CIL
CENTRE FOR INTERNATIONAL LAW
National University of Singapore

Teaching and Researching International Law in Asia

MEMORANDUM

TO: Participants, TRILA Indonesia

FROM: TRILA Indonesia Organisers

RE: Readings and an Exercise

DATE: 28 June 2020

Welcome to our TRILA Indonesia Webinar!

A Workshop Exercise: Could we ask all participants, not just the presenters, to please write an abstract of up to 300 words of the research project you are working on. Participants will not be asked to share this with the group but hopefully the workshop will assist you in assessing and refining your own abstract.

Readings: We have prescribed quite a lot of readings for you. We do not expect you to have done all the reading. However, we thought it would be useful for you to have these readings with you to read in your own time as and when you think they may be useful. Further, some of the issues we would like to discuss can be helpfully illustrated by pointing to these readings.

We look forward to meeting you on Wednesday!

Readings:

-Hikmahanto Juwana, `Indonesia' in *The Oxford Handbook of International Law in Asia and the Pacific*, edited by Simon Chesterman, Hisashi Owada and Ben Saul, Oxford University Press, 2019

-Luis Eslava, Michael Fakhri, Vasuki Nesiah, `Introduction: the Spirit of Bandung', *Bandung, Global History and International Law*, Cambridge University Press 2017.

-Steven R.Ratner and Anne-Marie Slaughter, `Appraising the Methods of International Law: A Prospectus for Readers' in *The Methods of International Law*, edited by Ratner and Slaughter, American Society of International Law, Studies in Transnational Legal Policy No. 36 (2004)

-Bruno Simma and Andreas Paulus, `The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', in *The Methods of International Law*

-Antony Anghie and B.S.Chimni, `Third World Approaches to International Law and Individual Responsibility in Internal Conflict', in *The Methods of International Law*

-Henrietta Zeffert, `The Lake Home: International Law and the Global Land Grab', Asian Journal of International Law, vol8(2) July 2018, pp. 432-460

-Dita Liliansa `The Necessity of Indonesia's Measures to Sink Vessels for IUU Fishing in the Exclusive Economic Zone', Asian Journal of International Law, vol10(1) January 2020, pp. 125-157

-Note and Comment: Sergey Sayapin `The Implementation of Crimes Against the Peace and Security in the Penal; Legislation of the Republic of Kazakhstan', Asian Journal of International Law, vol10(1) January 2020 p. 1-11

-Note and Comment: Victor Kattan, `The Chagos Advisory Opinion and the Law of Self-Determination', Asian Journal of International Law, vol10(1) January 2020 p. 12-22

Indonesia

Hikmahanto Juwana

The Oxford Handbook of International Law in Asia and the Pacific
Edited by Simon Chesterman, Hisashi Owada, and Ben Saul

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Abstract and Keywords

This chapter looks at international law in Indonesia. From the beginning of its establishment as a state, alongside the formation of the Indonesian government, Indonesia has committed itself to participating on the international stage. Paragraph 4 of the Preamble of the Constitution of the Republic of Indonesia 1945 shows such commitment. Indonesia's role in the Bandung Conference of 1955 is another pivotal point to consider since Indonesia was one of the initiators of the Conference. Nevertheless, the development of international law in Indonesia is not merely about the 1945 Constitution and the Bandung Conference. It is also about Indonesia advancing its interests at the international level and making its voice count. In doing so, however, Indonesia has not been free from politics. Indonesia uses international law as a political instrument to pursue its interests; and other countries likewise use international law to advance their interests towards Indonesia.

Keywords: Indonesia, international law, politics of law, ASEAN, Bandung conference

1 Introduction

FROM the beginning of its establishment as a state, alongside the formation of the Indonesian government, Indonesia—as a nation—committed itself to participating on the international stage. Paragraph 4 of the Preamble of the Constitution of the Republic of Indonesia 1945 ('1945 Constitution') shows such commitment. It provides that the Indonesian government will 'participate in the establishment of a world order based on freedom, perpetual peace, and social justice'.[1] Indonesia not only wants to engage in world affairs, but such engagement must serve the purpose of creating 'freedom, perpetual peace, and social justice'. The Preamble is a starting point for those who want to study the development of international law in Indonesia.

Besides the 1945 Constitution, Indonesia's role in the Bandung Conference of 1955 is another pivotal point since Indonesia was not only one of the initiators of the Conference,[2] gathering together countries such as India and Pakistan to discuss a proposal for it,[3] but

it also hosted the Conference in the Indonesian city of Bandung. In other words, Indonesia showed leadership in holding a conference of which one aim was to strengthen 'post-colonial solidarity' among Asian-African countries.[4] Further, as the Final Communiqué of the Conference laid out, the Conference worked towards (p. 387) cooperation among Asian-African countries, for instance, in the fields of economics, culture, human rights, and self-determination.[5] The Conference itself, as Makau Mutua asserts, was the 'symbolic birthplace' of the Third World Approach to International law (TWAIL).[6] The celebration of the sixtieth anniversary of the Bandung Conference was held in Indonesia in 2015,[7] asserting the importance that Indonesia places on this day in maintaining collaboration among Asian-African countries.

Nevertheless, the development of international law in Indonesia is not merely about the 1945 Constitution and the Bandung Conference. It is also about Indonesia advancing her interests at the international level and making her voice count. For example, Indonesia fought for the notion of archipelagic states to be adopted in the United Nations Convention on the Law of the Sea 1982 (UNCLOS). At the regional/Southeast Asia level, Indonesia brings international law matters to the Association of Southeast Asian Nations (ASEAN). On top of that, the relationship between international law and national law is of paramount importance in understanding of the development of international law in the Indonesian legal context.

This chapter will examine three main topics concerning Indonesia and international law. First and foremost, it will discuss Indonesia and the politics of international law-making. As mentioned earlier, Indonesia wants her voice to be heard on the international stage. However, in doing so, according to Hikmahanto Juwana, Indonesia is not free from politics.[8] This view means two things. Indonesia uses international law as a political instrument to pursue her interests; and other (and often developed) countries use international law to advance their interests, for instance economic ones, towards Indonesia.[9]

Secondly, this chapter will discuss the relationship between international law and Indonesian national law. This discussion concludes that to date, there is not yet a consensus, especially among Indonesian scholars, as to what the place of international law is in Indonesia's national legal system. Lastly, this chapter will discuss the relationship between Indonesia and the regional body, ASEAN. We chose this topic because (p. 388) Indonesia contributes to making international law important in ASEAN. For instance, Indonesia played a significant part in the establishment of a regional human rights commission under the ASEAN Charter.

Nonetheless, it is important to note that this chapter is not meant to represent all discussions about the development of international law in Indonesia or to serve as an encyclopedia of Indonesia and international law. Instead, this chapter aims to point out essential events with the hope of providing readers with a general depiction of Indonesia and international law. Additionally, the term 'Indonesia' in this chapter shall not be interpreted strictly, as in certain events it may refer to the 'Indonesian government', and in other

events it may refer to ‘Indonesian academics’ or ‘Indonesian society in general’. As such, the term ‘Indonesia’ must be interpreted in context.

2 A Short Background to the Indonesian Legal System

As of 2017, Indonesia’s population was 242 million people.[10] This places Indonesia in the top ten most populous countries in the world.[11] Indonesia is also regarded as ‘the largest economy in Southeast Asia’.[12] The philosophical foundation of Indonesia, as a nation-state, is *Pancasila*. *Pancasila* comprises five core principles. The first principle is ‘The Belief in One God’; the second is ‘A just and civilized humanism’; the third is ‘Unity of Indonesia’; the fourth is ‘Democratic citizenship led by wise guidance born of representative consultation’; and the fifth is ‘Social justice for all the people of Indonesia’.[13] Indonesia’s political and legal system is established under the 1945 Constitution. Indonesia once adopted a centralized governmental system but, in the Reform era, Indonesia moved to a decentralized system, which means there are substantial roles for local governments. For example, there is more authority in budgeting, and power to legislate, at the provincial, city, municipality, and village levels.[14]

Indonesia’s domestic legal system bears the influence of the civil law tradition. This is attributed to Dutch colonization,[15] which originated in the commercial activities of the (p. 389) Dutch East India Company in the seventeenth century and was formalized under direct Dutch rule as the Dutch East Indies from 1800 to 1949 (albeit disrupted by Japanese military occupation from 1942 to 1945). The obvious example is Indonesia’s Civil Code, which was ‘inherited’ from the Dutch and is still in force to this day. Nevertheless, Indonesia also received a certain extent of common law influence, especially in term of legislation making.[16] One example is the Law No. 5 of 1999 on Competition that ‘adopts numerous concepts from the US’s Sherman Antitrust Act and Clayton Antitrust Act’.[17]

Regarding Indonesia’s standpoint towards international law, as Damos Dumoli Agusman argues, Indonesia somewhat deviates from the Dutch as her former colonizer.[18] The reason for this is that, at the very beginning of her ‘life’, Indonesia regarded international law as ‘unfriendly’ and ‘favour[ing] the colonial power’.[19] This stance led Indonesia to later initiate the Bandung Conference in 1955, which was an important step towards the creation of the Non-Aligned Movement.[20]

According to Agusman, the following are three patterns in the way Indonesia has reacted to international law:

(i) ‘the hostile’ one (1945–1966), by which Indonesia, through her leader President Soekarno, ‘induced negative sentiments in Indonesia towards international law’;[21]
(ii) the ‘no cold shoulder’ approach (1966–1998) by which, under the leadership of President Soeharto in the New Order era, there was a welcoming reaction to international law;[22] and

(iii) ‘the Reform era’ (1998 to the present time),[23] in which the focus is no longer so much on international law (particularly the question of its place in Indonesia’s legal system) but instead on ‘strengthening the constitutional framework’.[24]

From Agusman’s point of view, we can see that Indonesia has a changing—if not inconsistent—stance towards international law.

Furthermore, Indonesia has faced several internal conflicts that received international attention, including the situations in East Timor (now Timor-Leste) from 1975 to 1999,[25] Aceh from 1976 to 2005, and West Papua (which was ceded to Indonesia by The Netherlands in 1963, followed by a referendum in 1969). However, the official stance remains that internal conflicts, for example in West Papua, are matters of national domain in which the participation of foreign parties is frowned upon.[26]

(p. 390) To briefly conclude, Indonesia is a country with a rich history that affects Indonesia’s outlook on international law. This chapter will explore further on this theme.

3 Indonesia and the Politics of International Law-Making

In participating and advancing her interests in the international law arena, Indonesia is not free from politics. Nonetheless, before delving further into the discussion, there are three things to be clarified. First and foremost, this section will emphasize the view of ‘international law as a political instrument’.[27] Proceeding from this view, we will explain first how Indonesia uses international law as political instruments and secondly how other countries use international law to put pressure on Indonesia. The second point to clarify is that this section is by no means claiming that international law is *always* used as a political instrument, including by states such as Indonesia. Last but not least, this section regards (international) law and (international) politics as two separate notions.[28]

3.1 Political Aspects Surrounding Indonesia’s Practices

In the context of Indonesia, Juwana divides the political use of international law into two categories of trends, namely: (i) Indonesia uses international law to bring her interests onto the international stage, and (ii) other countries use international law to put pressure on Indonesia.[29] In regard to the former, the Indonesian government has experienced both success and failure. Regarding the latter, the Indonesian government in some instances succumbed to other countries’ interests and in others it resisted international pressures.

As Juwana explains, one success story of Indonesia bringing her interests onto the international stage is the adoption of the notion of ‘archipelagic states’ in Part IV of UNCLOS 1982.[30] In contrast, a failure came when Indonesia wanted the recognition of the Geo-Stationery Orbit as Indonesia’s territory.[31] However, the political aspect is not only confined to what Indonesia wants but also to what Indonesia does not want. One example of the latter is the reluctance of the Indonesian government to accede to the Refugee Conven-

tion 1951 and its Protocol 1967 despite the increasing number of asylum (p. 391) seekers and refugees in Indonesia.[32] Another example is the unwillingness of the Indonesian government to ratify the International Labour Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples 1989, due to the complexity of the issue of *masyarakat adat* (indigenous peoples) in the President Habibie era (1998–1999) in Indonesia.[33]

Other states and international organizations have used international law to apply pressure to Indonesia.[34] One example is the case of East Timor (now Timor-Leste), of which Indonesia took control from Portugal, the colonial power, in 1975. From that time, there was a push from the international community, especially from the UN Security Council,[35] which produced a number of resolutions regarding East Timor.[36] Despite the Security Council's seemingly constant affirmation of Indonesia's territorial integrity and its government's efforts in East Timor,[37] the pressures were evident in the substance of the Security Council's resolutions and UN intervention in East Timor.

Thus, in Resolution 384 (1975), the Security Council recognized 'the inalienable right of the people of East Timor to self-determination and independence in accordance with the principles of the Charter of the United Nations'. In Resolution 1236 (1999), the Security Council welcomed 'the intention of the Secretary-General to establish as soon as practicable a United Nations presence in East Timor'. The Security Council decided, in Resolution 1246 (1999), 'to establish until 31 August 1999 the United Nations Mission in East Timor'.[38] A referendum was held in East Timor in August 1999, followed by a temporary UN Transitional Administration in East Timor and the independence of East Timor from Indonesia in 2002.

Another push was for the Indonesian government to form a court to prosecute the alleged perpetrators of international crimes in Timor Timur.[39] Indonesia accordingly (p. 392) established a Human Rights Court (*Pengadilan HAM*) in 2000.[40] However, this was an ad hoc court which lacked further implementing regulations to make it work.[41]

One more example of putting Indonesia under international pressure concerns Indonesia's participation in the global trade regime, for example, the Agreement on Trade-Related Aspects of Intellectual Property Rights 1995 (TRIPS).[42] This participation might be mutual, though, in the sense that the developed countries need Indonesia as a big market and Indonesia herself needs cooperation for gaining economic benefits. For example, Parikersit and Wairocana argue that the national interest of Indonesia is not always in conflict with the World Trade Organization (WTO) and might even benefit from it.[43] Even so, one might question the impact of Indonesia's participation in the WTO in some areas, for example in poverty reduction.[44]

To sum up, Indonesia's practices concerning international law involves political aspects in which there is an interplay among Indonesian government interests, developed states interests, and the interests of the international community as a whole.

3.2 International Law (from the West): Indonesia's Experience Matters

To date, Indonesia's achievement of having the notion of 'archipelagic state' included in UNCLOS is taught in classroom discussions of international law and the law of the sea. The reason for this is that this achievement is evidence of making Indonesia's experience matter in international law. There has been quite a discussion about the concerns and efforts of Indonesia (and the Philippines) towards the recognition of archipelagic states at the international level.[45] It was at the Third Law of the Sea (p. 393) Conference (1973–1982) of UNCLOS 1982 that the concept of archipelagic states was recognized.[46] Hasjim Djalal points out, at least for Indonesia, that the efforts to make the concept of archipelagic states recognized were enormous.[47] After the failure of promoting the concept in the First Law of the Sea Conference (1956–1958), Indonesia started to use the concept at the domestic level through the enactment of Law No. 4 of 1960 in Indonesian Waters. In that law, the Indonesian government's Djuanda Declaration of 1957—a declaration that embodied a concept of *tanah air* (homeland)—was transplanted into the Law on Indonesian Waters. Then, after years of efforts at the national level, finally at the Third Law of the Sea Conference the concept of archipelagic states was recognized in UNCLOS.[48]

At present, the Indonesian government maintains her stance as an archipelagic state. Nonetheless, the government develops policies that address Indonesian sovereignty over her territorial waters. One example is in the field of combatting illegal fishing. The current Minister for Maritime Affairs (at the time of writing in 2018) has a vessel-sinking policy for vessels that undertake illegal fishing in Indonesian waters.[49] As such, through her Ministry of Maritime Affairs, Indonesia takes protection of her territory seriously.[50]

Another milestone in making Indonesia's voice count internationally was the Bandung Conference. The Bandung Conference, or the Asian-African Conference, was initiated by Indonesia, Burma, India, Pakistan, and Ceylon (now Sri Lanka).[51] These countries invited twenty-four other countries to participate, which from Asia included Afghanistan, Cambodia, China, Iran, Iraq, Japan, Laos, Nepal, Philippines, Thailand, North Vietnam, and South Vietnam.[52] The Conference considered 'problems of common interest and concern to countries of Asia and Africa and discussed ways and means by which their people could achieve fuller economic, cultural and political co-operation'.[53] As with Mutua's proposition on TWAIL, the Bandung Conference was a way for Asian and African countries to make their voice heard and recognized on the international stage, by first cooperating with each other.

Notwithstanding this intention, to the present time there remains a question as to whether the Bandung Conference, and hence TWAIL itself, succeeded in deconstructing—if not rebuilding—the international legal order.[54] The recent sixtieth anniversary of the Bandung Conference in 2015 might provide a perspective as to whether the initial intention of the Conference has been achieved in the present day. Such celebration (p. 394) allows the gathering of Asian-African countries and, as Juwana put it, this gathering still

maintains relevance for the current situation of the Asian-African countries, where several of them face, for example, industrialization processes and internal conflicts.[55]

As such, Juwana proposed that Asian-African countries must do more work, especially in facing 'a new form of colonialism' that is 'the economic dependency on the developed states'.[56] In doing so, Juwana suggested that Asian-African countries must do three things: construct universal values in coherence with global dynamics; work towards economic independence from the developed states; and commit to solving their internal conflicts.[57] The sixtieth anniversary Conference itself, at the end, produced three important documents, namely the Bandung Message 2015, New Asian-African Strategic Partnership,[58] and Declaration for Palestine.[59] The common thread among these three documents is a push for the Asian-African countries to work together for stronger cooperation. As for Indonesia, it has been said that Indonesia must be the 'Asia-Africa Centre'.[60]

The examples of UNCLOS and the Bandung Conference show us Indonesia's attempts to make her experience matter on the international stage. Nonetheless, we should contemplate such experiences in terms of their relevance to the present and the future, which was the case with the Bandung Conference and its sixtieth anniversary Conference in Indonesia.

4 Indonesia and the (Unresolved) Relationship between International Law and National Law

This section will explore various examples to show the relationship between international law and Indonesia's national laws. However, before doing so, it will point out (p. 395) examples of major international legal instruments ratified or adhered to by Indonesia. It will then discuss the place of international legal instruments within Indonesia's national law and before Indonesia's national courts, namely the Supreme Court and the Constitutional Court.

4.1 Ratification of International Legal Instruments

In the field of human rights, Indonesia has acceded to a number of treaties, including the International Covenant on Civil and Political Rights 1966 (ICCPR), International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), and the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD).[61] The accession instrument of the ICCPR is Law No. 12 of 2005, for the ICESCR it is Law No. 11 of 2005, and for the CERD it is Law No. 29 of 1999.

Nevertheless, the ratification instrument is not always in the form of a Law (*Undang-Undang*) but may be contained instead in a Presidential Regulation (*Peraturan Presiden*). The latter is usually used for a more specific and practical international legal instrument, for example Presidential Regulation No. 23 of 2017 on the Ratification of the Credit Guarantee and Investment Facility Articles of Agreement, in the context of ASEAN+3 (ASEAN,

China, Japan, and Korea).[62] For the former, as prescribed in article 10 of Law No. 24 of 2000, the ratification is in the form of Law (*Undang-Undang*) if the international agreement concerns a matter of (i) politics, peace, defence, or state security; (ii) territorial issues; (iii) sovereignty or sovereign rights; (iv) human rights or the environment; (v) the formulation of new norms; or (vi) foreign loans or grants.

It is not always clear whether there are direct implementing regulations of international legal instruments. Nonetheless, the judges of the Constitutional Court of Indonesia often refer to international legal instruments such as the ICCPR and ICESCR.[63] The reference is made in the sense that the judges mostly take note of them as significant human rights instruments for Indonesia.[64] As for national instruments, direct reference to international legal instruments is made in Law No. 39 of 1999 on Human Rights. This Law makes a direct reference to the Universal Declaration of (p. 396) Human Rights 1948 in its preamble: 'whereas as a member of the United Nations, the nation of Indonesia has a moral and legal responsibility to respect, execute, and uphold the Universal Declaration on Human Rights promulgated by the United Nations'.[65]

Of course, there are more international human rights instruments that are ratified or acceded to by Indonesia. Those instruments include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1985 (UNCAT) on 28 October 1998; Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW) on 13 September 1984; Convention on the Rights of the Child 1989 (CRC) on 5 September 1990; and Convention on the Rights of the Persons with Disabilities 2006 (CRPD) on 30 November 2011. As for an example of enactment (if not transformation or direct implementation) of these instruments into Indonesia's national laws, one can look at Law No. 8 of 2016 on Persons with Disabilities and Law No. 23 of 2002 on Child Protection (later amended by Law No. 35 of 2014). Additionally, Indonesia is in the process of drafting a Law on Elimination of Violence against Women.[66]

For further evidence of Indonesia's fulfilment of her international human rights obligations, one can look at the UN Human Rights Council's Universal Periodic Review (UPR), for which Indonesia submitted her national report in February 2017.[67] The report outlines Indonesia's progress in respecting the promotion and protection of human rights. Nonetheless, in her report, Indonesia emphasizes the importance of 'local context' in applying universal human rights standards in Indonesia.[68]

In the field of environmental law, Indonesia has ratified or acceded to some international legal instruments, including the UN Framework Convention on Climate Change 1992 (UNFCCC) and Convention on the International Trade in Endangered Species of Wild Flora and Fauna 1973 (CITES). On the latter, there was an extensive study in 2015, from the Indonesia Program of the Wildlife Conservation Society (WCS) and the United States Agency for International Development (USAID), that assessed CITES implementation in Indonesia.[69] In general, the study found that implementation of CITES in Indonesia needs improvement and, regarding laws or legislation, such improvements should take into ac-

count non-native species under CITES and develop better ‘preventative measures’ to prevent illegal trade of wildlife.[70]

(p. 397) As for direct implementation of regulations, Law No. 5 of 1990 on Conservation of Living Resources and their Ecosystems is, as the WCS and USAID reported, ‘the principal legislation for CITES Implementation’.[71] Besides, there are the Government Regulation No. 7 of 1999 on Preservation of Animal and Plant Species and Government Regulation No. 8 of 1999 on the Utilization of Wild Plant and Animal Species, which more practically implement Law No. 5 of 1990.

For climate change, the First Nationally Determined Contribution in 2016, prepared by the Indonesian government, stipulates that the ‘Indonesian Environmental Protection and Management Law of 2009 secure the legal framework to support 2015–2019 strategies and actions, which would serve as enabling conditions for a long-term policy of 2020 and beyond’.[72] From this statement, one can consider that Law No. 32 of 2009 on Environmental Protection and Management is a further elaboration of Indonesia’s obligations and commitments on the climate change issue.

In the field of international trade, one can look at the issue of intellectual property rights. Indonesia ratified TRIPS,[73] enacted domestic legislation, namely Law No. 30 of 2000 on Trade Secrets, Law No. 31 of 2000 on Industrial Designs, and amended the Law on Patents, Law on Trademarks, and Law on Copyright. Nevertheless, these changes bring problems for Indonesia. On the one hand, it is quite difficult for Indonesia to adequately enforce these laws as the Indonesian government lacks enforcement capacity. On the other hand, Indonesia herself might not be that compatible with these laws because, as Simon Butt points out, ‘many features of Indonesia’s economic, social, cultural and legal order appear to contradict fundamental precepts of intellectual property’.[74]

Based on the explanation above, from the ratification or accession to international legal instruments in the three areas of human rights, environmental law, and international trade (particularly intellectual property), it can be seen that there are different trends among those areas. On human rights, Indonesian law is more welcoming of the instruments. Although it is unclear in the implementing regulations, the international human rights instruments such as ICCPR and ICESCR can be traced even into the Constitutional Court of Indonesia. As for environmental law, especially the issues of climate change and wildlife, the implementing regulations and explicit commitments of the Indonesian government are apparent, for example, in Indonesia’s First Nationally Determined Contribution in 2016.

Then, on intellectual property rights, the issue is complicated as the existing implementing regulations of TRIPS do not guarantee the welcoming of such regulations in (p. 398) Indonesia. The reason for this is twofold. On the one hand, the Indonesian government lacks enforcement mechanisms. On the other hand, the substance of the regulations does not fit in with the Indonesian context. Despite this trend, the fact that the Indonesian government ratifies and/or accedes to the international legal instruments and, at the very least, that the Indonesian government attempts to make such instruments relevant in

Indonesia's domestic law, should be considered as part of Indonesia's contribution to the development of international law.

4.2 What is the Place of International Law?

One may start with article 11(2) of the 1945 Constitution in finding out what place international law holds within Indonesia's national legal system. Article 11(2) states:

The President in making other international agreements that will produce an extensive and fundamental impact on the lives of the people which is linked to the state financial burden, and/or that will require an amendment to or the enactment of a law, shall obtain the approval of the House of Representatives.

While the provision empowers the president, alongside the House of Representatives, to bind Indonesia to international legal instruments,[75] there is not yet a consensus on how to interpret this provision, or on what the right interpretation of it should be.[76] Further elaboration of article 11 of the 1945 Constitution is contained in Law No. 24 of 2000 on International Agreements.[77] In general, Law No. 24 of 2000 further regulates the details of the procedures for the Indonesian government when it wants to bind Indonesia to international agreements, for example whether the ratification or accession will be done in the form of Law (*Undang-Undang*) or Presidential Regulation (*Peraturan Presiden*).[78]

The next issue is how to implement the ratified or acceded international legal instruments at the national level. There are at least two mainstream answers. One (p. 399) approach is that the instrument must first be transformed into national law and that then, once the transformation is complete, one can start talking about the fulfilment of Indonesia's international obligations. The second answer is that the transformation of the international legal instrument is not required because, at the time the instrument is ratified or acceded to, the obligation on Indonesia to observe the instrument is already there; as such, Indonesia is automatically bound by the obligations. Which approach to take relates to the issue of whether Indonesia is a monist or dualist country. Kusumaatmadja and Agoes argue that Indonesia acknowledges her obligations under international legal instruments without waiting for regulations implementing those instruments.[79] Nevertheless, there is not yet a consensus among Indonesian international law scholars on this matter.[80]

For further research on this issue, one can peruse two significant cases before the Constitutional Court of Indonesia that sparked the debate about the place of international law in Indonesia's legal system. The first is the constitutional review of Law No. 38 of 2008 on the Ratification of the ASEAN Charter. One of the contested issues in this case was the petitioners' argument that the ASEAN Charter, as an attachment to Law No. 38 of 2008, is inseparable from the Law itself and, as such, it is justifiable to review the constitutionality of the ASEAN Charter.[81] However, regarding this argument, the question was then 'is challenging Law No. 38 of 2008 equal to challenging the ASEAN Charter?' The judges of the Constitutional Court did not reach consensus in their attempt to answer this question, as Judge Hamdan Zoelva issued a dissenting opinion. He asserted that the Law is on-

ly a model of 'consent to be bound by a treaty'.[82] Therefore, one cannot challenge the constitutionality of the ASEAN Charter through Law No. 38 of 2008.

The second case, Case No. 13/PUU-XVI/2018, is about the role of Indonesia's national House of Representatives in the ratification of international legal instruments.[83] The petitioners' main argument is that Indonesia's national House of Representatives should be more involved in the ratification process of international legal instruments; (p. 400) 'more' in the sense that the House of Representatives should review all international legal instruments before Indonesia's ratification.

In general, the response from the Government of Indonesia has been that the involvement of the House of Representatives in ratification would make the process inefficient, since it would involve a lengthy bureaucratic process in the House of Representatives.[84] In the Court Session on 22 May 2018, Dr Damos Damoli Agusman (from the Ministry of Foreign Affairs of the Republic of Indonesia) asked this practicality-related question of the expert witness from the petitioners' side, Dr Boli Sabon Max (a constitutional law expert from Atma Jaya University, Jakarta): '[i]f Dr Max adopted the view that all agreements must go through the House of Representatives, how to anticipate the practical difficulties? That is, every year the Republic of Indonesia signed 200 documents per year'.[85] The Court finally decided the case in October 2018. In summary, the Court ruled that for certain agreements, the House of Representatives will be involved in the ratification process, namely agreements on political issues, territorial boundaries, sovereignty, human rights, the environment, the formulation of new legal rules, and foreign loans.[86]

To summarize, there is not yet a consensus, especially among Indonesian scholars, as to what the place of international law is in Indonesia's national legal system. The next section will elaborate further on the place of international law in Indonesia's national courts.

4.3 International Law before Indonesia's National Courts

This section will examine the two main national courts in Indonesia, namely the Constitutional Court of Indonesia and the District Court. The objective is to sketch out whether Indonesian courts use international legal instruments. Given the abundant cases in both the Constitutional Court and the District Courts, this section will only highlight specific case(s) on human rights and environmental law, since these themes were also the focus when discussing the ratification or accession practice of Indonesia.

Simon Butt, in 'The Position of International Law within the Indonesian Legal System', uses the *Landside case* of 2003 to explain the status of international law in (p. 401) Indonesia's Supreme Court.[87] Simon Butt argues that the principle in Indonesian law which says that judges cannot reject a case just because there is no law could be a way for judges to apply international law.[88] Despite this possibility, it is common to hear that judges in the Supreme Court are reluctant to refer to international legal instruments simply because such instruments are international in nature and not national laws per se.

Besides the *Landside case*, there was a recent case in the District Court of Samarinda City in 2014.[89] The case involved a suit brought by citizens of Samarinda City, under the name of *Gerakan Samarinda Menggugat*, against the Ministry of Energy and Mineral Resources, Ministry of Environment, Governor of East Kalimantan, Mayor of Samarinda City, and People's Representatives Council of Samarinda City. The citizens complained about the irresponsibility of the national and local governments in failing to make corporations responsible, through laws and policies, for their conduct.[90] One argument was that the governments failed to fulfil their obligations to protect the environment, including those arising from Indonesia's ratification of the UNFCCC and Kyoto Protocol.[91] The judges in the District Court of Samarinda City did not, however, refer to the UNFCCC and Kyoto Protocol but relied on national laws, including Law No. 32 of 2009 on Environmental Protection and Management. Nonetheless, such reference by the petitioners is a vital sign that Indonesian citizens are aware of Indonesia's international obligations and use that awareness in court to push governments to fulfil their environmental protection obligations.

Regarding the issue of international law and the Constitutional Court of Indonesia, it has been fairly well discussed in the literature.[92] Both Simon Butt and Adriaan Bedner point out that the use of human rights instruments in the Constitutional Court is widespread, as the instruments are referred to in order to better explain the rights in the 1945 Constitution of Indonesia.[93] Nonetheless, the direct reference to international human rights instruments such as the ICCPR and ICESCR still matters, in the sense that it shows that international agreements may not need to be transformed formally into Indonesian Law (*Undang-Undang*) to be relevant at the domestic level. This view might sound like a simplification of the matter, as it is still uncertain as to what extent (p. 402) the courts (the Constitutional Court, the District Court, and Supreme Court) will position international law at the domestic level. Will international law matter more than just as a general reference point in the courts?

5 Indonesia and ASEAN

The Association of Southeast Asian Nations is a regional organization comprised of ten member states, including Indonesia.[94] ASEAN has a motto, 'One Vision, One Identity, One Community'.[95] This part will discuss ASEAN specifically as it pertains to Indonesia.

Indonesia herself played a significant role in establishing and developing ASEAN.[96] Firstly, Indonesia was one of its co-founders.[97] As such, Indonesia is considered one of the leading countries in ASEAN. Secondly, in many regional issues in ASEAN, such as migration and maritime issues, Indonesia is looked upon as 'the natural leader of the ASEAN'[98] to start the cooperation that will hopefully provide solutions for such issues.[99]

Furthermore, in a more specific field, one of Indonesia's roles in ASEAN is strengthening human rights protections.[100] For instance, as pointed out by Heiduk, it was Indonesia who ensured the establishment of a human rights commission under the ASEAN Charter[101]—the ASEAN Intergovernmental Commission on Human Rights (AICHR).[102] Other than

drafting the ASEAN Human Rights Declaration, the AICHR also undertakes ‘research, trainings, and workshops related to pertinent issues on human rights’.[103] Nevertheless, even though Indonesia contributes to the advancement (p. 403) of human rights at the ASEAN level, ASEAN itself as an intergovernmental body is not always successful in protecting and fulfilling human rights in the ASEAN region. One recent example is the issue of Rohingya people in Myanmar, whom experts called upon ASEAN to protect.[104] The ASEAN Chairman condemned the crisis in Myanmar in a Statement on the Humanitarian Situation in Rakhine State.[105] However, this statement has been criticized for not explicitly addressing the ‘Rohingya’ and some have expressed disappointment towards ASEAN because of this.

Aside from human rights, Indonesia also plays a part in shaping ASEAN–European Union (EU) trade relations. As addressed in the 16th ASEAN Economic Ministers-EU Trade Commissioner Consultation, Indonesia’s Trade Minister stated that Indonesia’s desired outcomes include the benefits of a free trade agreement (FTA) for Indonesia’s small and medium-sized enterprises (SMEs).[106]

For all Indonesia’s roles, Indonesia herself has also benefited from the existence of ASEAN through the opening of opportunities such as food security, environmental protection, and the internationalization of higher education. ASEAN itself and ASEAN-level cooperation contribute to such openness. For instance, Dilip Dutta and Fajar Hirawan identify that Indonesia–ASEAN trade opens the possibility for Indonesia to achieve her own food security.[107] Another example is in the field of the environment, where the ASEAN Agreement on Transboundary Haze 2002 became the push for Indonesia to tackle haze pollution that is not only harmful to Indonesian citizens but also to citizens of neighbouring countries such as Malaysia and Singapore.[108]

Moreover, ASEAN membership is another exciting topic in observing the relationship between Indonesia and ASEAN. One might want to look at the extent to which Indonesia plays a role in decision-making about Timor-Leste’s membership of ASEAN. Indonesia’s Foreign Minister Retno Marsudi stated at the beginning of 2018 that Indonesia always supports Timor-Leste’s application.[109] Another membership issue is about the offer from Indonesian President Jokowi that he welcomes Australia to be a new member of ASEAN.[110] Despite this welcoming remark, (p. 404) as Juwana points out, it might not be that easy as the membership needs approval from other ASEAN members.[111]

Concerning the internationalization of higher education, Indonesia benefits from ASEAN in at least in two ways. Firstly, Indonesian students are exposed to chances to study abroad at the ASEAN-level as the ASEAN University Network allows them to do so. Secondly, the discussion about international law in Indonesia includes the development of ASEAN itself, not only as a regional and intergovernmental organization but also in terms of the legal frameworks produced by ASEAN. This way, Indonesian students, particularly those specializing in international law, are enriched with knowledge about ASEAN and its legal frameworks.[112]

To briefly review, Indonesia and ASEAN benefit from each other. Indonesia played roles in both the establishment and development of ASEAN, while it continues to gain some advantages from it.

6 Conclusion

This chapter has discussed three main topics about Indonesia and international law: firstly, Indonesia and the politics of international law-making; secondly, the (unresolved) relationship between international law and Indonesian national law; and thirdly, the relationship between Indonesia and ASEAN. In addition, throughout the chapter, other relevant questions on Indonesia and international law are laid out.

Since her establishment as a state, alongside the formation of the Indonesian government, the nation of Indonesia has committed herself to participate on the international stage, as shown in paragraph 4 of the Preamble of the 1945 Constitution. The cementation of this is that Indonesia has been involved in international law-making in the sense of (i) contributing something to it, such as the notion of archipelagic states and through the Bandung Conference; and (ii) participating in it by means of the ratification of international legal instruments such as the ICCPR and CEDAW.

Despite this, there is an unresolved relationship between international law and Indonesia's national law: to transform or not to transform? However, the practice of taking international legal instruments into account is there, particularly in the Constitutional Court. While the judges in the Supreme Court are somewhat reluctant to refer (p. 405) to international legal instruments, there are examples, such as in Samarinda City, where citizens have used international principles when arguing before the District Court. This is a sign of citizens' awareness about international law.

As for Indonesia and ASEAN, the relationship is likely to be mutual. While Indonesia plays roles in developing ASEAN, ASEAN itself contributes to developments within Indonesia, such as in the fields of food security, trade, and the internationalization of higher education.

Notes:

(1) An unofficial translation of the Constitution of Indonesia 1945 is available at <http://www.unesco.org/education/edurights/media/docs/b1ba8608010ce0c48966911957392ea8cda405d8.pdf> accessed 24 April 2019.

(2) See further Luis Eslava, Michael Fakhri, and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017).

(3) N'Dri Therese Assie-Lumumba, 'Behind and Beyond Bandung: Historical and Forward-looking Reflections on South-south Cooperation' (2015) 2 Bandung: Journal of Global South DOI 10.1186/s40728-014-0011-5.

(4) See Luis Eslava, Michael Fakhri, and Vasuki Nesiah, ‘The Spirit of Bandung’ in Eslava et al (eds) (n 2) 3.

(5) See ‘Final Communiqué of the Asian-African Conference of Bandung’, 24 April 1955 <http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf> accessed 22 March 2018. See also the website of the Asian-African Museum in Bandung <http://asianafricanmuseum.org/perpustakaan-museum-asia-afrika/> accessed 30 October 2018.

(6) Makau Mutua and Antony Anghie, ‘What is TWAIL?’ (2000) 94 Proceedings of the Annual Meeting of the American Society of International Law 31.

(7) Museum Konperensi Asia-Afrika, ‘KTT AA 2015’ <http://asianafricanmuseum.org/ktt-aa-2015/> accessed 15 May 2018.

(8) See Hikmahanto Juwana, ‘Hukum Internasional Sebagai Instrumen Politik: Beberapa Pengalaman Indonesia sebagai Studi Kasus’ [‘International Law as Political Instruments: A Case Study of Indonesia’s Experiences’] (2012) 5 Arena Hukum 106 <http://arenahukum.ub.ac.id/index.php/arena/article/view/100> accessed 30 October 2018.

(9) See Hikmahanto Juwana, ‘Hukum Internasional Dalam Konflik Kepentingan Ekonomi Negara Berkembang dan Negara Maju’ [‘International Law within the Context of Conflicts of Economic Interests between Developing and Developed Countries’] (2001) 8 Jurnal Hukum 105 <http://journal.uii.ac.id/IUSTUM/article/view/4855/> accessed 30 October 2018.

(10) As of 2011: Statistics Indonesia (Badan Pusat Statistik), *Statistical Yearbook of Indonesia 2017*, 1 <http://www.bps.go.id/website/pdf_publikasi/Statistik-Indonesia-2017.pdf> accessed 23 July 2018.

(11) World Bank, ‘Indonesia Overview’ <http://www.worldbank.org/en/country/indonesia/overview> accessed 23 July 2018.

(12) Ibid.

(13) Translation of Pancasila is provided in the *Statistical Yearbook of Indonesia 2017* (n 10) 37.

(14) See further Anwar Nasution, ‘Government Decentralization Program in Indonesia’, Asian Development Bank Institute, Working Paper No 601, October 2016 <http://www.adb.org/sites/default/files/publication/201116/adbi-wp601.pdf> accessed 23 July 2018.

(15) See further Hikmahanto Juwana, ‘Courts in Indonesia: A Mix of Western and Local Character’ in Jiunn-Rong Yeh and Wen-Chen Chang (eds), *Asian Courts in Context* (Cambridge University Press 2014) 303.

(16) Ibid. 314.

(17) Ibid.

(18) Damos Dumoli Agusman, ‘The Dynamic Development on Indonesia’s Attitude Toward International Law’ (2015) 13 Indonesian Journal of International Law 1, 2.

(19) Ibid. 3.

(20) The Bandung Conference is discussed in section 3.2.

(21) Agusman (n 18) 10.

(22) Ibid. 11.

(23) Agusman’s article, ibid., was published in 2015.

(24) Ibid. 14.

(25) This situation is discussed in section 3.1.

(26) See for example Hikmahanto Juwana, ‘Pakar: Insiden Papua Berkaitan dengan Kedaulatan’ [‘An Expert: West Papua Incident is about Sovereignty’] (*Republika Online*, 30 August 2012) <http://www.republika.co.id/berita/nasional/hukum/12/08/30/m9k8d5-pakar-insiden-papua-berkaitan-dengan-kedaulatan> accessed 23 July 2018.

(27) Juwana (n 8).

(28) The division between (international) law and (international) politics might not be that distinctive. Nonetheless, it is not the purpose of this section to go deeply into the debate about the distinction.

(29) Juwana (n 8).

(30) Ibid. 111.

(31) Ibid. 112.

(32) See further discussion in Dita Liliansa and Anbar Jayadi, ‘Should Indonesia Accede to the 1951 Refugee Convention and Its 1967 Protocol’ (2015) 3 Indonesia Law Review 324 <http://ilrev.ui.ac.id/index.php/home/article/viewFile/161/pdf_71> accessed 22 March 2018.

(33) See Umi Nurhayati, ‘Aspek Politik dalam Proses Ratifikasi Konvensi No 169 (Indigenous and Tribal People Convention) di Indonesia pada Era Habibie’ [‘Political Aspects in the Ratification Process of ILO Convention No 169 (Indigenous and Tribal People Convention) in Indonesia in the Habibie Era’], Undergraduate Thesis, University of Jember, Indonesia, January 2002 <http://repository.unej.ac.id/handle/123456789/77590> accessed 22 March 2018.

(34) Juwana (n 8) 111.

(35) Hikmahanto Juwana, ‘Special Report Assessing Indonesia’s Human Rights Practice in the Post-Soeharto Era: 1998-2003’ (2003) 7 Singapore Journal of International & Comparative Law 644, 668 <http://www.asianlii.org/sg/journals/SGJlIntCompLaw/2003/24.pdf> accessed 23 July 2018.

(36) UNSC Resolution 384 (22 December 1975), Resolution 389 (22 April 1976), Resolution 1236 (7 May 1999), Resolution 1246 (11 June 1999), Resolution 1257 (3 August 1999), Resolution 1262 (27 August 1999), Resolution 1264 (15 September 1999), and Resolution 1272 (25 October 1999).

(37) For example, while UNSC Resolution 1264 (1999) repeated the ‘successful conduct of the popular consultation of the East Timorese people’, it also reaffirmed ‘respect for the sovereignty and territorial integrity of Indonesia’. Such affirmation was repeated in UNSC Resolution 1272 (1999).

(38) The mandate of the UN Mission in East Timor (UNAMET) was later extended until 30 September 1999 by UNSC Resolution 1257 (1999), and was again extended until 30 November 1999 by UNSC Resolution 1262 (1999).

(39) Juwana (n 8).

(40) Through Law No. 26 of 2000 on the Human Rights Court. See Zainal Abidin, ‘Pengadilan HAM di Indonesia’ [‘Human Rights Court in Indonesia’], ELSAM [Institute for Policy Research and Advocacy], 18 September 2014 <http://referensi.elsam.or.id/2014/09/pengadilan-ham-di-indonesia/> accessed 22 March 2018. See also Hikmahanto Juwana, ‘Beberapa Masalah Hukum Internasional dari Dugaan Pelanggaran Hak Asasi manusia di Timor Timur’ [‘International Law Issues of the Allegation of Human Rights Violation in Timor Timur’] (2000) 11(34) Mimbar Hukum 117 <http://i-lib.ugm.ac.id/jurnal/download.php?dataId=2399> accessed 22 March 2018.

(41) Ibid.

(42) Juwana (n 8), 111.

(43) I Gusti Ngurah Parikersit and I Gusti Ngurah Wairocana, ‘The Rise of the Spirit of National Interest and the Existence of World Trade Organization Agreement: A Case Study of Indonesia’ (2017) 4 Padjajaran Journal of Law 319.

(44) See Anne-Sophie Robilliard and Sherman Robinson, ‘The Social Impact of a WTO Agreement in Indonesia’ in Thomas W Hertel and L Alan Winters (eds), *Poverty and the WTO: Impacts of the Doha Development Agenda* (Palgrave Macmillan and World Bank 2006) 319.

(45) See among others Charlotte Ku, ‘The Archipelagic States Concept and Regional Stability in Southeast Asia’ (1991) 23 Case Western Reserve Journal of International Law 463; Hasjim Djalal, ‘Regime of Archipelagic States’, ASEAN Regional Forum, Manila, March 2011 <http://aseanregionalforum.asean.org/files/Archive/18th/

ARF%20Seminar%20on%20UNCLOS,%20Manila,%208-9Mar2011/Annex%20K%20-%20Prof%20Hasjim%20Djalal%20-%20Regime%20of%20Arch%20States.pdf> accessed 5 November 2017; Vivian Louis Forbes, *Indonesia's Delimited Maritime Boundaries* (Springer 2014).

(46) Ku, ibid. 463.

(47) Hasjim Djalal (n 45).

(48) Juwana (n 8) 111.

(49) See among others Hikmahanto Juwana, 'Sinking Ships Legitimate to Combat Illegal Fishing' *The Jakarta Post* (6 December 2014) <http://www.thejakartapost.com/news/2014/12/06/sinking-ships-legitimate-combat-illegal-fishing.html> accessed 21 March 2018.

(50) Ibid.

(51) See 'Final Communiqué of the Asian-African Conference of Bandung (24 April 1955)' <http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf> accessed 22 March 2018.

(52) Ibid.

(53) Ibid.

(54) For further discussion see Andrew Phillips, 'Beyond Bandung: The 1955 Asian-African Conference and its Legacies for International Order' (2016) 70 Australian Journal of International Affairs 329.

(55) Hikmahanto Juwana, quoted in Ike Agestu, 'Setelah 60 Tahun, Asia-Afrika Hadapi Kolonialisme Model Baru' ['After 60 Years, Asia-Africa Face a New Model of Colonialism'] (CNN Indonesia, 21 April 2014) <https://www.cnnindonesia.com/internasional/20150421121252-106-48094/setelah-60-tahun-asia-afrika-hadapi-kolonialisme-model-baru> accessed 17 May 2018.

(56) Ibid.

(57) Hikmahanto Juwana, quoted in 'KAA ke-60 Sukses, 3 Hal Ini Bisa Bikin Geger Eropa' ['The Success of the 60th Asian-African Conference, These Three Things Can Appall Europe'] *Tempo* (20 April 2015) <https://nasional.tempo.co/read/659013/kaa-ke-60-sukses-3-hal-ini-bisa-bikin-geger-eropa> accessed 17 May 2018.

(58) <http://www.bandungspirit.org/IMG/pdf/naaspcomplete-bandung_of_states_2005.pdf> accessed 17 May 2018.

(59) See the Secretariat of the Cabinet of Indonesia, Outcomes of the 60th Asia Africa Summit, 22–23 April 2015 <http://setkab.go.id/inilah-hasil-hasil-ktt-asia-afrika-ke-60-di-jakarta-22-23-april-2015/> accessed 17 May 2018.

(60) See among others ‘Pesan Bandung’ [‘Bandung Message’] *Investor Daily* (26 April 2015) <http://id.beritasatu.com/home/pesan-bandung/114480> accessed 17 May 2018.

(61) Other international human rights instruments that are ratified by Indonesia are available at UN Human Rights, Status of Ratification <http://indicators.ohchr.org/> accessed 21 March 2018. For further discussion on human rights in Indonesia see, for example, Anbar Jayadi, ‘What Constitutes as Limitation of (Human) Rights in Indonesian Legal Context?’ (2017) 3 Hasanuddin Law Review 290 <http://dx.doi.org/10.20956/halrev.v3i3.1203> accessed 30 October 2018.

