under the Court’s positive complementarity. She underlines these countries’ lack of adequate judicial action to conduct criminal trials and their political unwillingness to investigate and prosecute international core crimes at their own courts.

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136. Ibid. at 1150.
138. Ibid. at 1167.
139. Ibid. at 1163.
141. Ibid. at 1182.
143. Ibid. at 1228.
Finally, Christine Alai and Njonjo Mue review the situation in Kenya and analyse the impact of the Court’s intervention—in the light of the principle of complementarity—on different aspects of Kenyans’ lives, including peace, justice, and victims of violence erupted in the aftermath of the presidential election of 2007. They underline the Kenyan government’s failure to establish a specific Tribunal for Kenya, or conduct genuine investigations and prosecutions of serious crimes committed against civilians and different communities in Kenya. They conclude by underlining the need to establish domestic judicial mechanisms to end impunity resulting from the lack of political will, corruption, and political interference in the judicial process. The authors emphasize that this would not be possible without effective reforms in Kenya’s judicial, political, and security sectors.

VIII. CONCLUSION

Stahn notes that the Rome Statute contains many ‘uncharted waters,’ a matter that has been clearly reflected in the provisions of Article 17 of the Rome Statute, where the Court’s complementarity regime is enshrined. Not yet adequately evaluated and academically debated, complementarity presents a number of doctrinal and jurisprudential challenges, many of them debated in the reviewed work. First, despite the fact that complementarity has served as a keyword in the establishment of the ICC, and has an essential function inside and outside the Court, it still endures a considerable degree of abstractness and ambiguity, an issue that leaves it open to different interpretations. The contributions underlined the dilemma of abstractness and lack of a precise definition of certain notions in the provisions of the Rome Statute, for instance, the silence of the latter on providing a clear definition of the relation between admissibility and the notions of ‘situation’ and ‘case.’ Moreover, Megan Fairlie and Joseph Powderly emphasize that the abstractness and ambiguity of different norms and concepts enshrined in the provisions of Article 17 of the Rome Statute constitute a challenge to the whole legal process and lead to inconsistent decisions. A case in point is the Court’s inconsistent approach in the Saif al-Islam Gaddafi and Abdullah al-Senussi admissibility decisions.

145. Ibid. at 1225.
146. Ibid. at 1233.
147. Ibid. at 1234.
148. Stahn, supra note 17 at 8.
149. Ibid. at 1 and 9; Schabas, supra note 10 at 506.
150. Fairlie & Powderly, supra note 98 at 642.
Second, the failure of the complementarity regime to recognize the primacy of the international jurisdiction leads to concession to national sovereignty. Indeed, by positioning the ICC as an international criminal accountability mechanism of last resort and as secondary to national prosecutions, complementarity weakens the Court’s judicial function.

Third, Article 17 of the Rome Statute, which governs the Court’s complementarity regime, does not indicate whether the crime of aggression is subject to complementarity or primacy regime. In this respect, it fails to address concerns about national courts’ prosecutions that lack due process. Accordingly, state Parties should amend the above article to ensure that the crime of aggression be prosecuted at the ICC, particularly when there are due process concerns with domestic courts’ proceedings.

Finally, it is argued that the Courts complementarity regime is heavily influenced by the European Kantian interpretation of universal justice, something which puts the Court into direct confrontations with other universal jurisprudential traditions, *inter alia*, the Islamic justice system. A case in point is the Darfur situation in Sudan.

In conclusion, this is an outstanding, original, comprehensive, and multidisciplinary work on the principle of complementarity. It is based on theoretical inquiries and practical experiences, with contributions by a number of prominent legal scholars and senior actors in the international criminal judicial system. It should be read by those interested in international criminal justice, namely international criminal law scholars at universities and research centres, international criminal lawyers, judges, investigators, and prosecutors. As a unique contribution to the literature, a revised edition of the work that would consider the Court’s ongoing challenges and inconsistent decisions—emerging from the ambiguity and abstractness of different norms and concepts enshrined in the provisions of Article 17 of the Rome Statute—might be needed in a couple of years.


Ibid. at 601.