(62) The Indonesian-language version of this Presidential Regulation is available at <http://sipuu.setkab.go.id/PUUdoc/175173/PERPRES%2023%20TAHUN%202017.pdf> accessed 30 October 2018.

(63) One may browse the Constitutional Court’s rulings at <http://www.mahkamahkonstitusi.go.id/> accessed 30 October 2018.

(64) See for example Constitutional Court ruling No. 140/PUU-VII/2009 on the constitutional review of blasphemy law.

(65) An English version of Law No. 39 of 1999 is available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/55808/105633/F1716745068/IDN55808%20Eng.pdf> accessed 30 October 2018.

(66) The draft Law on Elimination of Violence against Women is available at <http://www.dpr.go.id/doksileg/proses2/RJ2-20170201-043128-3029.pdf> accessed 17 May 2018.

(67) UN Human Rights Council, National Report submitted in accordance with paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Indonesia, A/HRC/WG.6/27/IDN/1, 20 February 2017.

(68) Ibid. 22. Indonesia’s UPR took place in May 2017: UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Indonesia, A/HRC/36/7, 14 July 2017.

(69) Indonesia Program of the Wildlife Conservation Society for USAID, ‘Changes for Justice Project Wildlife Trade, Wildlife Crimes and Species Protection in Indonesia: Policy and Legal Context’ (USAID, 6 March 2015) <http://pdf.usaid.gov/pdf_docs/PA00KH4Z.pdf> accessed 21 March 2018.

(70) Ibid. 39.

(71) Ibid. 17.

(72) The document is available at <http://www4.unfccc.int/ndcregistry/PublishedDocuments/Indonesia%20First/

First%20NDC%20Indonesia_submitted%20to%20UNFCCC%20Set_November%20%202016.pdf> accessed 21 March 2018.

(73) An overall profile of Indonesia and the World Trade Organization (WTO) can be found at <http://www.wto.org/english/tratop_e/tpr_e/tp378_e.htm> accessed 30 October 2018.

(74) See Simon Butt, 'Intellectual Property in Indonesia: A Problematic Legal Transplant' in Tim Lindsey (ed), *Indonesia: Law and Society* (Federation Press 2008) 620.

(75) Of course, the next question will be 'To what extent does the House of Representative have roles in the ratification or accession process of Indonesia?' Nevertheless, this chapter will not delve into this as literature on constitutional law in Indonesia would be a better setting to discuss that at length. There is a recent (as of March 2018) constitutional review before the Constitutional Court that focuses on the role of the House of Representatives in the process of ratification or accession of Indonesia to international agreements. See Case No. 13/PUU-XVI/2018 <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=14363#.WrH385NubsE> accessed 21 March 2018.

(76) The debate on this issue emerged especially during the constitutional review of Law No. 38 of 2008 on the Ratification of the ASEAN Charter. The ruling of the Constitutional Court of Indonesia on this is available at <http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_33%20PUU%202011_ASEANcharter_telah_baca_26Feb2013%20final.pdf> accessed 21 March 2018.

(77) The Indonesian-language version of Law No. 24 of 2000 [Undang-Undang Nomor 24 Tahun 2000 tentang Perjanjian Internasional] is available at <https://pih.kemlu.go.id/files/uu0242000.pdf> accessed 24 April 2019.

(78) See Law No. 24 of 2000, arts 10 and 11 (art. 11 still calls it a Presidential Decree [Keputusan Presiden]).

(79) Mochtar Kusumaatmadja and Etty R Agoes, *Pengantar Hukum Internasional [Introduction to International Law]* (Center for the Study of the Archipelago, Law and Development and PT Publisher 2003).

(80) Simon Butt succinctly summarizes the various stances on this matter: see Simon Butt, 'The Position of International Law within the Indonesian Legal System' (2014) 28 Emory International Law Review 1. See also Damos Dumoli Agusman, 'Indonesia dan Hukum Internasional: Dinamika Posisi Indonesia terhadap Hukum Internasional' ['Indonesia and International Law: The Dynamics of Indonesia's Position on International Law'] (2014) 15 Jurnal Opinio Juris 8 <http://pustakahpi.kemlu.go.id/app/Indonesia%20dan%20Hukum%20Internasional%20Dinamika%20Posisi%20Indonesia%20terhadap%2 accessed 21 March 2018.

(81) The document on this review is available at <http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_33%20PUU%202011_ASEANcharter_telah_baca_26Feb2013%20final.pdf> accessed 17 May 2018.

(82) Ibid. 200.

(83) Documents related to the case are available in the Indonesian language at <http://igj.or.id/wp-content/uploads/2018/12/13_PUU-XVI_2018.pdf> accessed 24 January 2019.

(84) Ibid.

(85) See the Court Transcript of 22 May 2018 (in Indonesian language), 15–16 <http://www.mahkamahkonstitusi.go.id/public/content/persidangan/risalah/risalah_sidang_10035_20180626090829_PERKARA%20NOMOR%2013.PUU-XVI.2018%2022%20MEI%202018%20.pdf> accessed 23 July 2018. The expert from the side of the President of the Republic of Indonesia, Hikmahanto Juwana, asserted in the Court Session on 22 June 2018 that there are alternatives for the involvement of Indonesian citizens through, among others: (a) civil society, (b) opinions in the mass media, and (c) focus group discussion sponsored by the relevant ministry. See the Court Transcript of 22 June 2018 (in Indonesian language), 46–7 <http://www.mahkamahkonstitusi.go.id/public/content/persidangan/risalah/risalah_sidang_10074_PERKARA%20NOMOR%2013.PUU-XVI.2018%20tgl%2025%20Juni%202018.pdf> accessed 23 July 2018.

(86) See documents related to the case (n 83), 266.

(87) See Butt (n 80).

(88) Ibid.

(89) Case No. 55 / Pdt. G / 2013 / PN.Smda. At the time of writing, the District Court of Samarinda has decided the case at the district level. It is essential to take this case into account as it relates to Indonesia’s ratification of the UNFCCC and the obligations arising from it.

(90) The Ruling of the District Court of Samarinda City No. 55/Pdt.G/2013/PN.Smda, 2014. See also further discussion on this case in Yetty Komalasari Dewi and Anbar Jayadi, ‘Enhancing Corporate Responsibilities to Fulfill the Right to Clean Environment: A Lesson Learned from Indonesia’, International Union for the Conservation of Nature Academy of Environmental Law Conference Paper, Oslo, 24 June 2016.

(91) See the Ruling of the District Court of Samarinda City No. 55/Pdt.G/2013/PN.Smda, 2014, 25.

(92) See Butt (n 80); Adriaan Bedner, ‘Indonesian Legal Scholarship and Jurisprudence as Obstacle for Transplanting Legal Institutions’ (2013) 5 The Hague Journal on the Rule of

Law 253 (Bedner points out the use of international legal instruments in the context of legal transplants).

(93) Butt (n 80); Bedner, ibid.

(94) The members are, in alphabetical order, Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam: 'ASEAN Member States', <http://asean.org/asean/asean-member-states/> accessed 23 July 2018.

(95) ASEAN, 'ASEAN Motto' <http://asean.org/asean/about-asean/asean-motto/> accessed 23 July 2018.

(96) See further Adijaya Yusuf, *Association of South East Asian Nations (ASEAN)* (Kluwer Law International 2001).

(97) Other co-founders are Malaysia, Philippines, Singapore, and Thailand. See ASEAN, 'About ASEAN' <http://asean.org/asean/about-asean/> accessed 23 July 2018.

(98) See Ralf Emmers, 'Indonesia's Role in ASEAN: A Case of Incomplete and Sectorial Leadership' (2014) 27 The Pacific Review 543.

(99) See for example Hikmahanto Juwana, 'Kewajiban ASEAN Melindungi Myanmar' ['ASEAN Obligations to Protect in Mynamar'] *Kompas* (14 September 2017) <https://kompas.id/baca/opini/2017/09/14/kewajiban-asean-melindungi-myanmar/> accessed 5 November 2017.

(100) See Felix Heiduk, 'Indonesia in ASEAN: Regional Leadership between Ambition and Ambiguity', SWP [German Institute for International and Security Affairs] Research Paper No. 6, April 2016, 12 <http://www.swp-berlin.org/fileadmin/contents/products/research_papers/2016RP06_hdk.pdf> accessed 23 July 2018.

(101) Ibid.

(102) ASEAN Intergovernmental Commission on Human Rights website <http://aichr.org/about/> accessed 29 January 2019.

(103) Ibid.

(104) Juwana (n 99).

(105) The ASEAN Chairman's Statement is available at <http://asean.org/storage/2017/09/1.ASEAN-Chairmans-Statement-on-the-Rakhine.pdf> accessed 22 March 2018.

(106) 'Indonesia pins hope on ASEAN-EU FTA to support SMEs, palm oil' *The Jakarta Post* (25 March 2018) <http://www.thejakartapost.com/news/2018/03/25/indonesia-pins-hope-on-asean-eu-fta-to-support-smes-palm-oil.html> accessed 17 May 2018.

(107) Dilip Dutta and Fajar Hirawan, ‘The Role of Indonesia-ASEAN Trade in Achieving Food Security in Indonesia’, The University of Sydney Economics Working Paper Series 2017–13, November 2017, <http://econ-wpseries.com/2017/201713.pdf> accessed 17 May 2018.

(108) See Kexian Ng, ‘Transboundary Haze Pollution in Southeast Asia: The Effectiveness of Three Forms of International Legal Solutions’ (2017) 10 Journal of East Asia and International Law 221.

(109) ‘Menlu Sebut RI selalu Dukung Timor Leste Jadi Anggota ASEAN’ [‘Foreign Minister Said Indonesia Always Support Timor Leste to be ASEAN Member’] (CNN Indonesia, 31 January 2018) <http://www.cnnindonesia.com/internasional/20180131132539-106-272896/menlu-sebut-ri-selalu-dukung-timor-leste-jadi-anggota-asean> accessed 17 May 2018.

(110) See for example ‘Ajakan Jokowi agar Australia Gabung ASEAN Dinilai Sulit Terwujud’ [‘Jokowi’s invitation for Australia to join ASEAN is considered difficult to materialize’] *Kompas* (19 March 2018) <https://nasional.kompas.com/read/2018/03/19/10144871/ajakan-jokowi-agar-australia-gabung-asean-dinilai-sulit-terwujud> accessed 17 May 2018.

(111) Ibid.

(112) See generally on legal education in Indonesia and its changes, Hikmahanto Juwana, ‘Legal Education Reform in Indonesia’ <http://www.aseanlawassociation.org/Hikmahanto_Juwana.pdf> accessed 23 July 2018.

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The Spirit of Bandung

LUIS ESLAVA, MICHAEL FAKHRI, AND VASUKI NESIAH*

UNDERSTANDING BANDUNG

On April 18–24, 1955, delegates from twenty-nine states attended a conference in Bandung, Indonesia.[1] The meaning of the events that took place during those days was disputed then and now. Bandung has generated, as a result, myths and countermyths, hopes and disappointments, solidarities and fractious disputes, visions for international law and its subversion. In fact, scholars and politicians refer to the conference by different names: the Asian-African Conference, the Bandung Conference, or simply Bandung. Each of these names signals a different understanding of the Conference and a different conceptualization of both its origins and horizons.

Bandung was born of the challenges of grappling with the legacies of European imperialism, their long reach from the past, as well as their transmutation into the structures of the current world order.[2] However, it also had, a forward-looking, almost utopian dimension with an unprecedented number of peoples across the world actively reimagining, changing, and prefiguring the rules of the global order. Newly independent countries such as Indonesia and India had begun to assert their presence in international politics and law. Postcolonial states that were previously held together within different empires

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[1] From Asia: Afghanistan, Burma (now Myanmar), Cambodia, Ceylon (now Sri Lanka), People's Republic of China (PRC), India, Indonesia, Iran, Iraq, Japan, Jordan, Laos, Lebanon, Nepal, Pakistan, the Philippines, Saudi Arabia, Syria, Thailand, Turkey, North and South Vietnam (now unified), and Yemen. From Africa: Egypt, Ethiopia, the Gold Coast (now Ghana), Liberia, Libya, and Sudan. The conference was also attended by several others who were in solidarity with the anti-imperialist project such as the Black Amerian scholar Richard Wright and the Kenyan freedom fighter Joseph Murumbi.

[2] See Chimni, Chapter 1 in this volume.

were now building new alliances among each other as "sovereigns."[3] While almost all countries in Asia had attained independence, in 1955 most of Africa was still colonized by European states. In fact, delegates from the Gold Coast (now Ghana) attended Bandung while their government was at a critical stage in their independence negotiations with the British (only achieving full independence in 1957). Countries on the cusp of independence, such as Ghana and Kenya, were aware that "self-determination" was going to be affected by the international landscape as much as by factors internal to their nations. While Asian states may have instigated Bandung, African states took it and continued to push for and assert their independence with their Declaration of the First Conference of Independent African States (held in Accra on April 15–22, 1958). Later, Latin America, in the form of some states and an expanding network of liberation movements, all of them postcolonial creations, joined their Asian and African counterparts to push for an even stronger anti-imperial agenda in the 1966 Tricontinental Conference.[4] Pankaj Mishra describes decolonization as "the central event of the last century for the majority of the world's population," namely "the intellectual and political awakening of Asia and its emergence from the ruins of both Asian and European empires."[5] This "awakening," we could argue, is also applicable to Africa, the Pacific, Latin America, and beyond. Bandung and its legacies are a manifestation of that "awakening."

The Bandung Conference was a coming together of leaders of countries whose combined population made up approximately two-thirds of the world's people. Attendees did not easily map onto a First World versus Second World political matrix, nor was the Conference a straightforward precursor to the Non-Aligned Movement.[6] Of the five organizers – the Colombo Powers – India, Burma (now Myanmar), and Indonesia were socialist but neutral, whereas Ceylon (now Sri Lanka) and Pakistan were anticommunist and pro-West. The delegates from Iran, Iraq, Libya, Lebanon, Pakistan, Philippines, Turkey, and South Vietnam were also anticommunist and pro-West. On the other hand, Egypt, an important player in the Conference and its aftermath, was engaged in developing a form of Arab socialism during the Nasser years.[7] Categories of "imperial" and "postcolonial" were also complicated, by the fact that delegates

[3] See Anghie, Chapter 32 in this volume.

[4] See, e.g., Obregón, Chapter 13 in this volume.

[5] Pankaj Mishra, *From the Ruins of Empire: The Revolt against the West and the Remaking of Asia* (Toronto: Doubleday Canada, 2012), p. 8.

[6] Lorenz M. Lüthi, "Non-Alignment, 1946–1965: Its Establishment and Struggle against Afro-Asianism" (2016) 7 *Humanity* 201. See also Oklopcic, Chapter 16 and Özsu, Chapter 17 in this volume.

[7] See Peevers, Chapter 34 in this volume. See also Fouad Ajami, "On Nasser and His Legacy" (1974) 11 *Journal of Peace Research* 41.

from Japan, a formal imperial power, attended the Conference,[8] and because many countries that were seen as the custodians of Bandung developed "colonial" relationships with internal minorities or neighboring regions that they had annexed.[9] Moreover, the Conference itself, the speeches given, and its final outcomes were all formally framed and articulated in the language of international law. This was the very same language that had served to unroll empires across the planet and that, in the post–World War II context, was again engaged in "constituting" a new "order" in the world[10] – an order that came to be soon denounced as neocolonial by critical and, especially, Southern intellectuals.[11]

These contradictions, tensions, and diversities shaped the Bandung Conference, and the ways in which most people in the world confronted that moment of decolonization and the political reconfigurations and possible futures that it heralded. The Final Communiqué reflected the complexities of this landscape and the exercises in alternative world making being conducted, as well as the contested futures of the time.[12]

The Conference was divided into Political, Economic, and Cultural committees.[13] Accordingly, the Final Communiqué outlined a series of principles under the following headings: Economic Co-operation, Cultural Co-operation, Human Rights and Self-determination, Problems of Dependent Peoples, Other Problems (which identified specific existing colonial cases), and Promotion of World Peace and Co-operation. It concluded with ten principles (the Dasa Sila),[14] which were meant to conform to the UN Charter. With the benefit of the passage of time and our knowledge of what emerged from 1955, we can see the Communiqué speaking to a vision of a new international order, and planting the seeds for a new international law. In the Communiqué's dual voice of formality and openness, we can also see the struggle to both conform to and resignify the language and categories of the

[8] See Shahabuddin, Chapter 5 in this volume.

[9] For example see Choudhury, Chapter 19 in this volume regarding Kashmir and India, McGregor and Hearman, Chapter 9 in this volume about West Irian and Indonesia, and Dirar, Chapter 21 in this volume regarding Western Sahara and Morocco and Eritrea and Ethiopia.

[10] Anne Orford, "Constituting Order" in James Crawford and Martti Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012).

[11] See, for example, Thomas Benjamin, "Neocolonialism" in Thomas Benjamin (ed.), *Encyclopedia of Western Colonialism since 1450* (New York: Thomson Gale, 2007), p. 831. See also on a theorization of neo-colonialism, Gyan Prakash, *After Colonialism: Imperial Histories and Postcolonial Displacements* (Princeton: Princeton University Press, 1994).

[12] See especially Parfitt, Chapter 2 and Pahuja, Chapter 33 in this volume.

[13] Conference Chair and Chairman of the Political Committee was Sastroamijoyo, Prime Minister of Indonesia. Chairman of the Economic Committee was Roosseno, Minister of Economy Indonesia. Chairman of the Committee on Culture was Muhammad Yamin, Minister of Education and Culture of Indonesia.

[14] See Oegroseno, Chapter 37 in this volume.

international legal order. This duality and its attendant challenges get revisited again and again in the extended (and still ongoing) process of decolonization over the decades following the Bandung Conference. This process includes institutional initiatives such as the Non-Aligned Movement (NAM) and the United Nations Conference on Trade and Development (UNCTAD); projects seeking to shape international law such as the New International Economic Order (NIEO) and the Law of the Sea; and interventions regarding specific independence struggles such as in Palestine and Namibia.

The Communiqué was built on a premise of cooperation among multiple civilizations and religions – what we would today call a "trans-civilizational" perspective.[15] From that, the text developed some ideas of postcolonial solidarity, based on decentering Europe as the organizing geopolitical and cultural fulcrum of the world. Yet, like all documents that are the result of negotiation and compromise, and indeed of diverse ontologies, it was, without doubt, aspirational, ambiguous, and limited. While it did not have any formal legal status, the Communiqué used and expanded the scope of legal concepts such as sovereignty, self-determination, and human rights. To an important degree, it repositioned postcolonial nations as the "newer" and "truer" subjects of the international legal order, challenging with this the foundations of the legal and political status quo.[16] This new postcolonial model of international legal personhood was to be invoked by these nations in their negotiations and discussions with both Western states and the Soviet Union.[17]

Reading the Communiqué as an aspirational document intended to assemble a "new politics" on the surface of a resilient patterning of moving and multiform (imperial) forces, it is possible to capture what is commonly known as the "Spirit of Bandung" – a phrase made popular in part by Roeslan Abdulgani, Secretary-General of the conference.[18] Just the fact that the Conference was convened empowered people in the colonized world to assert their own place in the world on their own terms and to crystallize in the Final Communiqué the convoluted drama of being in the world after empire. As Vijay Prashad notes, "[f]rom Belgrade to Tokyo, from Cairo to Dar es Salaam, politicians and intellectuals began to speak of the Bandung Spirit."[19] The Communiqué represents a position of hope against almost insurmountable

[15] Yasuaki Onuma, *A Transcivilizational Perspective on International Law* (Leiden and Boston: Martinus Nijhoff, 2010).

[16] See Parfitt, Chapter 2 in this volume. [17] See Peevers, Chapter 34 in this volume.

[18] Roeslan Abdulgani, *Bandung Spirit: Moving on the Tide of History* (Djakarta: Prapantja, 1964), p. 110.

[19] Vijay Prashad, *The Darker Nations: A People's History of the Third World* (New York: New Press, 2007), p. 45.

stakes. The agenda was not only about asserting independence against an imperial past and present; it was also about facing an uncertain future. The stakes of peace and cooperation were nothing less than the fear of global nuclear war and the sedimentation of a reloaded, international structure that could be used, once again, against the interests of the Global South, as it came to be known.

It is not surprising that such an ambitious agenda has generated two types of historiography.[20] Some have written Bandung into history as a story of disappointment, with little long-term impact on international relations and no concrete agenda that gained traction with the countries of the global South. They argue that the Conference failed to have a tangible impact – there were no new international institutions that were established, and no new collective initiatives that proved sustainable.[21] Others, however, have measured Bandung differently. They look at the follow-up conferences that took place in the years after Bandung and the multiple solidarity movements that emerged from these efforts as not insignificant for the decolonization of international relations. While acknowledging the limited character of Bandung's formal effects, these other accounts have described the conference as representing and emboldening an emotional and psychological experience shared across the postcolonial and non-white world.[22] While both types of narratives continue – traces of which are present in this collection – in recent years, there has been renewed interest in going beyond international institutions in tracing Bandung's legacies for the decolonization of the international order.[23]

[20] For a detailed account of these bodies of literature, see Michael Fakhri and Kelly Reynolds, "The Bandung Conference" in Anthony Carty (ed.), *Oxford Bibliographies in International Law* Oxford: Oxford University Press, 2017.

[21] George McTurnan Kahin, *The Asian-African Conference, Bandung, Indonesia, April 1955* (Ithaca: Cornell University Press, 1956).

[22] Odette Guitard, *Bandoeng et le Réveil des Anciens Peuples Colonisés* (Paris: Presses Universitaires de France, 1961).

[23] For recent historiographies, see Seng Tan and Amitav Acharya (eds.), *Bandung Revisited: The Legacy of the 1955 Asian-African Conference for International Order* (Singapore: NUS Press, 2008); Christopher J. Lee (ed.), *Making a World after Empire: The Bandung Moment and Its Political Afterlives* (Athens: Ohio University Press, 2010); Sally Percival Wood, "Retrieving the Bandung Conference . . . moment by moment" (2012) 43 *Journal of Southeast Asian Studies* 523; Robert Vitalis, "The Midnight Ride of Kwame Nkrumah and Other Fables of Bandung (Ban-doong)" (2013) 4 *Humanity* 261; Naoko Shimazu, "Diplomacy as Theatre: Staging the Bandung Conference of 1955" (2014) 48 *Modern Asian Studies* 225; Brian Russell Roberts and Keith Foulcher (eds.), *Indonesian Notebook: A Sourcebook on Richard Wright and the Bandung Conference* (Durham and London: Duke University Press, 2016); "Special Issue: Bandung/Third World 60 Years" (2016) 17:1 *Journal of Inter-Asia Cultural Studies* 1–163.

Some of these accounts are more invested in celebrating Bandung and are keen to mine its legacies for remaking international relations today; others are more wary about romanticizing the conference and retrospective mythmaking. However, rather than dismissing certain accounts as simply "romantic," or measuring Bandung in terms of success and failure, we believe that one of the most significant things about Bandung was precisely this unknown and unknowable potential – no one at the time knew what the repercussions of Bandung would be. This powerful sense of being on the precipice of the new and unknown emerges, in one way or another, across these different strands of literature on Bandung. The final goal of the Conference was to undo imperialism and "racialism" (as it was then called). But at the dizzying heights of this historical summit, there were different ideas about what were the best tactics to achieve such a goal, and different visions of what that goal looked like. The trajectories that came out of the Conference were as disparate as they were aspirational. The stakes were high and the challenges enormous. In this sense, the debate over Bandung's meaning began even before the Conference was formally convened. However, if there is one thing that animated Bandung then that also characterizes its meaning now, it is the call to act, to shape history – a sensibility captured in Aime Cesaire's famous words in *Notebook of a Return to the Native Land*:

> Beware of crossing your arms in the sterile attitude of the spectator, because life is not a spectacle, because a sea of sorrows is not a proscenium, because a man who screams is not a dancing bear.[24]

Bandung was a conference against both imperialism and *mere* spectatorship. It was a performative commitment to changing the conditions of life under empire and returning the native land to the possibilities of history, with all of the associated costs this enterprise entails. This was the challenge confronting the *Wretched of the Earth*. As if in response to Cesaire's poetic manifesto against spectatorship, his Martinique comrade, Frantz Fanon, calls for collective action and a new sense of collective humanity to shape a new history:

> Today we are present at the stasis of Europe. Comrades, let us flee from this motionless movement … [to] … reconsider the question of mankind. … Come, brothers, we have far too much work to do for us to play the game of rearguard [action]. … The Third World today faces Europe like a colossal mass whose aim should be to try to resolve the problems to which Europe has not been able to find the answers. … No, we do not want to catch up with

[24] Aimé Césaire, *Notebook of a Return to the Native Land* (1939) (Middletown: Wesleyan University Press, 2001), pp. 13–14.

> anyone. What we want to do is to go forward all the time, night and day, in the company of Man, in the company of all men. The caravan should not be stretched out, for in that case each line will hardly see those who precede it; and men who no longer recognize each other meet less and less together, and talk to each other less and less. It is a question of the Third World starting a new history of Man.[25]

SITUATING THE POWER OF BANDUNG

Even though this collection starts from Bandung and examines how it may help understand the present, much work could also be done in trying to understand how Bandung is situated within a longer history of anticolonial solidarity and resistance engaged with international law. For instance, one could also look to liberal anticolonialists of 1919 or to the formation of the League Against Imperialism in 1927 as earlier moments when international law was deployed to challenge and undo imperial rule, and in a sense opening a road toward Bandung.[26] However, what makes the Bandung Conference particularly profound for international lawyers, in its time as well as in our own, is that it was the formal beginning of a project whose aim was to ensure that all peoples of the world benefited from what was claimed to be the twin building blocks of world order, sovereign statehood and international law. For most of history – despite good intentions, and sometimes enabled by good intentions – purveyors of past and modern international law either ignored or legitimized various forms of imperialism.[27] But at Bandung, international law's relationship with imperialism was formally and significantly challenged, from within.

How is it then that a diplomatic conference on international law on the island of Java projected a "Spirit of Bandung" that has traveled through the imagination of countless peoples and so many subsequent international events and phenomena? To respond to this question it is important to accept that it is not a shortcoming that some accounts of Bandung have a popular and idealistic tenor. This was indeed a defining feature of the Conference. While professional interest in Bandung ebbs and flows, very few international diplomatic conferences have entered popular culture, spread through diverse local social movements across the globe, and remained so resonant in the political imagination across different generations. How is it that Bandung is

[25] Franz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1963), pp. 314–315.
[26] See Petersson Chapter 3 in this volume.
[27] See especially, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004).

simultaneously a reference point for Malcolm X,[28] international economic lawyers,[29] international environmental lawyers,[30] and art movements?[31] Maybe a possible start to answering these questions is to pay attention to Bandung's creative fusion of formalism and subversion, of "formal" forms being turned inside out, against a historical backdrop of oppression. A productive excess comes out naturally here. The future had to be made anew, in a world in which there were already set frames in place. Some steps forward, some steps back. Rehearsals and projections mark the Conference and its history.

Naoko Shimazu has written a richly suggestive account of the Conference as a diplomatic theater consciously designed as a performance.[32] The delegates engaged in a number of public events and in pageantry developing a rapport with the people of Bandung. The delegates were particular about what they wore in public, and the conference organizers transformed the city for the Conference. People in Bandung were indeed both the audience and actors in their interaction with delegates at public events, through their conversations with each other, and in public discussions through local newspapers and magazines. But if the people at Bandung had front-row seats, there was also a global audience with their eyes trained on the stage. And the conference organizers and delegates were aware of it: they had in their minds their audiences across the seas, in their home countries and continents as well as in Europe and the Americas. According to Roeslan Abdulgani, the Secretary-General of the Joint Secretariat of the Conference, Sukarno was, for example, attentive to setting the stage in everyway – not just in terms of law and policy talk but also the details of the principal conference venue:

> The interior of the Concordia Building must be inspiring. Everyone sitting inside it must be inspired. Don't be so prosaic. Not so dry. Not like a book of laws … You know what I think – *Met juristen kun je nooist een revolusi beginnen*. You can't make a revolution with jurists! They have no inspiration.

[28] Malcolm X, "Message to the Grass Roots. November 10, 1963, Detroit" in George Breitman (ed.), *Malcolm X Speaks: Selected Speeches and Statements* (New York: Grove Press, 1965), p. 3.

[29] An Chen, "Reflection on the South-South Coalition in the Last Half Century from the Perspective of International Economic Law-Making – From Bandung, Doha and Cancun to Hong Kong" (2006) 7 *Journal of World Investment & Trade* 201. See also Faundez, Chapter 30 in this volume.

[30] Sumudu Atapattu and Carmen G. Gonzalez, "North-South Divide in International Environmental Law: Framing the Issues," in Shawkat Alam et al. (eds.), *International Environmental Law and the Global South* (New York: Cambridge University Press, 2015), p. 1.

[31] See Kanwar, Chapter 8 in this volume.

[32] Naoko Shimazu, "Diplomacy as Theatre: Staging the Bandung Conference of 1955" (2014) 48 *Modern Asian Studies* 225.

> Whereas the participants need to be enfolded in inspiration! For that reason, change the interior of this building![33]

For us the metaphors of performance, actors, and audience are suggestive of how to read Bandung and the multiple contexts that have shaped the event, its reception, and its legacy. As the contributions in this collection suggest, the best approach to engaging with Bandung is not to read Bandung in isolation, but to see how it played out, and continues to play out, in diverse forms at different moments. Contextual, anachronistic, competing, and sometimes contradictory histories of Bandung allow us to understand better, as a result, the many different ways that Bandung occupies the history of international law, imperialism and resistance, and global history in general.

Taken as a complex, composite, collectively authored global history, this volume affirms a historical voice shaped by radical multiplicity in matters related to international law, imperialism, and resistance in our long post-colonial present. Indeed, it would be more accurate to speak of global histories, often even within the multiple registers of individual chapters. Relatedly, many of our contributors speak to social movements and marginalized communities' experience of and shaping of international legal history – what some may term a peoples' history of international law. To this end, it pays attention to how international legal history is narrated, contested, and imagined in multiple fora, from diplomatic memoranda and General Assembly resolutions to paintings and family letters; in other words, our histories are culled both from the formal archive of "official" Bandung and the repertoire of "embodied memory" of Bandung.[34] But, as the reader will notice, this multiplicity does not display here as agnostic or unsituated. It does not pretend to be complete and does not aspire to be cosmopolitan. Instead, as an artifact of global history itself, this volume relates to Bandung as part of a longer, open-ended project to de-constitute and reconstitute order in the world, especially in the Global South through post-imperial forms of governance, international legal mechanisms, and permanent resistance.

Bandung could be understood, in this way, as something more than a single event or a moment of commencement. Perhaps Bandung is a story; a story in which the "Spirit of Bandung" was already haunting the world at the moment in which the Conference took place, and it then took off in different

[33] Roeslan Abdulgani, *The Bandung Connection: The Asia-Africa Conference in Bandung in 1955* (Singapore: Gunung Agung, 1981), p. 68.

[34] Diana Taylor, *The Archive and the Reportorie* (Durham, NC: Duke University Press, 2003).

directions. If we follow this line of thought, it is possible to realize how Bandung came to provide the necessary conditions for a momentous gathering – one with wide global repercussions at the normative, institutional, and cultural levels. In this sense, our orientation toward the Global South involves an attention to both the cross-geographical underpinnings and effects of Bandung in the South as well as in the North, and the multiple registers, scales, and temporal locations that were haunted and continue to be haunted, productively or not, by Bandung and its "Spirit."[35] As such, we are less interested here in chronicling Bandung as an event; we are more interested in how the "global histories of Bandung" are narrated, how the postcolonial condition is emplotted, and how the intellectual and political stakes of the synergies and tensions in those multiple and varied histories shaped, or could shape, the orientation of the dominant world order.

Bandung's larger significance as a counterpoint to the dominant order has been particularly significant for international lawyers because it was both an act of collective imagination and a practical political project that gave rise to a range of institutional experiments and social movements. In this sense, Bandung is often identified with birthing the Third World project.[36] However, it is more accurate to understand Bandung as a moment that facilitated and empowered a number of "third-word-list" projects.[37] Sometimes these different projects aligned together, and at other times they manifested divergent projections of third-world futures.

Focusing on Afro-Asian solidarity, this is a dynamic that peaked in 1955 and subsided in 1965.[38] From this perspective, the preliminary institutions and conferences that led to Bandung were the Arab League (1945), the Asian Relations Organization (1947), the Delhi Conference on Indonesia (1949), the Baguio Conference (1950), the Colombo Conference (1954), the Nehru-Chou En Lai Statement (Panchsheel Treaty) (1954), the SEADO Treaty (1954), and the Bogor Conference (1954).[39] The Afro-Asian Peoples' Solidarity Organization (AAPSO) was a social movement created as a direct result of Bandung (and the people-to-people, nongovernment Conference of Asian

[35] On the turn to Global History and its complications, see Samuel Moyn and Andrew Sartori (eds.), *Global Intellectual History* (New York: Columbia University Press, 2013).

[36] Prashad, *The Darker Nations: A People's History of the Third World*.

[37] Christopher J. Lee, "Between a Moment and an Era: The Origins and Afterlives of Bandung" in Christopher J. Lee (ed.), *Making a World after Empire: The Bandung Moment and Its Political Afterlives* (Athens: Ohio University Press, 2010), p. 1.

[38] See McGregor and Hearman, Chapter 9 in this volume.

[39] Sundar Lal Poplai (ed.), *Asia and Africa in the Modern World: Basic Information Concerning Independent Countries* (Bombay: Asia Pub. House, 1955), pp. 189–214.

Countries held in 1955 in New Delhi a few days before Bandung). In turn, this organization created the Afro-Asian Writer's Conference that held its inaugural meeting in 1958 in Taskent and the Afro-Asian Federation for Women that held its inaugural conference in 1961 in Cairo. The Asian-African Legal Consultative Organization (AALCO) (originally known as the Asian Legal Consultative Committee) was another direct result of Bandung. Both the AAPSO and AALCO remain active today.

Focusing on Third World politics more broadly, Bandung contributed to the creation of the Non-Aligned Movement (NAM) (1961) and there was some ideational continuity between the two. But, as already mentioned, only some Bandung participants supported full nonalignment; moreover, NAM had its own political tensions and dynamics focused on interstate politics and realigning global power away from the West in an already more virulent and polarizing Cold War context.[40] Similarly, the Tricontinental Conference (1966) and its institutional birth-child, the Organization of Solidarity with the People of Asia, Africa, and Latin America (OSPAAAL) is indebted to Bandung – except this one embraced a more socialist and liberationist tenor, and left behind the conciliatory aspects immersed in the Asian focus and values of 1955. As Robert Young has put it,

> Third World identity at Bandung . . . was very much mediated by recent and ongoing wars in Asia. This encouraged the delegates to try to step out of the dynamics of the Cold War that was producing such conflicts into a free space of neutrality. In this context, the Soviet Union was regarded as the most threatening power. By the time of the Tricontinental Conference in Havana eleven years later, the situation had changed dramatically. At Havana, the Soviet Union was regarded as the major ally, and the US characterized as the global imperialist power that had to be resisted at all costs. Non-alignment had changed to alignment, and the political philosophy of non-violence had moved to one of violence.[41]

Accompanying these direct inputs and outcomes of the Conference, there is, of course, a whole universe of areas touched by Bandung through its response to imperialism, international law and resistance. At this level, Bandung becomes both a trace, and a question of tracing. It exists across disparate spaces, time trajectories, and registers: from institutional and conceptual formations,[42] to past histories,[43] to national and regional narratives and

[40] See also, Oklopcic, Chapter 16 and Özsu, Chapter 17 in this volume.
[41] Robert Young, "Postcolonialism: From Bandung to the Tricontinental" (2005) 5 *Historein* 11, 14.
[42] See, e.g., Khan, Chapter 6 and Faundez, Chapter 30 in this volume.
[43] See, e.g., Shahabuddin, Chapter 5 in this volume.

statecraft practices,[44] to alternative conceptualization of the world and international law,[45] to social movements and liberation struggles,[46] and to old and new forms of both resistance and oppression.[47]

BANDUNG IN INTERNATIONAL LAW

As mentioned earlier, over the last decade scholars interested in decolonization and international relations have begun to reassess the historic role of Bandung. One of the most common approaches in this historic reassessment is a discussion of the political significance of Bandung in terms of major world powers, Cold War axes of interests, or Great Men of history. Others situate Bandung within national or regional politics.[48] Some chapters in this collection follow similar kinds of approaches to varying degrees. But what does it mean to situate Bandung or place these other accounts within international legal history?

Interestingly, many of the facts about Bandung have become blurred and disputed over time. Scholars have pointed to how historical accounts of the conference have been inaccurate and laden with romantic and political mythmaking.[49] Undoubtedly, it is necessary to establish a correct account of who attended and what happened during the conference – a task that has in fact generated a growing body of literature in recent years. But an exclusive focus on the factual details of the conference does little to contribute to our

[44] See, e.g., Carvalho Veçoso, Chapter 25; Chen, Chapter 10; Choudhury, Chapter 19; Gupta, Chapter 29; Rasulov, Chapter 12; and Peevers, Chapter 34 in this volume.

[45] See Chimni, Chapter 1; LaForgia, Chapter 24; Mamlyuk, Chapter 11; Pahuja, Chapter 33; Parfitt, Chapter 2; Obregón, Chapter 13; Okafor, Chapter 31; and Saberi, Chapter 38 in this volume.

[46] See, e.g., Ahmed, Chapter 27; Farley, Chapter 36; McGregor and Hearman, Chapter 9; Aboueldahab, Chapter 23; Petersson, Chapter 3; and Samour, Chapter 35 in this volume.

[47] See, e.g., Anghie, Chapter 32; Chatterjee, Epilogue; Dirar, Chapter 21; Esmeir, Chapter 4; Gassama, Chapter 7; Kanwar, Chapter 8; Kapur, Chapter 18; Mickelson and Natarajan, Chapter 28; Oegroseno, Chapter 37; Reynolds, Chapter 14; Sayed, Chapter 26; and Sandoval, Chapter 15 in this volume.

[48] J.A.C. Mackie, *Bandung 1955: Non-Alignment and Afro-Asian Solidarity* (Singapore: Editions Didier Millet, 2005); Prashad, *The Darker Nations: A People's History of the Third World*; Itty Abraham, "Bandung and State Formation in Post-colonial Asia" in See Seng Tan and Amitav Acharya (eds.), *Bandung Revisited: The Legacy of the 1955 Asian-African Conference for International Order* (Singapore: NUS Press, 2008), p. 48; Antonia Finnane and Derek McDougall(eds.), *Bandung 1955: Little Histories* (Caulfield East, Victoria: Monash University Press, 2010); Lee (ed.), *Making a World after Empire: The Bandung Moment and Its Political Afterlives*.

[49] Vitalis, "The Midnight Ride of Kwame Nkrumah and Other Fables of Bandung (Ban-doong)".

understanding of what Bandung means in the larger sense. As we started to suggest above, the historical embellishments and political lore that has been attached to Bandung are important windows into understanding its significance for the global order, and, in particular, for international law as part of this global order. One reason for this is because international law – as all other laws – has always been laden with myths. Let us briefly provide the example of the Treaties of Westphalia to explain this point.[50]

As the story goes, two treaties were signed at two important European conferences in the Catholic city of Münster and the Lutheran city of Osnabrück – both in Westphalia (a province in present-day Germany) – on October 24, 1648. These treaties marked the closure of the Thirty Years' War, which was a bloody conflict between Catholics and Protestants. In the annals of orthodox international law these treaties mark the emergence of the modern state as a secular institution independent from the Church. It was the moment that created a system in which the international order shifted from one "based on the recognition of authorities above the States to a horizontal system characterized by the coexistence of a multiplicity of territorially defined autonomous entities and sustained by a new type of law operating between rather than above the members of the system."[51] According to the discipline's canonical history, it is this new configuration that gave rise to the modern international legal order.[52]

Arguably, however, it is sociologically more accurate to situate international law's beginnings in 1868–1873 when it shifted, as Martti Koskenniemi has argued, from being the musings of "professors and philosophers, [as well as] diplomats with an inclination to reflect on the procedure of their craft" to becoming the practice of lawyers.[53] Westphalia as an origin (mythical) story was, in this way, only made popular later on, in the middle of the twentieth century.[54] But pointing this out does not mean that the most significant feature of "Westphalia" in the international legal canon is its inaccuracy.

[50] The same discussion can take place in the realm of private international law in regards to *lex mercatoria*; see Emily Kadens, "The Myth of the Customary Law Merchant" (2012) 90 *Texas Law Review* 1153; Ralf Michaels, "Legal Medievalism in Lex Mercatoria Scholarship" (2012) 90 *Texas Law Review* 259.

[51] Rainer Grote, "Westphalian System" (2006) *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008), online edition: www.mpepil.com.

[52] See how "the myth" of Westphalia also underpins the field of International Relations: Benno Teschke, *The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations* (London: Verso, 2003).

[53] Martii Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001), pp. 17, 41.

[54] Leo Gross, "The Peace of Westphalia, 1648–1948" (1948) 42 *American Journal of International Law* 20.

Instead, this point reveals that the actual value of Westphalia resides in its "mythic" role – the work it does, and what that tells us about the ambitions of the discipline of international law, and the political projects it serves. The Treaties of Westphalia thus serve as a foundational myth to explain how modern states and international law, mythical entities of their own, sprang from the same source, and how both of them are "rational," "modern," and necessarily "universal" projects. Many cultures have myths about siblings who often become deadly rivals. But unlike other mythical siblings, the state and international law do not destroy each other but depend on each other – this is congealed by memory in the myth of Westphalia. And it is precisely because of Westphalia's mythical status and its association with concrete institutional formations that Westphalia still occupies such a foundational place in both international law handbooks and the actual operation of the world.

But if Westphalia serves as the creation myth of international law, the myth of Bandung is its counterpoint. Bandung represents a vexed relationship with Westphalia: a critical grappling with world history as it has unfolded in its colonial and postcolonial period and in its many contexts. A richer historical account of Bandung – in fact, multiple histories of Bandung – will help us better understand, for this reason, the significance of Bandung, its constitutive debates, and how it is deployed in different legal contexts at all levels. Going further, we believe that a critical historiography of dominant Bandung histories will help us better connect the Conference with substantive questions about the nature, evolution, and, perhaps, the agonic or – even better – tragic unfolding of the international legal order. The objective of this collection is precisely this task. It provides different perspectives concerning what Bandung was, what it has meant, and what it could signify going forward, as a touchstone for our political imaginations, connecting the dots between different postcolonial moments. In different ways, these chapters ask about the formation and work of the Bandung myth, how it enriches or circumscribes our own time and our future, and how it can help us enhance our appreciation and use of international law, particularly as it relates to North-South relations in our unequal global world. In this sense, the contributions gathered here do not simply revisit Bandung, and its attendant historical accounts with a critical eye. Instead, treating Bandung as a window onto international law, these readings also offer a global history of the legal order that has patterned the legacies of colonialism and the struggle to give birth to a postcolonial world.

We could argue then, that 1955 at Bandung was when international law became truly "universal." It was the moment during which the majority of the people in the world either lived within a state (which they either claimed as their own or contested) or were fighting to form an independent state that was supported by international law. In this sense, it might make more sense to

describe our contemporary international order as *Bandungian* rather than *Westphalian*. If our mythical twins, the state and international law, were personified, they would likely have darker skin than expected.

This leads to another of Bandung's unique contributions to our understanding of international law and its world, namely the recognition that racism and political, legal, and economic structures of racial difference were an inextricable part of international law and the genealogy of the nation-state.[55] The Conference attendees deployed international law and state power to condemn and eradicate colonialism and "racialism," even though not every delegate at the conference wanted to frame questions in terms of race and in fact some were adamantly against racial discourse.[56] However, some participants at the Bandung Conference highlighted white supremacy, and there was discussion of race among the delegates. Indeed, Wright argues that the convening of the conference was in itself a statement about race and history:

> The despised, the insulted, the hurt, the dispossessed – in short, the underdogs of the human race were meeting. Here were class and racial and religious consciousness on a global scale. Who had thought of organizing such a meeting? And what had these nations in common? Nothing, it seemed to me, but what their past relationship to the Western world had made them feel. This meeting of the rejected was in itself a kind of judgment upon the Western world![57]

Thus Bandung also has a life in the global history of antiracism, a history that moves from the Bandung conference to the Durban conference to the present moment.[58] A number of antiracism activists in the American Black community, for example, have invoked Bandung to situate their own struggle in transnational solidarities. In these spaces, Bandung continues to animate the global battle against racism in all of its forms.[59]

[55] Prashad, *The Darker Nations: A People's History of the Third World* and Robert Vitalis, *White World Order, Black Power Politics: The Birth of American International Relations* (Ithaca: Cornell University Press, 2015).

[56] For instance, Vitalis argues that Nehru saw invocations of race as a "dangerous and retrograde step." On the other hand, Vitalis himself notes that Richard Wright recalled Nehru speaking (although not in his formal remarks at the end of the conference) "movingly" about his experience of racialized treatment. Vitalis, "The Midnight Ride of Kwame Nkrumah and Other Fables of Bandung (Ban-doong)," pp. 21 and 16.

[57] Richard Wright, *The Color Curtain: A Report on the Bandung Conference. Foreword by Gunnar Myrdal*, 1st ed. (Cleveland: World Pub. Co, 1956), p. 12.

[58] For instance, note the January 2017 event at University of Chicago: *Racing the International, from Bandung to Durban*. For more information, see http://csrpc.uchicago.edu/programs/public_programs/racing_the_international/bandung_to_durban/.

[59] See Farley, Chapter 36 in this volume.

Bandung brought together, in this way, different nationalist projects and class interests in order to create a widespread condemnation of "the indignity of imperialism's cultural chauvinism."[60] The resulting Bandung Communiqué and Principles addressed this strong consensus against imperialism by framing their points in terms of equality, sovereignty, human rights, and justice. While the delegates at Bandung could not agree on a definition of imperialism, to some degree they framed it in cultural terms and linked questions of culture to the political economy of imperialism. Almost two decades later, Edwards Said would investigate culture in imperial terms.[61] The two were inextricably linked and constituted a struggle over geography and "forms of control which do not depend so much on the holding of territory by settlers, but rather on the transformation of territories in the metropolitan imagination as somehow necessary to the cultural existence of the metropole."[62] Bandung was a powerful moment in this history that Said gestures to: a history that in Bandung turns into counter hegemonic struggle to transgress metropolitan imaginaries.

Foregrounding that global history, we can consider Bandung as being about cultural resurgence as much, as it was about (re)claiming sovereign nationhood. This was about anti-imperialism as an expression of alternative postcolonial modernities. In this vein, Bandung generated a series of conferences that embodied Asian-African ("AA" as it was referred to) solidarity and that were anti-imperial in cultural terms. These were inaugural meetings such as the AA Students Conference (Bandung, 1956), Conference of AA Journalists (Tokyo, 1956), AA People's Solidarity Conference (Cairo, 1958), AA Conference on Women (Colombo, 1958), and the Afro-Asian Writers' Conference (Tashkent, 1958).

The Bandung Political Committee proceedings were, however, the real priority for the heads of state present. Despite the number of socialist leaders at the conference (some of whom saw politics, culture, and economics as part of a single whole), the Political Committee was separated from the smaller Economic Committee (and Cultural Committee). This keen attention to the political dimension of a new world order came to be expressed more forcefully in subsequent years at the UN General Assembly, now increasingly darkening in its color composition. General Assembly resolutions conflicted

[60] Prashad, *The Darker Nations: A People's History of the Third World*, p. 45.
[61] Edward Said, *Orientalism* (London: Routledge & Kegan Paul, 1978); *Culture and Imperialism* (1993).
[62] Edward Said, "Response" (1994) 40 *Social Text* 20, p. 21. See also Rasulov, Chapter 12 in this volume.

with the priorities of the Security Council on issues that ranged from apartheid South Africa to the Israeli occupation of Palestine. Thus from Bandung to the structure of the United Nations, the fault lines of the postcolonial moment had a long afterlife that remained vibrant and contentious through the course of the Cold War period.

In contrast to the Bandung Political Committee, the Economic Committee's agenda was developed by experts, and the discourse was technocratic.[63] A commonly held assumption that would define future Third World agendas was that national independence and sovereignty were the preconditions to social and economic progress.[64] Thus independence fueled a range of new initiatives for reconfiguring the economic structure of the global landscape; these initiatives are among the most significant Bandungian contributions to international law, both in terms of the ingenuity of the specific proposals, and the inspiration to denormalize the inherited economic order.

The Bandung Communiqué was primarily, however, a product of the Political Committee and therefore does not fully capture the antagonism that former colonies felt against the relatively new Bretton Woods institutions and the relatively new postwar economic order. Bandung's alternative economic vision can be situated, as a result, in a timeline of global development politics that began around 1945. The dominant model of development emerging at that point, and which has definitely solidified now, came to not only separate politics and economics; it also began to insulate the economy from the political through a discourse of independence, expertise and technocracy.[65] For these reasons it is particularly unfortunate that scholars and commentators on Bandung have often ignored the economic aspects of Conference.[66] During the Economic Committee discussions, delegates were extremely critical of the International Bank for Reconstruction and the International

[63] Godfrey H. Jansen, *Afro-Asia and Non-Alignment* (London: Faber, 1966), pp. 308–09.

[64] See, e.g., Roeslan Abdulgani, *Bandung Spirit; Moving on the Tide of History* (Djakarta: Badan Penerbit Prapantja, 1964), p. 17. See also Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (New York: Cambridge University Press, 2011)

[65] See Gupta, Chapter 29 in this volume.

[66] Some notable exceptions include Benjamin Howard Higgins, *Economic Implications of the Asian-African Conference and Its Aftermath* (Cambridge, MA: Massachusetts Institute of Technology, Center for International Studies, 1955); Helen E. S. Nesadurai, "Bandung and the Political Economy of North-South Relations, Sowing the Seeds for Re-visioning International Society" in See Seng Tan and Amitav Acharya (eds.), *Bandung Revisited: The Legacy of the 1955 Asian-African Conference for International Order* (Singapore: NUS Press, 2008), p. 68; Bret Benjamin, "Bookend to Bandung: The New International Economic Order and the Antinomies of the Bandung Era" (2015) 6 *Humanity* 33.

Monetary Fund for unfairly treating or ignoring "underdeveloped countries" (as they were called).[67] But they decided, and here problematically, that the "proper place for such critical comments was at the annual Conference of the Bank and Fund itself, and not at the Asian-African Conference where other members of the Bretton Woods organizations were not represented."[68] Indeed, the underdeveloped countries had already also coalesced in the formation of the International Trade Organization (ITO), where they put forward alternative international trade and development policies, such as an international legal structure intended to stabilize commodity prices, reflected in the ITO Charter in 1948.[69] After the ITO collapsed upon birth, the call for stable commodities was reiterated in the Final Communiqué. Through the UNCTAD and individual commodity agreements, Third World countries would continue, up until around 1982, to devise multiple and competing international legal plans for the stabilization of commodities. All of these efforts were marked, however, by mixed results and the increasing separation of economics from political considerations.[70]

Bandung's most profound effect, at the level of economics, was thus to define the Third World agenda in terms of decolonization and "national development." The later was understood, problematically again, as the way to generate economic progress on the basis of the newly acquired political independence.[71] Within this narrative, Bandung is no longer only about Asia and Africa. Along this register, Bandung laid the groundwork for a larger Third World politics that included some countries in Europe and all of Latin America. What brought Third World countries together were a colonial history and their struggle for independence. Countries in Latin America had their own, earlier postcolonial history, and jurists could describe Latin America's unique position in international law, and how international law changed because of Latin American countries' independence.[72] Liliana Obregón describes this as a Creole legal consciousness – a consciousness that used international law to find a place in the world for postcolonial states and to

[67] Benjamin Howard Higgins, *Economic Implications of the Asian-African Conference and Its Aftermath* (Cambridge, MA: Massachusetts Institute of Technology, Center for International Studies, 1955), p. 7.

[68] Ibid., pp. 7–8.

[69] Michael Fakhri, *Sugar and the Making of International Trade Law* (Cambridge: Cambridge University Press, 2014), pp. 149–172.

[70] Ibid., pp. 139–208.

[71] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003), p. 74.

[72] Alejandro Alvarez, "Latin America and International Law" (1909) 3 *American Journal of International Law* 269.

justify, in turn, the continued disciplining of local realities – a project increasingly undertaken by local elites in lieu of the colonial masters of a previous era.[73] According to Obregón, jurists and politicians "strategically adapted both the meaning and the use of the external law to local circumstances, giving it an identity of place and a sense of regional uniqueness, while at the same time their flexibility was essential to maintaining the colonial enterprise and the centrality of a European legal heritage."[74]

So despite all the ideological diversity at Bandung, including disagreement on what constituted colonialism and imperialism, almost all Bandung delegates were united by a discourse of developmentalism.[75] As a collective agenda in the global public sphere this generated projects such as the above mentioned UNCTAD, and as a national agenda by individual states, policies of industrialization to address what many referred to at the time as economic "backwardness."[76] Within this paradigm, once political independence was attained, the road ahead was economic transformation and modernization; projects undertaken with the assumption of post-independence cultural homogeneity and a progress narrative of modernization.

This commitment to developmentalism in Bandung bridged domestic and international politics, and is a thread that runs through from international to domestic law, from then until now.[77] Soon after Bandung, international jurists examined for these reasons the role of "newly independent countries" of Asia and Africa in the world and how they would change international law.[78] At Bandung, newly independent states

[73] Liliana Obregón, "Noted for Dissent: The International Life of Alejandro Álvarez" (2006) 19 *Leiden Journal of Intenrational Law* 983.

[74] Ibid., 987. See also on the appropriation of international law by postcolonial international lawyers, Arnulf Becker Lorca, *Mestizo International Law* (New York: Cambridge University Press, 2014).

[75] See Gupta, Chapter 29; Özsu, Chapter 17; and Sayed, Chapter 26 in this volume.

[76] See, e.g., Charles Habib Malik, *The Problem of Coexistence* (The Mars Lectures) (Evanston, IL: Northwestern University Press, 1955), p. 25. See also Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality*.

[77] See especially on the intertwining operation of international law and development in the South, Anghie, *Imperialism, Sovereignty and the Making of International Law*; Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development*; Fakhri, *Sugar and the Making of International Trade Law*; Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality*; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

[78] For a selection of this literature, see Georges Abi-Saab, *Selected Bibliography on the Newly Independent States and International Law* (Geneva: Carnegie Endowment for International Peace, European Centre, 1963); *The Third World and International Law: Selected Bibliography (1955–1982)* (Geneva: UN Library, 1983); Michael Fakhri and Kelly Reynolds, "The Bandung Conference."

explicitly adopted and linked the language of development to "the problem of balancing interests and creating a truly universal international law."[79] This generated, as we have seen, visionary alternative proposals, for example, the Resolution on Permanent Sovereignty over Natural Resources (1962), the Declaration on the Establishment of a New International Economic Order (1974), the Charter of Economic Rights and Duties of States (1975), and the Declaration on the Right to Development (1986). These proposals remained, however, largely enclosed within the nation state-developmentalist paradigm and deeply vulnerable to a resilient old economic order. Newly independent states, as well as the already postcolonial republics of Latin America, very quickly became characterized in international law as "developing states" and, therefore, in need of developmental interventions. These interventions eventually came to show these "developing countries" the weakness of political (formal) independence in a world already crafted through the tools of imperial disciplines and economic interests – economic interests increasingly conceptualized, once again, as independent and technical. Debt accumulation, environmental degradation, elite capture, structural adjustments, and economic exploitation became, in this way, also part of the (tragic) legacies of Bandung era statehood.

A POST-BANDUNG AGENDA

We want to leave readers with a sense of how we compiled this volume and how it may be read. With the sixtieth anniversary of the Bandung Conference in mind, we approached a number of colleagues with the request to think critically about how Bandung has informed their engagement with law, to write anything they wished about this idea, and to employ any style they felt best fitted their own window into the Conference. We tried to include people from as many different places of the world and perspectives as we could, and did our best to be strict with our (unreasonable) word limit. We had no idea what to expect in return or what ideas would emerge. We did know that due to limits of time and resources we would inevitably not be able to cover some key aspects of Bandung. As the project unfolded, our sense of how much more there was to say on Bandung became more pronounced; we encountered other scholars who we would have loved to

[79] Anghie, *Imperialism, Sovereignty and the Making of International Law*, p. 204.

include in this conversation, and our own conversations about Bandung – among editors, contributors, and others – deepened our understanding of the themes and issues we had not fully appreciated or even known about when we started this project. That said, our sense of the value of this project, with all its limitations, was also further affirmed as time passed and this book slowly started to take shape.

The end result of our collective efforts is this volume. The book captures a rich, multiform window into contemporary understandings about Bandung's meaning and legacy. As a whole, it can be seen as a historiographical artifact of global international legal writing by a large and widespread collective of scholars, all of them influenced by the global effects of Bandung. It is then a window not only into 1955 but also into the current moment and all *its* myths and countermyths, hopes and disappointments, solidarities and fractious disputes, visions for international law and its subversion.

In putting this collection together, we learned that in writing about Bandung we engaged immediately in an exercise of imagining Bandung, and that such imaginaries affect our accounts of international law. Thinking about and through Bandung, we argue over how the world is and how it should be governed. Bandung is, in this sense, one way to debate different understandings of global time and space, or different ways to attain a decolonized future or to live with an always never fully postimperial tomorrow. Thus, if you read this collection as a whole, we hope you find the differences and arguments as productive as the shared conclusions. Moreover, we hope you find commonalities in unexpected places.

Derek Walcott, a St. Lucian poet, evoked the waves of colonialism, slavery, and exploitative trading relations that washed onto Caribbean shores in *The Sea Is History*.[80] It is this oceanic legacy, of multiple layerings, that President Sukarno invoked in his focus on the sea "as the main artery of imperialism" in his opening address at the Bandung Conference.[81] Walcott writes in his poem:

> but the ocean kept turning blank pages
> looking for History.

Yet Walcott holds onto the struggle to extricate history from that ocean with independence from colonialism:

[80] Derek Walcott, "The Sea Is History" in Eduard Baugh (ed.), *Selected Poems* (New York: Farrar, Straus and Giroux, 2007), p. 137.
[81] See Esmeir, Chapter 4 in this volume.

Then came the white sisters clapping
to the waves' progress,
and that was Emancipation—
jubilation, O jubilation—
vanishing swiftly
as the sea's lace dries in the sun

Yet that too was a false dawn:

but that was not History,
that was only faith,
and then each rock broke into its own nation;

He ends:

and then in the dark ears of ferns

and in the salt chuckle of rocks
with their sea pools, there was the sound
like a rumour without any echo

of History, really beginning.

As a historical question, if Bandung represented a politics of decolonization, nationhood, and development – with all of the contradictions involved in these processes – more work needs to be done to understand the current moment as yet another one where "history" is "really beginning." To some degree, Bandung was the early culmination of twentieth-century anticolonial movements.[82] But it also created new anticolonial possibilities. This sense of possibility, of beginning to imagine and create the world anew, is another of Bandung's enduring legacies.

To commemorate Bandung, African and Asian leaders renewed their commitment to each other on the fiftieth and sixtieth anniversaries of the Conference.[83] The most important event of Bandung's sixtieth anniversary,

[82] See, e.g., Petersson, Chapter 3 and Mamlyuk, Chapter 11 in this volume.

[83] Bandung's fiftieth anniversary was marked by the April 22–24, 2005 Asian-African Summit held in Indonesia. African and Asian leaders renewed their commitment to each other in terms of strategic relationship. This is reflected in the three-document Declaration on the New Asian-African Strategic Partnership (NAASP), Joint Ministerial Statement on the New Asian African Strategic Partnership Plan of Action, and Joint Asian African Leaders' Statement on Tsunami, Earthquake and other Natural Disasters. See "Archives," Bandung Spirit Network, www.bandungspirit.org/spip.php?article14. On April 22–24, 2015, in Bandung, national delegates and civil society leaders attended the Commemoration of the Sixtieth Anniversary of the 1955 Asian-African Conference. Delegates at the 2015 conference adopted three documents: the Bandung Message, Reinvigorating the NAASP, and the Declaration on

however, was not the formal political conference, but the renewed imaginative output exemplified by the large number of editorials, blog entries, and scholarship that emerged in light of the commemoration.[84] Political leaders in their contemporary commemoration of Bandung have eschewed the language of anti-imperialist alliances leaving the focus only on "South-South" cooperation. The authors in this collection, as with many writers, instead use Bandung as way to reinterpret and reexamine what imperial pasts and presents mean for the future.

Thus we resist seeing Bandung as necessarily a narrative of disappointment. It is teleological and ahistorical to reduce Bandung to a finite project such as national independence, nonalignment, or NIEO. Rather it is, to invoke Walcott again, the legacy that "the ocean kept turning blank pages/ looking for History." It is this sea of endless possibility and a horizon that is still ahead that frame the post-Bandung agenda. The diverse perspectives in this collection share the assumption that articulating Bandung's meaning or promise is an argument that one makes, not a premise one places in the background. Bandung's meaning depends on the writer's approach, context, or position. What we have learned in crafting this volume is thus that Bandung inspired a great many people in vastly different contexts to imagine different Third World projects, or resist Third World projects. And this continues today. One should ask, therefore, as many do in this collection, how people relied on Bandung or how people were inspired by Bandung to create a different world. Or to see how ideas promulgated by Bandung traveled, and continue to travel, to unanticipated places and remerge at different points in time.

A significant number of chapters in this collection interpret Bandung's legacy in a particular way, and use this interpretation to gauge contemporary issues, trace continuity, and notice change. Some focus on an aspect of Bandung's legacy and influence in areas such as human rights and development[85] or in areas not covered by Bandung such as gender politics, international economic law, or international environmental law.[86] Others suggest that one must consider Bandung in order to understand law and politics today of particular states and regions, such as China, India, Latin America, and the

Palestine. See "The New Asian-African Strategic Partnership," Ministry of Foreign Affairs Republic of Indonesia, www.kemlu.go.id/en/kebijakan/kerjasama-regional/Pages/NAASP.aspx.

[84] Many of the workshops, conferences, and publications generated in light of the sixtieth anniversary are cataloged in the Bandung Spirit Network, www.bandungspirit.org/.

[85] See Aboueldahab, Chapter 23; Okafor, Chapter 31; and Sayed, Chapter 26 in this volume.

[86] See Ahmed, Chapter 27; Faundez, Chapter 30; Mickelson and Natarajan, Chapter 28; and Taha, Chapter 20 in this volume.

Arab world,[87] and of course Asia and Africa.[88] By treating Bandung as a center point in the world, places like Europe become peripheral and Australia, Japan, and Brazil, with their ambiguous relationship with imperialism (for very different reasons), appear to be on the semi-periphery.[89] Palestine decidedly remains an issue that was explicitly raised at Bandung and remains unresolved today, though Bandung's relationship to the cause of Palestinian statehood is a matter of debate.[90] Certain ideas, such as race, were raised at Bandung that remain relevant today, but do not resonate as loudly in today's international legal scholarship as they definitely should.[91]

As the reader may already intuit, given our description of the different ways in which Bandung relates to international law, one of the main issues that arise in this collection is the critical tension created by the fact that sovereignty was such a foundational idea at the Conference. Newly independent countries adopted Western notions of sovereignty but developed them in ways that asserted their autonomy and sought to resist imperialism. The idea was that by pooling their sovereign power through a politics of anti-imperial solidarity, these new states would change the world order. But this concept of sovereignty often meant that state authorities could govern their territories as they saw fit, making Bandung's commitment to external equality the fulcrum for internal political distortions and excesses.[92] And not only did Bandung principles of equality and justice not apply internally, but it reinforced the idea of post-colonial states as "national majorities joined by ethnic or cultural minorities."[93] In ways that echoed Western nation-states, here too ethnic, racial and religious majorities were often treated as the prime beneficiaries of sovereignty. In this way, a multitude of "[c]ommunities marked by difference from these national majorities were … recast as aliens and outsiders,

[87] See Aboueldahab, Chapter 23; Chen, Chapter 10; Kang'ara, Chapter 22; Kapur, Chapter 18; and Sandoval, Chapter 15 in this volume.

[88] See Oegroseno, Chapter 37 and Rasulov, Chapter 12 in this volume.

[89] See, LaForgia, Chapter 24; Shahabuddin, Chapter 5; and Veçoso, Chapter 25 in this volume.

[90] See Samour, Chapter 35 in this volume.

[91] See Farley, Chapter 36 in this volume. See also, "Panel: International Dimensions of Critical Race Theory" (1997) 91 *Proceedings of the Annual Meeting of the American Society of International Law* 408; "Symposium on Critical Race Theory and International Law: Convergence and Divergence" (2000) 45 *Villanova Law Review* 827; Vasuki Nesiah, "Placing International Law: White Spaces on a Map" (2003) 16 *Leiden Journal of International Law* 1; Robert Knox, "Civilizing Interventions? Race, War and International Law" (2013) 26 *Cambridge Review of International Affairs* 111; Adrian A. Smith, "Migration, Development and Security Within Racialized Global Capitalism: Refusing the Balance Game" (2016) 37 *Third World Quarterly* 219.

[92] See Anghie, Chapter 32 and Gassama, Chapter 7 in this volume.

[93] Itty Abraham, *How India Became Territorial: Foreign Policy, Diaspora, Geopolitics* (Stanford: Stanford University Press, 2014), p. 69. Quoted in Anghie, Chapter 32 in this volume.

notwithstanding their long residence in these countries."[94] Today this infamous legacy continues to be present in many parts of the world.[95] Connected with this, the other ambiguous legacy of Bandung can be seen today in the vast numbers of people fleeing their homelands through the Mediterranean Sea, reversing the direction of European colonial travel, only to face bounded nation-states, each trying to keep themselves together. The sea has become, as we write this, a mass graveyard structured by international law. Yet, as Samera Esmeir notes in her contribution to this volume, people's journeys, "notwithstanding its deadly outcome, is a testament to the possibilities that the sea continues to present as a site of crossing, struggles, solidarity, and some hope."[96]

Authors in this volume have situated themselves differently in relation to the alliances, divergences, and tensions crisscrossing Bandung – both Bandung as event, and Bangung as myth. Bandung's influence on nationalist projects is reexamined through archival records or part of a history of ideas.[97] Others write in a more reflective register and consider Bandung to be an exercise in redescribing the world; they suggest that Bandung becomes politically salient when it is understood in a way that opens up multiple understandings of the past, present, and future.[98] Some see a present where Bandung's promise of freedom and equality among nations and peoples remains unfulfilled, in effect calling for a continued push in that direction.[99]

At the same time, a number of authors provide a precise account of Bandung's darker legacies. One argument is that the idea of solidarity at Bandung, when examined against NAM and NIEO, in effect elided differences that were irreconcilable.[100] The case studies on South Asia and Africa foreground how concepts of nationhood developed at Bandung allowed, and continue to allow, violence to be unleashed against populations whose rulers are not perceived as members of their nationalist/ethnic group or worth of attention.[101] Focusing on the specific role of Bandung's charismatic nationalist statesmen, two authors bring also a poignant understanding of Bandung's legacy: they tell us that while these leaders should be credited with generating Bandung's inspirational anticolonial power, they should also be understood as historical actors who are responsible for the significant inequality and violence

[94] Ibid. [95] See especially Dirar, Chapter 21 and Kapur, Chapter 18 in this volume.
[96] See Esmeir, Chapter 4 in this volume.
[97] See Obregón, Chapter 13; Peevers, Chapter 34; and Oklopcic, Chapter 16 in this volume.
[98] See Parfitt, Chapter 2 and Pahuja, Chapter 33 in this volume.
[99] See Chatterjee, Epilogue in this volume. [100] See Özsu, Chapter 17 in this volume.
[101] See Choudhury, Chapter 19; Dirar, Chapter 21; Gassama, Chapter 7; and Kapur, Chapter 18 in this volume.

within many postcolonial states because of their adherence to certain shared worldviews.[102]

This type of focus on Bandung's past implies that if we soberly look at the violence and inequality in the world today, we may see that it is partly the result of the fact that the leaders at Bandung achieved much of it what they set out to do. For instance, while none of the Four Asian Tigers – Hong Kong, Singapore, South Korea, and Taiwan – were present at the Conference, their political and economic policies have often been told as a story of planned economic independence that fits well within Bandungian sensibilities. Yet arguably, transnational solidarity plays only a minor role in the success of the Asian Tiger story. We may be witnessing a different version of nationalist alliance in the story of BRICS. China, India, post-apartheid South Africa, post-Soviet Russia, and Brazil have relied together, especially since 2009 when they began to meet annually, on claims of sovereignty and economic development to push themselves ahead in the modernist narrative and upgrade from developing into emerging economies. But yet again, many smaller countries were left behind – perhaps even rendered more vulnerable by the success of the BRICS countries. Is this in the tradition of Bandungian solidarity that we want to claim?

The challenges of a broader appeal for solidarity may be a call to return to the Bandungian insistence on the significance of colonial history. This is surely a significant part of the story of the tragedy of genocide, war, and environmental crisis in contexts such as Rwanda[103] and Palestine, and beyond, and our inability to respond to these events in a non-state-centric manner.[104] In the midst of this crisis, developmental discourses have come to fill the gap of proper political responses; coupled with humanitarianism these often carry an ontological structure predicated on victimhood, a poor disabling move that takes us to commiseration and not to liberation.[105] Another example lurking in the background of one of the chapters is, for these reasons, Syria. As we drew this volume together, we have been witnessing the regressive unraveling of imperial borders created by the 1916 Sykes-Picot Agreement. What does a Bandungian solidarity call for in this moment? Again, we are grappling with the limitations of reducing solidarity to commiseration or formulaic versions of sovereignty. As Prashad notes, "distress produces its own contradictions."[106]

[102] See Gassama, Chapter 7 and Gupta, Chapter 29 in this volume.
[103] Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton: Princeton University Press, 2001).
[104] See Samour, Chapter 35 in this volume. [105] See Sayed, Chapter 26 in this volume.
[106] Prashad, *The Darker Nations: A People's History of the Third World*, p. 279.

These are all important issues, and further research into them will complicate and enrich our post-Bandung agenda without descending into a narrative of failure on the one hand or nostalgia on the other. The treatment of civil unrest and internal repression in the post-colony as failures in the Bandung vision dehistoricizes the complexity of local social struggles. The failure narrative is often accompanied with an ascension into ethereal cosmopolitanisms – a move that history has shown as often quickly descending into international technical managerialisms and imperial projects of all sorts. The nostalgia narrative presents an equally problematic take on history in looking to the nation-state as the only locus of social change – a move that history has shown as often quickly descending into repression of dissenters and internal minorities. On the one hand, the failure narrative denies the long reach of colonialism and the continued role of neocolonialism; unrest in, or resistance to, the postcolonial nation-state is not the same as the failure of the Bandungian inheritance, in its nation-state form as well as others. Bandungian nationalism of the postcolonial moment could be understood as the tactical means people chose at the time to achieve their goals in an inherited "Westphalian" world order.[107] On the other hand, the nostalgia narrative denies that tactics is a matter of strategy and the nation-state should not be fetishized as a transhistorical category. These fault lines, this unrest, stands at the historical intersection of complex dynamics internal to the postcolonial nation as well as the complex dynamics of the neocolonial global landscape. Kamala Viswesarna notes in her discussion of India and Kashmir, in this sense, that refusing history often conflates "post-colonial critique with nation-state melancholia." She says this "not only produces an elision of the question of occupation but also has a tendency to subsume socio-political opposition in post-colonial states to mere symptoms of its 'failure.'"[108] Here, leaving aside both the failure narrative and the nostalgia narrative, we can think of the "occupation" as both Indian occupation of Kashmir and British colonization of the subcontinent. It is perhaps overdetermined that "unrest" and opposition will emerge at this potent historical junction.

In 1955, Richard Wright's conversation with Benjamin Higgins foregrounded the temporal terms for Bandung in a way that continues to resonate today. Wright was an author who provided a famous firsthand account of Bandung and linked it to the antiracism struggle in the United States, and Higgins was a development economist who studied the economic aspects of Bandung. They discussed Higgins's proposals after Bandung, and in their

[107] Robert Knox, "Strategy and Tactics" (2010) 21 *Finnish Yearbook of International Law* 193.
[108] Kamala Visweswaran, "Occupier/occupied" (2012) 19 *Identities* 440, 444.

conversation both thought that it might be too late to even start solving Asian countries' problems. Wright was overwhelmed by the degree of change necessary to improve living conditions and the amount of resources necessary to implement change. But then he concluded, "The problem here is not whether these Asian masses can or will make progress; the problem is one, above all, of means, techniques, and *time*."[109]

Today, we are living in one of those particular times and with the results of some of the particular techniques present in Bandung. In that sense, Bandung is our present. But is this the world we want? Today, in contradistinction to the Bandung moment, the progressive Third World project (certainly as exemplified in many of the contributions included in this volume) has unmoored itself from the state. It is also suspicious of developmental discourses, progress narratives, and illusory promises of emancipation. However it remains anti-imperial.[110] At Bandung, delegates argued over the geographical dimensions of imperialism, some emphasizing European colonialism, others worried more about the Soviet Union or the United States. This perspective, of course, left out postwar imperial ambitions among Asian and African states.[111] But just as imperialism can be understood in a multitude of ways, anti-imperialism should comprise a plurality of methods and perspectives. In this precise way, it is important to pay attention not only to the anti-imperial social movements that produced Bandung but also to their current local and transnational iterations.[112]

Today we could say, as a result, that anti-imperialism is an undertaking that engages with the workings of the state but with a deep mistrust if not hostility against it.[113] For the last three decades many have been engaged, along these lines, in what can be called a post-Bandung agenda. It is an agenda that provides a critical engagement with notions of sovereignty, human rights, and the international economic order. And it does not treat the state as a predetermined or privileged category. Rather, it is one that constantly revisits "how and where exactly we do engage, and should engage, with international

[109] Wright, *The Color Curtain*, p. 216 (emphasis in the original).
[110] See also Usha Natarajan, John Reynolds, Amar Bhatia, and Sujith Xavier (eds.) "Special Issue: TWAIL – On Praxis and the Intellectual" (2016) 37:11 *Third World Quarterly* 1943–2138 (with contributions by Georges Abi-Saab, Nesrine Badawi, Reem Bahdi, Richard Falk, Ali Hammoudi, Vanja Hamzić, Mudar Kassis, Adil Hasan Khan, Zoran Oklopcic, John Reynolds, Adrian M. Smith, and M. Sornarajah).
[111] See Dirar, Chapter 21 in this volume.
[112] See Chimni, Chapter 1 and McGregor and Hearman, Chapter 9 in this volume.
[113] See Chatterjee, Epilogue in this volume.

law."[114] With such an agenda, we can better appreciate, for example, the progressive and revolutionary implications of uprisings, revolutions, and social mobilizations in different Asian, Arab, African, Latin American, and European countries in recent years.[115]

As such, spatial concepts and their relation to political formations are currently a matter of investigation and argument within international legal scholarship. One approach has been to contextualize the state within different transnational scales, whether it is through new international institutions formations or regional imaginaries. Others have opted instead to put the state deeper in the background (or even better dispersed throughout our human and material world), calling, in this way, for an international law of the everyday.[116] This has been a reaction against an international law that is formed as a response to crises – crises from which it extracts value, in order to present itself as an extraordinary safety zone, while still sustaining these crises in different ways.[117] The aim of this exercise has been to reflect on, and move away from, the received myths of international law, and instead to pay attention to shared vernacular ways of seeing the world, communicating values, and performing or transmitting culture. Even as Bandung's generation of politicians, writers, and intellectuals pass away, taking living memory of the Conference with them, Bandung remains alive in today's intimate spaces of friendship, mentorship, and family.[118] This is not a space for grand romance, but it is a space of resistance and solidarity found in the places where we live and work – from Rhodes Must Fall in one space to Occupy in another; Black Lives Matter in one space and the Arab Spring in another. For instance, within the domain of Third World Approaches to International Law (TWAIL) – the multigenerational network of scholarship and solidarity that has nurtured us and many contributors to this volume – Bandung continues, not as a heroic conquest of the international legal order, but more as a popular spirit of "enlightened anarchy" that Gandhi aspired to for independent India.

[114] Luis Eslava and Sundhya Pahuja, "Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law" (2012) 45 *Journal of Law and Politics in Africa, Asia and Latin* 195.
[115] See, e.g., Abouelda hab, Chapter 23 in this volume.
[116] Luis Eslava, *Local Space, Global Life*.
[117] See, e.g., Anne Orford, "Embodying Internationalism: The Making of International Lawyers" (1998) 19 *Australian Year Book of International Law* 1; Hilary Charlesworth, "International Law: A Discipline of Crisis" (2002) 65 *Modern Law Review* 377, 385–386; Fleur Johns, Richard Joyce, and Sundhya Pahuja (eds.), *Events: The Force of International Law* (London: Routledge, 2011).
[118] See Mickelson and Natarajan, Chapter 28; Pahuja, Chapter 33; and Sandoval Chapter 15 in this volume.

But this call for an international law that pays attention to the everyday forces us to question whose day matters. The question of "who" is not self-evident and cannot be answered in the abstract, especially if we think from the perspective of the claims – enacted, forgotten, or imagined – in Bandung. In this sense, even though we all live in the realm of the everyday, international law and its myths still give people a platform to dream of alternative futures and enable one to speak to the world. In this way the post-Bandung agenda remains committed, as the contributions collected here demonstrate, to finding new spaces of unity and collective action that defy and transfigure concepts of nations and states, and international law as such. To paraphrase from the recent Black-Palestinian Solidarity movement: solidarity against imperialism and state-sanctioned violence is neither a guarantee nor a requirement – it is a choice.[119] Solidarity gains and loses momentum and direction like the winds in the sails of a ship. When there is a shared sense of solidarity, it feels as though there is collective movement toward a clear goal. At other times, however, solidarity feels more like a political agenda that is at the mercy of forces of nature pushing in unknown directions. Alliances are difficult to create and tenuous at best, but, as we have discovered, the effort to create them is profoundly transformative.[120]

Bandung inserted the concepts of equality and justice into international law in a way that cannot be undone. Bandung's significance for international lawyers arises from the fact that it is both an idea and a project, a collective imagination of a new world and a practical effort to make that idea a reality. It is for every generation to argue and debate over what equality and justice mean for international law, and in doing so to resist normalization and to wrench open the possibility of an alternative, fairer, and more just world order, "like a rumor without any echo/of History, really beginning."

[119] See www.blackpalestiniansolidarity.com/#sthash.ZUnfqH4K.DoHqmzCS.dpuf.

[120] Vasuki Nesiah, "Uncomfortable Alliances: Women, Peace and Security in Sri Lanka" in Ania Loomba and Ritty Lukose (eds.), *South Asian Feminisms* (Durham: Duke Univeristy Press, 2012), p. 139.

The Methods of International Law

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Editors

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THE METHODS OF INTERNATIONAL LAW

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FOREWORD

The last half of the twentieth century witnessed a seismic transformation in the field of international law. Large areas of international life became the subject of international legal norms and processes, creating demands by governments, international institutions, NGOs, and other global actors for the skills of international lawyers. Moreover, the discipline of international law became transformed, as the European traditions that had dominated earlier generations were augmented, modified, and rejected by scholars around the world. This transformation began in the 1950s and continued into the 1990s. The result is an array of genuinely new methods of understanding, analyzing, and prescribing the role of law in international affairs.

In the fall of 1998, the *American Journal of International Law* commissioned a group of leading scholars around the world to analyze the methods of contemporary international law. Each author was chosen because his or her work was identified with a significant method. We asked the authors to describe the basic contours of their method and apply its insights to one problem in international law. The resulting essays—nine of the ten in this book—originally appeared in Volume 93, Number 2 of the *American Journal of International Law* (April 1999). The tenth essay, on Third World approaches to international law, was commissioned especially for this book.

The nine original essays appear as published in the *AJIL* with two adjustments. First, because each of the original essays responded to the other essays in the symposium, we asked their authors to revise them to respond to the newest chapter. Second, each author was asked to update his or her article to rectify any obvious anachronisms arising since the original publication in 1999; for the sake of expediency, we did not ask the authors to make major revisions to reflect recent developments.

The editors wish to acknowledge with gratitude the work of those individuals who made both the original symposium and this book possible. The late Jonathan Charney and W. Michael Reisman, who served as Editors-in-Chief of the *AJIL* during the preparation of the symposium, devised the idea for this project. Their wisdom

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APPRAISING THE METHODS OF INTERNATIONAL LAW: A PROSPECTUS FOR READERS

Steven R. Ratner and Anne-Marie Slaughter

In 1908 the second volume of the *American Journal of International Law* featured a piece by Lassa Oppenheim entitled *The Science of International Law: Its Tasks and Method.* Oppenheim began his article by noting, apparently with some approval, that the first volume of *AJIL*, stacked with articles only by Americans, had "shown to the world that America is able to foster the science of international law without being dependent upon the assistance of foreign contributors."[1] Concerned, however, that students were "at first frequently quite helpless for want of method [and] mostly plunge into their work without a proper knowledge of the task of our science, without knowing how to make use of the assertions of authorities, and without the proper views for the valuation and appreciation of the material at hand," Oppenheim sought to bring "the task and the method of this our science into discussion in this Journal."[2] What followed was a comprehensive exposition of his views on the purposes of international law and the methods available to lawyers and scholars for approaching the problems they face.

In the nine decades since that article appeared, the hundreds of articles published in the *Journal* have revealed the two fundamental transformations in our field: first, the susceptibility of new areas of international affairs to treatment through international norms and institutions; and second, theoretical innovations leading to new ways of thinking about each of these issue areas. Indeed, these two developments are inseparable. As Ronald St. J. Macdonald and Douglas M. Johnston wrote in their introduction to a significant and weighty volume of theoretical essays on international law fifteen years ago, a focus on theory is increasingly needed in a field such as ours that has been driven to great degrees of both specialization

[1] Lassa Oppenheim, *The Science of International Law: Its Tasks and Method*, 2 AJIL 313, 313 (1908).
[2] *Id.* at 313, 314.

and fragmentation.[3] The need for an understanding of overarching constructs linking the various subdisciplines within international law seems even greater today, as we have moved, it seems, from the establishment of new international law journals by law schools around the world to a proliferation of specialized international law journals and very specialized international lawyers. For beneath the surface of much scholarship by our authors and those in other periodicals are a host of unanswered questions about presuppositions, conceptions, and missions, all of which influence how they undertake their analyses of an issue and how they arrive at conclusions and recommendations for decision makers. Hence the timeliness of this symposium on method in international law.[4]

The term "method" as we use it here, however, requires a bit more refinement. Many authors have used the term, but with the assumption that the reader would know what was meant. For Oppenheim, "method" was intimately associated with his view that international law was a science that had its own unique and rigorous approach to analyzing and solving questions—in the words of the *Oxford English Dictionary*, "a special form of procedure adopted in any branch of mental activity, whether for the purpose of teaching and exposition, or for that of investigation and inquiry."[5] This scientific link between method and international law can be found in the thinking of other great scholars of an earlier era. Hans Kelsen spoke in his 1932 Hague lectures and his 1940–1941 Oliver Wendell Holmes lectures of the "technique of international law," which would fulfill the purposes of the law but which could not itself be understood or undertaken without an underlying theory.[6] In a profoundly

[3] *See* Ronald St. J. Macdonald & Douglas M. Johnston, *International Legal Theory: New Frontiers of the Discipline, in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 1, 3 (Ronald St. J. Macdonald & Douglas M. Johnston eds., 1983).

[4] The *AJIL* is not the first periodical of its kind to embrace the need for such an understanding. Our friends at the *European Journal of International Law* stated at the time of its founding a decade ago that they would devote pages to the intellectual legacies of the great European scholars, and their collections of essays on Friedmann, Verdross, Lauterpacht, and Kelsen have been exemplary in this regard.

[5] 9 OXFORD ENGLISH DICTIONARY 690 (2d ed. 1989).

[6] According to Kelsen:

> [U]ne analyse juridique rigoureuse est indispensable pour atteindre l'amélioration si désirable de la *technique du droit international.* C'est justement pour remplir cette tâche de la politique du droit qu'une *théorie pure* du droit est nécessaire, de même qu'il n'y a pas de médecine scientifique sans biologie, pas de technique sans physique.

Hans Kelsen, *Théorie Générale du Droit International Public: Problèmes Choisis,* 42 RECUEIL DES COURS 117, 122 (1932 IV). *See also* HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS 82–122 (1942). For a trenchant analysis, see David Kennedy, *The International Style in Postwar Law and Policy,* 1994 UTAH L. REV. 7, 38–40.

important attack on the positivist method in this *Journal* in 1940, Hans Morgenthau spoke of the need to "reexamine the methodological assumptions with which the traditional science of international law starts" and to "reconcile the science of international law and its subject-matter."[7] For Philip Allott, the methods employed by various international lawyers refer to the structure of their argumentation, in particular its logical discourse.[8]

The scientific leanings of the earlier writers aside, most of these scholars seem to be speaking roughly of the same idea: the application of a conceptual apparatus or framework—a theory of international law—to the concrete problems faced in the international community. This idea of method, which we adopt for this symposium, is thus distinctly different from abstract theories of international law that explain the nature of international law but are devoid of application to particular problems.[9] We focus here not on the coherence of a particular theory for explaining the foundations or traits of international law, but on its relevance for lawyers and legal scholars facing contemporary issues. At the same time, method is far broader than a methodology of legal research in the sense of ways to identify and locate primary and secondary resources.[10]

The link between a legal theory and a legal method is thus one between the abstract and the applied.[11] By organizing a symposium

[7] Hans J. Morgenthau, *Positivism, Functionalism, and International Law,* 34 AJIL 260, 261 (1940). *See also* Samuel J. Astorino, *The Impact of Sociological Jurisprudence on International Law in the Inter-War Period: The American Experience,* 34 DUQ. L. REV. 277 (1996).

[8] Philip Allott, *Language, Method and the Nature of International Law,* 45 BRIT. Y.B. INT'L L. 79 (1971).

[9] For one theory that nonetheless disguises itself as a method, see MARTIN BOS, A METHODOLOGY OF INTERNATIONAL LAW (1984); and *id.* at 2 (" methodology. . . in fact is a phenomenology").

[10] *See, e.g.,* SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW (1984).

[11] The distinction between a legal theory—the conceptual framework—and a legal method is not the same as the distinction between "theory" and "practice." At least one of the methods presented in this symposium rejects such a distinction on the ground that "theory is practice" and vice versa. Its point is rather that a method entails the *application* of more abstract concepts to more concrete problems.

on method, we seek to provide a greater grasp of the major theories of international law currently shared by scholars, but to view these theories in the most direct way—by seeing how they establish what the law is, where it might be going, what it should be, why it is the way it is, where the scholar and practitioner fit in, how to construct law-based options for the future, and whether it even matters to ask those questions. A method used by a writer on international law may correspond to one theory of international law or to more than one if an author chooses to apply different theories. It is also possible to imagine that a theory of international law created or posited by a particular writer may yet have no methodological counterpart in that its creator or supporters have not yet developed, or never did develop, a construct for approaching concrete problems.

Discerning Methods to Appraise

To elucidate the theoretical underpinnings of contemporary scholarship through recourse to the methods employed by various theories, we decided upon eight methods for appraisal: legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, Third World approaches to international law, and law and economics.[12] In our view, they represent the major methods of international legal scholarship today. Our list does not include methods that may have been utilized by scholars in the past, or that dominated the scholarship of earlier eras—as the absence of Roman law, canon law, and socialist/Soviet law would indicate. It also excludes, owing to space constraints, other approaches that offer important insights, such as natural law, the comparative method,[13] and functionalism.[14] Moreover, our identification of seven discrete methods does not preclude other useful ways of grouping international legal

[12] The original Symposium that appeared in the *American Journal of International Law* did not include Third World approaches to international law, and the essay in this volume on this method was commissioned specifically to address this gap.

[13] *See* W. E. Butler, *Comparative Approaches to International Law*, 190 Recueil Des Cours 9 (1985 I).

[14] *See* Douglas M. Johnston, *Functionalism in the Theory of International Law*, 26 Can. Y.B. Int'l L. 3 (1988).

scholarship. Macdonald and Johnston, for instance, spoke of three orientations: philosophical (Kelsen, Verdross, and Verzijl), humanistic (Brierly, Lauterpacht, and Jenks), and scientific (Schwarzenberger, Friedmann, and Stone).[15] More recently, various scholars, including two contributors to this symposium, have identified themselves as part of a "New Stream" of international legal scholarship, to be distinguished from the mainstream, itself composed of several approaches.[16]

As the contributors to this symposium will present their respective methods in some detail, here we simply identify their most basic characteristics. We confess that these are purely our own descriptions, informed by our own perspectives, with which the authors may differ.

Positivism

Positivism summarizes a range of theories that focus upon describing the law as it is, backed up by effective sanctions, with reference to formal criteria, independently of moral or ethical considerations.[17] For positivists, international law is no more or less than the rules to which states have agreed through treaties, custom, and perhaps other forms of consent.[18] In the absence of such evidence of the will of states, positivists will assume that states remain at liberty to undertake whatever actions they please. Positivism also tends to view states as the only subjects of international law, thereby discounting the role of nonstate actors. It remains the lingua franca of most international lawyers, especially in continental Europe.

[15] Macdonald & Johnston, *supra* note 3, at 4.

[16] *See* Deborah Z. Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law*, 65 Nordic J. Int'l L. 341 & n.3 (1996) (components of mainstream scholarship are "realist (Schwarzenberger, Weil, Watson), classicist (Fitzmaurice), and liberal-humanitarian (Henkin, McDougall [*sic*], Falk)"); Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 131–91 (1989) (four schools are the "rule-approach position" (Schwarzenberger as paradigm), the "policy-approach position" (McDougal), the "skeptical position" (Morgenthau), and the "idealistic position" (Alvarez)).

[17] *See* Hilaire McCoubrey & Nigel D. White, Textbook on Jurisprudence 11 (2d ed. 1996).

[18] *See* Hans Kelsen, Principles of International Law 438–39 (Robert W. Tucker ed., 2d. rev. ed. 1966).

New Haven School (policy-oriented jurisprudence)

Established by Harold Lasswell and Myres McDougal of Yale Law School beginning in the mid-1940s, the New Haven School eschews positivism's formal method of searching for rules as well as the concept of law as based on rules alone. It describes itself as a policy-oriented perspective, viewing international law as a process of decision making by which various actors in the world community clarify and implement their common interests in accordance with their expectations of appropriate processes and of effectiveness in controlling behavior.[19] Perhaps the New Haven School's greatest contribution has been its emphasis on both what actors say and what they do.

International legal process

International legal process (ILP) refers to the approach first developed by Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld at Harvard Law School in the 1960s. Building on the American legal process school, it has seen the key locus of inquiry of international law as the role of law in constraining decision makers and affecting the course of international affairs.[20] Legal process theory has recently enjoyed a domestic revival, which seeks to underpin precepts about process with a set of normative values. Some ILP scholars are following suit.

Critical legal studies

Critical legal studies (CLS) scholars have sought to move beyond what constitutes law, or the relevance of law to policy, to focus on the contradictions, hypocrisies, and failings of international legal discourse. The diverse group of scholars who often identify themselves as part of the "New Stream" have emphasized the importance of culture to legal development and offered a critical view of the progress of the law in its confrontations with state sovereignty. Like the deconstruction movement, which is the

[19] *See, e.g.*, Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law Is Made, in* INTERNATIONAL LAW ESSAYS 355, 377 (Myres S. McDougal & W. Michael Reisman eds., 1981).

[20] ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, INTERNATIONAL LEGAL PROCESS at xi (1968).

intellectual font of many of its ideas, critical legal studies has focused on the importance of language.

International law and international relations

IR/IL is a purposefully interdisciplinary approach that seeks to incorporate into international law the insights of international relations theory regarding the behavior of international actors. The most recent round of IR/IL scholarship seeks to draw on contemporary developments and strands in international relations theory, which is itself a relatively young discipline. The results are diverse, ranging from studies of compliance, to analyses of the stability and effectiveness of international institutions, to the ways that models of state conduct affect the content and subject of international rules.

Feminist jurisprudence

Feminist scholars of international law seek to examine how both legal norms and processes reflect the domination of men, and to reexamine and reform these norms and processes so as to take account of women.[21] Feminist jurisprudence has devoted particular attention to the shortcomings in the international protection of women's rights, but it has also asserted deeper structural challenges to international law, criticizing the way law is made and applied as insufficiently attentive to the role of women. Feminist jurisprudence has also taken an active advocacy role.

Third World approaches to international law

TWAIL is an overtly post-colonial set of perspectives on international law. A first generation of TWAIL scholars sought to work within an essentially positivist view of international law to benefit newly independent states after World War II; more recent scholars view colonialism as a permanently imbedded concept in both international norms and the processes used for prescribing and applying them. TWAIL scholars have thus examined the dependency of many states and societies on Western conceptions of international law and have sought to challenge them, both within existing structures and in alternative fora.

[21] *See* Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law,* 85 AJIL 613, 621 (1991).

Law and economics

In its domestic incarnation, which has proved highly significant and enduring, law and economics has both a descriptive component that seeks to explain existing rules as reflecting the most economically efficient outcome, and a normative component that evaluates proposed changes in the law and urges adoption, of those that maximize wealth. Game theory and public choice theory are often considered part of law and economics. In the international area, it has begun to address commercial and environmental issues.

Although, as will be clear from the essays that follow, each of these methods has its own defining characteristics, it is equally apparent that each is a *living* method, employed by a diverse community of scholars who help ensure its continual evolution. If positivism is simplistically termed the most conservative of the methods, it is safe to say that the positivist method of today might well have been unrecognizable to a lawyer one hundred years ago; if critical legal studies is in some sense the most radical of the methods in the questions it poses about the nature of international law, it too has undergone transformations since its arrival in scholarly circles in the 1980s. The essays can thus present only a snapshot of their method, with perhaps some sense of its path to date and future trajectory. Moreover, although many of the methods have a distinctly American origin, the community of scholars for nearly all of them is now global.

A Heuristic for Understanding and Appraising Methods

In light of our approach to evaluating the impact of theories on the analysis of concrete problems in international law, we asked authors writing from each perspective to approach one contemporary issue—the same one for all of the authors—and apply their method to it. Many of these authors might normally draw on multiple theories and hence methods in analyzing a legal issue, but we asked them to stick as close as possible to one method. The results may seem a bit artificial or stylized in some cases, but readers should at least get a clear picture of each method. As for the issue that could demonstrate the power of seven different methods, we

believed it needed to be one that was topical, but not so technical as to require special expertise by our readers.

Our choice—accepted by all our authors (though in the same sense that the Versailles Treaty was accepted by the Central Powers)—is the question of individual accountability for violations of human dignity committed in internal conflict, with respect to both the substantive law and the mechanisms for accountability. The issue is at the forefront of current debates within international human rights law, international humanitarian law, and international criminal law, with implications for the role of international organizations, principles of criminal jurisdiction, and incorporation of international law into domestic law. It is also central, in a very concrete way, to political transitions around the globe in which new governments are variously attempting to come to grips with their past. We offer the following sketch of the issue with the recognition that it is itself influenced, if not determined, by different methods.

Although international humanitarian law provides some basic protections for individuals during civil conflicts, most notably through common Article 3 of the four 1949 Geneva Conventions and Additional Protocol II of 1977,[22] none of these treaty provisions holds individuals, as opposed to states, accountable for violations. This position contrasts with the provisions on interstate war in the Geneva Conventions (that is, all of the articles except for common Article 3) and Additional Protocol I of 1977; they not only contain more detailed protections for persons not involved in hostilities, but

[22] *See, e.g.*, Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 3, 6 UST 3516, 75 UNTS 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 UNTS 609 [hereinafter Protocol II]. For instance, common Article 3 includes the following provision:

> [T]he following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons [persons taking no active part in the hostilities]:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

also list certain violations as "grave breaches" for which individuals are responsible and with respect to which states must extradite or prosecute all suspected offenders.[23] As for human rights law, the International Covenant on Civil and Political Rights[24] nowhere explicitly calls for punishment of individuals for violations of human rights. Other conventions—notably the 1948 Genocide Convention, the 1956 Slavery Convention, the 1973 Apartheid Convention, and the 1984 Torture Convention[25]—do require states to prosecute, or extradite or prosecute, persons who have allegedly committed those offenses, but those treaties are limited only to those offenses, some of which, like genocide, are quite narrowly defined. Beyond treaty law, customary law has developed the notion of crimes against humanity. Under the principles first set forth in the Charter of the Nuremberg Tribunal,[26] individuals could be held accountable for—though states were not obligated to prosecute—large-scale or systematic attacks (murder, torture, extermination, deportation, forced labor, inhuman acts, and persecution) on civilian populations.

Prosecutions for these offenses were rare until recently; domestic cases mostly involved government prosecution of insurgents for sedition or other acts under domestic law, but both governments and insurgencies were generally unwilling to prosecute or punish their own personnel. Authority to exercise universal jurisdiction to

[23] See, e.g., the list in Geneva Convention IV, *supra* note 22, Art. 147:

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and want only.

[24] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

[25] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 UST 3201, 266 UNTS 3; International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 UNTS 243; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85.

[26] Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279.

prosecute these crimes was also uncertain; and states other than the territorial state generally abstained from undertaking any such prosecutions. The absence of a community desire to criminalize these acts also contributed to the opposition among states to an international criminal court that would undertake such prosecutions.

Developments in the last decade have focused renewed attention on these issues. In 1993 the Security Council gave the International Criminal Tribunal for the former Yugoslavia (ICTY) jurisdiction over various crimes committed in civil wars—notably genocide, crimes against humanity, and "violations of the laws or customs of war."[27] When the ICTY began to consider indictments that included as crimes certain violations of the laws or customs of war, it had to address the extent to which such violations were, in fact, crimes in internal conflicts so that the law would not apply retroactively to a defendant. The Tribunal's appellate chamber offered an answer in one of its most important decisions to date, the 1995 interlocutory appeal in the *Tadić* case.[28] In 1994 the Security Council gave the International Criminal Tribunal for Rwanda jurisdiction not only over genocide and crimes against humanity, but also over "serious violations" of common Article 3 and Protocol II, making such violations per se war crimes in the Rwanda context.[29]

In codification processes within the United Nations, the International Law Commission in 1996 completed its nearly half-decade-long project to draft a Code of Crimes against the Peace and Security of Mankind. The code designates as war crimes for internal conflicts a list of acts, taken principally from the Statute of

[27] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Art. 3, UN Doc. S/25704, annex (1993), *reprinted in* 32 ILM 1192 (1993).

[28] Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT-94-1-AR72 (Oct. 2, 1995) (majority opinion), *reprinted in* 35 ILM 32 (1996).

[29] Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, SC Res. 955, UN SCOR, 49th Sess., Res. & Dec., at 15, Art. 4, UN Doc. S/INF/50 (1994), *reprinted in* 33 ILM 1602 (1994). Equally important, though less relevant for the symposium, the Statute of the Rwanda Tribunal defines crimes against humanity without any reference to armed conflict (interstate or internal) at all, thus confirming the severance of the nexus first included in the Charter of the International Military Tribunal at Nuremberg.

the Rwanda Tribunal.[30] The states participating at Rome in July 1998 in the drafting of the Statute for the International Criminal Court included war crimes in internal conflicts in the court's jurisdiction.[31]

Outside the chambers and corridors of international organizations, accountability has assumed increased importance as a significant number of states have settled their civil wars and addressed the fate of those who committed atrocities during them. Moreover, authoritarian governments that committed the same type of abuses one finds in civil wars—often proclaiming that they were fighting a civil war against their opposition—have fallen in many states. The extent to which those governments hold individuals accountable for these abuses is of vital importance to the transition of these states to stable democracies. Some have chosen to prosecute; others have chosen pardon; others have established truth commissions or engaged in purges of those associated with the past regime. Many have not yet made a clear choice.[32] As a result, the scope of a duty to hold individuals accountable, criminally or otherwise, is now the object of significant attention by international bodies and domestic courts.[33] Academic debate on this issue is also rich.[34]

[30] Draft Code of Crimes against the Peace and Security of Mankind, Art. 20(f), *in* Report of the International Law Commission on the work of its forty-eighth session, UN Doc. A/51/10 (1996), *reprinted in* 1996[II] Y.B. INT'L L. COMM'N, pt. 2, at 15, 53–54, UN Doc. A/CN.4/Ser.A/1996/Add.1 (Part 2) (1998). The future of the code remains quite uncertain in light of the codification of its key crimes in the Statute of the International Criminal Court.

[31] Rome Statute of the International Criminal Court, July 17, 1998, Art. 8(c), (e), UN Doc. A/CONF.183/9*, *reprinted in* 37 ILM 999 (1998).

[32] The definitive compilation of state practice in this area is the three-volume TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Nell J. Kritz ed., 1995). For a superlative account of the Eastern European experience, see TINA ROSENBERG, THE HAUNTED LAND: FACING EUROPE'S GHOSTS AFTER COMMUNISM (1995).

[33] *See, e.g.*, Comments on Argentina, Report of the Human Rights Committee, UN GAOR, 50th Sess., Supp. No. 40, at 31, 32, paras. 153, 158, UN Doc. A/50/40 (1995); Velásquez-Rodríguez Case, Inter-Am. Ct. H.R. (set. C) No. 4, para. 174 (July 29, 1988); Azanian People's Organisation (AZAPO) v. President of the Republic of South Africa, 1996 (4) SA 671 (CC).

[34] Recent articles and books include Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707 (1999); Juan E. Mendez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255 (1997); CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996); Symposium, *Accountability for International Crime and Serious Violations of Fundamental Human Rights*, 59 LAW & CONTEMP. PROBS. 1 (1996); IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (Naomi Roht-Arriaza ed., 1995); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

Lastly, the concept of universal jurisdiction to prosecute violations of human rights has lately received more attention from governments, victims, and human rights advocates. Courts in Switzerland and Germany have prosecuted war criminals from Bosnia; Spanish courts are attempting to prosecute Argentine generals for their acts in the "dirty war"; and the United States sought (in vain) to find countries with universal-jurisdiction statutes willing to carry out domestic trials of members of Cambodia's former Khmer Rouge regime.[35]

The result of these recent trends in the law (if they are, indeed, trends) is, alas, hardly complete clarity. Many questions remain unanswered. A few of the more obvious ones are: To what extent does customary law now hold individuals accountable for atrocities in civil wars? Is the difference in accountability for atrocities in interstate wars and acts in civil wars justifiable? Should all serious violations of human rights and humanitarian law be crimes? What obligations do states have to prosecute? What limitations are there upon a state's ability to prosecute foreigners for crimes committed abroad against other foreigners? What are the advantages and disadvantages of international versus domestic tribunals, or of war crimes trials versus nonprosecutorial mechanisms like truth commissions, civil suits and removal from office? In choosing this subject for our contributors, we also very much realize that the subject can be quite vast, and can encompass numerous issues both procedural and substantive. Yet that variety of legal problems will also, we hope, enable our contributors to focus their lens on the appropriate targets of scrutiny. Some subissues will be less amenable to a method, while others will be central. The contributions will speak for themselves in this regard.

THEMES AND VARIATIONS

After considering how best to provide a clear demonstration of the various methods through use of the above problem, we asked our authors to explicitly or implicitly address several core questions that help get to the essence and uniqueness of each of their methods:

[35] *See, e.g.*, Andreas R. Ziegler, Case note, *In re G.*, 92 AJIL 78 (1998) (Mil. Trib. Division 1, Switz, Apr. 18, 1997); Christoph J. M. Safferling, Case note, *Public Prosecutor v. Djajić*, 92 AJIL 528 (1998) (Sup. Ct. Bavaria May 23, 1997); Anthony De Palma, *Canadians Surprised by Proposal to Extradite Pol Pot*, N.Y. TIMES, June 24, 1997, at A10.

1. What assumptions does your method make about the nature of international law?

2. Who are the decision makers under your method?

3. How does your approach address the distinction between *lex lata* and *lex ferenda?* Is it concerned with only one, both, or neither?

4. How does it factor in the traditional "sources" of law, i.e., prescriptive processes?

5. Is your method better at tackling some subject areas than others, both as regards the issue noted above and as compared to other subjects?

6. Why is your method better than others?

We realized that some authors might find these to be the wrong questions and choose not to answer some or all of them. We thus invited them to challenge the questions themselves, if they preferred, with an explanation of why our questions were objectionable. We also recognize that not all of these methods can neatly answer these questions. Our conclusion aims at bringing together and comparing the responses provided by our authors.

These questions, in turn, highlight several major themes worth considering by the reader. The first is the distinctiveness and independence of international law as a discipline for approaching questions of international relations—what David Kennedy calls "law's claim to special knowledge."[36] More specifically, we need to ask whether international law has one method, one that presumably distinguishes it from other fields, as Oppenheim so confidently held in 1908,[37] whether there are multiple methods, or whether, perhaps, there is no method unique to our field. The first view may seem antiquated, and indeed in contradiction to the very idea of a symposium considering eight distinct methods. But in appraising the seven methods other than positivism, it is worth reflecting upon whether they are, in fact, legal methods, or interdisciplinary

[36] Kennedy, *supra* note 6, at 39.

[37] Oppenheim, *supra* note 1, at 333 ("the method to be applied by the science of international law can be no other than the positive method").

methods of the "law and (sociology, international relations, economics, postmodern literary theory)" variety: that is, do our nonpositivist authors seek to provide an alternative that can be recognized as a legal method, or a new method that combines legal and nonlegal aspects? Is it possible, indeed, that the use of analytic approaches from disciplines outside the law serves to rob these methods of any distinctive legal quality?

The contribution by the positivists, and indeed their critique of the other methods, suggests that they regard their method as offering such a distinctive—or, in the words of Hans Kelsen, "pure"—quality. Readers may find that some papers—the overtly interdisciplinary methods of IR/IL and law and economics—come close to accepting positivism's claim in this regard, but assert that their methods nonetheless offer critical intellectual tools for the sophisticated practitioner or scholar. Other papers—in particular, those of the New Haven School and international legal process—suggest that they accept the idea of a legal method but find positivism's version too confining for real-world lawyers involved in decision making. Still others from the more critical perspective— CLS, feminist jurisprudence, and TWAIL—seem to find embedded in these very questions objectionable assumptions about the nature of law and hence a distinctively "legal" method.

In addition, lawyers often seek what we call rigor in legal analysis.[38] Do these methods enlighten us as to what such rigor entails? Methods built on injecting the theoretical insights of outside disciplines, such as IR/IL and law and economics, the reader will note, claim to bring more rigor into the study of atrocities in internal conflicts by explicitly and systematically treating aspects of the behavior of international actors that other methods either ignore or treat only in an ad hoc manner. Policy-oriented jurisprudence also claims to have constructed a theoretical architecture that promises the practitioner or scholar a method to dissect and rigorously appraise numerous variables. But the critical approaches might label these as suffering from an incomplete or artificial rigor, one that

[38] For a classic explanation of legal reasoning in the domestic context, see EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

does not delve deep enough to discover the biases of those applying them. This leads to the broader question of whether, as suggested by CLS, each method has its own unique view of what constitutes rigor: for each method that claims its sequence of intellectual operations or its core factors for analysis (ranging from economic efficiency to the gendered nature of law) enhance rigor, other methods will proclaim that reliance on those factors actually reduces it by bringing in extraneous, even diversionary, variables.

A second and related question concerns the usefulness of these various methods to the practicing lawyer (whether in private, governmental, or nongovernmental circles), as opposed to the academic analyst. To what extent are each of the methods helpful or necessary tools for actual decision makers, as opposed to those who have the luxury, as it were, to reflect on more comprehensively, and dissect, a particular issue? The proponents of most of the methods below will hasten to insist on their relevance—if not, indeed, indispensability—for the practitioner. But in what situations and arenas will and should practitioners use each method? Is one method better for the brief before the court, another for the internal memo (to a client or other decision maker), and still another for the lobbying document before the government or international organization? Some methods might be challenged by practitioners as substituting a focus on method for attention to substance. Is this a valid criticism?

In this context, the articles in this symposium force us to scrutinize not only the claims of relevance made by the authors, but also the readers' own prejudices regarding the methods, i.e., any certainties in our own minds of the irrelevance of certain methods to our work as lawyers. Can we accept the insights of these methods as shown by their treatment of the problem in this symposium, and yet reject their pertinence to and appropriateness for lawyering? For instance, lawyers may assume that law and economics arguments have no place before a court of law, but are best left for the legislature. Yet even the International Court of Justice has long considered economic efficiencies in its decision making in a key part of

its caseload (the delimitation of the continental shelf),[39] so negative presuppositions about the "real world" use of certain methods may be unwarranted. In fact, the number and diversity of audiences and targets of legal claims and argumentation in the process of international law suggest, instead, the need to recognize that each method—however academic it may seem at first blush—can resonate in certain contexts.

A third major theme to consider for those who do not find themselves already attached to one particular method, and even for those who do, is how the methods relate to each other. Do they accept certain common premises? To what extent do they even apply the same lenses but simply use different terms for them? From one perspective, the brief introduction provided here already suggests that three pairs of the methods seem closely related: IR/IL and law and economics (with their focus on rational behavior of actors); the New Haven School and international legal process (with their focus on the decision-making process itself); and critical legal studies, law and feminism, and TWAIL (with their challenges to the identity of the decision makers and the logic of the process). But other linkages can be found, e.g., in the importance of unequal distribution of political power to the New Haven School, law and economics, feminist jurisprudence, and TWAIL. On the other hand, some of the methods seem to be speaking almost different languages from each other, with few shared assumptions about international law. The process that positivists see of states consenting to specific rules that determine the regime for accountability for civil war atrocities appears in many ways remote from the one that feminists (or TWAIL) see of men (or wealthy states) forcing through rules for their own benefit. Indeed, CLS challenges the notion of shared assumptions entirely, suggesting that they are merely the personal preferences of those employing the various methods.

This question of common features raises a second-order methodological question: namely, for the lawyer who is contemplating writing about a new subject—whether the legal issues associated

[39] *See, e.g.*, North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 51–52 (Feb. 20).

with the space station, rights for indigenous peoples, or trends in the practice of recognition—is there some method by which she can decide which of the eight (or more) methods to employ? It may be enticing for the lawyer or scholar, seeing the insights offered by various methods, to pick and choose from each those aspects that sound most appealing. But such intellectual eclecticism may end up eating away at the core premises of each method, leaving a sort of bland gray instead. And again, the critical perspectives remind us of the need to ask whether a rational choice among the methods is even possible.[40]

Fourth, and finally, what do the existing methods and the directions in which they take legal inquiry suggest about the future of the field? Each of the methods we consider here (with the possible exception of IR/IL) originated in an approach to domestic law. This, of course, reinforces the conceptual connections between international law and domestic law. But the movement from the domestic to the international has not followed one trajectory; the differences between the two arenas make one model of transposition too facile. International legal process, for instance, has not incorporated certain normative components of the domestic legal process method. Feminism has taken into account numerous actors not involved in domestic feminist jurisprudential debates, e.g., international organizations. CLS emerged on the international scene within a decade of its arrival in domestic circles, while law and economics has taken many more years to make this move. TWAIL scholarship has transformed itself significantly over the years as a newer generation has brought in certain ideas from American critical race theory. Is there some mapping operation to understand or predict the receptivity of our field to innovations in domestic law, or is it a matter of ad hoc individual initiative by certain scholars?

Moreover, one can ask if the origin of most of these methods in the domestic paradigm means that international lawyers must await new sources of thinking within domestic law before bringing new

[40] *Cf.* KOSKENNIEMI, *supra* note 15, at 189–90 (stating that four modernist approaches are both mutually exclusive and incapable of offering a rational choice among them).

insights and methods to international law. Perhaps, instead, international legal scholarship can build upon the differences between international law and domestic law to create new methods of inquiry—methods that might, in a reversal of fortune, trickle down (or over) to our domestic law colleagues instead of the other way around. For example, can concepts of legitimacy or justice now advocated as lodestars for decision making in international law form the basis for a new method of international law?[41] (Such a method might inspire yet another take on the problem of accountability for civil war atrocities.)

But there may be limits here, too. The proliferation of new issues for consideration by international law does not in itself require new methods of international law, just methods sophisticated enough—or basic enough—to handle different subject areas. Critical legal studies, with its deconstructionist bent, may at times seem like the last method, if indeed its exponents are willing to regard it as a method. On the other hand, just as the predicted "end of history" has proved premature, so it may be that the end of new methods is not yet upon us. In that respect, some clarity in understanding the potentials and limitations of the principal methods currently employed may plant the seeds for new methodological projects that can invigorate our field.

Indeed, whether as regards the methods in this symposium or others that might develop, their uniquely international aspects point to the need for more overt appraisal of a new set of linkages between international law and domestic law. Specifically, the active debates throughout our field about incorporation of international norms in domestic law and decision making—whether regarding human rights, the environment, investment, or intellectual property—seem to have a methodological analogue. Instead of just defensively asking why international law has not followed certain methodological paths taken in domestic jurisprudence, we can focus on how our own ways of thinking about the law might resonate more among domestic lawyers. This process of communication

[41] *See, e.g.*, THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992).

about method could convey important benefits to domestic lawyers in understanding the nature of international law and the content of its norms. For domestic law to appreciate and incorporate international law, it seems necessary for domestic lawyers to know how international lawyers think.

The essays that follow are presented in chronological order based on our sense of the sequence in which the methods were originally elaborated (with the recognition that dating a method of international law is no easier than dating the solidification of customary law): positivism, policy-oriented jurisprudence, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, Third World approaches, and law and economics. We believe this order should provide readers with a sense of how the various methods did or did not represent reactions or responses to those methods already in use. It will also allow for consideration of whether there are any overarching trends in the development of new methods of international law, perhaps related to the increase in international issues addressed by our field over time, as well as the range of new actors participating in the process of international law. Finally, this order offers an important vantage point for comparing the elaboration of international law theory and domestic law theory.

Nevertheless, we underline our point above, that each method itself has evolved significantly since its original formulation. Moreover, we do not wish to suggest that international law has witnessed an inevitable march of progress in the development of new theories and methods. Indeed, approaching the essays in a completely different order will likely yield additional insights. An alternative the editors considered for this symposium and offer our readers is the following: positivism, critical legal studies, policy-oriented jurisprudence, international legal process, international law and international relations, law and economics, feminist jurisprudence, and Third World approaches. The first two might be said to define the spectrum of methods; the next two, to attempt to find an accommodation between them; the following two, to try to sidestep the old debates by bringing in the insights of other disciplines; and the last two, to admit to a range of methodologies while maintaining a strong normative commitment.

Whichever order our readers choose, it is our hope that the essays that follow will clarify and ultimately stimulate debate and innovation concerning the lenses through which international lawyers see concrete problems and the tools they use to approach them.

THE RESPONSIBILITY OF INDIVIDUALS FOR HUMAN RIGHTS ABUSES IN INTERNAL CONFLICTS: A POSITIVIST VIEW

Bruno Simma and Andreas L. Paulus

I. INTRODUCTION: POSITIVISM AND HUMAN RIGHTS

When we were invited to contribute a positivist perspective to the present symposium, we did not know whether to regard this invitation as flattering or as an insult: does positivism not represent old-fashioned, conservative, continental European nineteenth-century views—naive ideas of dead white males on the possibility of objectivity in law and morals? There is little we can do about being male and white, but we have certainly not seen ourselves as positivists of that kind. From the range of methodologies that the editors assembled, we could associate ourselves with several approaches just as much as with positivism. But in reflecting on our day-to-day legal work, we realized that, for better or for worse, we indeed employ the tools developed by the "positivist" tradition.

The applicability of humanitarian law to internal armed conflicts appears to us to be a good test case for the practical use of the methodologies chosen: On the one hand, the changing reality, in which international conflicts increasingly give way to internal violence, militates in favor of a concomitant change in the law. Our humanitarian instincts strongly demand that we treat the legal consequences of distinctions between international and internal conflicts, between wartime and peacetime atrocities, as irrelevant.[1] On

[1] See the first decision of the appeals chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY):

> Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

the other hand, our professionalism does not allow us simply to follow this urge without regard to "international law as it is," as compared to "how it should be." Governments charged with violations of humanitarian law constantly remind us of that very difference, which seems so utterly out of place from a humanitarian standpoint. After all, it usually is governments we are dealing with when we present our views of "the law." In our view, it is precisely this need to get our legal message through to other people, especially representatives of states who might not share our individual moral or religious sensibilities, that constitutes one of the main reasons for the adoption of a positivist view of international law.

There is yet another reason why positivism and human rights sensibilities are not incompatible but complementary. The rules of criminal law, especially the principle *nullum crimen sine lege,* are also meant to protect the accused from arbitrary prosecution. Even though Article 15, paragraph 2 of the International Covenant on Civil and Political Rights allows the punishment of offenders for international crimes pursuant "to the general principles of law recognized by the community of nations," it expressly requires that those principles must have been in force "at the time when [the crime] was committed."[2] As Judge (then President) Cassese has put it: "[A] policy-oriented approach in the area of criminal law runs contrary to the fundamental customary principle *nullum crimen sine lege.*"[3] Only so long as the prosecution of offenders accords with existing international criminal law is it defensible from the viewpoint of human rights law.

Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT–94–1–AR72, para. 119 (Oct. 2, 1995), 35 ILM 32 (1996) [hereinafter *Tadić Interlocutory Appeal*]. *See also* Steven R. Ratner, *The Schizophrenias of International Criminal Law,* 33 TEX. INT'L L.J. 237, 239, 240, 249 (1998).

[2] International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 15, 999 UNTS 171 [hereinafter ICCPR].

[3] Prosecutor v. Erdemović, Appeals Judgement, No. IT–96–22–A, Separate and Dissenting Opinion of Judge Cassese, para. 11, 111 ILR 386, 395 (Oct. 7, 1997). *But see* Joint Separate Opinion of Judges McDonald and Vohrah, para. 78, *id.* at 314.

II. "CLASSIC" POSITIVISM AND SOME MODIFICATIONS

"Positivism" is a label for a whole array of differing approaches to international legal theory.[4] We will limit ourselves to describing the main strands of a "classic view" and to some modern modifications. Further, we will try to draw some conclusions from the critiques of positivism voiced, inter alia, in the other contributions to this symposium. The result will be a modern and, we hope, enlightened view of positivism as the core of international legal discourse.

The main characteristic of the classic view is the association of law with an emanation of state will (voluntarism). Voluntarism requires the deduction of all norms from acts of state will: states create international norms by reaching consent on the content of a rule.[5] If a state later changes its mind, there must be another—this time nonconsensual—rule that prevents the state from unilaterally withdrawing its consent. The German positivist Heinrich Triepel thus based international law on the "collective will" of states instead of the individual will of each and every one of them.[6] The combination of positivism and voluntarism found its classic expression in the famous *Lotus* judgment of the Permanent Court of International Justice:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[7]

From this viewpoint, the role of the lawyer is limited to interpreting the authentic will of the states concerned.

[4] For a more detailed description, see Ulrich Fastenrath, *Relative Normativity in International Law,* 4 EUR. J. INT'L L. 305 (1993).

[5] *See* GEORG JELLINEK, DIE RECHTLICHE NATUR DER STAATENVERTRÄGE 2, 42–49, 56–58 (Vienna, Alfred Hölder 1880).

[6] HEINRICH TRIEPEL, VÖLKERRECHT UND LANDESRECHT 27–32, 79–87 (Leipzig, Hirschfeld 1899). Similarly, 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 21–22 (2d ed. 1912).

[7] S.S. "Lotus" (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10, at 18 (Sept. 7).

But one need not necessarily associate positivism with state voluntarism.[8] Positivism can also be understood as the strict separation of the law in force, as derived from formal sources that are part of a unified system of law, from nonlegal factors such as natural reason, moral principles and political ideologies.[9] For the modern representatives of analytical positivism, the unity of the legal system, embodied by the *Grundnorm* (basic norm)[10] or the "unity of primary and secondary sources,"[11] is more important than the emanation of law from concrete acts of will.

Let us then summarize the classic positivist perspective on law as follows: Law is regarded as a unified system of rules that, according to most variants, emanate from state will. This system of rules is an "objective" reality and needs to be distinguished from law "as it should be." Classic positivism demands rigorous tests for legal validity. Extralegal arguments, e.g., arguments that have no textual, systemic or historical basis, are deemed irrelevant to legal analysis; there is only hard law, no soft law.[12] For some, the unity of the legal system will provide one correct answer for any legal problem;[13] for

[8] *See* Prosper Weil, *Le Droit international en quête de son identité*, 237 RECUEIL DES COURS 75–76 (1992 VI).

[9] *See* H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958); HANS KELSEN, PURE THEORY OF LAW (Max Knight trans., Univ. of Cal. Press 1967) (1960) [hereinafter KELSEN, PURE THEORY]. According to Kelsen:

> The Pure Theory of Law is a theory of positive law. . . .
>
> . . .
>
> It is called a "pure" theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements.

HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 1 (2d rev. ed., Robert W. Tucker ed. 1967). For a naturalist response, see Lon L. Fuller, *Positivism and Fidelity to Law*, 71 HARV. L. REV. 630 (1958).

[10] *See* KELSEN, PURE THEORY, *supra* note 9, at 198–205, 211–14.

[11] Primary rules designate rules imposing obligations; secondary rules, as "rules of recognition, change and adjudication," relate to the creation, variation, or violation of primary rules. H. L. A. HART, THE CONCEPT OF LAW 79–99 (2d ed. 1994). According to Hart, however, international law lacks an "ultimate rule of recognition" and comprises primary rules only. *Id.* at 213–37.

[12] *See* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413, 414–18 (1983).

[13] *See* KELSEN, PURE THEORY, *supra* note 9, at 205–08.

others, even if law is "open-textured," it still provides determinate guidance for officials and individuals.[14]

For international law, this implies that all norms derive their pedigree from one of the traditional sources of international law, custom and treaty.[15] Treaties embody the *express* consent of states, custom nothing but their *tacit* consent. The only relevant conduct is that of states seen as unitary actors. Treaties, including so-called lawmaking treaties—e.g., those creating new rules or changing old ones—are binding upon the contracting parties only. Whether habitual conduct of states amounts to legally binding custom is a question of objective determination of fact.[16]

The Critique of Positivism

In this brief paper we cannot give a comprehensive account of the critique of positivism.[17] Instead, we will react to criticisms usually advanced against positivism, especially those voiced in this symposium, and modify classic positivism to address some of these concerns.

In her contribution to this symposium, Mary Ellen O'Connell makes the point that *process* constitutes an important element of legal analysis that complements the analysis of norms. In particular, she argues that "duly established decision makers should 'have the authority to develop new legal standards.'"[18] The power-conferring capacity of norms is not alien to positivists.[19] But positive law also sets substantive limits on any delegation of powers. If tribunals exceed the discretion inherent in the delegation, they act *ultra vires* and are prone to lose not only their legal authority but also their political influence.

The New Haven approach, by conflating law, political science, and politics plain and simple, fails to provide the very guidance that

[14] *See* HART, *supra* note 11, at 135.

[15] *See* OPPENHEIM, *supra* note 6, at 22. For an analysis of the changes in subsequent editions of the treatise, see W. Michael Reisman, *Lassa Oppenheim's Nine Lives*, 19 YALE J. INT'L L. 255 (1994).

[16] *See* OPPENHEIM, *supra* note 6, at 22.

[17] For an extensive presentation of recent criticisms of positivism, see Joseph H. H. Weiler & Andreas L. Paulus, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?* 8 EUR. J. INT'L L. 545, 549–58 (1997), with further references.

[18] O'Connell, *infra* this volume, at 86.

[19] *See* HART, *supra* note 11, at 48–49, 79–80.

real-life decision makers expect from their lawyers. The degree of abstraction of Siegfried Wiessner and Andrew Willard's contribution to this symposium[20] amply demonstrates this point. What a decision maker expects from her lawyer might not be conclusive guidance in the first place but, rather, clarification of the constraints placed on her by existing law. In addition, by not distinguishing clearly between norms and values, the New Haven approach ideologizes international law, which is all too often based on a minimal consensus on means and not on ends.[21] Nevertheless, writings following the New Haven approach may have considerable value for both the analysis of actual decision making and the formulation of policy proposals.

The same can be said, *mutatis mutandis,* about law and economics and international relations theory.[22] Without doubt, their contributions are powerful tools for policy analysis, lawmaking and research. But even where they claim to be more positivist than the positivists,[23] we have some difficulty in accepting their analysis as informed by existing law rather than policy considerations. Law and economics assumes that effectiveness is the main, if not the only, criterion for the interpretation and application of the law. Alas, this is not necessarily the case. And international relations theory is always in danger of conflating the analysis of norms with that of politics.

As far as critical and feminist approaches are concerned, it is obvious that the interpretation of law—as of any text—is subject to the individual preferences and political choices of the lawyer. But does this mean that the application of norms owes nothing to the rule and everything to the person of the interpreter? The everyday reality of international law bears little similarity to this dim picture. There is neither complete determinacy nor complete indeterminacy. Sound legal analysis will not hide the indeterminacy of the law and the creativity it takes to make sense of it, but will render the law accessible to scrutiny by others. There is no specific competence of the lawyer beyond the law itself. Thus, the lawyer must, as far as

[20] Wiessner & Willard, *infra* this volume, at 47.

[21] *See* TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES 15–16, 49–50 (1983).

[22] Abbott, *infra* this volume, at 127; Dunoff & Trachtman, *infra* this volume, at 211 (both with further references).

[23] Dunoff & Trachtman, *infra* this volume, at 220.

possible, openly distinguish between the "law in the books" and her personal prejudices or political motivations. There is a certain inward-looking tendency in the pieces by Martti Koskenniemi, Hilary Charlesworth, and Antony Anghie and B.S. Chimni.[24] Whereas Koskenniemi does not even try to give an "operational" answer to the problem of how to deal with the perpetrators of human rights violations, the other authors seem to dispense with neutrality and objectivity for the sake of highly subjective analysis. We doubt, however, that such analysis will be helpful in the dialogue with decision makers because it does not appear compatible with the setting of general standards for human behavior—norms urgently needed to hold the perpetrators of crimes against women accountable under the rule of law. The impressive contribution of the feminist movement to the development of international criminal law during the last decade testifies to the transformative potential of the adaptation of positive law to meet women's concerns.

A Defense of Modern Positivism

Notwithstanding our skepticism regarding policy approaches to international law, the debate has demonstrated convincingly that law is not independent of its context, as an extreme positivism might suggest. Prosper Weil, one of the most vocal recent proponents of strict positivism in international law, has emphasized the proximity of positivism to political reality.[25] However, this reality is subject to change. On the international plane, the different branches of government are increasingly acting on their own behalf instead of through foreign ministries. Other actors than states are assuming growing importance: intergovernmental organizations, as well as nongovernmental organizations, global economic players, and the global media.[26] If norm perception in the international sphere now

[24] *See* Charlesworth, *infra* this volume, at 159; Koskenniemi, *infra* this volume, at 109; Anghie and Chimni, *infra* this volume, at 185. For a more thorough analysis of postmodern and subjective approaches to international law, see Andreas L. Paulus, *International Law After Postmodernism: Towards Renewal or Decline of International Law?*, 14 LEIDEN J. INT'L L. 727 (2001).

[25] Weil, *supra* note 12, at 441–42.

[26] For extensive treatment of these developments and their impact on international law, see THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL AND INSTITUTIONS 1–6 (1995); Jonathan I. Charney, *Universal International Law,* 87 AJIL 524 (1993); Bruno Simma, *From Bilateralism to Community Interest in International Law,* 250

focuses on the will of states less than previously, the sources of law, and the interpretive tools to understand them, will also have to change.

Modern textbooks recognize the need to widen the evidence of "state practice": "The practice of states. . . embraces not only their external conduct with each other, but is also evidenced by such internal matters as their domestic legislation, judicial decisions, diplomatic despatches, internal government memoranda, and ministerial statements in Parliaments and elsewhere."[27] Further, *opinio juris* may be deduced from the conclusion of treaties or voting records in international fora, up to the point where practice and *opinio juris* cannot be clearly distinguished from each other.[28] This allows for the rather rapid development of customary law. International institutions, in particular the International Law Commission established by the United Nations General Assembly, play an important role in the codification and progressive development of international law by treaties, which may evolve into customary law of universal scope.[29] Increasingly, general principles of international law establish themselves from the top down, as it were; that is, not by deduction from domestic law but by proclamation in international fora.[30] As to decisions of international tribunals, which

RECUEIL DES COURS 215 (1994 VI); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

[27] 1 OPPENHEIM'S INTERNATIONAL LAW 26 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). Similarly, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 cmt. b (1987) [hereinafter RESTATEMENT]. *See also* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 99–100, paras. 188–89 (June 27) [hereinafter *Nicaragua*].

[28] *See Nicaragua*, 1986 ICJ REP. at 98, para. 186; RESTATEMENT, *supra* note 27, §103(2)(d); ALFRED VERDROSS & BRUNO SIMMA, UNIVERSELLES VÖLKERRECHT §566 (1984).

[29] *See* Restatement, *supra* note 27, §102 cmts. *f, i.* On codification and the impact of international organizations on sources generally, see 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 27, at 45–52, 11–14; VERDROSS & SIMMA, *supra* note 28, §§589–96.

[30] *See* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 102–06 (1992); VERDROSS & SIMMA, *supra* note 28, §606. This development can be squared with the wording of Article 38 of the ICJ Statute, which requires only general international recognition of those principles, not their deduction from domestic law. *Cf.* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 27, at 36–37, 40 (limiting general principles to those applied *in foro domestico*, but emphasizing their role as independent source); RESTATEMENT, *supra* note 27, §102(1) (speaking of "rules. . . accepted as such by the international community of states. . . by derivation from general principles common to the major legal systems of the world") & reporters' note 7 (emphasizing the origin of general principles in domestic law). *But cf. id.* §701(c) (general principles as source of human rights law).

in Article 38 of the Statute of the International Court of Justice are merely counted among the "subsidiary means for the determination of rules of law," their importance for the clarification of legal rules nowadays can hardly be overestimated. Judgments of municipal courts may not directly bind the state concerned but will constitute important evidence of custom and general principles as applied by state organs.[31] In the ways illustrated, modern positivism is able to adapt to new developments in international affairs, even if sometimes at the cost of the beauty of traditional theory—namely, its clarity and rigidity.

Relying on a positivist conception of law does not necessarily imply subscribing to the view that there is only one correct answer to any legal problem. Rather, it means that we do not give up the claim to normativity and the prescriptive force of law. In many cases, law does provide guidance regarding what to do or not to do. Only by being normative can law preserve a balance between its transformative force, which does not accept reality, as it is, and its roots in social reality.[32] Maybe a decision maker will decide to disobey a rule—for whatever reason, moral or immoral, egoistic or altruistic, humanitarian or state-interested. But the lawyer's role is not to facilitate the decision maker's dilemma between law and politics (and, occasionally, between law and morals), but to clarify the legal side of things. Of course, the time when the claim of positive science to objective knowledge remained largely unchallenged is over, and there is no way back to yesterday's certainties behind the insights of critical theory, be it late- or postmodern. If we take the critique of positivism as a call for self-consciousness of one's own political, economic, religious, ethical, male or other bias, we do not object. But what we do reject is the step from criticism of positivism to arbitrariness or postmodern relativism.

In sum, enlightened positivism is identical neither with formalism nor with voluntarism. Both custom and general principles cannot simply be reduced to instances of state will. So-called soft law is an important device for the attribution of meaning to rules and for

[31] *See* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 27, at 41–42; RESTATEMENT, *supra* note 27, §103(2)(a), (b); VERDROSS & SIMMA, *supra* note 28, §§618–22.

[32] *But cf.* MARTII KOSKENNIEMI, FROM APOLOGY TO UTOPIA 8–50 (1989) (arguing that such balancing is impossible).

the perception of legal change. Moral and political considerations are not alien to law but part of it. However, formal sources remain the core of international legal discourse. Without them, there is no "law properly so-called." Only when linked to formal sources recognized as binding by the international community does law serve the decision maker in the search for a balance between idealism and realism, common values and ideological neutrality, apology and utopia.

III. A Test Case for Modern Positivism

Let us now put the method to the test. A positivist approach to law is an ideal tool for stocktaking: where does "existing" law stand on the matter? Our analysis will demonstrate that, according to a modern positivist approach, humanitarian law does provide for individual responsibility for human rights violations.

Individual Criminal Responsibility in Internal Conflicts

Three main areas of criminality are to be explored in international humanitarian law: genocide, crimes against humanity, and "ordinary" war crimes. The criminal nature of the first is largely based on a multilateral convention; the second, more or less on customary law; and the third, on a delicate mixture of both. The law on war crimes and crimes against humanity currently finds itself in a process of progressive codification, including its applicability to internal conflicts.[33] In the field, one has to distinguish carefully between international obligations of states to try individuals and punish them for certain conduct on the basis of domestic criminal law—the so-called *delicta juris gentium*—and rules establishing individual criminal responsibility directly at the *international* level. Only in the latter case are we in the presence of individual responsibility of a truly international character.

The obvious case: genocide. Genocide constitutes the most obvious case of international criminal responsibility of individuals. According to Article II of the Genocide Convention,

[33] *See, e.g.*, Rome Statute of the International Criminal Court, July 17, 1998, Art. 8, para. 2(c), (e), UN Doc. A/CONF.183/9* (1998), *reprinted in* 37 ILM 1002 (1998) [hereinafter ICC Statute].

> genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> *(a)* Killing members of the group;
>
> *(b)* Causing serious bodily or mental harm to members of the group;
>
> *(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> *(d)* Imposing measures intended to prevent births within the group;
>
> *(e)* Forcibly transferring children of the group to another group.[34]

No distinctions are made between international and internal conflict, between war and peacetime. Article I obliges states parties to prevent and punish the crime. Article V calls for the enactment of domestic legislation making genocide a punishable offense and for effective penalties. Article VI allows for trials at both the national and the international levels and thereby establishes the truly *international* legal character of the crime. In addition, the definition of the crime and of the punishable acts in Article III is precise enough to be directly applicable. Some national laws implementing the Convention have reproduced the text almost literally.[35] For the states parties to the 1948 Convention, therefore, genocide is an international crime as a matter of treaty law.

By asserting that states parties only "confirm" the criminal character of genocide, Article I indicates that the Convention considers the criminalization of genocide as codification of existing law. To anchor individual responsibility for genocide in customary law,

[34] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277 [hereinafter Genocide Convention]. It has been ratified by 134 states. For a regularly updated list see *Multilateral Treaties Deposited With the Secretary-General* (visited Aug. 18, 2003), <http://untreaty.un.org> [hereinafter *Multilateral Treaties*]. *See also* GA Res. 96 (I), UN GAOR, 1st Sess., pt. 2, at 1134, UN Doc. A/231 (1946).

[35] See, *e.g.*, Genocide Convention Implementation Act of 1987 (the Proxmire Act), Pub. L. No. 100–606, §2(a), 102 Stat. 3045 (1988) (codified at 18 U.S.C. §1091 (1994)); VÖLKERSTRAFGESETZBUCH [VStGB] §6 (FRG).

there must be practice and *opinio juris*. International practice on the prosecution of perpetrators can be found in both domestic and international trials of offenders. Trials involving the charge of genocide have been conducted both internationally and domestically, against individuals[36] and states,[37] especially since the end of the Cold War. *Opinio juris* concerning individual responsibility for genocide is widespread. The International Court of Justice has counted "elementary considerations of humanity" among the general principles of law, even if it did not expressly say so, and later affirmed that "the principles underlying the Convention are recognized by civilized nations as binding on States, even without any conventional obligation."[38] Thus, the traditional triad of sources clearly confirms that individual criminal responsibility for genocide is part and parcel of international law.[39]

[36] For examples, see Prosecutor v. Akayesu, Judgement, No. ICTR–96–4–T (Sept. 2, 1998), *available at* Web site of the International Criminal Tribunal for Rwanda [hereinafter ICTR] <http://www.un.org/ictr/english/judgements/>, *summarized in* 37 ILM 1399 (1998) [hereinafter *Akayesu*]; Prosecutor v. Kambanda, Judgement and Sentence, No. ICTR–97–23–S, para. 40 (Sept. 4, 1998), *reprinted in* 37 ILM 1411 (1998); Prosecutor v. Karadžić and Mladić, Review of the Indictment Pursuant to Rule 61, Nos. IT–95–5–R61, IT–95–18–R61, paras. 92–95 (July 11, 1996), 108 ILR 86, 133–36 (ICTY 1996). For national prosecutions, see STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 151–58 (1997); Catherine Cissé, *The End of a Culture of Impunity in Rwanda? Prosecution of Genocide and War Crimes before Rwandan Courts and the International Criminal Tribunal for Rwanda*, 1 Y.B. INT'L HUMANITARIAN L. 161, 175–86 (1998); Carla J. Ferstman, *Domestic Trials for Genocide and Crimes Against Humanity: The Example of Rwanda*, 9 AFR. J. INT'L & COMP. L. 857 (1997); *cf.* Attorney-General v. Eichmann, 1965 Psakim Mehoziim 3, 36 ILR 5, 32–39 (D.C. Jm. 1961), *aff'd*, 16 Piskei Din 2003, 36 ILR 277, 297, 303 (S. Ct. Isr. 1962) (universal jurisdiction for genocide as crime against humanity); José Alejandro Consigli, *The* Priebke *Extradition Case before the Argentine Supreme Court*, 1 Y.B. INT'L HUMANITARIAN L. 341 (1998).

[37] *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), Preliminary Objections, 1996 ICJ REP. 595 (July 11) [hereinafter Application of Genocide Convention].

[38] Reservations to the Convention on Genocide, Advisory Opinion, 1951 ICJ REP. 15, 23 (May 28). *See also* Application of Genocide Convention, 1996 ICJ REP. at 615, para. 31; Corfu Channel (UK v. Alb.) (Merits), 1949 ICJ REP. 4, 22 (Apr. 9); *Nicaragua*, 1986 ICJ Rep. at 114, paras. 218–20.

[39] For further examples, see ICTY Statute, Art. 4, *in* Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), annex, UN Doc. S/25704 (1993), *reprinted in* 32 ILM 1159, 1192 (1993) [hereinafter ICTY Report]; ICTR Statute, Art. 2, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), *reprinted in* 33 ILM 1602 (1994). *See also* RESTATEMENT, *supra note* 27, §702(a) (genocide as violation of customary law).

Crimes against humanity. Crimes against humanity constitute a more difficult case as regards individual responsibility. They first appeared in the Nuremberg Charter, which limited their scope to crimes committed in armed conflicts.[40] At present, however, neither the Statute of the International Criminal Tribunal for the former Yugoslavia[41] nor the Statute of the International Criminal Tribunal for Rwanda demands a nexus to armed conflict.[42] Both the UN Secretary-General and ICTY jurisprudence rely on customary law to dispense with this requirement.[43] It is not easy to ascertain, however, where the *practice* element of custom is to be found in this regard. In *Tadić*, the ICTY appeals chamber referred to the trials pursuant to Control Council Law No. 10,[44] to the overall scope of the Genocide

[40] *See* Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Art. 6(c). 59 Stat. 1544, 82 UNTS 279, 288 [hereinafter Nuremberg Charter]:

> *Crimes against humanity:* namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, *before or during the war*, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. (Interior emphasis added)

See also International Military Tribunal, Judgment, *reprinted in* 41 AJIL 172, 249 (1947) [hereinafter IMT Judgment]; Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, GA Res. 95 (I), UN GAOR, 1st Sess., pt. 2, at 1144, UN Doc. A/236 (1946). For examples of national prosecutions, see Fédération Nationale des Déportés et Internés Résistants et Patriotes v. Barbie, 78 ILR 124 (Cass. crim. Fr. 1983–1985); *Eichmann*, 36 ILR at 48–49 (D.C. Jm.), 239–52 (S. Ct.); CRIM. C., R.S.C., ch. 30, §1 (3d Supp. 1985) (Can.); Regina v. Finta, [1994] 1 S.C.R. 701 (Can.), *critically summarized in* 90 AJIL 460 (1996).

[41] *See* ICTY Statute, *supra* note 39, Art. 5; SC Res. 827, para. 2, UN SCOR, 48th Sess., Res. & Dec., at 29, UN Doc. S/INF/49 (1993).

[42] ICTR Statute, *supra* note 39, Art. 3. See also the relevant ICTY and ICTR jurisprudence confirming the wording of the Statutes: *Tadić Interlocutory Appeal*, *supra* note 1, paras. 138–42; *Kambanda*, *supra* note 36, para. 40. For an account of the history of crimes against humanity, see Prosecutor v. Tadić, Opinion and Judgement, No. IT–94–1–T, paras. 618–23 (May 7, 1997), 112 ILR 1 [hereinafter Tadić Judgement]; *Akayesu*, *supra* note 36, §6.4.

[43] *See Tadić Interlocutory Appeal*, *supra* note 1, paras. 138–42; ICTY Report, *supra* note 39, para. 34.

[44] Control Council Law No. 10, Art. II(1)(c), CONTROL COUNCIL FOR GERMANY, OFFICIAL GAZETTE, Jan. 31, 1946, at 50 [hereinafter CCL 10]. *See* TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (1950–53).

Convention, and to the Convention outlawing apartheid.[45] In addition, some domestic practice exists.[46] The universal acceptance of the Statutes of the Tribunals is itself an indication of *opinio juris* in this regard. Applying modern positivist criteria, one may conclude that sufficient practice and *opinio juris* are present for customary law to emerge.

"Ordinary" war crimes. The case for individual responsibility for war crimes committed in internal armed conflict is the most difficult one. This is largely due to the rather extensive threshold provisions of both the Geneva Conventions and the Additional Protocols thereto, which exclude internal conflicts from the scope of most of their provisions, including the regime of "grave breaches."[47] Common Article 3, which applies "[i]n the case of armed conflict not of an international character," does not contain any provision dealing with individual responsibility.

One cannot but deplore the high level of confusion about the meaning of the "grave breaches" provisions of the Geneva Conventions. These provisions merely refer to the obligation of the parties

[45] International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, Arts. 1–3, 1015 UNTS 243 [hereinafter Apartheid Convention]. The Convention is currently in force for 101 parties, but for none of the "West European and Others" group. *See Multilateral Treaties, supra* note 34. *See also* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, Art. I(b), 754 UNTS 73 [hereinafter Convention on Statutory Limitations]; ICC Statute, *supra* note 33, Art. 7, para. 1.

[46] *See Eichmann, supra* note 36, at 48–49 (D.C.Jm.) & 139 (S. Ct.); *Barbie, supra* note 40, at 136; David Turns, *War Crimes without War?* 7 AFR. J. INT'L & COMP. L. 825–26 (1995); and the references *supra* note 36. For national laws, see RATNER & ABRAMS, *supra* note 36, at 51–53.

[47] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 2, 6 UST 3114, 75 UNTS 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, Art. 2, 6 UST 3217, 75 UNTS 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 2, 6 UST 3316, 75 UNTS 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 2, 6 UST 3516, 75 UNTS 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Art. 1, paras. 3, 4, 1125 UNTS 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, Art. 1, 1125 UNTS 609 [hereinafter Protocol II].

either to try or to extradite alleged criminals, *aut dedere aut judicare.*[48] They do not qualify grave breaches as crimes of a truly international character. Nor does Protocol II criminalize violations of the law of war in internal conflicts. However, an indication of the international character of the offenses is given by Article 85, paragraph 5 of Protocol I, according to which "grave breaches. . . shall be regarded as war crimes."[49] Grave breaches are also included in the jurisdiction of the ICTY.[50]

In *Tadić,* the ICTY appeals chamber applied four tests for the existence of an international crime: (1) the infringement of a rule of international humanitarian law, (2) the customary or treaty law character of the crime, (3) the "seriousness" of the violation of humanitarian law, and (4) the establishment of individual criminal responsibility by the rule in question.[51] Since not all of these elements are present in the Geneva Conventions, we have to resort to customary law following the Nuremberg precedent.[52] True, actual *state* practice is difficult to find here. Modern positivism as described above, however, considers the acceptance of the practice of *international* bodies by states, e.g., in the cases of the Yugoslavia and Rwanda Tribunals and the Nuremberg and Tokyo Tribunals, as establishing the required *opinio juris.*[53] By creating tribunals to punish offenders of humanitarian law, states have demonstrated that

[48] *See supra* note 47, Geneva Conventions I, Art. 49; II, Art. 50; III, Art. 129; IV, Art. 146; and Protocol I, Art. 85.

[49] The ICRC commentary implicitly equates war crimes punishable at an international level with grave breaches, *see* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, paras. 3411–22, 3521–23 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

[50] ICTY Statute, *supra* note 39, Art. 2; ICTY Report, *supra* note 39, paras. 39, 40.

[51] *Tadić Interlocutory Appeal, supra* note 1, para. 94.

[52] *See* LAW REPORTS OF TRIALS OF WAR CRIMINALS (United Nations War Crimes Commission ed., 1947). For recent national prosecutions of war crimes, see, e.g., *In re G.* (Mil. Trib., Division 1, Switz., Apr. 18, 1997), *summarized in* 92 AJIL 78 (1998); Public Prosecutor v. Djajić, 3 St 20/96 (Sup. Ct. Bavaria May 23, 1997), *excerpted in* 1998 NEUE JURISTISCHE WOCHENSCHRIFT 392, *summarized in* 92 AJIL 528 (1998). *See also* U.S. War Crimes Act of 1996, Pub. L. No. 104–192, §2(a), 110 Stat. 2104 (codified at 18 U.S.C. §2441 (Supp. II 1996)). Before Nuremberg, war crimes were prosecuted nationally according to customary international law, *see* Rüdiger Wolfrum, *The Decentralized Prosecution of International Offences through National Courts, in* WAR CRIMES IN INTERNATIONAL LAW 233, 239 (Yoram Dinstein & Mala Tabory eds., 1996).

[53] There is ample evidence for the existence of such *opinio juris. See, e.g.,* ICTY Statute, *supra* note 39, Art. 3; ICC Statute, *supra* note 33, Art. 8.

they regard violations of humanitarian law as punishable at the international level, and thus have added practice to the—scant—existing record. The same can be said of the "laws and customs of war," which the Hague Regulations partly codified[54] and which Article 3 of the ICTY Statute includes under the jurisdiction of the Tribunal.[55] Originally, none of these rules did contain penal provisions, but individuals have since been customarily punished for their violation.

But what about internal conflicts? As already mentioned, the Geneva Conventions and Protocols I and II do not include violations of common Article 3 (which deals with internal conflicts) in the regime of "grave breaches." There are different strategies to overcome this gap. However, not all of them are satisfactory from a positivist viewpoint.

A first device lies in a broad construction of the Conventions themselves: since the grave breaches provisions deal only with the obligation to try or extradite, they do not exclude the punishment of alleged offenders for infractions of common Article 3. Neither, however, do they provide for the punishment of infractions. Another opinion goes so far as to hold the grave breaches regime to be directly applicable to internal conflicts,[56] although this interpretation is difficult to reconcile with common Article 2. A second strategy consists in a broad construction of the "international" character of a conflict.[57] Even the indirect involvement of another country is said to "elevate" a conflict to the international level. But this reading contradicts the care with which states drafted the threshold provisions of both the Geneva Conventions and Protocols I and

[54] Annex to Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (3e sér.) 461. *See* IMT Judgment, *supra* note 40, at 218.

[55] *See* ICTY Report, *supra* note 39, para. 44.

[56] *See Tadić Interlocutory Appeal, supra* note 1, Separate Opinion of Judge Abi-Saab, 105 ILR at 537–38; THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, para. 1209 (Dieter Fleck ed., 1995). *But see Tadić* Interlocutory Appeal, *supra*, paras. 80–81.

[57] *See Tadić Judgment, supra* note 42, Separate Opinion of Judge McDonald; *see also* Prosecutor v. Delalić, Judgement, No. IT–96–21–T, paras. 230–34 (Nov. 16, 1998); Prosecutor v. Rajić, Review of Indictment Pursuant to Rule 61, No. IT–95–12–R61, para. 22 (Sept. 13, 1996), *summarized in* 91 AJIL 523 (1997); Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia:* Nicaragua's *Fallout*, 92 AJIL 236 (1998).

II, excluding any criminal provision from the law of internal armed conflict laid down in Protocol II.[58] According to a third strategy, the inclusion of common Article 3 of the Geneva Conventions within the jurisdiction of the ICTR,[59] established to cope with an essentially internal case of genocide, constitutes the culmination of a development of customary law that has criminalized the law of internal conflicts beyond the Geneva Conventions.[60] This view is very much in line with the American "customary law of human rights school," which mocks the very term *customary* because it almost completely excludes actual state practice from consideration.[61] Of course, the recent international practice of the Yugoslavia and Rwanda war crimes tribunals might actually create the very practice missing from the so-called customary law of human rights.

Even if one follows one or another of these approaches, the criminal law status of violations of the law of war in internal conflict remains precarious. The Security Council cannot close this gap by fiat with a resolution, because it may establish a tribunal but not legislate—even though, of course, the creation of the Tribunals is important evidence of the *opinio juris* of the Council's members in that regard.[62] The ICTY appeals chamber has refused to consider infractions of common Article 3 of the Geneva Conventions as grave breaches, rightly regarding some military manuals and a U.S. brief as insufficient evidence of the existence of customary law.[63] But it did interpret violations of common Article 3 as violations of "the laws or customs of war" subject to its jurisdiction.[64]

[58] Geneva Conventions, *supra* note 47, common Art. 2; Protocols I and II, *supra* note 47, Art. 1.

[59] ICTR Statute, *supra* note 39, Art. 4.

[60] *See Tadić Interlocutory Appeal, supra* note 1, paras. 128–34 (citing military manuals and Yugoslav law); *Delalić, supra* note 57, paras. 307–10; Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 554, 558–65 (1995).

[61] For an extensive critique, see Simma & Alston, *supra* note 30. For a rather robust reply, see Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 10–21 (1995–96). *See also* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AJIL 238, 240 (1996).

[62] *See Delalić, supra* note 57, para. 417; ICTY Report, *supra* note 39, para. 29; Simma, *supra* note 26, para. 39. *But see* BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO 211–13 (1998).

[63] *Tadić Interlocutory Appeal, supra* note 1, paras. 79–84.

[64] *Id.*, paras. 86–137.

Nevertheless, the state practice involved is anything but firm. We know of no case in which a national, let alone an international, tribunal prior to the ICTY's establishment has exercised jurisdiction over war crimes in internal conflicts irrespective of the nationality of the victim and the perpetrator.[65] On the other hand, the Tribunals create further international practice. Moreover, widespread acceptance of the jurisprudence of the Tribunals represents evidence that the punishment of perpetrators of offenses against international humanitarian law in internal conflicts is nowadays permitted by a general principle of law. In addition, the Statute of the International Criminal Court provides a list of criminal offenses in internal conflict.[66] As a treaty, the Statute may change or abrogate existing limitations in the relations of the parties *inter se*. Further, it might sooner or later be recognized as an expression of customary law or of general principles concerning war crimes, even by those states who have not ratified the Statute. The Statute entered into force on July 1, 2002.[67]

In the creation of custom, there is always an element of innovation. On the basis of a modern positivism—hence also taking into account the practice of international institutions and accepting as *opinio juris* the legal views expressed by states in international organizations—one can defend the ICTY jurisprudence and the Rwanda Statute on the basis of a combination of developing customary law and existing general principles. We therefore consider the introduction of individual responsibility for war crimes as an example of

[65] *See* Michael Bothe, *War Crimes in Non-International Armed Conflicts, in* WAR CRIMES IN INTERNATIONAL LAW, *supra* note 52, at 293. The UN Secretary-General has been very outspoken in this regard: the Security Council "included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime." Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994), para. 12, UN Doc. S/1995/134. *But see Akayesu, supra* note 36, para. 6.5; *Tadić Interlocutory Appeal, supra* note 1, paras. 128–37.

[66] *See* ICC Statute, *supra* note 33, Art. 8, para. 2 (c).

[67] As of December 2003, 92 states had ratified or acceded to and 139 states had signed the Statute. Of the latter, the United States and Israel have declared, however, that they do not intend to become a party to the treaty. The United States has started a ferocious campaign against the Court, but this does not necessarily entail a rejection of the definition of the crimes, in whose negotiation the United States took an active part.

lawmaking in accordance with the traditional methods of law formation by treaty, custom, and general principles.

Other crimes. Other crimes in both the humanitarian and the human rights fields may be established by way of treaties or customary law. There exists a whole array of offenses with quite varied characteristics. In the oldest case, that of piracy, every state was deemed to have the right to punish offenders.[68] Most special conventions impose obligations on states to try or extradite perpetrators.[69] Others also establish universal jurisdiction, even while leaving primary responsibility with the state where the crime was committed.[70] However, whether these treaties establish individual responsibility at the international level is doubtful.[71] A coherent and comprehensive international legal regime for the prosecution of individual violators of human rights does not exist.

The Institutional Dimension: Mechanisms of Accountability

The rapid development of international criminal law following the establishment of the Yugoslavia and Rwanda Tribunals by the Security Council demonstrates that effective prosecution of war crimes requires the creation of mechanisms of implementation. At the same time, the need perceived by most states to create a permanent international criminal court by way of a convention demonstrates that the international community still regards codification by formal treaties as preferable to the application of essentially non-conventional law by instances ad hoc.

[68] *See* S.S. "Lotus" (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10, at 70 (Sept. 7) (Moore, J., dissenting); 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 27, at 746–47. For a recent definition, see United Nations Convention on the Law of the Sea, Dec. 10, 1982, Art. 101, 1833 UNTS 3. For a skeptical view, see ALFRED P. RUBIN, THE LAW OF PIRACY 343–45 (1988).

[69] *See, e.g.*, International Convention against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11,081, 1316 UNTS 205; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 UST 1975, 1035 UNTS 167.

[70] *See, e.g.*, Apartheid Convention, *supra* note 45, Arts. III–V (providing for international criminality, universal jurisdiction, and an international tribunal); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, Art. 5(2), 1465 UNTS 85 [hereinafter Torture Convention].

[71] For an argument in favor of characterizing torture as an international crime, see Prosecutor v. Furundžija, Judgement, No. IT–95–17/1–T, paras. 134–64 (Dec. 10, 1998); *Delalić, supra* note 57, paras. 446–77. Similarly, see RESTATEMENT, *supra* note 27, §103 reporters' note 7, §702(d).

International proceedings. With regard to international jurisdiction for the prosecution of violations of humanitarian law in internal conflict, the Statute of the International Criminal Court, once universally ratified, will provide a sufficient legal basis. In addition, the Security Council may respond to specific acts of genocide, crimes against humanity, and war crimes by creating further ad hoc tribunals. Furthermore, Article 90 of Protocol I establishes an International Fact-Finding Commission with the authority to investigate alleged offenses against humanitarian law and to report the results of the investigation to the parties concerned.

National judicial proceedings. As regards national proceedings, the question of jurisdiction for human rights abuses has not yet been satisfactorily resolved. States remain just as reluctant to scrutinize the behavior of other states vis-à-vis the latter's own population as to bring their own leaders to justice.[72] Nevertheless, as evidenced by national trials, the establishment of universal jurisdiction for genocide and crimes against humanity, even if committed by aliens against aliens abroad, seems almost universally to be considered permissible, although the Genocide Convention is silent on the matter.[73] However, no treaty (yet) exists that obliges states to extradite or prosecute alleged offenders on charges of crimes against humanity. Universal jurisdiction for grave breaches of the Geneva Conventions seems to be increasingly accepted.[74] Treaties obliging states to try offenders and prosecute them for violations of human

[72] For an overview of recent national prosecutions, see RATNER & ABRAMS, *supra* note 36, at 146–56.

[73] *See* Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985), *reprinted in* 79 ILR 535, 545–46; *Eichmann*, 36 ILR at 32–39 (D.C. Jm.), 297, 303 (S. Ct.); Polyukhovich v. Australia, 91 ILR 1, 39–51 (Brennan, J., dissenting), 119–32 (Toohey, J., concurring) (High Ct. Austl. 1991); RESTATEMENT, *supra* note 27, §404, cmt. *a* & reporters' note 1. For an overview of domestic laws, see Ratner & Abrams, *supra* note 36, at 156–58. For a law providing for universal jurisdiction for genocide, see, e.g., VStGB §§1, 6. *But see* U.S. Genocide Implementation Act of 1987, *supra* note 35 (limiting jurisdiction to offenses committed in the United States or cases where the alleged offender is a U.S. national); Galinier v. Munyeshyaka, 102 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 825 (1998), note Alland (Cass. crim. Fr. 1998) (universal jurisdiction for genocide limited to the former Yugoslavia and Rwanda).

[74] See Meron, *supra* note 60, at 564; L. R. Penna, *Criminal Sanctions for Violations of International Humanitarian Law, in* NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 73, 77–78 (Michael Bothe ed., 1990). Again, the U.S. War Crimes Act of 1996, *supra* note 52, is limited to cases in which the alleged offender or the victim is a U.S. national.

rights such as torture and forced disappearances expressly provide for universal jurisdiction only in some instances.[75] Effective national implementation remains central to the prosecution of alleged offenders.

Immunity has often shielded heads of state and government officials from prosecution even after they have left (or been removed from) office. This practice, however, runs counter to the stated purpose of international humanitarian law, i.e., to exclude certain criminal acts from the legitimate exercise of state functions.[76] It was therefore not recourse to natural law but respect for international law in force that guided the Appellate Committee of the House of Lords, which rejected Senator Augusto Pinochet's claim of immunity for torture allegedly committed while he was Chilean head of state.[77] The Law Lords also held that serving heads of state and government officials enjoy complete immunity from suit.[78] Before domestic tribunals, this may be justified by the personal character of the latter's immunity, as opposed to that of former heads of state, which is derived from the immunity of states themselves and is therefore to be applied to official acts only. Often national officials are not prepared to prosecute violations of

[75] See the Conventions cited *supra* note 69.

[76] *See* Nuremberg Charter, *supra* note 40, Art. 7; ICTY Statute, *supra* note 39, Art. 7(2); ICTR Statute, *supra* note 39, Art. 6(2); ICC Statute, *supra* note 33, Art. 27. *See also* IMT Judgment, *supra* note 40, at 221.

[77] *See* Regina v. Bow Street Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [1999] 2 W.L.R. 827 (H.L.) [hereinafter *Pinochet III*], which confirmed and reversed in part an earlier decision, Regina v. Bow Street Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [1998] 3 W.L.R. 1456 (H.L.), *reprinted in* 37 ILM 1302 (1998) [hereinafter *Pinochet II*], vacated by Regina v. Bow Street Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [1999] 2 W.L.R. 272 (H.L.), *reprinted in* 38 ILM 430 (1999) (because of the alleged bias of Lord Hoffmann). In the last decision, the Law Lords decided by a 6 to 1 majority that the Torture Convention, *supra* note 70, excludes the invocation of immunity by former heads of state and by their home state on their behalf, provided that the Convention is in force for the states concerned. By holding that most of the charges against Senator Pinochet did not constitute extraditable crimes, the Lords avoided a general pronouncement to the effect that the invocation of immunity by former heads of state is excluded in all cases of international crimes. *Pinochet III, supra,* at 847 C (Lord Browne-Wilkinson). *But see id.* at 899 F (Lord Hutton), 913 H (Lord Millett), 924 F (Lord Phillips).

[78] None of the Law Lords claimed that serving heads of state were subject to prosecution. *See, e.g., Pinochet III, supra* note 77, at 844 F (Lord Browne-Wilkinson), and *Pinochet I,* 37 ILM at 1334 (Lord Nicholls), 1336 (Lord Steyn).

humanitarian law and human rights abroad. Also in this respect, Pinochet's arrest in Britain pursuant to an international warrant issued by a Spanish judge constitutes a remarkable precedent. Imprescriptibility of war crimes, crimes against humanity, and genocide may be considered part of customary law.[79]

As far as civil suits are concerned, the U.S. example of allowing suits for alleged acts of torture[80] seems not to have been followed elsewhere. In many cases, the defendant, as a government or government official, will enjoy immunity from civil action. But this holds true only if one regards torture as an act committed in an official capacity.[81]

Nonjudicial proceedings. Truth commissions are in more and more frequent use.[82] Even if not expressly foreseen by general international law, they have been sponsored by the United Nations and several other governmental and nongovernmental organizations. Commissions of experts were precursors of both the Yugoslavia and the Rwanda Tribunals. Truth commissions combine the establishment of the truth about the past—a condition for peace—with the prospect of lasting political reconciliation. What they alone cannot achieve, however, is the prosecution of offenders or a judicial determination of responsibility. In view of the obligation to try or

[79] *See* Convention on Statutory Limitations, *supra* note 45; *Barbie, supra* note 40, at 132–41 (1984) (imprescriptibility of crimes against humanity, but not war crimes); Sergio Marchisio, *The* Priebke Case *before the Italian Military Tribunals: A Reaffirmation of the Principle of Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,* 1 Y.B. INT'L HUMANITARIAN L. 344 (1998); Consigli, *supra* note 36. The objections of Western states to the Convention were merely due to the inclusion of apartheid.

[80] *See* Alien Tort Claims Act, 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. §1350 (1994)); Torture Victim Protection Act, 28 U.S.C. §1350 note (1994); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), 577 F. Supp. 860 (1984); Kadić v. Karadžić, 70 F.3d 232 (2d Cir. 1995), *cert. denied,* 518 U.S. 1005 (1996), *summarized in* 90 AJIL 658 (1996).

[81] *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330–1332, 1391, 1441, 1602–1611 (1994 & Supp. II 1996); State Immunity Act, 1978, ch. 33, pt. I (UK), 17 ILM 1123 (1978). Case law is divided on the question whether state immunity also applies to individuals acting in an official capacity. *See* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990); Hilao v. Marcos, 25 F.3d 1467 (9th Cir. 1994), *cert. denied,* 513 U.S. 1126 (1995) (mem.). The Law Lords in *Pinochet III* carefully limited the exclusion of immunity for former heads of state to criminal proceedings.

[82] For an overview, see RATNER & ABRAMS, *supra* note 36, at 193–204, with further references.

extradite, the granting of an amnesty, even in combination with the establishment of a truth commission, may well constitute a violation of international law.[83] In several instances, such as in Bosnia and Herzegovina, the prosecution of offenders of humanitarian law has been combined with amnesties for lesser crimes.[84] Article 6, paragraph 5 of Protocol II encourages the granting of amnesties in internal conflicts. Nevertheless, current international law does not appear to draw a clear-cut line between the obligation to prosecute and punish violations of humanitarian law and the granting of amnesties for the purpose of reconciliation.

IV. RÉSUMÉ: POSITIVISM AND BEYOND

The result of our endeavor remains double-edged: there does not seem to be "one correct answer" to the question of the applicability of international humanitarian law to internal armed conflict, only a patchwork of considerations to be applied to particular problems.[85] Under these circumstances, the ethical standpoint of the observer—and the lawyer—will almost necessarily inform the answers provided, for instance in the application of general principles of law. The use of traditionalist methodologies makes such individual value choices visible. Thus, the professional ethics of a lawyer requires the impartial mediation of attitudes, ideologies, or

[83] *See, e.g.,* ICCPR, *supra* note 2, Art. 2(3); Torture Convention, *supra* note 70, Art. 7; American Convention on Human Rights, Nov. 22, 1969, Arts. 1, 2, 1144 UNTS 123; Velásquez-Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, 1988 ANN. REP. 35, para. 166; Report of the Human Rights Committee, 47 UN GAOR, Supp. No. 40, Annex VI, general comment 20(44) (Art. 7), para. 15, at 195, UN Doc. A/47/40 (1992). For extensive treatment, see Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,* 100 YALE L.J. 2537, 2551–612 (1991); Naomi Roht-Arriaza, *Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation, and Superior Orders, in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 57, 57–65 (Naomi Roht-Arriaza ed., 1995).

[84] *See, e.g.,* General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, Annex 7, Art. VI, 35 ILM 75, 138 (1996): "Any returning refugee or displaced person charged with a crime, *other than a serious violation of international humanitarian, law.* . . or a common crime unrelated to the conflict, shall upon return enjoy an *amnesty*" (emphasis added).

[85] *See* Ratner, *supra* note 1, at 250: "The portrait of international criminal law is one of a legal environment resembling more a patchwork than a coherent, let alone complete, system."

conflicts. But in this process it is standards derived from legal sources deemed to be representative of the attitude of the community that provide the yardsticks for finding *a*—not *the*—correct solution to a legal problem.

So far, it seems, the traditional sources of international law have displayed enough flexibility to cope with new developments. Even if they may not satisfy the intellectual quest for unity of the international legal system, these sources have stood the test of time and have been universally accepted. As long as no alternative legal processes that would be universally acceptable are in sight, the old ones will simply have to do. And yet, the vision of an international law more amenable to the realization of global values remains compatible with the regime of traditional sources. However, this is true only to the extent these values find "sufficient expression in legal form."[86] Thus, the nonapplication to internal conflicts of the bulk of humanitarian law is gradually giving way to the establishment of universal criminal jurisdiction of both international and domestic tribunals in any kind of conflict. This development is being brought about by the traditional means of international lawmaking through state consent. Further, contemporary international law increasingly renders individuals accountable for violations of the most basic humanitarian rules. As lawyers with strong human rights sensibilities, we welcome this development with sympathy, even enthusiasm.

[86] South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, Judgment, 1966 ICJ REP. 6, 34, para. 49 (July 18).

POLICY-ORIENTED JURISPRUDENCE AND HUMAN RIGHTS ABUSES IN INTERNAL CONFLICT: TOWARD A WORLD PUBLIC ORDER OF HUMAN DIGNITY

Siegfried Wiessner and Andrew R. Willard

Real problems, like the problem posed, are not amenable to simple solutions. Human rights abuses in internal conflicts usually have roots deep in history and the collective psyche of the individuals and groups involved. To prevent them, the certain prospect of a swift punitive reaction on the international plane might have a useful deterrent effect. But if a violent conflict or genocide is in progress, the expectation of punishment may not by itself be likely to end the conflict. Ironically, it may prolong the plight of the persecuted, since persecutors may conclude that they have no alternative but to fight to the bitter end to avoid the consequences of their misdeeds. To deal with major incidents of unauthorized coercion and violence, an amnesty for the violators might contribute to a lessening of the toll in blood of a particular ethnic or religious rage. But that, again, might be an incomplete reaction, since the victims of the atrocities committed will not find solace, satisfaction or rehabilitation. Nor will persons who may be pathologically violent be removed from circulation. Where society remains unreconciled, jarred, conflicted—in a state of continual animosity between warring families, clans or ethnic, religious, or social groups—"cold" war might heat up and erupt at any time in the future even more violently than before. Thus, truth commissions have been established in various contexts at least to shine the light of searching inquiry on situations in which truth has always been the first casualty. Still, such agencies alone might not suffice to bring about social reconciliation and restoration. Neither might bodies set up to mete out justice in the form of civil compensation. International criminal courts may send a message to people elsewhere contemplating massive violations, but they may do nothing to reconstruct the civil society that has been disrupted.

The problem posed for this symposium engages a range of goals for the international community, including restoring minimum

THIRD WORLD APPROACHES TO INTERNATIONAL LAW AND INDIVIDUAL RESPONSIBILITY IN INTERNAL CONFLICT

Antony Anghie and B. S. Chimni

I. INTRODUCTION

When the *American Journal of International Law* published a Symposium on Method in 1999, Third World Approaches to International Law (TWAIL) was omitted.[1] TWAIL is not a "method" if by method we simply refer to a means of determining "what the law is." But it is certainly as much a "method" as feminism, critical legal studies (CLS), international relations/international law (IR/IL), and even legal process. As the authors presenting each of these perspectives make clear, these are not "methods" in a traditional sense, but they are distinctive ways of thinking about what international law is and should be; they involve the formulation of a particular set of concerns and the analytic tools with which to explore them. In attempting to describe and apply TWAIL[2] in the following pages, we are acutely aware that we cannot speak for the entire community of Third World international law scholars: we present only one version of this tradition, and other TWAIL scholars may very well disagree with the positions we outline here.[3]

[1] Symposium, *Method in International Law*, 93 AJIL 291 (1999); *Correspondence*, 94 AJIL 99, 100–01 (2000).

[2] We also assume that the term "Third World" has meaning and denotes a unity that transcends the enormous diversity that marks it. For various other accounts, over a period of many years, of what might be termed TWAIL, see, e.g., R. P. ANAND, NEW STATES AND INTERNATIONAL LAW (1972); TASLIM O. ELIAS, NEW HORIZONS IN INTERNATIONAL LAW (Francis M. Ssekandi ed., 2d rev. ed. 1992) (1979); THIRD WORLD ATTITUDES TO INTERNATIONAL LAW: AN INTRODUCTION (Frederick E. Snyder & Surakiart Sathirathai eds., 1987); Christopher Weeramantry & Nathaniel Berman, *The Grotius Lecture Series*, 14 AM. U. INT'L. L. REV. 1515 (1999); Makau Mutua, *What is TWAIL?*, 94 ASIL PROC. 31 (2000); James Thuo Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 184 (1998); Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353 (1998).

[3] Further, for the reasons cited by Charlesworth, we too have mixed feelings about participating as Third World voices and not just plain "international lawyers." Charlesworth, *supra* this volume, at 159.

For TWAIL scholars, international law makes sense only in the context of the lived history of the peoples of the Third World. Two important characteristics of TWAIL thinking emerge from this. First, the experience of colonialism and neo-colonialism has made Third World peoples acutely sensitive to power relations among states and to the ways in which any proposed international rule or institution will actually affect the distribution of power between states and peoples. Second, it is the actualized experience of these peoples, and not merely that of the States that represent them in international fora, that is the interpretive prism through which rules of international law are to be evaluated. This is because, for reasons detailed below, Third World states often act in ways that are against the interests of their peoples. For us, then, Third World peoples' resistance to, or acceptance of, international rules and practices that affect their lives offers strong evidence of the justice or injustice of those rules and practices.[4] By evaluating positivist rules through the lens of the lived experience of Third World peoples, TWAIL scholars seek to transform international law from a language of oppression to a language of emancipation—a body of rules and practices that reflect and embody the struggles and aspirations of Third World peoples and that, thereby, promote truly global justice.

II. WHAT IS TWAIL?

Like many of the other perspectives presented in this symposium, TWAIL has undergone evolution and transformation over time, and we might distinguish between what could be called TWAIL I scholarship produced by the first generation of post-colonial international lawyers and more recent TWAIL II scholarship. TWAIL II scholarship has broadly followed the TWAIL I tradition and elaborated upon it, while, inevitably, departing from it in significant

[4] We take the term "resistance" from the extensive work done by post-colonial scholars. *See, e.g.*, SELECTED SUBALTERN STUDIES (Ranajit Guha & Gayatri Spivak eds., 1988). *See also* Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT'L L.J. 529 (2000); Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337 (1996).

ways. At the risk of simplifying considerably, TWAIL I scholars[5] formulated a number of positions that had an important impact on all subsequent TWAIL scholarship.

First, TWAIL I indicted colonial international law for legitimizing the subjugation and oppression of Third World peoples. Nineteenth century international law, for instance, excluded non-European

[5] These include pioneering scholars such as Georges Abi-Saab, F. Garcia-Amador, R. P. Anand, Mohammed Bedjaoui, and Taslim O. Elias. Needless to say, the complexity of the views of these individual scholars, whose own work has developed over time, cannot be done justice in our presentation here. Over the years, several Western scholars have been sympathetic to the Third World's position and made important contributions to this body of scholarship, and these include scholars such as C. H. Alexandrowicz, Richard Falk, Nico Schrijver, and P. J. I. M. de Waart. Examples of the immense body of work produced by scholars who have focused on the relationship between developing countries and international law include: S. P. SINHA, NEW NATIONS AND THE LAW OF NATIONS (1967); J. J. G. SYATAUW, SOME NEWLY ESTABLISHED ASIAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW (1961); M. T. AL-GHUNAIMI, THE MUSLIM CONCEPTION OF INTERNATIONAL LAW AND THE WESTERN APPROACH (1969); Majid Khadduri, *Islam and the Modern Law of Nations*, 50 AJIL 358 (1956); Wang Tieya, *International Law in China: Historical and Contemporary Perspectives*, 221 RECUEIL DES COURS 195 (1990 II); Alejandro Alvarez, *Latin America and International Law*, 3 AJIL 269 (1909) (history of international law); S. N. Guha Roy, *Is the Law of "Responsibility of States" for Injuries to Aliens a Part of Universal International Law?*, 55 AJIL 863 (1961); F. V. Garcia-Amador, *State Responsibility in the Light of the New Trends of International Law*, 49 AJIL 336 (1955); C. F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1967); M. S. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (1994); Samuel K. B. Asante, *Stability of Contractual Relations in the Transnational Investment Process*, 28 INT'L & COMP. L.Q. 401 (1979). Other works that deal with particular areas include S. K. Agrawala, *The Emerging International Economic Order*, 17 INDIAN J. INT'L L. 261 (1977); Rahmatullah Khan, *The Normative Character of the New International Economic Order: A Framework of Inquiry*, 18 INDIAN J. INT'L L. 294 (1978); LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER (Kamal Hossain ed., 1980); PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW: PRINCIPLE AND PRACTICE (Kamal Hossain & Subrata Roy Chowdhury eds., 1984); B. S. CHIMNI, INTERNATIONAL COMMODITY AGREEMENTS: A LEGAL STUDY (1987); MILAN BULAJIC, PRINCIPLES OF INTERNATIONAL DEVELOPMENT LAW: PROGRESSIVE DEVELOPMENT OF THE PRINCIPLES OF INTERNATIONAL LAW RELATING TO THE NEW INTERNATIONAL ECONOMIC ORDER (2d ed. 1993); R. P. ANAND, ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA: HISTORY OF INTERNATIONAL LAW REVISITED (1983); A. O. Adede, *The Group of 77 and the Establishment of the International Sea-Bed Authority*, 7 OCEAN DEV. & INT'L L. 31 (1979); K. Krishna Rao, *The Legal Regime of the Sea-Bed and Ocean Floor*, 9 INDIAN J. INT'L L. 1 (1969); F. V. Garcia-Amador, *The Latin American Contribution to the Development of the Law of the Sea*, 68 AJIL 33 (1974); S. P. Jagota, *Developments in the UN Conference on the Law of the Sea: A Third World Review*, 3 THIRD WORLD Q. 287 (1981). For a guide to other literature, including literature in languages other than English, see, e.g., UN Library, Geneva, *The Third World and International Law: Selected Bibliography*, Publications Series C, No. 5 (1955–1982).

states from the realm of sovereignty, upheld the legality of unequal treaties between European powers and non-European powers, and ruled that it was completely legal to acquire sovereignty over non-European societies by conquest.[6]

Second, TWAIL I emphasized that pre-colonial Third World states were not strangers to the idea of international law. Non-European societies had developed sophisticated rules relating, for example, to the law of treaties and the laws of war. TWAIL I, then, attempted to create a truly international law, both by pointing to the commonalities among ostensibly very different societies, and by identifying a rich body of doctrine and principle which was to be found in Third World legal systems and cultures, and which could be used for the benefit of the entire international community.[7]

Third, TWAIL I adopted a non-rejectionist stance toward modern international law. TWAIL I believed that the contents of international law could be transformed to take into account the needs and aspirations of the peoples of the newly independent states. This was to be achieved principally through the United Nations system. TWAIL I scholarship was closely aligned with the diplomatic initiatives undertaken by newly independent Third World states, and it placed immense faith in the UN to bring about the changes necessary to usher in a just world order. In attempting to achieve these ends, the Third World states attempted, in effect, to formulate a new approach to sources doctrine by arguing that General Assembly resolutions passed by vast majorities had some binding legal effect.[8] These TWAIL attempts to create a system of international law that

[6] *See, e.g.*, R. P. ANAND, INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES 24–27 (1987). For a detailed study of the division between civilized and non-civilized states in nineteenth century international law, see GERRIT W. GONG, THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY (1984).

[7] *See, e.g.*, S. P. SINHA, LEGAL POLYCENTRICITY AND INTERNATIONAL LAW (1996); ASIAN STATES AND THE DEVELOPMENT OF UNIVERSAL INTERNATIONAL LAW (R. P. Anand ed., 1972). For a somewhat different approach, see Onuma Yasuaki, *When Was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective*, 2 J. HIST. INT'L. L. 1 (2000).

[8] *See, e.g.*, Georges Abi-Saab, *The Development of International Law by the United Nations*, *in* THIRD WORLD ATTITUDES TO INTERNATIONAL LAW: AN INTRODUCTION, *supra* note 1, at 221; V. S. MANI, BASIC PRINCIPLES OF MODERN INTERNATIONAL LAW: A STUDY OF THE UNITED NATIONS DEBATES ON THE PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES (1993); OBED Y. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS (1966).

was democratic and participatory were often defeated by positivist arguments regarding sources and consent.[9]

Fourth, TWAIL I laid great stress on the principles of sovereign equality of states and non-intervention, fundamentally important issues to societies that had just recovered their independence. Thus the Third World states initiated a number of resolutions in the United Nations which sought to advance these principles of sovereign equality and non-intervention.[10]

Fifth, it understood that political independence in itself was insufficient to achieve liberation, as the economic structures which linked the First and Third worlds, the North and South, continued to disadvantage the South and needed to be reformed; thus it sought to inaugurate a New International Economic Order.[11] The South sought in this way to make structural changes to an international economic system which was perceived to disadvantage developing countries, and, more specifically, it sought to regain control over its natural resources and to exercise effective control over foreign investors.[12]

III. TWAIL II

In the last decade or so, what might be termed TWAIL II scholarship has attempted to reassess both the relationship between international law and the Third World, and the approaches outlined by TWAIL I. TWAIL II has attempted, then, to further develop the analytical tools necessary to deal with Third World realities in a continuously shifting international setting.[13]

[9] The classic example of this type of positivist reasoning used to defeat Third World claims is found in *Texaco Overseas Petroleum et al. v. Libyan Arab Republic*, 17 ILM 1 (1978).

[10] *See, e.g., Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131 (XX), UN GAOR, 20th Sess., Supp. No.14, at 11, UN Doc. A/6014 (1965); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations*, G.A. Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1970).

[11] The classic work on this subject is MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (1979).

[12] *See, e.g., Charter of Economic Rights and Duties of States*, G.A. Res. 3281 (XXIX), UN GAOR, 29th Sess., Supp. No. 31, UN Doc. A/9631 (1974).

[13] The work of several TWAIL II scholars has been influenced by the writings of post-colonial scholars. *See generally* BART MOORE-GILBERT, POSTCOLONIAL THEORY: CONTEXTS, PRACTICES, POLITICS (1997); LAWS OF THE POSTCOLONIAL (Eve Darian-Smith & Peter Fitzpatrick eds., 1999).

Critiquing the Post-Colonial State

First, TWAIL II has adopted a critical attitude toward many of the important tenets of TWAIL I. TWAIL I perceived the newly independent, post-colonial state as a unitary entity that transcended and stood above conflicts and tensions generated by class, race, and gender within Third World societies. The task of intellectuals was viewed as supporting this state in its nation building tasks. Consequently, TWAIL I did not closely interrogate the idea of state sovereignty in order to align the language of international law with the destiny of Third World peoples as opposed to Third World states. This view of the transcendent post-colonial state prevented a focus on the violence of the state at home.

By contrast, while recognizing the fundamental importance of the doctrine of sovereignty for advancing Third World interests and for protecting and preserving Third World states against various forms of intervention, TWAIL II scholars have developed powerful critiques of the Third World nation-state, of the processes of its formation and its resort to violence and authoritarianism.[14] Corresponding with this is a concern to identify and give voice to the people within Third World states—women, peasants, workers, minorities—who had been generally excluded from consideration by TWAIL I scholarship. TWAIL scholars have examined, on one hand, how the great projects of "development" and nation building promoted by international law and institutions and embraced in some form by Third World leaders worked to the disadvantage of Third World peoples. On the other hand, they have examined whether and how international human rights norms may be used to protect Third World peoples against the state and other international actors.[15] By simultaneously examining the Third World state critically and recognizing the possibility of using international law to promote the interests of Third World peoples, these TWAIL II positions on international human rights law differ from either mainstream or critical Northern views on human rights as well as

[14] *See, e.g.*, Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 113 (1995); OBIORA OKAFOR, RE-DEFINING LEGITIMATE STATEHOOD: INTERNATIONAL LAW AND STATE FRAGMENTATION IN AFRICA (2000).

[15] *See, e.g.*, LEGITIMATE GOVERNANCE IN AFRICA: INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES (Edward Kofi Quashigah & Obiora Chinedu Okafor eds., 1999).

from the views of the Third World states themselves.[16] One of the major difficulties confronting TWAIL scholars arises precisely because it is sometimes through supporting the Third World state and sometimes by critiquing it that the interests of Third World peoples may be advanced.

Theorizing the Fundamentals

In addition, TWAIL II has sought to further the analysis developed by TWAIL I of the structural factors promoting inequalities between First and Third World states. In this respect, TWAIL II has focused more explicitly on theoretical inquiry than TWAIL I, which adopted a relatively unproblematic view of international law and saw its task as using the established techniques of international law to address Third World concerns. As a consequence of the failure of a number of Third World initiatives, most prominently that of the New International Economic Order, TWAIL II scholars began to examine more closely the extent to which colonial relations had shaped the fundamentals of the discipline. Rather than seeing colonialism as external and incidental to international law, an aberration that could be quickly remedied once recognized, TWAIL II scholarship has focused on a more alarming proposition: that colonialism is central to the formation of international law.

This inquiry has been conducted through a study of particular doctrines of international law such as human rights, and through a critical examination of the history of international law. For TWAIL II scholars, the history of the relationship between international law and the non-European world was important not simply to demonstrate that the non-European world had developed a number of important principles which corresponded with well-recognized principles of international law but also to understand the extent to which the doctrines of international law had been created through the colonial encounter. It was principally through colonial expansion

[16] *See, e.g.*, Celestine Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L.J. 381 (2000). Not only human rights, but other major discourses such as feminism are given a different character when viewed from a post-colonial perspective. *E.g.*, Joe Oloka Onyango & Sylvia Tamale, *"The Personal is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism*, 17 HUM. RTS. Q. 691 (1995).

that international law achieved one of its defining characteristics: universality. Thus the doctrines used for the purpose of assimilating the non-European world into this "universal" system—the fundamental concept of sovereignty and even the concept of law itself—were inevitably shaped by the relationships of power and subordination inherent in the colonial relationship.[17] It is thus hardly surprising that the Third World's attempts to use these same fundamental doctrines to advance its goals might encounter unique difficulties and challenges.

The Structure of Colonialism: The Civilizing Mission

We have said that international law has historically suppressed Third World peoples. How does this suppression take place, what are the techniques and technologies by which it is effected? This inquiry takes different forms depending on the area of international law involved. At a broader level, such inquiries use an analytic framework derived from the concept of the "civilizing mission." This concept justified the continuous intervention by the West in the affairs of Third World societies and provided the moral basis for the economic exploitation of the Third World that has been an essential part of colonialism.

The "civilizing mission" operates by characterizing non-European peoples as the "other"—the barbaric, the backward, the violent—who must be civilized, redeemed, developed, pacified. Race has played a crucially important role in constructing and defining the other.[18]

[17] For recent works examining the relationship between international law and colonialism see, e.g., Annelise Riles, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723 (1993); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law*, 40 HARV. INT'L L.J. 1 (1999).

[18] It is for this reason that TWAIL has much in common with a number of other important bodies of scholarship including Critical Race Theory and LatCrit Theory. *See, e.g.*, Henry J. Richardson III, *The Gulf Crisis and African-American Interests Under International Law*, 87 AJIL 42 (1993); Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903 (1997); Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211 (1991); Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 VILL. L. REV. 1037 (2000); and Adrien Katherine Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943 (1997). For important collections of work in these traditions that also provide guidance to the literature, see

This task of transforming the other requires the development of new doctrines, technologies, and institutions. A number of issues arise from this reflex: how is this "other" constructed? How does this construction shape the legal framework that regulates the interaction between the West and the other? How does it determine what is legally permissible to each of the parties?

These ideas of the backward and the primitive, we argue, exercise a powerful and unstated influence on international law. More particularly, in the context of the ongoing problem of violence in the international system, it is significant that since the beginnings of international law, it is frequently the "other," the non-European tribes, infidels, barbarians, who are identified as the source of all violence, and who must therefore be suppressed by an even more intense violence. However, this violence, when administered by the colonial power, is legitimate because it is inflicted in self-defense, or because it is humanitarian in character and indeed seeks to save the non-European peoples from themselves.[19]

What is remarkable is the way in which the project of the civilizing mission has endured over time, and how its essential structure is preserved in certain versions of contemporary initiatives, for example, of "development," democratization, human rights, and "good governance," which posit a Third World that is lacking and deficient and in need of international intervention for its salvation. To understand the cunning of colonialism, the ways in which the civilizing mission reproduces itself in bewilderingly different forms, all of them presented as benevolent, TWAIL II scholars have focused more explicitly on the methodologies of international law and the ways in which those methodologies addressed Third World issues or else precluded consideration of those issues.[20]

Symposium, Critical Race Theory and International Law: Convergence and Divergence, 45 VILL. L. REV. 827 (2000); on Lat-Crit Theory, see *Colloquium, International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1997).

[19] This basic structure is evident in the works of Francisco de Vitoria, one of the earliest jurists to write on "modern international law." *See* Francisco de Vitoria, *On the Indians Lately Discovered* and *On the Indians, Or On the Law of War Made by the Spaniards on the Barbarians*, *in* DE INDIS ET DE IVRE BELLI: RELECTIONES 115 and 163 (Ernest Nys ed., John Pawley Bate trans., 1917).

[20] *See, e.g.*, B. S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES (1993) (critique, from a Third World perspective, of theories of international law proposed by Morgenthau, McDougal-Lasswell, Richard Falk, and Grigory Tunkin); James Thuo Gathii, *Neoliberalism, Colonialism and*

TWAIL and the Politics of Knowledge

Given the importance of theoretical inquiry to our understanding and approach to international law, it is inevitable that TWAIL scholars have turned their attention to the question of how knowledge about international law is produced. How do we identify what counts as acceptable scholarship in the field of international law? Here a powerful international division of intellectual labor prevails: Northern scholars and Northern institutions set these important standards. Further, these scholars and institutions seem to assume that the most significant schools of thought originate in the North—or even more specifically, in the United States. In the words of the editors when introducing the methodologies initially compiled in *AJIL*, "although many of the methods have a distinctly American origin, the community of scholars for nearly all of them is now global."[21] We draw—unhappily wearisome—attention to this aspect of the symposium project since it reflects a powerful reality that scholarship cannot be separated from the institutional resources—law schools, journals, publishers—that enable its production.

TWAIL has thus found it difficult to assert itself in an institutional setting that, when it is not generally uncomprehending of TWAIL's history and its aims, seeks to incorporate TWAIL into a familiar geography of alliances and rivalries.[22] Some Northern schools of thought that have generally neglected the subjects of race, colonialism, and the Third World have recently developed an interest in TWAIL methodologies and concerns, which we welcome.[23]

International Governance: Decentering the International Law of Government Legitimacy 98 MICH. L. REV 1996 (2000); SIBA N'ZATIOULA GROVOGUI, SOVEREIGNS, QUASI-SOVEREIGNS AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW (1996).

[21] Ratner & Slaughter, *supra* this volume, at 8.

[22] This outline might further explain why, when attention was drawn to the omission of any methodology focusing on race by Professor Richardson, the editors' response was that they believed Third World (postcolonial) approaches did not constitute a distinct method, and could be seen as incorporated under critical legal studies approaches. *See* Henry J. Richardson, *Correspondence*, 94 AJIL 99, 100–01 (2000); Reply of Professors Slaughter and Ratner, *id.* at 101. To be fair, the Critical Legal Studies (CLS) presenter, Martti Koskenniemi, is not the source of this confusion as he does suggest that CLS does not incorporate post-colonial theory: "where were the methods of 'ethics', 'natural law', 'post-colonialism'. . . ?" Koskenniemi, *supra* this volume, at 111. Critical Race Theory, which has concerns in common with TWAIL, has drawn on CLS work in ways that suggest both contestation and coalition.

[23] There has been a growing interest on the part of scholars who are usually thought of as CLS scholars in Third World issues. See footnotes 59–61 *infra* and discussion therein.

However, to then see TWAIL as a product or subsidiary of these Northern schools would be to further the familiar pattern that all knowledge and theory—including TWAIL—originates in the North. This would disregard the enormous body of work that has been done by TWAIL scholars for more than five decades, work that has often not received proper recognition, and only a part of which we can present in these pages.

IV. INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNAL CONFLICTS

Overview

The issue presented to us by the editors is whether, under current international law, individuals are criminally responsible for atrocities committed in internal conflicts or, if they are not, whether they should be. The fundamental inconsistencies arising from the regime currently in place has been carefully analyzed by a number of scholars[24] and presented by several contributors to the original symposium. In essence, atrocities committed by an individual in the context of a conflict between states will give rise to criminal responsibility on the part of that individual, whereas the same crimes committed in an internal conflict may not give rise to any such responsibility—although they may amount to a violation of international human rights law. The reasons for this anomaly may be traced back to the complex, parallel, and overlapping developments in international humanitarian law, international human rights law, and international criminal law. For TWAIL, it is also noteworthy that the many atrocities committed by colonial powers against colonized peoples were generally not the subject of concern for international law, and it was only when European peoples were subject to the tragedy of the Holocaust that a concern for atrocities committed within a state emerged. Indeed, as Schabas argues, the distinction between atrocities committed in international and internal conflicts was established by the Allies after the war because the prospect of using the rubric of "crimes against humanity" for internal conflicts pure and simple made the Allies "uncomfortable with the

[24] THEODOR MERON, WAR CRIMES LAW COMES OF AGE: ESSAYS (1998); Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237 (1998).

ramifications that this might have with respect to treatment of minorities within their own countries, not to mention their colonies."[25] Thus, a connection was established between crimes against humanity and international armed conflict, the result of which is the schizophrenia that has since afflicted international humanitarian law (IHL). For TWAIL scholars, this point is not unexceptional; rather, it suggests again the ways in which colonial issues shape in some way an ostensibly neutral, objective, and universal law, including IHL.

How then, do the characteristic preoccupations of TWAIL scholars affect our approach to the issue of individual responsibility in internal conflict? We see this issue in the context of the broader issue of the control of violence, the protection of civilians during conflict and the attribution of responsibility. Our analysis may be broadly divided into two parts. First, we approach the problem by questioning the understanding of "internal conflict" that appears to provide the foundation for the whole issue of individual accountability. The other methods presented in the Symposium rely on "context" in various ways to address the validity and appropriateness of rules, but for us context means North-South relations and the civilizing mission that often structures these relations. Second, we turn to some of the more specific issues involved in determining whether and how individuals should be held accountable for internal atrocities.

In relation to the first point regarding context, we agree that individual accountability is important to the issue of addressing internal conflict. We also believe that international human rights law plays a vital role in constraining the type of "ethnic politics" that often accompanies the grand project of "nation building" in Third World states where politicians have often played the racial card in order to win popular support. However, these approaches alone are insufficient. We argue that violence has been displaced in part from the First to the Third World by a number of international practices that have resulted in the South's subjection to a range of unsustainable economic and social policies policed by international financial and trade institutions that enrich and favor the North.

[25] WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 35 (2001).

The Yugoslavia and Rwanda conflicts have been crucially important in raising the whole question of individual responsibility for internal conflict, and the international community has devoted a massive amount of its resources to the creation and administration of the two tribunals charged with trying individual perpetrators in both conflicts. In both cases, however, it is clear that policies authored by international financial institutions (IFIs), the World Bank and the International Monetary Fund,[26] in which powerful actors of the international system play a dominant role, were in part responsible for creating the wider environment in which these human rights violations took place.[27] Thus any attempt to identify responsibility for these tragedies and to create systems of accountability should also inquire into the roles that these other international actors played in promoting and exacerbating the situation. Even more pointedly and directly, it is now well acknowledged that significant international actors such as the United Nations itself failed to address the growing dangers in Rwanda.[28] In addition, we question whether a regime of individual accountability appropriately

[26] *See* MICHEL CHOSSUDOVSKY, THE GLOBALIZATION OF POVERTY: IMPACTS OF IMF AND WORLD BANK REFORMS (1997); *Presentation of Dr. Susan L. Woodward, Case Study: The Former Yugoslavia, in* HEALING THE WOUNDS: REFUGEES, RECONSTRUCTION AND RECONCILIATION 12, 12–14 (UNHCR, Geneva 1996). For a particularly incisive analysis, see Anne Orford, *Locating the International: Military and Monetary Interventions After the Cold War*, 38 HARV. INT'L L.J. 443 (1997).

[27] The International Panel of Eminent Personalities, asked by the Organization of African Unity to investigate the 1994 genocide in Rwanda, notes in its report of June 2000 that:

> [b]y the late 1980s . . . all economic progress ended. Rwanda's economic integration with the international economy had been briefly advantageous; now the inherent risks of excessive dependence were felt. Government revenues declined as coffee and tea prices dropped. International financial institutions imposed programs that exacerbated inflation, unemployment, land scarcity, and unemployment. Young men were hit particularly hard. The mood of the country was raw.

International Panel of Eminent Personalities (IPEP), Report on the 1994 Genocide in Rwanda and Surrounding Events, 40 ILM 141, 143 (2001).

[28] *See* José Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999). Indeed, Alvarez argues that tribalism and ethnic identities were, in significant ways, created and politicized by colonial powers in pre-independence Rwanda, relying on European theories of racial superiority, in order to further their own authority. These findings further complicate any easy distinctions between "internal" and "external" violence. *See id.* at 440–41.

addresses situations where entire communities inflict massive violence on each other.

Basically, then, any proposal to develop new regimes and institutions to address these tragedies must surely consider, first, the extent to which the negligence and failure of *existing* international institutions contributed to the problem, and secondly, the direct ways in which powerful states, which have played the virtuous role of establishing new mechanisms of accountability, may have promoted, or in the least, failed to prevent, the very violence that they now seek to redress.[29] If there is any basis for the claim that IFIs have exacerbated "internal" conflicts, then surely it is ironic that they have been significantly expanding the scope of their activities, often in ways which appear to be in excess of their mandates,[30] and that they now indeed are becoming involved in the "reconstruction" of post-conflict societies. Awareness of and accountability for international policies and practices that create the environment in which internal conflicts are ignited must accompany individual accountability for conduct during conflict.

In our view, then, a legal approach that addresses the conditions under which these broad societal conflicts take place may prove more effective in quelling violence against civilians over the long term than a regime of individual accountability alone enforced through national and international courts.[31]

Secondly, turning to the issue of individual accountability, TWAIL insists on a consistent and objective approach to initiatives directed

[29] Thus the historian Gérard Prunier argues that French authorities "play[ed] an important part in one of the worst genocides of the twentieth century." GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 340 (1995). Nevertheless, France has been forceful in calling for the prosecution of the individuals responsible for these atrocities, and has played an important role in the establishment and administration of the Rwanda Tribunal. The indifference and delays of the United Nations, and various Security Council members, further compounded the situation.

[30] *See* Orford, *supra* note 26; Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions and the Third World*, 32 N.Y.U. J. INT'L L. & POL. 243 (2000).

[31] As Makau Mutua argues, with respect to the Rwanda and Yugoslavia tribunals, "such tribunals would only make sense in the context of an overall solution, a comprehensive and bold settlement addressing the foundational problems that unleashed the genocide in the first place." Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167 (1997).

toward establishing individual accountability. Initiatives of this nature always suffer the danger of becoming, simply, the reproduction of the civilizing mission and victor's justice. The NATO military operations in 1999 raised disturbing questions about the neutrality and objectivity of the International Criminal Tribunal for the former Yugoslavia (ICTY). Although the Tribunal's prosecutor was presented with compelling evidence that NATO had violated international humanitarian law,[32] she chose not to proceed with any further inquiries, stating dismissively that no inquiry was useful and that nothing would emerge.[33] For TWAIL scholars—and indeed, many other scholars concerned about the rule of law and impartial justice—decisions of this sort by the ICTY prosecutor, whose mission is, precisely, to identify and try the parties responsible for the "unlawful killing of civilians," unhappily tend to confirm the suspicion that justice is selective. To prevent selectivity, we further believe that a regime must be established to hold accountable the individuals and states who support individuals, such as General Pinochet, who have been responsible for massive human rights violations. Finally, given the concern to protect civilian populations, we believe it vital to examine all the current practices, including the imposition of economic sanctions, which are currently deemed "legal" and that have a devastating effect on those populations. It is a tragic paradox that the people of Iraq have suffered more in a time of supposed "peace" than they ever suffered in a time of war. International law

[32] *See, e.g.*, Amnesty International, *NATO violations of the law of war during Operation Allied Force must be investigated* (June 7, 2000), *available at* http://web.amnesty.org. For an original approach to the NATO campaign, see Kriangsak Kittichaisaree, *The NATO Military Action and the Potential Impact of the International Criminal Court*, 4 SING. J. INT'L & COMP. L. 498, 498–529 (2000).

[33] The Final Report to the ICTY prosecutor stated, very broadly, that:

> neither an in-depth investigation related to the bombing campaign as a whole, nor investigations related to the specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences.

Final Report to the ICTY Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, *available at* http://www.un.org/icty. By contrast, Amnesty International's own inquiries led them to state categorically that "NATO forces violated the laws of war leading to cases of unlawful killing of civilians." *See* Amnesty International, *supra* note 32.

has yet to develop principles that address the problems arising from this situation.[34]

The Development of Contemporary International Humanitarian Law

Having placed the issue of individual accountability within this broader context, we now proceed to focus more closely on some of the issues and doctrines regarding individual accountability—for we believe that IHL has a vitally important part to play in dealing with the problem of internal conflict. TWAIL continues to aspire toward the creation of an international law that truly reflects the needs and interests of peoples rather than states. However, even within the existing framework of sources doctrine, from a TWAIL perspective, it is vital that the creation of a system of individual accountability for internal atrocities must occur through a process that involves all states and that is open, democratic, and participatory. It is for this reason that we are opposed to the current manner in which these doctrines are being developed. We apply these perspectives and principles both to the creation of international criminal tribunals and the development of international criminal law.

We are opposed to the development of the law by the ICTY and ICTR, and are more in favor, whatever its weaknesses, of the process undertaken through the International Criminal Court. As the IR/IL approach notes, the problem is that international legal institutions are "intensely political actors."[35] This recognition has two implications. The first implication concerns the creation of the institution itself. We are doubtful as to whether the ICTY should have been established by the United Nations Security Council.[36] The exigencies of the situation in Yugoslavia may have made such a response attractive, but we are extremely uneasy about the fact that this is part of an intensifying trend whereby the Security Council is arrogating to itself the power to deal with numerous international questions that have been the subject of ongoing negotiations by the larger international community.

[34] *See* W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanction Programs*, 9 EUR. J. INT'L L. 86 (1998).

[35] Abbott, *supra* this volume, at 155.

[36] At the same time, we acknowledge that the establishment of the ICTY may play a role in deterring further war crimes. *See* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AJIL 7 (2001).

In terms of the creation of the law, tribunals such as the ICTY have been seeking to rapidly develop the law and indeed, to resolve the contradictions confronting the application of IHL in humanitarian conflict, through interpretive techniques that Simma and Paulus have termed "modern positivism."[37] We are opposed to this approach to the development of international criminal law because it undermines both the settled law and the principles of participation in the formulation of the law.

For example, in its 1995 decision on the issue of jurisdiction in the *Tadić* case, the ICTY appeals chamber eroded the distinction between international and internal conflict by enunciating a customary law of war crimes in internal conflicts although it was unclear whether the necessary practice could be established.[38] In the course of its decision on the merits, the appeals chamber further departed from what appeared to be a number of established principles of international law. The result may have been that the chamber, in attempting to fashion a response to the Balkan conflict, created a new set of problems that could unsettle the existing law.[39] While the law certainly needs to be revised, we are uncertain as to whether this is the best method to adopt and whether in fact it furthers justice in a broader sense. The approach of the chamber raises grave questions as to whether the fundamental principle of *nullum crimen sine lege* had been properly respected. The chamber's approach contravenes, further, the explicit comments made in a

[37] Simma & Paulus, *supra* this volume, at 29.

[38] Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT–94–1–AR72, para. 119 (Oct. 2, 1995), *reprinted in* 35 ILM 32 (1996) (also quoted in Simma & Paulus, *supra* this volume, at note 1). *See also* Peter Rowe, *The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadic Case*, 45 INT'L & COMP. L.Q. 691, 701 (1996). As Simma and Paulus point out, however, the state practice needed to support such a conclusion was "anything but firm." Simma & Paulus, *supra* this volume, at 39.

[39] The chamber decided that the grave breaches regime extended to conflict in Bosnia in which the accused, a Bosnian Serb, had participated. To achieve this result, the appeals chamber departed from the law of state responsibility laid down by the ICJ in the *Nicaragua* decision, and also redefined the concept of "protected persons" in the Geneva Conventions by articulating a strained and problematic approach to the question of "nationality." Further, in holding Tadić responsible for crimes that he had not committed himself, the chamber developed an interpretation of the "common purpose" doctrine based on case law that was admittedly uncertain and inconsistent. Prosecutor v. Tadić, Judgment, Case No. IT–94–1–A (July 15, 1999), *reprinted in* 38 ILM 1518 (1999).

report of the Secretary General in relation to the creation of the Tribunal to the effect that the Tribunal "would have the task of applying existing international humanitarian law."[40]

Overall, then, because of TWAIL's concern for an inclusive and participatory international law, our view is that the law relating to individual responsibility in internal conflict should evolve in a manner that is fair and acceptable to all parties rather than through formulations that reflect the views of dominant states alone. The Rome Statute of the International Criminal Court[41] suffers from several significant shortcomings that suggest that participation and democracy often give way to power. Thus the ICC Statute does not outlaw the use of nuclear weapons, in a situation where this issue is surely fundamental to the goal of the ICC, to prevent the acts harming innocent civilians. In addition, the jurisdiction of the tribunal has been severely curtailed. The powers of the Security Council, provided for in the ICC framework, are a further concern. Nevertheless—perhaps repeating TWAIL I's hopes for the gradual reconstruction of international law—we endorse the creation of the ICC. Despite the several shortcomings we identify here, the ICC represents the efforts of the international community as a whole to address these problems and to cover the gaps in international humanitarian law pertaining to the responsibility of the individual in internal wars. The formulation of articles 8(c) and (e) of the ICC Statute deals explicitly with war crimes arising in internal conflict.[42]

Simply, it greatly facilitates the creation of a culture of compliance if the rules in question have been established through an open process that has received the broad approval of the international community as a whole. Thus, for example, the recognition of the multicultural basis of the laws of war is particularly relevant to improving compliance with the law of war. The point is relevant even from the point of view of the issue of the enforcement of

[40] *See* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (1993), *reprinted in* 32 ILM 1159 (1993). The Secretary-General further asserted that "the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law. . . ." *Id.* at 9, para. 34.
[41] Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9*, *reprinted in* 37 ILM 999 (1998) [hereinafter ICC Statute].
[42] *Id.*

international humanitarian laws in internal conflicts. As Judge Weeramantry noted in his dissenting opinion in the *Nuclear Weapons* case, "[i]t greatly strengthens the concept of humanitarian laws of war to note that this is not a recent invention, nor the product of any one culture."[43]

Finally, we are of the view that the people of the state that has experienced internal conflict should decide how to deal with individuals who commit atrocities in internal conflict.[44] We recognize that such a position raises a number of problems regarding the relationship between international tribunals and the societies in which these atrocities take place. On the one hand, the internationalization of internal atrocities could play an important role in providing justice in situations where national mechanisms are lacking or else hopelessly compromised. On the other hand, there are many important national interests that could justify leaving the matter to nationally established institutions to settle—as argued by Kader Asmal.[45] These concerns may be addressed by the ICC through the mechanism of complementarity that would enable national courts to deal with these issues initially.[46]

IV. TWAIL II AND OTHER APPROACHES

While seeking to reconstruct international law, TWAIL's approach to the discipline is based on a philosophy of suspicion because it sees international law in terms of its history of complicity with colonialism, a complicity that continues now in various ways with the phenomenon of neo-colonialism, the identifiable and systematic pattern whereby the North seeks to assert and maintain its economic, military, and political superiority. "Context" is an important concept to many of the other methodologies, and this is the context in which we locate the problem of individual accountability.

[43] Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ REP. 226, 478 (Advisory Opinion of July 8) (Weeramantry, J., dissenting).
[44] For a searching inquiry into the choices faced by societies that have suffered such violence, see MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998).
[45] Kader Asmal, *International Law and Practice: Dealing with the Past in the South African Experience*, 94 ASIL PROC. 1 (2000).
[46] *See* ICC Statute, *supra* note 41, Arts. 17–20.

However, none of the other approaches consider internal conflict in the broader framework we have outlined above. Contemporary ethnic conflict is not simply the latest expression of primordial forces. Its nature, its conduct, its shape are all inextricably linked both with colonialism and with the very modern forces of globalization that inevitably involve North-South economic relations.[47] By approaching the issue in this way, we seek to make IHL more effective by attempting to create a comprehensive system in which powerful states and international institutions are prevented from exacerbating the social tensions that often give rise to such conflict. We note that with the exception of Charlesworth, none of the other contributions question in any significant way the characterization of the concept of "internal" and the analysis that follows from it. Given that the vast majority of "internal" conflicts that have attracted the attention of international law scholars have occurred in the Third World—Latin America, Asia, Africa—the effect of such an approach is implicitly to accept that violence is endogenous to these societies. While this may be a consequence of the way in which the editors presented the issue, we find such approaches problematic because they hardly correspond with the complex socio-political circumstances in which such conflict arises. For these reasons, we believe it is important to connect the issue of individual accountability to various other areas of international law that clearly have a bearing on the matter in a world that is so intensely interdependent.

This interdependence is something that IR/IL approaches purport to encompass.[48] IR/IL approaches have much to contribute to understanding international legal structures and processes, but TWAIL II places great emphasis on international economic relations even as it does not negate the role of power (realism), subjective factors (constructivists), the role of institutions (institutionalists) and the role of domestic politics (liberal). Indeed, it subscribes to a particular synthesis that emphasizes these individual elements in relation to the structures of global capitalism, and, in our view, has greater explanatory value as far as the North-South divide and the causes of internal conflicts are concerned. While we use many of

[47] For an inquiry into the relationship between ethnic conflict and development policy, see Amy L. Chua, *Markets, Democracy and Ethnicity: Toward A New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998).

[48] *See* Abbott, *supra* this volume, at 127.

the elements that are found in IR/IL approaches, we do not subscribe to the vision and broader policy recommendations that are often produced by such approaches. In fact, as Holsti points out, Western "International Relations Theory as it has developed over the past 250 years may be of limited relevance in helping to explain the crucial issues facing contemporary Third World and post-Socialist States."[49] Further, we are concerned that calls for interdisciplinarity that undermine or erode the notion of valid law may have the effect of "smoothening the paths of the hegemon."[50] At the risk of confirming an orientalist stereotype of the feminine nature of the colonized, we find ourselves in agreement with many aspects of Charlesworth's feminist analysis, as indicated throughout our presentation.

Our position on sources, which has been the subject of comment by others, may be stated in terms of a number of propositions. First, like Simma and Paulus as well as Dunoff and Trachtman (L&E),[51] we believe it is important to be able to identify clear rules of law. Nevertheless, we agree with many of the critiques of positivism that have been noted by others in the Symposium. Positivism is insular and therefore fails to locate international law and institutions in their political context. It freezes the sources of international law, which acquire an almost mystical quality. It posits that an objective interpretation of rules (both textual and customary) is the reality. Furthermore, it fails to place these rules within a larger normative framework, as a consequence of which it does not take cognizance of structures and practices that reproduce oppressive and patriarchic international law rules. By generally disregarding the political dimension of international rule making, interpretation, and application, positivism does not take into account the complex ways in which "consent" can be extracted from weak Third World countries; nor can it provide a critique of the ways in which a few powerful states can block international initiatives that benefit the larger international community. Positivism, as pointed out earlier,

[49] K. J. Holsti, *International Relations Theory and Domestic War in the Third World: The Limits of Relevance, in* INTERNATIONAL RELATIONS THEORY AND THE THIRD WORLD 103, 107 (Stephanie G. Neuman ed., 1998).

[50] Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations, in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 17, 34 (Michael Byers ed., 2000).

[51] Simma & Paulus, *supra* this volume, at 31–32; Dunoff & Trachtman, *infra* this volume, at 218–20.

has continuously defeated Third World attempts to reform international law. At the same time, however, we are skeptical about the approaches of the International Legal Process (ILP) school and the New Haven school,[52] both of which provide for and indeed encourage expansive interpretations of the law. Thus O'Connell asserts that "even where treaties and customary rules do not fully support an outcome, a duly established international law decision maker should reach the outcome that supports society's values."[53] It is of course tempting to subscribe to this view on the basis that this might be one way for values promoting Third World interests to be advanced notwithstanding the obstructions of positivism. However, we are concerned about the ways in which "society's values" are interpreted, particularly in a situation where "society" is often equated with dominant Northern views.

This same concern shapes our response to the New Haven school. We have elsewhere offered a detailed critique of the New Haven method and will confine ourselves to recalling a few points in context.[54] The New Haven approach suggests that legal rules are open to various interpretations.[55] TWAIL believes that both positivism, with its emphasis on the transparency of a rule, and the Policy approach, which in effect enables considerable hermeneutic freedom, are problematic. Because it does not further examine the connection between the way in which hermeneutic power is exercised and existing power structures, the Policy approach does not appear to explore the ramifications following from the fact that the content of international law rules is written by power. Thus, the notions of "human dignity" and "world public order" that the New Haven school would look to in offering guidance are themselves shaped by these considerations of power. These considerations often possess a North-South dimension, much as they would be

[52] Wiessner & Willard, *supra* this volume, at 47; O'Connell, *supra* this volume, at 79.

[53] O'Connell, *supra* this volume, at 104.

[54] For a detailed critique, see B. S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES, ch. 3 (1993).

[55] Wiessner and Willard make the point, with which we agree, that "[o]ne's perception of 'the law' can differ substantially depending on whether one is a member of the system observed, whether one is an outsider, or whether one lives at its margin. It may also vary depending on one's culture, class, education, gender, age, life experiences, and other factors." Wiessner & Willard, *supra* this volume, at 57.

shaped by considerations of gender.[56] There has been marked disparity between the extraordinarily comprehensive methodology proposed by the New Haven school and the somewhat narrow, U.S.-oriented proposals that have emerged from such an inquiry.[57] In this context, we welcome the point, made by Wiessner and Willard, that self-reflection, "clarification of the observer's standpoint,"[58] is an important aspect of the Policy approach, as this might lead to a more open version of the New Haven school.

So the paradox we face is this: TWAIL shares the positivist and L&E desire for clear rules even while acknowledging the inherent impossibility of ever achieving them. The alternatives suggested by ILP and the New Haven school are equally problematic. This leaves the CLS approach[59] and Martti Koskenniemi's suggestion that the indeterminacy of international law is such that it is of little assistance in justifying or criticizing international behavior.[60] Many of the insights that CLS developed have been important and useful to TWAIL scholarship.[61] Almost inevitably, given that the Third World

[56] As Charlesworth states, "[t]he New Haven commitment to a world public order of human dignity also fails to consider the gendered dimensions of the notions of order and human dignity." Charlesworth, *supra* this volume, at 180–81. Basically, where certain voices and interests have been systematically excluded from participating in a system of world order, as has been the case with the Third World and women, it is perhaps only by understanding the specificity of the ways in which they have been excluded and actively seeking to excavate those voices that they may be effectively recovered and taken into consideration. But the New Haven school does not appear to engage in this project, operating more at a problematic general level. As Judge Rosalyn Higgins, a follower of the school, noted many years ago, "McDougal is concerned for human dignity in the new nations, as in all nations; but he does not see the developing countries as requiring the separate and urgent attention of the legal process." Rosalyn Higgins, *Policy and Impartiality: The Uneasy Relationship in International Law*, 23 INT'L ORG. 914, 924 (1969).

[57] *See* CHIMNI, *supra* note 54, at 143–145 (for a discussion of some of the scholars who argue this point).

[58] Wiessner & Willard, *supra* this volume, at 57.

[59] CLS has itself gone through various metamorphoses and has acted as the basis for what might be called the NAIL (New Approaches to International Law) movement. For a detailed account of these transformations, see David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335 (2000).

[60] Koskenniemi, *supra* this volume, at 114–17.

[61] The classic CLS works are DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987) and MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989). For outstanding examples of works that draw upon both CLS and TWAIL, see Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509 (1992); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias*

has often been subordinated by international law, TWAIL has several elements in common with CLS and feminism, both of which in different ways have attempted to question the power structures embedded in law. Nevertheless, TWAIL differs from CLS in several ways.

Language is never free of ambiguity; law is, inevitably, indeterminate. We agree that justice at times may be promoted by the employment of another discourse, the language of a novel, in the words of Koskenniemi, although of course, there is no discourse free of ambiguities: novels—particularly great novels—may evoke very different responses.[62] There are at least two reasons, however, why TWAIL scholars are unwilling to depart from the arena of international law, notwithstanding the injustices that international law has inflicted on the Third World, and the disappointments of TWAIL I. First, TWAIL scholars believe in the transformative potential of international law and in the ideal of law as a means of constraining power. While the problem of indeterminacy is real, it is not a problem purely internal to the argumentative structures of international law and the ambiguities of language. Linguistic indeterminacies are resolved most often by resort to social context. This is why indeterminacy rarely works in favor of Third World interests. Ambiguities and uncertainties are invariably resolved by resort to broader legal principles, policy goals, or social contexts, all of which are often shaped by colonial views of the world and the conceptual apparatuses that support it. This, after all, is precisely why we are troubled by the New Haven approach. We believe that international law is constraining, that good argument based on law does prevail; but it often prevails only as argument, and in the face of power, good argument does not necessarily control action.

Under the Specter of Neo-liberalism, 41 HARV. INT'L L.J. 419 (2000). David Kennedy has been very important in promoting and encouraging TWAIL scholarship. *See* Kennedy, *supra* note 59; David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INTL. L. 9 (1999).

[62] Thus Robert Kaplan has written a very influential essay on Joseph Conrad's magnificent novel *Nostromo*, which presents it as a novel whose major theme is Third World disorder; Kaplan's reading overlooks Conrad's superb exploration of the corrupting effects of colonialism at both personal and political levels. *See* Robert D. Kaplan, *Conrad's Nostromo and the Third World*, NATIONAL INTEREST, Spring 1998, at 51; for an alternative reading of *Nostromo* that focuses on colonialism, see EDWARD SAID, CULTURE AND IMPERIALISM xvii–xix (1993). How should we read the novels and non-fiction of V. S. Naipaul?

Secondly, and equally importantly, there are real dangers in conceding the entire arena of international law to other methodologies and actors in the aspiration to find a more powerful discourse that would render injustice with such clarity and persuasion that it would compel the changes in international relations that TWAIL seeks. To the extent that CLS suggests this course of action, it runs the risk of merely supporting, if not furthering the status quo, as Koskenniemi recognizes.[63] TWAIL simply cannot afford this because international law has now become an extraordinarily powerful language in which to frame problems, suggest fault and responsibility, propose solutions and remedies. International law rules matter and must be taken seriously. It is not simply a distinctive style of argumentation but has serious consequences for how ordinary people live. To present it as a mere style is to privilege form over content; as Charlesworth notes, international law has "a symbolic, as well as a regulative function."[64] International law is a field of contestation over meanings, approaches, solutions, remedies, and one that TWAIL cannot surrender. Finally, even Koskenniemi appears to be ambiguous about the uselessness of law: law does serve some function in preventing the simple prevalence of politics in its most blatant form.[65]

V. CONCLUSION

The issues presented to us, as the responses suggest, are far too complex to enable the production of a comprehensive and detailed set of proposals. Rather, the different methodologies outline a set of broad principles, approaches, and concerns to the problem in question. TWAIL, while using analytical tools that are also part of the arsenals of various approaches, represents a distinctive approach to international law. Our perspective is profoundly shaped by the

[63] Koskenniemi, *supra* this volume, at 124.

[64] Charlesworth, *supra* this volume, at 182.

[65] *See* Koskenniemi, "Whatever one thinks of lawyers, or of a culture within which the question of 'validity' is a matter of professional concern and not of formalistic fiction, doing away with it has definite social consequences. Not least of these is the liberation of the executive from whatever constraints (valid) legal rules might exert over them." Koskenniemi, *supra* note 50, at 32. For his most recent views on these large themes, see MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2001).

experiences of the peoples and states of the Third World. However, this does not mean that our methods are limited and partial, as opposed to other methods that present themselves in more universal terms. First, as we have argued, it is the Third World that is in important respects the object of these initiatives. Any system that purports to be universally valid must surely be assessed in terms of how it deals with the most disadvantaged. Second, methodologies that purport to be "universal" and that rely on concepts posited as having the same valence everywhere—"the individual," "cost benefit analysis," etc.—often prove to be narrow and particular, a mechanism for advancing certain unacknowledged but specific interests as being for the universal good.

TWAIL is not so much a fixed methodology that promises to provide clear answers if only the appropriate amount of research were done (into cost benefit analysis or the role of the domestic actors or the contexts in which decisions are made). Many methodologies, we believe, aspire to a science that may never be achieved. In TWAIL, then, we offer instead an ongoing project that is continuously questioning not only the foundations and operations of international law, but also its own methodological premises. Approaches to international law that fail to take into account its violent origins might preclude an understanding of the continuing complicity between international law and violence and in this way, simply perpetuate a "violence that thinks of itself as kindness."[66] It is precisely by attempting the task of excavating these aspects of international law that TWAIL seeks to formulate an international law that might hold good to its ideals and serve the cause of global justice.

This project may appear both presumptuous and paradoxical: but given that we belong to a profession whose engagement with paradoxes and tensions are inescapable, if not defining—how is order created among sovereign states—the task, perhaps, is not that of achieving consistency and resolving paradox but rather, choosing which paradoxes and tensions to engage with in our personal and professional lives.

[66] ZYGMUNT BAUMAN, LIFE IN FRAGMENTS: ESSAYS IN POSTMODERN MORALITY 161 (1995).

THE LAW AND ECONOMICS OF HUMANITARIAN LAW VIOLATIONS IN INTERNAL CONFLICT

Jeffrey L. Dunoff and Joel P. Trachtman

INTRODUCTION

The problem of criminal responsibility for human rights atrocities committed in internal conflict provides an appropriate vehicle for examining various theoretical and methodological approaches to international law. The issues raised include the following: Does international law provide for individual criminal responsibility for such acts? How best can these atrocities be prevented? Should international law address these matters or are they better left to domestic law? Why does international legal doctrine distinguish between human rights violations committed in international conflict and the identical acts committed in internal conflict?

International lawmakers, judges, practitioners, and scholars have had trouble answering questions like these because of a shortage of useful theory. Law and economics (L&E) is rich in useful theory: it has constructed and refined a body of rationalist theory that can generate refutable hypotheses, and it suggests methodologies by which those hypotheses may be tested. While law and economics is rich in theory, it exalts empiricism (in which it is surprisingly poor). In fact, we are critical of a law and economics that has immodestly been willing to prescribe solely on the basis of theory. In this necessarily brief essay, we do not reach positive conclusions or normative prescriptions because our theoretical and methodological approach does not permit conclusions prior to empirical testing. We are only able to indicate the types of areas that law and economics theory would suggest evaluating, and to describe how law and economics has addressed some related or similar topics. In addition, we show how L&E can assist international lawyers in perhaps their most important creative role—the design and operation of international

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The Lake Home: International Law and the Global Land Grab

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Abstract

Home is not a familiar concept in international law. This paper looks at land grabbing and international law from the perspective of home. Through a case-study of a land grab in the context of a World Bank development project at Boeung Kak Lake in Phnom Penh, Cambodia, it argues that international law is involved in profound transformations of home. By making visible how experiences of loss, suffering, and struggle, as well as radical engagement, emerge from international law's "homemaking" work, it also argues that the concept of home opens up a terrain of experience that cannot be captured or expressed in international law. The perspective from home in the land-grabbing debate is particularly important where not only is land at risk of capture for economic gain, but so too are the personal lifeworlds that homes represent.

"Even a bird needs a nest."
Khmer folk tale[1]

Since the end of the civil war, Boeung Kak Lake residents have lived in stilt homes set in the shallows.[2] The stilts steady homes through monsoon floods and the fury of summer storms. In the dry season, stilt homes shelter cows and chickens, ducks and dogs, and the many-headed *naga* snake. Khmer mythology tells how the *naga* twists its nest among the stilts, bringing good luck to the family dwelling above and protection from misfortune. Stilt homes are built by hand and often house many generations under one roof. The ground below is reached by ladders that poke up through gaps in the floorboards, while spiny arrangements of planks, ramps, and gangways connect homes to the street.

Boeung Kak Lake is one of Phnom Penh's seven lakes and a natural asset that has historically ensured the capital's dominance as a gateway to Southeast Asia through the

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1. A Khmer folk tale says that even while a bird has wings to fly, it still needs a nest to keep itself above floodwaters.

2. This paper draws from fieldwork conducted by the author at Boeung Kak Lake, Phnom Penh, Cambodia.

Mekong River trade route.[3] The lake was settled in the early 1990s by refugees returning from camps on the Thai border following the Vietnamese withdrawal from Cambodia. It lies north of the city in the Doun Penh canton, a short *tuktuk* ride from the central business district.[4] The ninety hectare lake is vital to Phnom Penh's complex drainage system, functioning as a unique closed hydrological circuit that captures rainfall, insulating the city from annual tides.[5] Residents have relied on the lake for harvesting fish, snails, and water vegetables,[6] and as the "lungs" of Phnom Penh, the lake has been a retreat for city-dwellers from Cambodia's oppressive sticky seasons.[7]

The lake attracted international attention after a land grab in 2008. The lake and its nine surrounding villages were sold by the ruling Cambodian People's Party [CPP] to a private investor. At least 4,000 families have been uprooted from their lake homes since 2009, and the evictions are continuing. The land grab coincided with a World Bank development project that operated at the lake between 2002 and 2009. The World Bank promised to improve security for local people by distributing land titles, and to stimulate investment in land. According to the World Bank, the land grab was a regrettable but unintended consequence of the project. Protests against the World Bank by residents and local activists are ongoing. In the meantime, the World Bank has emerged as a leader in efforts to regulate large-scale land acquisition, a move likely to promote, rather than prevent, land grabbing.

Land grabbing is a major development problem. There is a growing literature in geography, political ecology, rural sociology, development, and anthropology, among other fields, seeking to understand the scope, character, and magnitude of land grabbing, the role of domestic and transnational capital processes in large-scale land acquisition, and the impact of land grabbing on land use change and change in land-property relations.[8] However, to date international law scholars have largely overlooked this debate, not least because law has been positioned as epiphenomenal to land grabbing, rather than, as this paper argues, a key driver of it.[9]

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3. On the history of Phnom Penh, see Milton OSBORNE, *Phnom Penh: A Cultural and Literary History* (Oxford: Signal Books, 2008).

4. *Tuktuks* are cycle rickshaws.

5. Bridges Across Borders Cambodia, "Boeung Kak Area Drainage and Flooding Assessment", Report, 2008; Cambodia Development Watch, "Boeung Kak Lake Lease Agreement Discussion Paper", Discussion Paper, 2007 [*Lease Agreement*].

6. Municipality of Phnom Penh, "City Development Strategy" (2005), online: CAEXPO <http://www.caexpo.com/special/Magic_City/Cambodia/jbjh.pdf>. See also Cambodian Society of Architects, "Master Plan of Phnom Penh by 2020" (2009), online: Cambodian Society of Architects <http://www.csacambodia.org/>.

7. *Lease Agreement*, *supra* note 5 at 5.

8. See, among others, Matias MARGULIS, Nora MCKEON, and Saturnino BORRAS, *Land Grabbing and Global Governance* (New York: Routledge, 2016); Marc EDELMAN, Carlos OYA, and Saturnino BORRAS, *Global Land Grabs: History, Theory and Method* (Abingdon: Routledge, 2016); Connie CARTER and Andrew HARDING, eds., *Land Grabs in Asia: What Role for the Law?* (New York: Routledge, 2015); and Ben WHITE, Saturnino M. BORRAS Jr., Ruth HALL, Ian SCOONES, and Wendy WOLFORD, eds., *The New Enclosures: Critical Perspectives on Corporate Land Deals* (New York: Routledge, 2013).

9. One notable exception is Surya SUBEDI, "International Law Response to Land Grabbing Asia" in Carter and Harding, *supra* note 8, at chapter 2. While not on land grabbing per se, Antony Anghie also examines colonial violence to the environment (and, implicitly, to indigenous home and homeland) in Nauru: "'The Heart of My Home': Colonialism, Environmental Damage, and the Nauru Case" (1993) 34 Harvard Journal of International Law 445. See also work by political scientists and political economists addressing

This paper examines land grabbing and international law from the perspective of home. Home is not a familiar concept in international law. However, my claim is that international law is involved in profound transformations of home. I take the land grab at Boeung Kak Lake as a case-study to examine the ways in which international law engages in "homemaking" work and the implications of this for the discipline. I make three arguments in this regard. The first is that the World Bank's intervention at the lake through the process of land titling transformed *home into property*, giving rise to opportunities for speculation and the transfer of wealth from the poor to the more secure. In the process, home at the lake became not a source of wealth but a means through which wealth was reorganized and accumulated.

The second argument is that the Bank's support for regulating large-scale land acquisition makes international law complicit in dispossessory paths of economic growth and development. As an international organization established by treaty, the Bank operates within a framework and mandate set by international law, in particular the international law of development, and is ultimately an international legal artefact.[10] In the light of this, the Bank's homemaking work occurs in ways that elucidate the scope and significance of international law norms, duties, and activities. Where homemaking involves acts of deprivation—in other words, "home-unmaking"—the implications for international law warrant close attention.

The third argument I make is that home can be understood as an analytical tool that opens up a terrain of experience which cannot be captured or expressed in international law. When we look at the events at Boeung Kak Lake through the lens of home, experiences of loss, suffering, and struggle, as well as radical engagement, become visible. This perspective from home is particularly important where, in the modern world, not only is land at risk of capture for economic gain, but so too are the personal lifeworlds that our homes represent.[11]

To develop these arguments, in what follows I first situate home in relation to international law and the recent "turn to the local" in international law scholarship. I then give an account of the concept of home itself. Third, I examine international law's homemaking and home-unmaking work, looking first at the Bank's intervention at Boeung Kak Lake and then its role in the wider global land grab through the push to regulate large-scale land acquisition. I conclude by suggesting how international law scholars might use home as an analytical tool in their work and the value of doing so.

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the role of law in land grabbing: Liz ALDEN WILY, "The Law and Land Grabbing: Friend or Foe?" (2014) 7 Law and Development Review 207; and Yorck DIERGARTEN and Tim KRIEGER, "Large-Scale Land Acquisitions, Commitment Problems and International Law" (2015) 8 Law and Development Review 217. See also De Schutter, *infra* notes 88, 175.

10. The World Bank Group is a specialized agency of the United Nations and an independent international organization comprising five members (the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, and the International Centre for Settlement of Investment Disputes) established through Articles of Agreement. See for example, *Articles of Agreement of the International Development Association*, 26 January 1960, 439 U.N.T.S. 249. In this paper, the World Bank is alternatively referred to as "the Bank".

11. On lifeworlds, see Jurgen HABERMAS, trans. T. MCCARTHY, *The Theory of Communicative Action: Reason and the Rationalization of Society (Vol 1)* (Cambridge: Polity Press, 2004).

I. HOME AND INTERNATIONAL LAW

Home is not a familiar concept in international law. International lawyers talk about housing, land, and property, but rarely about home. This is surprising when home is central to everyday life in the world.[12] It is also concerning in the light of increasing anxieties about home arising out of disparate global phenomena: from mass population displacement following conflict (Afghanistan, Iraq, Sudan, Syria) to the mortgage and household debt crisis (the US, Spain, Ireland, the UK), and uneven development, aggressive speculation, and land grabbing (China, Colombia, Cambodia). While these anxieties are not unique to our time, two things are distinctive about their contemporary phase.

First, patterns and conditions of human habitation are being transformed at a rapid pace and on a dramatic scale. Urban migration, for example, will see over sixty-six percent of the world's population living in cities by 2050, up from fifty-four percent in 2016, and thirty percent in 1950, placing acute pressure on space and competition for homes.[13] Meanwhile, armed conflict is increasingly being waged in domestic environments—in streets, schools, hospitals, hallways, and bedrooms—making home and home life more dangerous and ambiguous.[14] These developments, among many others that could be mentioned, raise new and urgent problems for home.

Second, the international legal order is more intensively and extensively involved in determining the local effects of those problems. This is reflected in the local presence of international institutions and procedures; the expansion of human rights and transnational activism to local and community groups; the proliferation of multilateral treaties that bring together states, international institutions, NGOs, and individuals; and the formation of new orders under negotiated climate and data-sharing agreements which have direct implications for how people organize their everyday life.[15]

The relocation of local problems and concerns to the international—and the interjection of the international in the local—designs new spaces in which the flows, conditions, and disciplines of the global legal order find shape and expression. This challenges the traditional perception of international law as inhabiting the "higher places", and being a law of the "above and beyond", a law concerned only with extraordinary and exceptional events, crises, and cases—and to which the domestic is thought irrelevant and mundane.[16]

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12. See, among others, Irwin ALTMAN and Carole WERNER, *Home Environments* (New York: Plenum, 1985), and more recently, Alison BLUNT and Robyn DOWLING, *Home* (New York: Routledge, 2006).

13. *World Urbanization Prospects: The 2014 Revision*, Report of the United Nations Department of Economic and Social Affairs, 2015, at xxi, and latest statistics at United Nations Department of Economic and Social Affairs, "Population Division", online: ESA <https://esa.un.org/unpd/wup/>.

14. See for example, International Committee of the Red Cross, "Urban Services During Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People", Report 2013, online: <https://www.icrc.org/sites/default/files/topic/file_plus_list/4249_urban_services_during_protracted_armed_conflict.pdf>. See also Wendy PULLAN and Britt BAILIE, eds., *Locating Urban Conflicts: Ethnicity, Nationalism and the Everyday* (Houndmills: Palgrave Macmillan, 2013), and the Conflict in Cities project, online: Conflict in Cities <http://www.conflictincities.org>.

15. See generally Luis ESLAVA, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge: Cambridge University Press, 2015).

16. Hilary CHARLESWORTH, "International Law: A Discipline of Crisis" (2002) 65 Modern Law Review 377; and Sundhya PAHUJA and Luis ESLAVA, "Beyond the (Post)colonial: TWAIL and the Everyday Life of International Law" (2012) 45 Journal of Law and Politics in Africa, Asia and Latin America 195.

International law scholars have responded by "turning" to the local in work that explores the everyday life of the discipline, drawing from the rich traditions of anthropology and ethnography to do so. This includes, for example, Annelise Riles's exploration of the everyday operation of international financial law in Japan;[17] Yishai Blank's work on the role of cities in the international legal order;[18] and Luis Eslava's study of Bogota's transformation amid the pressures and opportunities of the international development project.[19] The nascent field of international law and everyday life extends to studies focusing on the minutiae of international legal processes and operations, and on instances and formalizations of transnational ideas, institutions, and legal technologies across sites and national borders, such as the work by Sally Engle Merry and Eve Darian-Smith.[20]

While the literature on international law and everyday life is diverse in the geography it traverses and the international law questions it engages with, it is characterized by three distinctive features. First, it treats international law as a layered phenomenon. That is, it does not involve an exclusive focus on international law, but rather demonstrates an interest in international law in its dynamic interplay with local and national legal systems operating at different scales.[21]

Second, it takes a broad view of what constitutes international law. On this view, international law comprises more than treaties and case-law, and includes a range of sources, materials, and actors, such as international organizations, officials, operational processes and directives, civil society, objects, and artefacts. The connection to international law is that these sources, materials, and actors work in the backdrop to, or in ways that elucidate, the scope and significance of international law norms, duties, and activities.

The third distinctive feature of the literature is its focus on the different roles of international law in everyday life. This encompasses how international law partly constitutes or shapes everyday life (such as through the operation of international development norms), but also how international law is shaped by everyday life and seeks to contribute to the resolution of problems generated by everyday life (such as through the oversight mechanisms of international human rights law).

The new attention of the international to the local, combined with dramatic transformations in human habitation, makes more urgent the need to ask how our homes are linked to the norms, ambitions, and contradictions of the international legal order.

Before we return to Boeung Kak Lake, we need to know more about home. In the next section, I briefly survey the wider literature on home to set some parameters for how we might think about this concept.

17. Annelise RILES, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (Chicago: University of Chicago Press, 2011).

18. Yishai BLANK, "The City and the World" (2006) 44 Columbia Journal of Transnational Law 875. See also Yishai BLANK, "Localism in the New Global Legal Order" (2006) 47 Harvard Journal of International Law 263.

19. Eslava, *supra* note 15.

20. For example, Sally ENGLE MERRY, "Transnational Human Rights and Local Activism: Mapping the Middle" (2006) 108 American Anthropologist 38; Eve DARIAN-SMITH, *Bridging Divides: The Channel Tunnel and English Legal Identity in the New Europe* (Berkeley, CA: University of California Press, 1999); and Riles, *supra* note 17.

21. Boaventura DE SOUSA SANTOS, *Towards a New Legal Common Sense: Law, Globalisation and Emancipation*, 2nd ed. (London: Butterworth, 2002).

II. THE CONCEPT OF HOME

Home is a rich and diverse concept, as well as an ambiguous and contradictory one. As Alison Blunt and Ann Varley argue: "As a space of belonging and alienation, intimacy and violence, desire and fear, the home is invested with meanings, emotions, experiences and relationships that lie at the heart of human life."[22] Home has been a sustained subject of academic interest and agenda setting for some time. In particular, feminist critiques of the "separate spheres" ideology in the 1980s and 1990s have inspired an efflorescence of critical work on home that continues today.[23] Home has recently been examined by scholars in architecture,[24] anthropology,[25] archaeology,[26] urban studies,[27] geography,[28] housing studies,[29] health,[30] disability,[31] history,[32] linguistics,[33] psychology,[34] phenomenology and philosophy,[35] and diaspora studies,[36] among other disciplines.[37] In this body of work, home has been related to (and, at times,

22. Alison BLUNT and Ann VARLEY, "Geographies of Home: Introduction" (2004) 11 Cultural Geographies 3.
23. Bonnie HONIG, "Difference, Dilemmas, and the Politics of Home" (1994) 61 Social Research 563; Iris M. YOUNG, "House and Home: Feminist Variations on a Theme" in Iris M. YOUNG, *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (Princeton: Princeton University Press, 1997), 134.
24. Carole DESPRÉS, "The Meaning of Home: Literature Review and Direction for Future Research and Theoretical Development" (1991) 8 Journal of Architectural and Planning Research 96, and Lynne WALKER, "Home Making: An Architectural Perspective" (2002) 27 Signs: Women in Culture and Society 823.
25. Tony CHAPMAN and Jenny HOCKEY, eds., *Ideal Homes? Social Change and Domestic Life* (London: Routledge, 1999).
26. Susan KENT, "Ethnoarchaeology and the Concept of Home: A Cross-cultural Analysis" in David BENJAMIN and David STEA, eds., *The Home: Words, Interpretations, Meanings and Environments* (Aldershot: Avebury, 1995), 163.
27. Henny COOLEN and Janine MEESTERS, "Editorial Special Issue: House, Home and Dwelling" (2012) 27 Journal of Housing and the Built Environment 1.
28. Peter SOMERVILLE, "Homelessness and the Meaning of Home: Rooflessness and Rootlessness?" (1992) 16 International Journal of Urban and Regional Research 529.
29. Among others, Hazel EASTHOPE, "A Place Called Home" (2004) 21 Housing, Theory and Society 128, and Hazel EASTHOPE, "Making a Rental Property Home" (2014) 29 Housing Studies 579.
30. Isabel DYCK, Pia KONTOS, Jan ANGUS, and Patricia MCKEEVER, "The Home as a Site for Long-term Care: Meanings and Management of Bodies and Spaces" (2005) 11 Health and Place 173.
31. Rob IMRIE, "Housing Quality, Disability and Domesticity" (2004) 19 Housing Studies 685.
32. Claire LANGHAMER, "The Meanings of Home in Postwar Britain" (2005) 40 Journal of Contemporary History 341; and Isabela QUINTANA and Seong LEONG, "Making Do, Making Home" (2015) 41 Journal of Urban History 47.
33. Stefan BRINK, "Home: The Term and the Concept from a Linguistic and Settlement-Historical Viewpoint" in Benjamin and Stea, *supra* note 26 at 17–24. See also Amos RAPOPORT, "A Critical Look at the Concept 'Home'" in Benjamin and Stea, *supra* note 26 at 27–30.
34. Sarah NETTLETON and Roger BURROWS, "When a Capital Investment Becomes an Emotional Loss: The Health Consequences of the Experience of Mortgage Possession in England" (2000) 15 Housing Studies 463.
35. Witold RYBCZYNSKI, *Home: A Short History of an Idea* (New York: Penguin, 1986); and J. TUEDIO, "Thinking About Home: An Opening for Discovery in Philosophical Practice" in Henning HERRESTAD, Anders HOLT, and Helge SVARE, eds., *Philosophy in Society* (Oslo: Unipub Forlag, 2002), 201 at 201–15.
36. Alison BLUNT, *Domicile and Diaspora: Anglo-Indian Women and the Spatial Politics of Home* (Maldon, MA: Blackwell, 2005).
37. See also Gaston BACHELARD, trans. M. JOLAS, 1992, ed., *The Poetics of Space* (Florida: Beacon, 1962); Junichiro TANIZAKI, *In Praise of Shadows* (London: Vintage, 1934); and Edwin HEATHCOTE, *The Meaning of Home* (London: Francis Lincoln, 2012).

conflated with) notions of dwelling, haven, refuge, preservation, identity, kinship, nationalism, and nostalgia.[38] Yet home has been almost entirely overlooked by legal scholars,[39] and the relationship between home and international law remains unexamined.

Nonetheless, the picture emerging from the vast literature is that home is a complex, "multifaceted", and "multilayered" phenomenon.[40] Alison Blunt and Robyn Dowling define home as simultaneously a material and affective space of emotion and belonging; as a locus of power and identity; and as a fluid and open-textured domain, host to personal relations in which public and political worlds transect.[41] Home is at once a "place/site, a set of feelings/cultural meanings, and the relations between the two".[42] As Susan Saegert argues about home: "[n]ot only is it a place, but it has psychological resonance and social meaning."[43] Similarly, Amos Rapoport writes that "home = house + x".[44] According to Lorna Fox, "x" represents "the social, psychological, and cultural values which a physical structure acquires through use as a home".[45] Home, as Kim Dovey contends, is an "intrinsically intangible phenomenon".[46]

Home is also an "intensely political" site, both "in its internal intimacies and through its interfaces with the wider world".[47] Thus, any attempt at an objective analysis of home must expect a passionate response. As Peter Saunders and Peter Williams reflect:

> The home is a major political background—for feminists, who see it as the crucible of gender domination; for liberals, who identify it with personal autonomy and a challenge to state power; for socialists, who approach it as a challenge to collective life and the ideal of a planned and egalitarian social order.[48]

Feminist scholars have chartered home as a site of struggle, exclusion, and violence,[49] and the domestic as a continuous process of negotiation and contest.[50]

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38. See further Shelley MALLETT, "Understanding Home: A Critical Review of the Literature" (2004) 52 Sociological Review 65.
39. With the notable exception of Lorna Fox O'Mahony's work on home in the UK domestic legal context: see Lorna FOX O'MAHONY, *Conceptualising Home: Theories, Laws and Policies* (Oxford: Hart, 2007).
40. For example, Somerville, *supra* note 28, Mallett, *supra* note 38.
41. *Supra* note 12; see also Katherine BRICKELL, "'Mapping' and 'Doing' Critical Geographies of Home" (2011) 36 Progress in Human Geography 1 at 2.
42. Blunt and Varley, *supra* note 22 at 2–3.
43. Susan SAEGERT, "The Role of Housing in the Experience of Dwelling" in Altman and Werner, *supra* note 12 at 287.
44. Amos RAPOPORT, "Towards a Cross-Culturally Valid Definition of Housing" in R. STOUGH and A. WANDERSMAN, eds., *Optimizing Environments—Research, Practice and Policy* (Oklahoma: Environmental Design Research Association, 1980), 310.
45. Lorna FOX, "The Meaning of Home: A Chimerical Concept or a Legal Challenge?" (2002) 29 Journal of Law and Society 580 at 590; and O'Mahony, *supra* note 39.
46. Kim DOVEY, "Home and Homelessness" in Altman and Werner, *supra* note 12 at 33–64.
47. Alison BLUNT, "Cultural Geographies of Home" (2005) 29 Progress in Human Geography 505 at 510.
48. Peter SAUNDERS and Peter WILLIAMS, "The Constitution of Home: Towards a Research Agenda" (1988) 3 Housing Studies 81 at 91.
49. See for example, Karel KURST-SWANGER and Jacqueline PETCOSKY, *Violence in the Home: Multidisciplinary Perspectives* (Oxford: Oxford University Press, 2003).
50. Tony CHAPMAN, "'You've Got Him Well Trained': The Negotiation of Roles in the Domestic Sphere" in Chapman and Hockey, *supra* note 25 at 163–81.

They have also drawn attention to the paradox that the comforting and discomforting dimensions of home may in fact be interdependent. As Nicole Schröeder argues:

> It makes much more sense to view home as a site of and for ambiguity since its protective functions are interconnected with its limiting characteristics. Feelings of solidarity, safety, and protection are often achieved by severe acts of exclusion and regulation, which are in turn oppressive.[51]

Home, then, may not be where the heart is.[52] Taking into account these critiques, it is clear that home has both positive and negative associations. The literature also indicates that there is no monolithic or universal definition of home, but rather that the meaning of home is contingent, given shape by the contexts and settings from which it emerges. Beyond bricks and mortar, we can understand home as a palimpsest for a range of affective, material, and imaginary meanings and experiences, such as dwelling, identity and security, preservation, homeland, and memory, and all of the contradictions these entail. Taking home as central to being and belonging in the world, it is a pivotal site for directing enquiries about the everyday life of international law. The understanding of home I have elaborated here is broad enough to reflect the complex, layered, and multifaceted nature of home, but still sets some parameters for the discussion in this paper. With this mind, we can return to Boeung Kak Lake and begin to examine international law's homemaking, and home-unmaking, work in this context.

III. HOME AND THE WORLD BANK AT THE LAKE

On maps of the city, Boeung Kak Lake is marked as a large blue tear-shape (Figure 1). Today the reality is quite different: since the land grab and the dredging of the lake, the lake bed is a dry, dusty, and arid expanse of sand. Under Cambodia's Land Law 2001, lakes are classified as state public property because they have a "natural origin" and serve a public purpose.[53] For the refugees who settled Boeung Kak Lake at the end of the war in the early 1990s, home at the lake represented a symbolic return to country, and the literal foundations of a new beginning. At the time, the text of the Paris Peace Accords had recently been agreed.[54] The Accords were designed to steer Cambodia along a path of transition to a liberal market economy.[55] Indeed, by the turn of the millennium, Phnom Penh was prospering from its new exposure to trade and tourism, and Boeung Kak Lake residents enjoyed the trickle-down effect: homes and

51. Nicole SCHRÖEDER, *Spaces and Places in Motion: Spatial Concepts in Contemporary American Literature* (Tübingen: Gunter Narr Varlag, 2006) at 33, cited in Brickell, *supra* note 41 at 2.

52. Homi BHABHA, "Halfway House" (1997) 35 Artforum International 11.

53. Kingdom of Cambodia, *Land Law 2001*, art. 58, online: <http://sithi.org/admin/upload/law/Land%20Law.ENG.pdf>.

54. United Nations, *Agreements on a Comprehensive Political Settlement of the Cambodia Conflict*, *Paris*, 23 October 1991 [*Paris Peace Accords*], online: <https://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/final_act_10231991.pdf>. See also *Final Act of the Paris Conference on Cambodia* in UN General Assembly, *The Situation in Cambodia: Resolution Adopted by the General Assembly*, UN Doc A/46/608, annex (30 October 1991).

55. See Trevor FINDLAY, *Cambodia: The Legacy and Lessons of UNTAC* (Oxford: Oxford University Press, 1994).

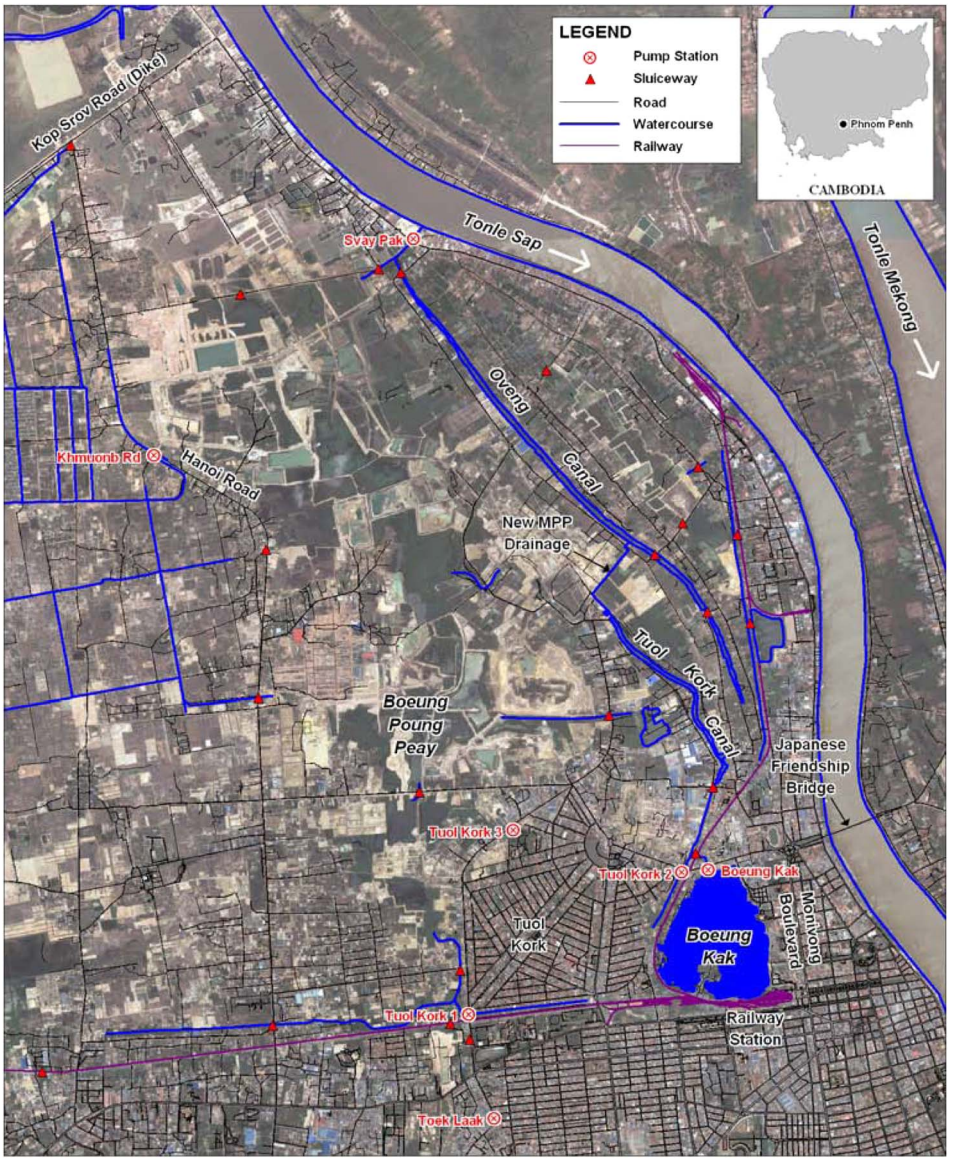

Figure 1 Boeung Kak Lake locality map

guesthouses were built and the lake became a popular alternative destination for backpackers and other travellers seeking a more authentic experience to the garishness of Phnom Penh, which had gained a reputation for sex tourism, gambling, and drug traffic. There was work for fishermen and local businesses and for *motodup* drivers ferrying locals and tourists in and out of the city.[56] Boeung Kak Lake, with its water and open space, became a lively residential and commercial area, a green oasis on the

56. *Motodups* are motorcycle taxis.

lip of the city.[57] The lakeshore and its nine surrounding villages were home to over 4,000 families.[58]

The prosperity of the lake area inevitably made it a target of investor interest. The government was already in talks with private developers and investors about plans for the lake when in 2002 the Sras Chok commune—which includes Boeung Kak Lake and its nine surrounding villages—was selected as one of fourteen sites across Cambodia for a World Bank development project. The project, formally called the "Land Management and Administration Programme" [LMAP], was founded on the twin goals of improving land tenure security for local people and promoting investment in land in Cambodia.[59] The Bank, announcing LMAP in a press release, explained the link between land titling, tenure security, and investment:

> Around one million households in both rural and urban areas will receive land titles under the project. The beneficiaries of land titles will enjoy the benefits associated with the titles, including increased tenure security, access to credit, and the opportunities to increase investments and productivity. Many of the expected beneficiaries are poor and vulnerable. Providing them with secure titles would sharply reduce the risks of dispossession that they now face.[60]

LMAP operated at Boeung Kak Lake from 2002 until 2009 at a total cost of US$33.9 million.[61] LMAP was in part designed to complement Cambodia's new property rights system, the Land Law 2001, which the World Bank had sponsored. The Land Law 2001 improved, updated, and streamlined Cambodia's older land law system, which was a bricolage of laws tacked together from the remnants of the French colonial period. Since all land records had been destroyed by the Khmer Rouge, and anyone skilled in land and property administration had been killed or exiled, the World Bank also provided technical assistance to the government to establish a central cadastral office and a land registration system, as well as training to equip government officials with necessary expertise.

LMAP was not the World Bank's first foray into Cambodia. Cambodia joined the World Bank in 1970[62] during the period of *laissez-faire* economic policy of the Khmer Republic (1970–75). Liberalization was reversed under the Khmer Rouge (1975–79) and the Democratic Republic of Kampuchea (1979–89), with intensive nationalization, de-industrialization, and the erasure of private capital.[63] The World Bank took on a more active role in Cambodia in the post-conflict period to assist with reconstruction. In effect, this meant opening the isolated country to the world economy. Thus the World Bank's 1993 "Emergency Rehabilitation Project" fused the implementation of

57. *Lease Agreement*, *supra* note 5 at 1.

58. The Lease Agreement refers to 4,250 affected households, *ibid*.

59. World Bank, "Cambodia Land Management and Administration Project: Project Appraisal Document", Report Number PID9768, 20 September 2001, at 5, 7 [*PAD*].

60. World Bank, "World Bank Approves Credit for Land Management and Administration Project in Cambodia", Press Release Number 2002/216/EAP, 26 February 2002.

61. *PAD*, *supra* note 59.

62. Cambodia joined the World Bank as a Member State on 22 July 1970. See "Member Countries", *World Bank* (2017), online: *World Bank* <http://www.worldbank.org/en/about/leadership/members>.

63. See Margaret SLOCOMB, *An Economic History of Cambodia in the Twentieth Century* (Singapore: National University of Singapore Press, 2010) at chapters 3–5.

the Paris Peace Accords with its own goals for fostering economic growth.[64] This came soon after Cambodia's hailed first free elections, held under the aegis of the United Nations Transitional Authority in Cambodia [UNTAC]. UNTAC, which exercised administrative control in Cambodia between 1992 and 1993, was one of the largest and most complex operations in UN history.[65] However, it was not an unqualified success. UNTAC has been criticized for failing to disarm the Khmer Rouge, leaving large swathes of the country under militia control and giving rise to the continuing threat of a new Khmer Rouge initiative.[66]

The World Bank found itself operating in Cambodia in this complicated and fractious post-conflict environment, and with an almost non-existent institutional infrastructure. It is not surprising that it sought "a new pattern of development in private hands".[67] Throughout the 1990s the World Bank provided financial support in key sectors such as transport, agriculture, health, and commodities. It became the largest and most influential player among the many international organizations that set up in Cambodia in the post-conflict period and whose long-term presence has been blamed for the country's continuing aid dependence.[68]

A. *Home and Land Titling*

Mass land titling was at the heart of LMAP. The World Bank's rationale was twofold. First, it said that lack of land titling in Cambodia directly related to the high incidence of land conflict.[69] Uncertainty about the boundaries of land resulting from unclear land policy and land classification had led to competing land claims between individuals, the government, and investors. Second, lack of land title and ambiguity about land rights was hindering economic growth in Cambodia by reducing incentives to invest.[70] According to the World Bank, "[l]ack of a land law is one of the main complaints of foreign investors in Cambodia".[71] By rolling out land titles in Cambodia, LMAP would "reduce the amount of land under state control",[72] "stimulate the development of more efficient land markets and allocate land to its 'best use'".[73]

The World Bank has long promoted land titling as key to its pro-market approach to development and economic growth in developing countries.[74] This is reflected in its

64. *Paris Peace Accords*, *supra* note 54.
65. See Findlay, *supra* note 55.
66. Michael CARNEY and Lian Choo TAN, "Whither Cambodia? Beyond the Election", Indochina Unit, Institute of Southeast Asian Studies, 1993.
67. World Bank, "Memorandum and Recommendation of the President of the International Development Association to the Executive Directors on a Proposed Credit of SUR 45.2 Million to the Kingdom of Cambodia For An Emergency Rehabilitation Project", 4 October 1993.
68. See especially Sophal EAR, *Aid Dependence in Cambodia: How Foreign Assistance Undermines Democracy* (Columbia: Columbia University Press, 2013).
69. *PAD*, *supra* note 59.
70. *Ibid.*
71. *Ibid.*
72. *Ibid.*, at 4–5.
73. *Ibid.*
74. See for example, World Bank, "Land Reform Policy Paper", Sector Policy Paper (May 1975). See also Ray BROMLEY, *The Urban Informal Sector: Critical Perspectives on Employment and Housing Policies*

housing policy, which has shifted from a "site and service" approach in the 1960s and 1970s to, with the rise of agricultural and urban capitalism, market provision of housing through land titling supported by state-backed land and property rights.[75] In its flagship 1993 report, *Housing: Enabling Markets to Work*, the World Bank argued that establishing property rights was key to ensuring the effective operation of land markets. In its 1997 *World Development Report*, the World Bank emphasized the importance of state-backed property rights systems and local land markets as "institutional enablers" of economic growth.[76]

The World Bank's championing of land titling bears the influence of Hernando De Soto's theory of property formalization.[77] De Soto posits land titling as a solution to Third World poverty. His theory has almost single-handedly reshaped land administration in many low-income countries.[78] It rests on the claim that the poor are occupying unlocked capital—according to De Soto, "forty times all the foreign aid received throughout the world since 1945"—and that this is held in "defective form".[79] Poverty will be reduced when the poor convert the "dead capital" of their land into collateral for loans through land title.[80] The Royal Government of Cambodia [RGC] has expressed a similar faith in capitalist land transformation: "[d]espite sensitive issues around land, there is still a lot of possibility to convert land into capital for high value addition."[81] In the past two decades, the World Bank has conducted dozens of "land administration" projects identical to the project at Boeung Kak Lake, combining mass land titling with new land and property law systems and kick-starting land markets.[82]

But land titling is not without significant and vocal detractors—not least when we look from the perspective of home.[83] First, the promotion of land titling rests on a

(Oxford: Pergamon, 1979), and Edward RAMSAMY, *The World Bank and Urban Development: From Projects to Policy* (New York: Routledge, 2006) at chapter 4.

75. See generally Admos CHIMHOWU and Phil WOODHOUSE, "Customary vs Private Property Rights? Dynamics and Trajectories of Vernacular Land Markets in Sub-Saharan Africa" (2006) 6 Journal of Agrarian Change 346; and Daniel BROMLEY, "Formalising Property Relations in the Developing World: The Wrong Prescription for the Wrong Malady" (2008) 26 Land Use Policy 20.

76. World Bank, "Housing: Enabling Markets to Work" (30 April 1993), online: World Bank <http://documents.worldbank.org/curated/en/1993/04/1561159/housing-enabling-markets-work>; and World Bank, "World Development Report 1997: The State in a Changing World" (1997), online: World Bank <http://documents.worldbank.org/curated/en/1997/06/17396260/world-development-report-1997-state-changing-world>. See also Anne ORFORD and Jennifer BEARD, "Making the State Safe for the Market: The World Bank's Development Report 1997" (1998) 28 Melbourne University Law Review 8.

77. See further Leah TRZCINSKI and Frank UPHAM, "Creating Law from the Ground Up: Land Law in Post-Conflict Cambodia" (2014) 1 Asian Journal of Law and Society 55.

78. See Hernando DE SOTO, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic, 2000); and Hernando DE SOTO, *The Other Path: The Invisible Revolution in the Third World* (New York: Harper & Row, 1989).

79. De Soto, *The Mystery* of *Capital, supra* note 78 at 5.

80. *Ibid.*

81. Royal Government of Cambodia, "An Approach Paper for National Strategic Development Plan 2014–2018", General Directorate of Planning, 2012, at 2.29.

82. Between 1984 and 2016, the World Bank lists 620 projects worldwide as "land administration and management" projects. See World Bank, "Projects & Operations" (2017), online: World Bank <http://www.worldbank.org/projects/search?lang=en&searchTerm=&themecode_exact=83>.

83. See especially work by Timothy MITCHELL, in particular "The Properties of Markets: Informal Housing and Capitalism's Mystery", Cultural Political Economy Working Paper Series, Working Paper No. 2, Institute for Advanced Studies in Social and Management Sciences, University of Lancaster, 2006.

number of assumptions about the capability of smallholders (which includes the land poor) to be active market players, the existence of functioning institutions modelled on those in the West, and services to assist smallholders to "maximize" their "assets". The success of land titling, then, rests on the fantasy that, as Lucy Earle argues, "one small piece of a complex cultural and legal fabric can be simply transplanted to a different social and political reality".[84] In many parts of the global South this does not reflect conditions on the ground.[85] Indeed, Mitchell critiques De Soto's plans for the vast creation of wealth by transforming "dead capital" into "live capital" through land titling, arguing that, in practice, this does not produce capital but instead transfers wealth from the poor and less affluent to the more secure.[86]

Second, scholars have criticized the idea that land title gives smallholders bargaining power to resist the advance of investors or to negotiate better deals.[87] The reality is often the opposite. Land targeted for investment is often in poor agricultural areas where smallholders struggle with debt and face competition from industrial manufacturing, making it more difficult to make ends meet. In these circumstances, smallholders may be forced into distress sales, losing home and livelihood.[88] Land title makes transactions in land easier, swifter, and more transparent, mainly benefiting buyers and investors. As a result, land titling moves from the promise of redistribution to actual reconcentration.[89] As Polanyi understood, the creation of markets in land leads to despoliation of both nature and livelihood.[90]

A third criticism is that investors are also inevitably larger and more experienced market players. Individual smallholders are unlikely to be successful in using their title to challenge investors in court or to extract concessions in deals. This resonates with Olivier De Schutter's argument that land deals should be the last and least desirable option because they can permanently close off the option of smallholding and alienate current and future generations of smallholders from returning to their homes, and the culture and history linked to this.[91] Finally, smallholders will not always have the skills or resources to "capitalize" on land title in the entrepreneurial ways imagined by De Soto, such as by using their homes as collateral to finance a business venture.

84. Lucy EARLE, "Stepping Out of the Twilight? Assessing the Governance Implications of Land Titling and Regularization Programmes" (2014) 38 International Journal of Urban and Regional Research 628 at 630.

85. I use the terms "global South" and "global North" in this paper, conscious that they are contested terms. See Partha CHATTERJEE, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (Columbia: Columbia University Press, 2004), and Sundhya PAHUJA, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

86. Mitchell, *supra* note 83 at 26.

87. See Diergarten and Krieger, *supra* note 9, and Bromley, *supra* note 75.

88. Olivier DE SCHUTTER, "How Not to Think of Land-Grabbing: Three Critiques of Large-Scale Investments in Farmland" (2011) 38 Journal of Peasant Studies 249 at 270.

89. See Borras *et al.*, *supra* note 8; and Saturnino BORRAS and Jennifer FRANCO, "Contemporary Discourses and Contestations around Pro-Poor Land Policies and Land Governance" (2010) 10 Journal of Agrarian Change 1.

90. See Nancy FRASER, "Can Society Be Commodities All the Way Down? Post-Polyanian Reflections on Capitalist Crisis" (2012) 43 Economy and Society 541.

91. See generally Borras *et al.*, *supra* note 8.

Moreover, for smallholders, the "best use" of their land may be for it to remain as it is (home, pasture, place of work) rather than as an asset or commodity.[92] Even when land titling schemes are meant to increase security and protect against eviction, they accelerate "the development of a market for land rights with potentially destructive effects on livelihoods".[93]

A final criticism is that capitalist accounts such as De Soto's place unrecorded and irregular forms of socioeconomic life (for example, self-sufficient and bartering smallholders) outside the market. However, they are in fact neither inside nor outside. As Mitchell argues, they instead form a frontier or a border, neither exterior nor interior to the market.[94] They are partly outside because their assets cannot be priced by the market, but also partly inside because the forms taken by capitalism or the market (for example, the forms of rent that are the principle means for the elite to reproduce its wealth) "are the outcome of a long and continuing encounter and interaction with this so-called outside".[95] As such, the transfer of wealth from the "outside" to the "inside" creates wealth, but not in the way envisaged by De Soto. Instead, property titling and the use of property—and *home into property*—as collateral create opportunities for speculation, for concentrating wealth, and accumulating rents. In the process, the poor, and their homes, are not the source of wealth but the means through which wealth is reorganized and accumulated.[96]

Many Boeung Kak Lake residents welcomed the opportunity to apply for land title under LMAP.[97] Few residents had formal legal ownership of their homes. This is unsurprising, considering the ad hoc way Boeung Kak Lake was settled and the almost non-existence of a land administration system—resulting in what Robin Biddulph describes as Cambodia's "uneven geography" of tenure insecurity.[98] This is not to say it was impossible to buy and sell property rights in Cambodia before the World Bank arrived. However, there has been a preference among Boeung Kak Lake residents to rely on customary systems of tenure.[99] This includes the custom of passing on the family home through kinship lines and the Khmer tradition of "family books" that record the history of every home. It also includes other forms of tenure recognition. For example, most families at Boeung Kak Lake were issued with house numbers and family books by the district authority. Some were approved for small home improvements and many had land sale contracts witnessed by district officials. One resident who lives at Boeung Kak Lake with her husband, five children, and three grandchildren

92. See further Mark GRIMSDITCH and Nick HENDERSON, "Untitled—Tenure Insecurity and Inequality in the Cambodian Land Sector", Bridges Across Borders Southeast Asia, Centre on Housing Rights and Eviction and Jesuit Refugee Service, Report, 2009.

93. De Schutter, *supra* note 88 at 249.

94. Mitchell, *supra* note 83 at 26–7.

95. *Ibid., at* 27.

96. *Ibid.*

97. Interviews with residents in Sras Chok, Daun Penh, September 2014.

98. Robin BIDDULPH, "Tenure Security Interventions in Cambodia: Testing Bebbington's Approach to Development Geography" (2011) 93 Human Geography 223 at 224.

99. On customary land rights generally, see Christoph OLDENBURG and Andreas NEEF, "Reversing Land Grabs or Aggravating Tenure Insecurity: Competing Perspectives on Economic Land Concessions and Land Titling in Cambodia" (2014) 7 Law and Development Review 49.

holds the land sale contract to her home. These customary tenure arrangements have long ensured residents' security at home, and are also linked to membership of a community and shared culture. For Boeung Kak Lake residents, *ontological* security[100]—the sense of being and belonging in the world derived from living in their homes at the lake—was just as, if not more, important than *legal* security of tenure. Until the World Bank's arrival at the lake they had not sought to change these arrangements.

In the end, no land titles were ever distributed at Boeung Kak Lake. The lake was excised from the project during the first stage, which involved mapping and classifying the land. The aim of mapping and classifying the land, according to the World Bank, was to formalize the boundaries of the lake area "in a transparent, rule-based manner" and to identify land available for private ownership.[101] After the lake was mapped it was classified as "unclear" and "unknown". Under the terms of LMAP, land determined to be "unclear" or "unknown" was automatically excluded from adjudication for title claims and handed over to the state as "state public land".[102] Under the Land Law 2001, "state public land" is unavailable for private ownership and no claims for land title can be made over it.[103] The maps were displayed in the local *pagoda*.[104] Residents were distressed to see not only that the lake had been excised from the project but also that their homes were unmarked and had effectively been disappeared, contrary to their settlement.[105]

The CPP shortly afterwards initiated a process under the Land Law 2001 to convert the lake from "state public land" into "state private land".[106] State private land cannot be sold but it can be leased to individuals and corporations on long leases such as "economic land concessions" for exploitation and development.[107] When residents approached project officials they were told they were living in a "development zone". Thus while pitched as part of a redistributive process, technologies of mapping and classifying have been critiqued as cover for attempts by states and governments to locate and reserve land for development and investment, or to legitimate the selection of land for those purposes after the fact, resulting in reconcentration of land and resources.[108] Robin Biddulph, for example, argues that mapping and classification

100. Anthony GIDDENS, *The Constitution of Society* (Cambridge: Polity, 1984). See discussion in Moira MUNRO and Ruth MADIGAN, "Privacy in the Private Sphere" (1993) 8 Housing Studies 29; and Saunders and Williams, *supra* note 48.

101. *PAD*, *supra* note 59 at 6.

102. *Ibid.*, *at* 8.

103. Royal Government of Cambodia, *Sub-decree 129 on Rules and Procedures on Reclassification of State Public Properties and Public Entities 2006* [*Sub-decree 129*], art. 18.

104. A *pagoda* is a temple.

105. Interviews with residents in Sras Chok, Daun Penh, September 2014.

106. *Sub-decree 129*, *supra* note 103, at art. 18.

107. Royal Government of Cambodia, *Sub-Decree 143 on Economic Land Concessions 2005*. See also "Map of Cambodia Land Concessions" *LICADHO* (2017), online: LICADHO <http://www.licadho-cambodia.org/concession_timelapse/>.

108. See Lorenzo COTULA, Sonja VERMEULEN, Rebeca LEONARD, and James KEELEY, "Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa", International Institute for Environment Development & Food Agriculture Organization of the United Nations, Report, 2009; and Alison SCHNEIDER, "What Shall We Do Without Our Land? Land Grabs and Resistance in Rural Cambodia", Institute of Development Studies, University of Sussex, Paper presented at the International Conference on Land Grabbing, 6–8 April 2011.

exercises "smooth space and conceal unevenness" and "define fixed boundaries" with the intent of transforming land for market exploitation.[109]

B. *Transforming the Lake Home*

The World Bank's intervention at Boeung Kak Lake transformed home for inhabitants and did so in particularly negative ways. First, since no land titles were distributed at the lake, LMAP entirely failed to improve tenure security for residents. In fact, the project succeeded in generating new insecurities about home. Second, residents were given the message that without land title, their homes were at risk of capture, and that failure to capitalize on their property through land title left them in a weak position. Third, the reclassification of the lake area as "unknown" and "unclear" devastated residents by erasing their homes from the land, denying their existence, and, to the extent that residents remained legally visible, criminalizing them as illegal squatters in their own homes. In effect, LMAP created and authorized conditions in which residents could be dispossessed of their homes.

The Bank's intervention also disrupted residents' *ontological security*, which rests on the affective connections between people and home and is vital to an individual's sense of being and belonging in the world. The type of insecurity at home LMAP generated can be understood as a particularly powerful background condition for capitalist land transformation precisely because it taps into the intimate and meaningful ontological experience of home. As residents reported, the Bank's intervention left them not only at risk of losing their physical homes, but also emotionally, socially, and spiritually threatened by the denial of home, belonging, memory, and identity that attends such a loss.

Thus the events at the lake reflect how international law is involved in profound transformations of home. To the extent that international law's "homemaking" work at Boeung Kak Lake involved acts of deprivation, we should also talk about "home-unmaking". By taking home as an analytical tool to examine the events at the lake, a terrain of experience opens up that cannot be captured or expressed in international law. The loss of home for residents, and the suffering and struggle related to that loss, is not part of the international development agenda or the responsibilities of international development agencies or actors. To the extent that home is implicated in titling schemes such as LMAP, home is seen as property, as an investment vehicle, and as an instrumental good or commodity. Transforming home in this way has the potential to leave behind "landscapes of dispossession".[110] This ignores and denies the richer meaning and experience of home that entails, for Boeung Kak Lake residents, the intrinsic link between home, being and belonging, family, community, identity, custom, and memory.

The World Bank project at Boeung Kak Lake is only one aspect of international law's homemaking and home-unmaking work that I look at in this paper. In the second part, I turn to examine the land grab that unfolded at the lake under the watch of the World Bank. This discussion is a starting point for investigating later in the paper how

109. Biddulph, *supra* note 98.

110. Arnim SCHEIDEL, "Tactics of Land Capture Through Claims of Poverty Reduction in Cambodia" (2016) 75 Geoforum 110.

international law is involved in homemaking work in the wider context of the "global land grab", and what the implications of this are for home.

IV. HOME AND LAND GRABBING

In January 2008, while the World Bank project was still operating at the lake, the Municipality of Phnom Penh signed an agreement to lease Boeung Kak Lake and the surrounding land, including all nine villages—an area covering 133 hectares—for ninety-nine years to a private company, Shukaku Inc. (hereinafter "Shukaku"). The value of the deal was US$79 million. At US$0.6 per square kilometre, Shukaku paid a fraction of the market value for land at Boeung Kak Lake.[111] Shukaku is owned by Lao Meng Khin, a friend of the Prime Minister of Cambodia, Hun Sen, and a senator in the ruling CPP. A handful of Chinese companies also have interests in the lake development. The Erdos Hongjun Investment Corporation, a company registered in Inner Mongolia, has a forty-nine percent stake in Shukaku. Guangdong New Golden Foundation is also said to have invested an undisclosed amount in the development.[112] The lease of the lake was helped by the relaxation of Cambodia's foreign investment rules in 2004. The Law on Investment of the Kingdom of Cambodia 2004 makes land in Cambodia available to overseas investors, provided that at least fifty percent of an investing entity is Cambodian owned.[113]

Shukaku's lease is in the form of an economic land concession [ELC].[114] ELCs are legal vehicles for land-property transfer and land use change. Land concessions are now a reasonably familiar, and popular, form used by governments in the rapidly developing countries of the global South.[115] The RGC promotes ELCs as part of its push to enhance productivity and development in Cambodia.[116] Under the Land Law 2001, ELCs entitle leaseholders to clear land for industrial, agricultural, or other exploitation.[117] Shukaku moved onto the lake area in August 2008. Soon after, construction workers began to dredge the lake. Sand was pumped into the lake from the Tonle Sap River, one of Cambodia's major arteries connecting to the Mekong, amid protests from residents and NGOs.[118]

111. *Lease Agreement*, *supra* note 5. See also "Lake Inferior: The Poor Pay for a Property Boom" *The Economist* (29 January 2009), online: The Economist <http://www.economist.com/node/13022123>.

112. "Chinese Linked to Filling of Lake" *Phnom Penh Post* (29 January 2010), online: Phnom Penh Post <http://www.phnompenhpost.com/national/chinese-linked-filling-lake>.

113. Royal Government of Cambodia, *Law on Amendment to the Law on Investment of the Kingdom of Cambodia 2004*, amending the *Law on Investment in the Kingdom of Cambodia 1994*.

114. *Land Law 2001*, *supra* note 53 at s. 8.

115. See for example, Oldenburg and Neef, *supra* note 99.

116. See for example, *Sub-Decree 143*, *supra* note 107; Royal Government of Cambodia, *National Strategic Development Plan 2009–2013*, at 121; and generally *National Strategic Development Plan 2014–2018*, *supra* note 81.

117. *Supra* note 14. As at May 2016 there were 286 ELCs operative in Cambodia: see records by NGO Open Development Cambodia at "Economic Land Concessions" *Open Development Cambodia* (2017), online: Open Development Cambodia <https://opendevelopmentcambodia.net/profiles/economic-land-concessions/>.

118. World Bank, "Investigation Report—Cambodia: Land Management and Administration Project", Inspection Panel, 2010 [*Inspection Panel Report*] at xvi.

The dredging of the lake killed all waterlife and destroyed fishing businesses. Residents' health, as well as tourism, suffered as air quality at the lake declined.[119] With the loss of the flood plain, monsoon rains now deluge the lake area, surrounding land and districts north of Phnom Penh. Many homes have since subsided into the lake. The lake shore and land nearby are now unstable for building and unsafe for human habitation.[120] Nonetheless, many families have tried to stay in their homes at the lake even while facing significant threats and environmental risks in order to maintain family life, connections to community, proximity to school and work, and to preserve as far as possible the ontological stability associated with home.

In early 2009, the first eviction notices arrived at Boeung Kak Lake.[121] Shukaku's lease area affected approximately 4,250 families.[122] The UN Committee on Economic, Social and Cultural Rights [UNCESCR] defines forced eviction as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of and access to appropriate forms of legal or other protection".[123] Residents were offered three compensation options.[124] The first option was US$8,500. The second option was a flat at the Damnak Trayeong housing relocation site and US$500 to assist with the cost of moving.[125] This sum did little to cover expenses and did not compensate income losses during and after relocation, among other expenses.[126] The third option was onsite rehousing. This required residents to move to the Trapeang Anchanh relocation site for four years while replacement housing was constructed at Boeung Kak Lake. Nothing ever came of the third option, so most residents took the second option and relocated to Damnak Trayeong.

Damnak Trayeong is one of fifty-four housing relocation sites scattered on the outskirts of Phnom Penh.[127] The site is approximately twenty kilometres from Boeung Kak Lake, or a very long and expensive *tuktuk* ride few Boeung Kak Lake residents can afford.[128] Housing and living conditions at Damnak Trayeong are extremely poor. There is no functioning sanitation and no clean water sources. Waste is piled in different locations. Most of the houses are unfinished or half-built and are barely habitable.

Some residents have left Damnak Trayeong and are now living with relatives elsewhere in overcrowded conditions. Others have returned to Boeung Kak Lake to squat on the site of their former homes and even to rebuild, despite the risk of being evicted again as well as abundant environmental hazards such as subsidence and lack of sanitation. But the risk is worth taking because, for most residents, life revolves

119. *Ibid*.
120. See generally Drainage and Flooding Assessment by Bridges Across Borders Cambodia, *supra* note 5.
121. District Governor of Daun Penh District, *Notification No. 180*, August 2009.
122. Letter to World Bank Inspection Panel, Centre on Housing Rights and Evictions, 4 September 2009.
123. UNESCR, *General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions*, UN Doc. E/1998/22 (1997).
124. *Notification No. 180*, *supra* note 121.
125. See discussion in UNHRC, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, UN Doc. A/HRC/27/70 (2014).
126. Interviews with former Boeung Kak Lake residents at Damnak Trayeong, 9 September 2014.
127. Sahmakum Teang Tnaut, "Resettling Phnom Penh—54 and Counting?" *Teang Tnaut* (2012), online: Teang Tnaut <http://teangtnaut.org/wp-content/uploads/2013/01/20121218_FF21_relocation-sites_vsFINAL1.pdf>.
128. Interviews with former Boeung Kak Lake residents at Damnak Trayeong, 9 September 2014.

around home at the lake: school and work, community and opportunity, belonging and identity, family, custom, and roots are intrinsically linked to home.

For the World Bank, the land grab at Boeung Kak Lake was a regrettable but unintended consequence of the project. In 2010, the World Bank Inspection Panel effectively cleared the organization and its staff from wrongdoing during LMAP.[129] It is arguable, however, to what extent the land grab really was unintended. Earlier we noted how land development projects like LMAP are used to identify "idle" or "empty" land for development (or, at Boeung Kak Lake, "unclear" and "unknown" land) and to make land "safe" for investors by bringing it within a system of legal property rights.[130] Whether titled or simply set aside for titling, land becomes attractive to investors precisely because a state or government has signalled its intention to make land available for market exploitation. Far from being an "unintended" consequence of the World Bank project, the transformation of home at the lake, and the sale and lease of the land to a private investor, can be seen as consistent with LMAP's goal of "promoting investment" in Cambodia.

The land grab at Boeung Kak Lake was not a unique event. In Cambodia, land grabbing has been described as a "prolonged crisis" and "slow-moving calamity".[131] Khmer human rights organization LICADHO estimates that over 2.1 million hectares of land in Cambodia has been granted by the CPP in land concessions to industrial agriculture firms and private developers since 1993, affecting over 400,000 Cambodians.[132] The former United Nations Special Rapporteur on the Right to Adequate Housing, Miloon Kothari, argues that years of civil war followed by "land grabbing on a massive scale" has exacerbated land conflicts in Cambodia and catalysed land ownership patterns that disadvantage the poor.[133] In the next part of the paper, I turn to the wider "global land grab" and examine international law's homemaking, and home-unmaking, work in this context.

A. *The Global Land Grab*

Phnom Penh's Olympic Stadium was built between 1963 and 1964 by the celebrated Khmer architect Van Molyvann. From a sporting centre, the Brutalist masterpiece was co-opted by the Khmer Rouge during the 1970s as an agitprop parade ground. Today the stadium remains one of the highest points in the city and is a favourite place for locals to exercise in the cool of the concrete pylons at dusk. From the rim of the stadium, one looks out across a landscape expanding in every direction, pockmarked with the craters of demolition sites, shiny new skyscrapers and apartment towers piercing through narrow spaces alongside *pagodas* and French colonial mansions. Since the mid 2000s, Phnom Penh's city policy has been to make the capital competitive

129. *Inspection Panel Report*, *supra* note 118.

130. See *supra* notes 108, 109.

131. Map of Cambodia Land Concessions, *supra* note 107.

132. *Ibid*. The figure of the number of persons affected is from 2003 alone; thus the number would be far greater including the years prior to that.

133. UNHCR, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari—Addendum—Mission to Cambodia*, UN Doc. E/CN.4/2006/41/Add.3 (2006).

with other Southeast Asian cities, an aspiration reflected in the pace of construction.[134] Opened to foreign trade and markets after the isolation of the Khmer Rouge era, and insulated from the effects of the Asian financial crash in the late 1990s, Phnom Penh now bears all the tumours of neoliberal urban growth in the global South: a building boom, rising land values, and swelling slums.

The land grab at Boeung Kak Lake can be seen in the context of Phnom Penh's post-conflict transformation under the aegis of investor-led global capitalism. However, it can also be linked to what scholars are now calling the "global land grab". While the phenomenon of land grabbing has so far caught the attention of scholars in geography, political ecology, rural sociology, development, and anthropology, among others,[135] international law scholars have been slow to enter the debate, at least in part because law is seen as epiphenomenal to land grabbing rather than a key driver of it.[136] It is worth spending a moment here sketching out the general idea of land grabbing before turning to the role of the World Bank in the global land grab, and the implications for home.

Land grabbing is not a new phenomenon. However, much about its contemporary phase is debated. Scholars variously refer to "land grabbing", "land deals", "large-scale land acquisition", and "large-scale investment in land".[137] Land grabbing is sometimes the thing to be explained while at other times it is the thing that does the explaining. What scholars do agree on is the idea that land grabbing is a process that generally entails the capturing of control of vast tracts of land and other natural resources through a variety of mechanisms, involving significant transfer of capital and often resulting in shifts in resource use from (for example) farming and forestry to extractive industries, whether for international or domestic purposes. Lorenzo Cotula talks about "land control", that is, "how actors are able to hold onto the land and to the institutional and political ramifications of access, claims, and exclusions".[138] The transactions that lie beneath a land grab are frequently characterized by disparities of power and market access as between states, investors, smallholders, and the land-poor in targeted areas.[139]

So we can see land grabbing as simultaneously a geographically specific event and part of a process that brings together different uses of land (production, industry, agriculture, speculation) with a range of local, national, transnational, and international practices, including planning rules, property regimes, trade policies, and

134. Céline PIERDET, "Private Investors in Phnom Penh (Cambodia) and the Reconfiguration of the City Center in Relation to the Periphery Since the 1990s" (2011) 5 Annales de Géographie 486.

135. See *supra* note 8.

136. See *supra* note 9.

137. See *supra* note 8, and *infra* note 139.

138. Lorenzo COTULA, "The International Political Economy of the Global Land Rush: A Critical Appraisal of Trends, Scale, Geography and Drivers" (2012) 39 Journal of Peasant Studies 649 at 669.

139. See for example, Ben WHITE, Saturnino BORRAS, Ruth HALL, Ian SCONES, and Wendy WOLFORD, "The New Enclosures: Critical Perspectives on Corporate Land Deals" (2012) 39 Journal of Peasant Studies 619; Borras and Franco, *supra* note 89; Saskia SASSEN, "Land Grabs Today: Feeding the Disassembling of National Territory" (2013) 10 Globalizations 25; Nancy LEE PELUSO and Christian LUND, "New Frontiers of Land Control: Introduction" (2011) 38 Journal Peasant Studies 667; and Matias MARGULIS and Tony PORTER, "Governing the Global Land Grab: Multipolarity, Ideas, and Complexity in Transnational Governance" (2013) 10 Globalizations 65.

investment law.[140] The exact causes and rationales of land grabbing are many and varied but it is said to be a "massive" and "growing" trend, catalysed by multiple, overlapping crises—oil, food, and finance.[141] The objectives of land grabbing may include genuine attempts to secure land for food and fuel production in the face of risks from unstable commodity markets and scarcity arising from environmental issues such as drought and climate change (sometimes referred to as the "food-fuel-feed crisis"[142]) to speculative acquisition driven by surplus cash withdrawn from precarious enterprises following financial crisis.[143]

In the light of this detailed picture it is less possible to think about land grabbing as a discrete, "one-off" event. That is, there may be "no one land grab".[144] Land grabbing might instead be understood as "a series of changing contexts, emergent processes and forces, and contestations that are producing new conditions and facilitating shifts in both de jure and de facto land control".[145] While the "grab" itself is important, it might only mark the beginning of a process: of "land emptying"—gaining access to and clearing the land for later development—or "land parking"—holding the land while its value appreciates before reselling at a profit. A large-scale land deal, then, might be no more than a framework. Concrete deals for leasing land—between private investors, agribusiness corporations, and local governments, for example—may or may not emerge, and even when they do they may not result in the actual enclosure of land, the dispossession of previous users, and the establishment of new production and labour regimes until many years later.[146] Land grabbing is an "amorphous and complex event".[147]

While land grabbing remains a conceptual challenge, we can gain some sense of its real-world significance through empirical evidence that indicates that an accelerated period of dispossession is in motion. Between 2000 and 2016, 26.7 million hectares of land have been transferred to private investors in large-scale land deals.[148] The vast majority of deals have been made in sub-Saharan Africa (forty-one percent), followed by Southeast Asia (thirty-two percent), and the Americas and Caribbean (nineteen percent).[149] These data have led scholars to suggest that land grabbing has "spiked" in the past decade.[150] However, the evidence needs to be approached with caution: collecting data on land grabbing is complicated by legibility problems and is, therefore, of uneven quality. Marc Edelman worries that oversimplified claims based on

140. White *et al.*, "The New Enclosures", *supra* note 139.

141. *Ibid.*

142. See generally Margulis *et al.*, *supra* note 8; and Philip MCMICHAEL, "Land Grabbing and Security Mercantilism in International Relations" (2013) 10 Globalizations 47.

143. See examples in Margulis *et al.*, *supra* note 8, and Margulis and Porter, *supra* note 139.

144. Margulis *et al.*, *supra* note 8.

145. *Ibid.* See also Peluso and Lund, *supra* note 139 at 667.

146. See Cotula, *supra* note 138, and Lorenzo COTULA, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law* (New York: Routledge, 2012).

147. Wily, *supra* note 9 at 209.

148. Land Matrix, "Analytical Report of the Land Matrix II" (11 October 2016), online: Land Matrix <http://www.landmatrix.org/en/>.

149. *Ibid.*

150. White *et al.*, supra note 139 at 620.

problematic data risks undermining attempts to counter land grabbing, while the tendency to reduce land grabbing to a quantitative problem distracts from the social relations it transforms.[151]

Another perspective on land grabbing comes from critical geographers. These scholars frame land grabbing as a capitalist colonial practice linked to the creation of new spatialized regimes of control.[152] Recalling the nineteenth century "Scramble for Africa", the contemporary phase of land transformation has been described as a "global land rush".[153] On this view, land grabbing today might be seen less as a unique event than "a surge within a well-trodden path of expanding and also ever-globalising capitalism",[154] a bout of "primitive accumulation" of land and natural resources by elites in both developed and developing country contexts. Land grabbing may be key not only to the transformation of land, but also to change in wider social, political, and economic conditions, including the conditions of human habitation.

However, contemporary land grabbing also has characteristics that distinguish it from the patterns of accumulation in the past. For one, land grabbing today involves new actors in new places—it is now just as likely to occur "South-South" as "North-South"—and new expressions of, and locations for, sovereign authority over territory, deterritorialization of power, shifting jurisdictions, and porous borders.[155] As Saskia Sassen argues, land grabbing "widens structural holes in the tissue of national sovereignty"[156] because "what was once part of national sovereign territory is increasingly repurposed for a foreign firm or government".[157] The trends and character of contemporary land grabbing might then be read as signals for the disassembly of national territory, the emergence of a new geopolitics characterized by non-national forms of authority over territory, such as foreign investors and World Bank loan conditionalities,[158] and the "active making" of new partial, specialized, cross-border spaces and arrangements.[159]

With this background, we are now in a position to examine the role of the World Bank in the global land grab. Arguably, this is not a new role as such but one the World Bank has arrived at after several decades of policy travelling in a particular direction. The World Bank's structural adjustment programmes, beginning in the early 1980s,

151. See generally Marc EDELMAN, "Messy Hectares: Questions about the Epistemology of Land Grabbing Data" (2013) 40 Journal of Peasant Studies 485.

152. See for example, Stefano LIBERTI, *Land Grabbing: Journeys in the New Colonialism* (New York: Verso, 2013); and see also Saturnino BORRAS, Christobal KAY, Sergio GÓMEZ, and John WILKINSON, "Land Grabbing and Global Capitalist Accumulation: Key Features in Latin America" (2012) 33 Canadian Journal of Development Studies 402.

153. Wily, *supra* note 9 at 209. See also Nicholas BLOMLEY, "Law, Property, and the Geography of Violence: The Frontier, the Survey and the Grid" (2003) 93 Annals of the Association of American Geographers 121.

154. Wily, *supra* note 9.

155. See Saskia SASSEN, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton, NJ: Princeton University Press, 2006).

156. Sassen, *supra* note 139 at 28–9.

157. *Ibid*.

158. McMichael, *supra* note 142.

159. Saskia SASSEN, *Expulsions—Brutality and Complexity in the Global Economy* (Cambridge, MA: Belknap, 2014).

developed into other forms of conditionality in the 1990s and 2000s, in particular "donee loan agreements". Donee loan agreements typically use land and land deals to create new spaces for capital flow. For example, agreements are often conditional on donee states privatizing resources that previously belonged in the public sector, such as the development of housing. Sassen argues that one effect of World Bank restructuring programmes, loans, and conditionalities is to rearrange land for its "insertion in today's novel global corporate circuits".[160] These are "disciplining regimes"[161]—not simply banking transactions—which tether already weak states to international institutions as well as to foreign national actors (other states, firms, and individual elites) and shape the socioeconomic effects that enable foreign buyers to access land with ease.[162] While corruption, maladministration, and other local factors are cited by international institutions as reasons for intervening in weak states, the continuing vulnerability of weak states is convenient for those same institutions to maintain power through access to land and natural resources. "The process of foreign land acquisitions now under way cannot be understood simply as caused by the corruption and weakness of host states."[163] Land grabbing should instead be seen as the product of complex instrumentalities, economic rationalities, and layers of governance operating at different levels—local, national, transnational, international, global.

Home at Boeung Kak Lake emerged from the land grab through this sort of interplay: between the World Bank and the Cambodian government; between the international development agenda and a national land law system; and between domestic elites, foreign corporations, and local residents. International law's homemaking (and home-unmaking) work is one part of this larger web of interactions that catalyse and condition land grabbing. Homemaking, then, is not a linear process with definite beginning and end points. Nor is it always easy or possible to trace lines of responsibility from international to home and back again, especially in the complicated context of a land grab. International law's homemaking work in this arena reflects the increasing interaction taking place in the local and global spheres between diverse sources of authority, as well as the more intensive and extensive reach of the international into the local.

Recently the World Bank has taken on a new role in the land grabbing debate, emerging as a leader in the push to regulate large-scale land acquisition. Yet the link between international law, through the agency of the World Bank, and land grabbing continues to go unnoticed. In the next part of this paper I briefly examine the regulation and suggest that it promotes, rather than prevents, land grabbing, with devastating effects for home. The World Bank's support for regulating land grabbing is another dimension of international law's homemaking and home-unmaking work, here on a global scale.

160. Sassen, *supra* note 139 at 25, 30.

161. *Ibid*., at 30.

162. Roel RAVANERA and Vanessa GORRA, "Commercial Pressures on Land in Asia: An Overview", IFAD Contribution to ILC Collaborative Research Project on Commercial Pressures on Land, 2011.

163. Sassen, *supra* note 139 at 41.

B. *The World Bank and Land Grabbing*

With anxieties about land grabbing increasing over the past decade, it has become a hot topic at the meeting tables of international institutions and multilateral groups such as the G8[164] and the G20.[165] It has also prompted a flurry of law-making activity. The World Bank has been a central player in the push to regulate large-scale land acquisition, arguing that regulation can transform the risks of land transactions into opportunities for investment.[166] This position is now crystallized in the two key regulatory prescriptions: the Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources [PRAI][167] and the Voluntary Guidelines on the Responsible Governance of Tenure of Land and other Natural Resources [Voluntary Guidelines].[168] Both the PRAI and the Voluntary Guidelines were developed by a coalition of specialized UN agencies led by the World Bank.[169] As pro-investment instruments, their aim is to facilitate land deals and reduce the risks of—but not prevent—land grabbing. They frame land deals as an equation of "risks" and "opportunities". The risks—for example, of a land deal being hampered by lack of property rights, unfair dealing, or the resistance of local people—can be transformed into opportunities for investment through "best practice", a "proper" regulatory environment,[170] and by consulting affected populations.[171]

It is perhaps not surprising that, on the pro-investment landscape, home interests are secondary. While the PRAI and the Voluntary Guidelines are concerned about food security[172] and environmental impacts[173]—which readily relate to agricultural

164. At its 2009 summit, the G8 called for the development of an international framework for responsible investment in agriculture. See *Responsible Leadership for a Sustainable Future*, Group of Eight, 2009, at para. 113b.

165. G20 leaders at the Cannes 2011 summit and the Los Cabos 2012 summit endorsed and encouraged the implementation of the Voluntary Guidelines and the PRAI (see discussion below). See *Leaders Declaration*, Group of Twenty, 2012, online: <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131069.pdf>.

166. For an overview of the emergence of these rules, see Saturnino BORRAS, Jennifer FRANCO, and Chunyu WANG, "The Challenge of Global Governance of Land Grabbing: Changing International Agricultural Context and Competing Political View and Strategies" (2013) 10 Globalizations 161; and Margulis and Porter, *supra* note 139 at 65. See also Saturnino BORRAS and Jennifer FRANCO, "From Threat to Opportunity? Problems with the Idea of a 'Code of Conduct' for Land-Grabbing" (2010) 13 Yale Journal of Human Rights and Development 507.

167. World Bank, "Principles for Responsible Agricultural Investment That Respects Rights, Livelihoods and Resources" (2010) [*PRAI*], online: World Bank <http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf>.

168. "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security", Committee on World Food Security and the United Nations Food and Agriculture Organisation, 2012. See also Philip SEUFERT, "The FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests" (2013) 10 Globalizations 1.

169. They were also informed by the Bank's own 2009 study of large-scale land acquisition across twenty countries. See World Bank, "Large-Scale Acquisition of Land Rights for Agricultural or Natural Resource-based Use", Report, 2009.

170. *PRAI, supra* note 167 at principle 3.

171. *Ibid*., at principle 4.

172. *Ibid*., at principle 2.

173. *Ibid*., at principle 7. Compare, however, discussion in World Bank, "The Practice of Responsible Investment Principles in Larger-Scale Agricultural Investments—Implications for Corporate Performance and Impact on Local Communities", Discussion Paper, 29 April 2014.

and industrial productivity—the impact of land deals on local people's homes goes unmentioned. And to the extent that home interests are implicitly raised in provisions for lawful eviction,[174] compensation, and resettlement under the PRAI and the Voluntary Guidelines, home is positioned as a mere good or commodity that can be exchanged and replaced. Again, this view contrasts with the rich concept of home I have elaborated in this paper. The pro-investment instruments indicate that the loss of home—ending in dispossession and eviction arising from a land deal—are not "risks" to be reduced but rather are accepted as part of, perhaps even an inevitable part of, a land deal. By providing a framework to facilitate and legitimate land transactions, and enshrining the loss of home within the logic of development, the PRAI and the Voluntary Guidelines perpetuate the dispossessory path of economic growth that underlies the international development agenda pursued by the World Bank.

The pro-investment response to land grabbing has been matched by a pro-poor, pro-human rights narrative. The United Nations Special Rapporteur on the Right to Food,[175] Olivier De Schutter, has developed a Set of Minimum Principles to Address the Human Rights Challenge of Large-scale Land Acquisitions and Leases [Minimum Principles], while Miloon Kothari has proposed the Basic Principles and Guidelines on Development-based Evictions and Displacement [Basic Principles].[176] The International Land Coalition has also adopted the Tirana Declaration, which defines land grabbing as a human rights violation.[177]

While these are welcome developments, when we examine the instruments from the perspective of home the difference between the pro-investment and pro-human rights camps appears limited. Neither the Minimum Principles nor the Basic Principles call for land grabbing to be rolled back. Instead, their aim is to mitigate human rights violations arising from large-scale land acquisition while still allowing the practice. Both the Minimum Principles and the Basic Principles authorize eviction and resettlement, accepting this as part of the reality of land deals.[178] In this way, the pro-poor, pro-human rights instruments tacitly legitimize the same dispossessory path of economic growth promoted by the pro-investment regulation and fall within the now-familiar discipline and logic of capitalist land transformation.

Further, the pro-human rights instruments suffer from the contradiction that, on the one hand, they authorize and facilitate a neoliberal development strategy through the transformation of home into property and the commodification of land while, on the other hand, they provide a modality through which social movements can oppose

174. For example, Voluntary Guidelines, *supra* note 168 at general principle 3.1(4).

175. UNHRC, "Report of the Special Rapporteur on the Right to Food, Olivier De Schutter—Addendum—Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge", UN Doc. A/HRC/13/33/Ad.2 (2009).

176. "Basic Principles and Guidelines on Development-based Evictions and Displacement: Annex I of the Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living", UN Doc. A/HRC/4/18/annex (2007).

177. *Tirana Declaration*, 26 May 2011, drafted at the international conference on "Securing Land Access for the Poor in Times of Intensified Natural Resources Competition", 24–26 May 2011.

178. Minimum Principles, *supra* note 175 at 2.

and resist the dispossessory consequences of that strategy.[179] This contradiction reflects an attempt to broker a compromise between groups vulnerable to dispossession from land grabbing and dominant groups whose interests are linked to the exploitation of the spaces being opened up by market-oriented reforms in the unfolding process of neoliberalization in the global South, a paradigm that has been noted by scholars in other contexts.[180] Even where such a compromise results in rights to compensation and resettlement, the fact remains that the regulation yokes international law to a regime of dispossession through the regulation. This also speaks to the tension in which international law in the development context frequently exacerbates and even reproduces the struggles it sets out to oppose.[181]

Further, whether pro-investment or pro-human rights, the regulation of land grabbing facilitates the transformation of *home into property*. While as soft law the regulation is not enforceable in international law, it does, however, form the backdrop to, or elucidate the ways in which, international law norms, duties, and activities are shaped and operate. Moreover, soft-law rules endorsed by international organizations such as the Bank carry normative force in their potential to "harden" into formal international legal rules, as Benedict Kingsbury has argued.[182] The transformation of home into property through the regulation and facilitation of large-scale land acquisition gives rise to opportunities for speculation, and in turn results in the dispossession of inhabitants and the reorganization and accumulation of wealth away from the poor to the more secure. This type of home-unmaking work involves reconstituting and reshaping home in destructive ways and ignoring, or denying, the important connections between home and notions of community, tradition, homeland, and memory for inhabitants. It also dismisses the potential of home as a place of radical engagement and possibility for international law to effect redistributive outcomes in the development context. In the final section of this paper, I turn to those possibilities.

V. HOME AND RADICAL ENGAGEMENT

The "BK13"—a group of thirteen Boeung Kak Lake women—have become famous for mobilizing their community in a long-running campaign against the World Bank and the evictions. They have won some small victories: it was in response to their demands that the World Bank investigated LMAP,[183] and they have even caught the attention of

179. See further Thomas POGGE, "Recognized and Violated by International Law: The Human Rights of the Global Poor" (2005) 18 Leiden Journal of International Law 717.

180. For example, see Kenneth NIELSEN and Alf NILSEN, "Law Struggles and Hegemonic Processes in Neoliberal India: Gramscian Reflections on Land Acquisition Legislation" (2015) 12 Globalizations 203.

181. See generally Antony ANGHIE, Bhupinder CHIMNI, Karin MICKELSON, and Obiora OKAFOR, *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff, 2003).

182. Benedict KINGSBURY, "Operational Policies of International Institutions as Part of the Law-making Process: The World Bank and Indigenous Peoples" in Guy GOODWIN-GILL and Stefan TALMON, eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford: Oxford University Press, 1999), at 323–42. See also Alvaro SANTOS, "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development" in David TRUBEK and Alvaro SANTOS, eds., *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006), at 253–300.

183. *Inspection Panel Report*, *supra* note 118.

the US Congress, which called for the World Bank to remedy the Lake situation.[184] This has nonetheless come at a personal cost to the BK13. All of the women have been arbitrarily detained, most have suffered police beatings, and many have been subjected to multiple evictions as they attempt to protect their homes.

The BK13 campaign brings to light how the World Bank's intervention at the Lake, and the land grab that followed, transformed home into a place of radical engagement. The Lake home is now the centre of a local resistance movement. That resistance in turn illuminates the emancipatory qualities of home. For Boeung Kak Lake residents, home at the Lake is associated with the freedom to live in a way that is meaningful to them. The loss of home, and the loss of the freedom integrally related to home, is worth fighting for. Yet while the potential for home as a place of radical engagement is well discussed in the wider literature,[185] this is not part of discussions about local struggles against land grabs, and certainly has not been positioned within international legal problematics.

The transformation of home at the Lake as a place of radical engagement illuminates another dimension of international law's homemaking work. While scholars have considered organized and everyday resistance "from below" in the land grabbing context from the perspective of social movements theory and critical agrarian studies,[186] this paper has sought to show that international law also conditions, accompanies, and fosters exercises of resistance at home. In doing so, international law is involved in shaping and activating the emancipatory qualities of home. This is not to discount, however, that resistance may be forced upon inhabitants. As Homi Bhahba has observed, "[h]ome may be a mode of living made into a metaphor of survival".[187] Nonetheless, resistance can be empowering.[188] For Boeung Kak Lake residents, the loss of home has prompted community organization, forged solidarity and support networks, and attracted national and international attention to conditions at the Lake and wider land problems in Cambodia. It has also led to opportunities for self-advancement.[189]

Home as a place of radical engagement, shaped by the interventions of international law, also reflects the nature of international law's homemaking work as an interplay of experiences and processes operating at different levels: from the personal, intimate, and everyday sphere of home to the national, international, and global. The BK13 campaign connects intimate, local experiences of eviction and dispossession to global

184. See US Congress, *2014 Consolidated Appropriations Act*, at s. 7043(c)(5); and Joint Civil Society, "US Congress Passes Law Demanding Redress for Boeung Kak Community, Pressures World Bank to Take Action", Media Statement,16 January 2012.

185. See for example, Bell HOOKS, "Homeplace: A Site of Resistance" in Bell HOOKS, *Yearning: Race, Gender, and Cultural Politics* (New York: Southend Press, 1990); Honig, *supra* note 23; and Young, *supra* note 23.

186. See in particular, Ruth HALL, Marc EDELMAN, Saturnino BORRAS, Ian SCOONES, Ben WHITE, and Wendy WOLFORD, "Resistance, Acquiescence or Incorporation? An Introduction to Land Grabbing and Political Reactions 'from Below'" (2015) 42 Journal of Peasant Studies 467, and papers in that volume.

187. Bhabha, *supra* note 52 at 11.

188. See further Hall *et al.*, *supra* note 186.

189. The documentary *Even A Bird Needs A Nest* (Divali Films 2012), was made about a Boeung Kak Lake resident and activist, tracing their campaign against evictions at the lake. See also *supra* note 1.

debates and high stakes decision-making about land transformation, development, agricultural capitalism, and economic growth in developing countries—and the rearrangements of territory, power, and authority consequent to this—in which international law is also increasingly involved. The slogan on one activist's t-shirt—"The whole world is watching"—powerfully draws attention to that connection. International law's homemaking opens up a view onto how all laws—local, customary, subnational, national, transnational, international—can be seen as part of an unfolding global legal order.[190]

Finally, the connection between home, the international, and the global is significant because it disrupts the assumption that the technical and economic activities of development and land deals are separate from the material, affective, and imaginary meanings and experiences of home. It also unsettles the binaries of private/public, inside/outside, male/female, home/work that have traditionally kept home out of the international domain. Far from being a pre-political, mundane, or irrelevant place, home is where personal relations intersect with public and political agendas. The home that emerges from the World Bank's intervention at Boeung Kak Lake is a personal and private realm as well as a public and political place, navigated and negotiated in international space, and central to a number of urgent global challenges.

V. CONCLUSION: HOME AS AN ANALYTICAL TOOL

While home is not a familiar concept in international law, in this paper I have argued that the discipline is involved in profound transformations of home. Home can—and should—be a subject of analysis for international law scholars. However, just as important is understanding that home can also be a valuable analytical tool in itself. At Boeung Kak Lake, when we look through the lens of home, we see how international law constitutes different experiences of home. The World Bank's activities at the Lake, and the land grab that followed, resulted in loss, suffering, and struggle as well as radical engagement. Taking home as an analytical tool also exposes conflicts and compromises at the heart of the international development project. For the World Bank, the "best use" of home is as land, property, and investment. As we have seen, land and property can be exchanged, alienated, replaced, and compensated in pursuit of economic growth and productivity. Yet for Boeung Kak Lake residents, the "best use" of home is *as a home*. For the BK13 and other residents evicted or facing eviction from the Lake, home is intrinsically linked to being and belonging, family and identity, the preservation of custom and tradition, connection to homeland and memory of the past, and hope for the future. These material, affective, and imaginary meanings and experiences of home are neither visible nor valued in the international development agenda.

Examining the World Bank's involvement in efforts to regulate large-scale land acquisition from the perspective of home reveals other ways that international law engages in homemaking and home-unmaking work. The regulation of land

190. See further Eve DARIAN-SMITH, *Laws and Societies in Global Contexts* (Cambridge: Cambridge University Press, 2013).

grabbing—whether pro-investment or pro-human rights—facilitates and legitimates transactions in land. In doing so, it consecrates the existing privilege of states and power-holders to access, occupy, and use the land of the poor, and to pursue dispossessory paths of economic growth. The World Bank's championing of the regulation makes it complicit in the profound transformations of home that result from land grabbing.

Seeing through the lens of home also reveals how home is a space of negotiation and conflict, subject to the interpellation and disciplines of the international development agenda and enfolded within international law's discursive organization of daily life. At Boeung Kak Lake, the World Bank reached into the intimate sphere of home, mixing international governance with local authority to shape home in particular ways. Meanwhile, while home is deeply implicated in the land grabbing regulation, home interests are barely acknowledged. To the extent that they are—such as through requirements for lawful eviction and resettlement—the potential to resist disruptions at home is stifled in a compromise between local people and investors.

In these ways, the concept of home illuminates international law's homemaking and home-unmaking work, and renders visible experiences of loss, suffering, and struggle, as well as radical engagement, that are not otherwise captured or expressed in international law and which may also be suppressed or denied. The scale and pace of contemporary transformations in human habitation and the centrality of home to a number of acute global challenges, alongside the paradigm shift from the global to the local in international law scholarship, makes more urgent the need to ask how our homes are linked to the norms, ambitions, and contradictions of the international legal order. The concept of home I have discussed in this paper could be taken up by international law scholars to begin to address home in their work.

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The Necessity of Indonesia's Measures to Sink Vessels for IUU Fishing in the Exclusive Economic Zone

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Abstract
Indonesia has been burning or sinking foreign vessels in its efforts to combat illegal, unreported, and unregulated fishing in its exclusive economic zone. Opinions on how much longer this measure should continue are manifold. While political issues may easily mask the situation, the underlying legal question remains: whether burning or sinking foreign vessels is a legal and necessary enforcement measure for Indonesia. Even though Article 73(1) of the UN Convention on the Law of the Sea does not make any reference to this type of measure, it allows coastal states to take measures that are "necessary to ensure compliance with their laws and regulations". This paper examines the meaning of the term "necessary" within the ambit of Article 73(1) to evaluate whether Indonesia's measure to burn or sink foreign vessels is necessary.

As the world's second-largest seafood producer,[1] Indonesia claims to suffer a massive amount of economic and environmental losses from illegal, unreported, and unregulated fishing [IUU fishing]. Indonesia's Presidential Task Force to Prevent and Combat Illegal Fishing [Task Force on Illegal Fishing] has cited a study that Indonesia has suffered losses up to 9bn Indonesian Rupiah [IDR] which is about US$632,000 from 2013 to 2014.[2] This figure, however, represents losses from only twelve out of Indonesia's 800 fishing ports in a given year.[3] Indonesia's Minister of Marine Affairs and Fisheries, however, had asserted that the losses suffered by Indonesia

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1. Food and Agriculture Organization of the United Nations, "The State of World Fisheries and Aquaculture 2018: Meeting the Sustainable Development Goals", online: FAO <http://www.fao.org/3/i9540en/I9540EN.pdf>.
2. Mas A. SANTOSA, "Indonesia's Multi-door Approach in Combating Fisheries Crime: The Fight against Fisheries and Associated Crimes in Indonesia", online: Fishcrime <http://fishcrime.com/wp-content/uploads/2016/10/Presentation_Mas-Achmad-Santosa.pdf>. The figure came from a study by Arif Satria, advisor for Indonesia's Ministry of Marine Affairs and Fisheries, for a one-year period between 2013 and 2014.
3. *Ibid*.

had once reached IDR 2,000tn, or about US$140bn.[4] Given its generally concealed nature, it is hard to quantify the exact losses resulting from IUU fishing. Thus, an estimate of losses has limited use, beyond the need to say that IUU fishing is a major problem for Indonesia's fisheries.

As a result, for the past four years, Indonesia has intensified its efforts against IUU fishing by employing a more stringent measure in the form of burning or sinking foreign vessels. This so-called "special measure" applies in all of Indonesia's fisheries management zones that includes Indonesia's internal waters, archipelagic waters, territorial sea, and exclusive economic zone [EEZ]. Even though IUU fishing can occur in all of those zones, Indonesia has mostly focused on fisheries violations in the EEZ.

Initially, the practice of burning or sinking foreign vessels was carried out based on Article 69 of the Law No. 45 of 2009 on Fisheries [*Fisheries Law*]. This law authorizes Indonesia's patrol vessels to take "special measures" in the form of burning or sinking foreign fishing vessels based on sufficient preliminary evidence.[5] On the other hand, Article 76A of the same law allows the destruction of a vessel—as an object of fisheries crime—by prior approval from a court.[6] Contrary to popular opinion, this paper argues that Indonesia's recent practices of sinking or burning vessels may not invoke either Article 69 or Article 76A of the Fisheries Law, but rather a higher standard by resorting to a final and binding court decision. Even though the Ministry of Marine Affairs and Fisheries [MMAF] has been praised for this measure, this measure should not be understood as an executive order; instead, it is the product of a court ruling by an independent and impartial judiciary.

As a party to the United Nations Convention on the Law of the Sea [UNCLOS], Indonesia is bound to its provisions without reservation. Article 73(1) of UNCLOS addresses a coastal state's enforcement power in the EEZ. It states that:

> the coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be *necessary to ensure compliance with the laws and regulations* adopted by it in conformity with this Convention.[7]

Even though Article 73(1) of UNCLOS does not make any reference to burning or sinking or destruction of vessels, Indonesia is not the only state applying this measure aimed at preventing and deterring illegal activities at sea. Despite the absence of a

4. "Susi Akui RI Pernah Rugi Rp 2,000 T Akibat Illegal Fishing" *CNBC Indonesia* (26 June 2018), online: CNBC Indonesia <https://www.cnbcindonesia.com/news/20180626075822-4-20458/susi-akui-ri-pernah-rugi-rp-2000-t-akibat-illegal-fishing>.

5. *Law No. 45 of 2009 on the Amendment of the Law No. 31 of 2004 on Fisheries* [*Law 45/2009*], art. 69(1).

6. *Ibid*., art. 76A.

7. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397 (entered into force 16 November 1994) [*UNCLOS*], art. 73(1) (emphasis added).

uniformly recognized standard, Malaysia,[8] France,[9] Australia,[10] and the US[11] are a few other states implementing vessel sinking or destruction as part of its enforcement measures, particularly for fishing violations in the EEZ.

While many scholars have studied Article 73(1) of UNCLOS, particularly concerning the legality of confiscation of vessels,[12] less attention has been paid to what the decision of the International Tribunal on the Law of the Sea [ITLOS] on the *M/V Virginia G* case entails to the interpretation and application of Article 73(1) of UNCLOS. In the Judgment of the *M/V Virginia G* case, the Tribunal had a lengthy discussion on what constitutes necessary enforcement measures within Article 73(1) of UNCLOS. Even though the case discusses the validity of the confiscation of vessels, it may provide guidance in determining whether the act of burning or sinking foreign vessels is a necessary enforcement mechanism to ensure compliance to a coastal state's fisheries laws and regulations in the EEZ.

This paper argues that Indonesia's practice of burning or sinking foreign vessels as a penalty for IUU fishing activities in its EEZ is necessary within the meaning of Article 73(1) of UNCLOS if such measures meet the proposed necessity test. Part I of this paper will first explore Indonesia's current state of IUU fishing. Then, Part II will examine the meaning of the term "necessary" within Article 73(1) of UNCLOS by employing rules on treaty interpretation; this part will also develop a test to determine the necessity of a coastal state's enforcement measure in the EEZ. Part III will apply the proposed test to Indonesia's measure, concluding that such a measure is necessary and in compliance with UNCLOS subject to several conditions. Part IV concludes.

I. OVERVIEW OF INDONESIA'S CURRENT STATE OF IUU FISHING

IUU fishing could occur both within and beyond a coastal state's jurisdiction—a zone controlled by a Regional Fisheries Management Organization [RFMO]. Even though the term "IUU fishing" is not defined in UNCLOS, it has been defined in the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported,

8. See Nadirah H. RODZI, "Malaysia Turns Up the Heat, Sets Foreign Boat Ablaze for Illegal Fishing" *The Straits Times* (30 August 2017), online: The Straits Times <http://www.straitstimes.com/asia/se-asia/malaysia-turns-up-the-heat-sets-foreign-boats-ablaze-for-illegal-fishing>.

9. See *The M/V Virginia G (No. 19) (Panama v. Guinea-Bissau)*, Case No. 19, Judgment of April 14, 2014, [*The M/V Virginia G*], Dissenting Opinion Judge Ndiaye, 14 ITLOS Rep. 1 at para. 205.

10. See Brian WILSON, "Human Rights and Maritime Law Enforcement" (2016) 52 Stanford Journal of International Law 243.

11. *Ibid*.

12. Prior to the *M/V Virginia G* case, one of the articles that provide an immense discussion on art. 73(1) of *UNCLOS* concludes that even though art. 73(1) contains a non-exhaustive list of a coastal state's enforcement measures, such measures must provide access to prompt release actions and domestic recourse. See Laurence BLAKELY, "The End of the Viarsa Saga and the Legality of Australia's Vessel Forfeiture Penalty for Illegal Fishing in Its Exclusive Economic Zone" (2008) 17 Pacific Rim Law & Policy Journal 677.

and Unregulated Fishing [IPOA-IUU], which serves as a non-binding voluntary instrument within the framework of the Food and Agricultural Organization [FAO] Code of Conduct for Responsible Fisheries.[13] The IPOA-IUU differentiates between illegal fishing, unreported fishing, and unregulated fishing.[14] In practice, however, the terms "IUU fishing" and "illegal fishing" are often used interchangeably. Theilen has argued that IUU fishing is illegal fishing because the term "illegal fishing" is considered more precise in many situations.[15] Except for the definitions provided for in paragraph 3, the remainder of the text of the IPOA-IUU does not distinguish between the treatment towards each prong of IUU fishing. If IUU fishing is treated as a single concept, it may be generally understood as an activity of capturing marine living resources without proper permission—either from a coastal state or an RFMO—or in violation of national or international conservation measures.

As a civil law country, Indonesia relies heavily on statutes and ministerial regulations to conduct anti-IUU fishing operations. Despite a strong political will to combat IUU fishing, Indonesian law does not provide any definition of IUU fishing, except for its National Plan of Action to Prevent and to Combat IUU Fishing which adopted the IPOA-IUU definitions.[16] It may also explain why Indonesia names its task force as the "Task Force on Illegal Fishing", rather than the "Task Force on IUU Fishing", even though its mandate also includes unreported fishing.[17]

Meanwhile, Indonesia's Fisheries Law makes numerous references to "fisheries crime" even though it neither defines it nor distinguishes it from IUU fishing. On one occasion, Indonesia's Minister of Marine Affairs and Fisheries even categorized what China considered fishing as a transnational organized crime.[18] The Fisheries Law has, however, differentiated what actions are deemed to be "crimes" and "violations".[19] Under Indonesia's criminal law, one of the distinctions between "crimes" and "violations" is that imprisonment is not applicable for "violations".[20] The

13. Food and Agriculture Organization of the United Nations, "International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing" (23 June 2001), online: FAO <http://www.fao.org/3/a-y1224e.pdf>.

14. Illegal fishing is defined as fishing activities that are conducted without a coastal state's permission, or in violation of a coastal state's law, or any regional or international regulation related to fisheries conservation and management. Unreported fishing, on the other hand, is related to how the catch is documented and reported to the relevant authority. Unregulated fishing refers to fishing activities for which there is an absence of applicable conservation or management measures, either because they are conducted by stateless vessels in the area beyond national jurisdiction or by vessels of a non-party to the RFMO. *Ibid*.

15. Jens T. THEILEN, "What's in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing" (2013) 28 International Journal of Marine and Coastal Law 533 at 543, 546.

16. *Minister of Marine and Fisheries' Regulation No. Kep.50/MEN/2012 on National Plan of Action to Prevent and to Combat IUU Fishing 2012–2016*.

17. *Presidential Regulation No. 115 of 2015 on Task Force to Combat Illegal Fishing*.

18. David G. ROSE, "'China Calls It Fishing, Indonesia Calls It Crime': Pudjiastuti Finds Her Target for Oceans Summit" *South China Morning Post* (18 October 2018), online: South China Morning Post <https://www.scmp.com/week-asia/geopolitics/article/2169153/china-calls-it-fishing-indonesia-calls-it-crime-pudjiastuti>.

19. *Law No. 31 of 2004 on Fisheries, as amended by Law 45/2009* [*Law 31/2004 as amended by Law 45/2009*], art. 103.

20. *Memorandum of Understanding Between Chief Supreme Court, Minister of Law and Human Rights, Attorney General, Chief National Police No. 131/KMA/SKB/X/2012, M.HH-07.HM.03.02,*

Fisheries Law further implies that other actions are also administrative issues, such as a failure to meet a minimum percentage of Indonesian crew for foreign vessels fishing in Indonesia's EEZ,[21] and transhipment of fish in non-designated ports.[22] This approach may demonstrate that Indonesia generally perceives illegal fishing or IUU fishing under the fisheries crimes framework, not merely as fisheries management issues.[23] The fact that illegal fishing cases are tried in a criminal court may further confirm this understanding.[24] Past cases further reiterate that fisheries courts generally view illegal fishing as "fish theft".[25]

In 2014, Indonesia's Minister of Marine Affairs and Fisheries issued a moratorium that prohibited the issuance of fishing licences for all fishing vessels built outside Indonesia.[26] The moratorium was mainly targeted at former foreign vessels that had been reflagged as Indonesian vessels—commonly referred to by the MMAF as "ex-foreign vessels", though they were technically Indonesian vessels by registration due to reflagging. The moratorium, which was initially intended for a period between November 2014 and April 2015,[27] was extended for six months and finally lifted in October 2015.[28] Then, in 2015, the Task Force on Illegal Fishing investigated 1,132 "ex-foreign" fishing vessels to identify their compliance level and to analyze their IUU fishing activities.[29] The investigation found varying degrees of violations, including forgery of vessels' documents, double flagging and double registration, fishing without appropriate licences and documents, deactivation of a vessel's transmitter, illegal transhipment at sea, forgery of logbook records, fishing outside the permitted fishing ground, and use of prohibited fishing gear.[30]

KEP-06/E/EJP/10/2012, B/39/X/2012 of 2012 on the Implementation of The Limits of Petty Crimes and The Total Fines, Prompt Investigation, and Implementation of Restorative Justice, art. 1(1).

21. *Law 45/2009*, *supra* note 5, art. 35A.
22. *Ibid*., art. 41(3).
23. See *Law 31/2004 as amended by Law 45/2009*, *supra* note 19, arts. 104, 105; *Law 45/2009*, *supra* note 5, arts. 66C, 76A, 76B, 76C, 83A, and commentary, art. 73.
24. *Law 45/2009*, *supra* note 5, art. 71; *Law 31/2004 as amended by Law 45/2009*, *supra* note 19, art. 106. Indonesia has designated five Fisheries Courts in North Jakarta, Medan, Pontianak, Bitung, and Tual to adjudicate fisheries crimes. Crimes occurring outside the territory of these courts remain tried in the respective District Courts.
25. See Decision of High Court of Jayapura No. 70./Pid.Sus-Prk/2015/PT JAP (*Indonesia v. Guo Yunping*); Decision of High Court of Pekanbaru No. 46/Pid.Sus/2016/PT PBR (*Indonesia v. Huynh Duy Phu*).
26. *Minister of Marine Affairs and Fisheries' Regulation No. 56/PERMEN-KP/2014 on Fishing Moratorium in Indonesia's Fishing Zones* [*Minister's Regulation 56/2014*], art. 1(2). In addition to the moratorium, the Minister also issued a ban on transhipment and the use of unsustainable fishing gear. See *Minister of Marine Affairs and Fisheries' Regulation No. 2 of 2015 on the Prohibition of Trawls and Seine Nets in Indonesia's Fisheries Management Zone*.
27. *Minister's Regulation 56/2014*, art. 3.
28. *Minister of Marine Affairs and Fisheries' Regulation No. 10 of 2015 on the Amendment of Minister of Marine and Fisheries' Regulation No. 56/PERMEN-KP/2014 on Fishing Moratorium in Indonesia's Fishing Zones*, art. 3.
29. Santosa, *supra* note 2.
30. *Ibid*.

The Task Force on Illegal Fishing further reported that all of those 1,132 "ex-foreign" vessels had breached Indonesian law.[31] Based on the report, all of those vessels are now blacklisted and deregistered.[32] As another follow-up action, the most recent Indonesian negative investment list now includes the prohibition of "ex-foreign" vessels, foreign vessels, and foreign investment in Indonesia's capture fisheries industries.[33] Thus, even though the moratorium has long ended, "ex-foreign" and foreign vessels are now banned from fishing in Indonesia's fisheries management zone that includes the EEZ.[34] As of 2018, MMAF submitted that there were 488 vessels destroyed from October 2014 to August 2018.[35] Vietnamese vessels dominate the number with 276 vessels, followed by ninety Philippine vessels, fifty Thai vessels, forty-one Malaysian vessels, twenty-six Indonesian vessels, two Papua New Guinean vessels, one Chinese vessel, one Belize vessel, and one stateless vessel.[36]

II. THE SCOPE OF A COASTAL STATE'S ENFORCEMENT MEASURES WITHIN ARTICLE 73 OF UNCLOS

Within an EEZ, a coastal state has sovereign rights to explore, exploit, conserve, and manage living natural resources.[37] In the *M/V Virginia G* case, ITLOS found that the term "sovereign rights" includes a coastal state's right to take the necessary enforcement measures,[38] which *include* measures such as "boarding, inspection, arrest, and judicial proceedings" against a vessel and its crew as may be "necessary to ensure compliance with [coastal state's] laws and regulations".[39] Neither UNCLOS nor the Virginia Commentaries[40] identify any criteria for determining what measures

31. Yunus HUSEIN, "Indonesia's Approach in Tackling Fisheries Crime: Strategy on Combating IUU Fishing and Post Moratorium Policies Plan" (12 October 2015), online: Fishcrime <http://www.fishcrime.info/assets/Uploads/Yunus-Husein-Indonesian-Approach-To-Tackling-Fisheries-Crime.pdf>.

32. The list of the blacklisted vessels is spelled out in the *Letters of the Secretary General of the Ministry of Marine Affairs* and *Fisheries Number B-195/SJ/11/2016* and *B-755/SJ/VI/2016* which were issued on 11 February 2016 and 16 June 2016, respectively. The letters also identify eighty-one persons and entities that do not make the list, meaning, they have never received administrative sanctions, are not being investigated, and still have tolerable level of compliance to Indonesian fisheries laws and regulations. The country of origin of the blacklisted vessels varies: Australia, Belize, China, Honduras, Japan, Panama, the Philippines, South Korea, Taiwan, Thailand, Vietnam, and the US.

33. See *Presidential Regulation No. 44 of 2016 on the List of Business Fields Closed and Opened with Conditions to Investment* at 29.

34. Indonesia's fisheries management zone includes Indonesian waters, Indonesia's EEZ, and freshwater areas such as rivers, lakes, reservoirs, swamps, or other potential fishing zones in Indonesia. See *Law No. 31 of 2004 as amended by Law 45/2009*, *supra* note 19, art. 5(1).

35. "Hari Kemerdekaan, Pemerintah Tenggelamkan 125 Kapal Pelaku Illegal Fishing" (21 August 2018), online: Kementerian Kelautan dan Perikanan Republik Indonesia <https://kkp.go.id/artikel/5714-hari-kemerdekaan-pemerintah-tenggelamkan-125-kapal-pelaku-illegal-fishing>.

36. *Ibid*.

37. *UNCLOS*, *supra* note 7, art. 56(1).

38. *The M/V Virginia G*, *supra* note 9 at para. 211.

39. *UNCLOS*, *supra* note 7, art. 73(1).

40. Virginia Commentaries refer to the seven-volume commentary to *UNCLOS*, prepared by Myron Nordquist and others under the auspices of the University of Virginia Center for Oceans Law and Policy. ITLOS has acknowledged the commentaries as the "most authoritative" source on the

are considered "necessary" within the ambit of Article 73(1) of UNCLOS. Nevertheless, the *M/V Virginia G* case may indicate how an international tribunal would examine whether the destruction of vessels to punish and deter IUU fishing in a coastal state's EEZ is a valid enforcement mechanism under international law.

In this section, to determine the scope and meaning of Article 73(1) of UNCLOS, its terms will be interpreted according to the general rules of treaty interpretation.[41] First, this section will look closely at the ordinary meaning of the term "necessary". Then, it will examine the context surrounding the term "necessary" in the light of the object and purpose of Article 73. To conclude, it will establish a necessity test based on the findings.

A. *The Ordinary Meaning of the Term "Necessary"*

In the *M/V Virginia G* case, Panama asked ITLOS to decide whether confiscation of *Virginia G*, a Panamanian oil tanker, by Guinea-Bissau, exceeded what is permitted under Article 73(1) of UNCLOS.[42] *Virginia G* was contracted to supply gas to four Mauritanian fishing vessels—*Amabal I*, *Amabal II*, *Rimbal I*, and *Rimbal II*—in the EEZ of Guinea-Bissau on two different but consecutive days.[43] On the day of the arrest, it was supplying gas oil to *Amabal I* and *II*.[44] It was then arrested together with them.[45]

Guinea-Bissau arrested *Virginia G* because it considered *Virginia G* unauthorized to conduct bunkering of ships fishing in its EEZ.[46] The owner of *Virginia G* then requested its release, but Guinea-Bissau refused because Guinea-Bissau considered that the time limit to request a release had lapsed.[47] Accordingly, Guinea-Bissau proceeded to confiscate *Virginia G* and all the cargo on board.[48] The owner of *Virginia G* then requested interim measures before the Regional Court of Bissau, and the Court ordered the suspension of the confiscation.[49] However, Guinea-Bissau's Secretary of State of the Treasury ordered the discharge of *Virginia G*'s gas cargo.[50] Again, the *Virginia G*'s owner requested interim measures before the Regional Court of

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Convention. See *The M/V Saiga (St. Vincent & Grenadines v. Guinea)*, ITLOS Case No. 2, Order of 1 July 1999, at 38.

41. Arts. 31 and 32 of the *Vienna Convention on the Law of Treaties* are the heart of the formulation for treaty interpretation; the ICJ has recognized both norms to bear the status of a customary international law. See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) [*VCLT*]; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment of 17 December 2002, I.C.J., at 645.
42. *The M/V Virginia G (No. 19) (Panama v. Guinea-Bissau)*, Case No. 19, Judgment of April 14, 2014, 14 ITLOS Rep. 1, Memorial of the Republic of Panama [*Memorial of the Republic of Panama*], at 55.
43. *The M/V Virginia G*, *supra* note 9 at 58.
44. *Ibid.*, at 61–2.
45. *Ibid.*, at 63.
46. *Ibid.*, at 64.
47. *Ibid.*, at 66, 68, 69.
48. *Ibid.*, at 70.
49. *Ibid.*, at 73.
50. *Ibid.*, at 76.

Bissau, and the Court decided in his favour and ordered the immediate return of the cargo.[51] Eventually, Guinea-Bissau released the vessel and considered the previous confiscation order repealed.[52]

Before ITLOS, Panama asked the Tribunal whether Guinea-Bissau had violated UNCLOS when it arrested and confiscated *Virginia G*.[53] The Tribunal found that, under Guinea-Bissau laws and regulations, fishing vessels that violated Guinea-Bissau fisheries regulations would be confiscated ex-officio, along with their gear, equipment, and fishery products.[54] It noted that Article 73(1) of UNCLOS makes no reference to the confiscation of vessels, even though many coastal states do confiscate fishing vessels as a sanction for EEZ violations.[55] It thus recognized the need to interpret Article 73(1) of UNCLOS "in the light of the practice of coastal states on the sanctioning of violations of fishing laws and regulations".[56] Even though the main text of the Judgment did not discuss in detail how Article 73(1) should be interpreted and applied, several judges made separate and dissenting opinions addressing the issue of interpretation of Article 73(1).[57]

As a rule of custom, the general rules of treaty interpretation follow the Vienna Convention on the Law of Treaties [VCLT]. The first element of these rules requires looking for the ordinary meaning of the terms of the treaty, which is the meaning that is "regular, normal, or customary".[58] International courts often turn to dictionaries to find that kind of meaning.[59] *Black's Law Dictionary* defines "necessary" as "that is needed for some purpose or reason; essential; that must exist or happen and cannot be avoided; inevitable".[60] It can also mean "needed to be done, achieved, or present; essential".[61] These meanings are good starting points that give a general idea of the meaning of the word "necessary".

Meanwhile, other international courts and tribunals have considered a range of meanings to the term "necessary". In *Korea–Various Measures on Beef*, the World Trade Organisation [WTO] Appellate Body examined whether South Korea's prohibition of retail sales of both domestic and imported beef products [dual retail system] was justified as general exceptions under Article XX(d) of the General Agreement on Tariffs and Trade 1994 [GATT 1994].[62] Earlier, the WTO Panel had found that

51. *Ibid*., at 79.
52. *Ibid*., at 82.
53. *Ibid*., at 161.
54. *Ibid*., at 250.
55. *Ibid*., at 251–3.
56. *Ibid*., at 253.
57. See *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik, Dissenting Opinion of Judge Ndiaye, Dissenting Opinion of Judge Jesus, Dissenting Opinion of Judge Servulo Correia, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, James L. Kateka, Zhiguo Gao, and Boualem Bouguetaia.
58. Oliver DORR and Kirsten SCHMALENBACH, eds. *Vienna Convention on the Law of Treaties: A Commentary* (New York: Springer, 2012) at 542.
59. *Ibid*.
60. Bryan A. GARNER, ed., *Black's Law Dictionary*, 10th ed. (St Paul, MN: Thomson Reuters, 2014).
61. Oxford Dictionary Online, online: Oxford Dictionaries <https://www.oxforddictionaries.com/>.
62. See *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Appellate Body Report, WTO Doc. WT/DS161/AB/R, WT/DS169/R (11 December 2000) [*Korea–Various Measures on*

South Korea's dual retail system was not necessary to secure compliance with South Korea's Unfair Competition Act concerning imported beef, because South Korea had failed to demonstrate that other reasonably available alternatives were insufficient to achieve such an objective.[63]

In its evaluation, the WTO Panel examined enforcement measures taken by South Korea for *related products* and found that the dual retail system was not utilized.[64] Instead, South Korea employed traditional WTO-consistent enforcement measures, such as record-keeping, investigations, policing, and fines, to enforce the same Act.[65] The Panel concluded that these alternative measures were reasonably available to meet South Korea's desired level of compliance in the beef sector.[66] South Korea appealed the Panel's conclusion and rebutted that an examination of the consistent application to related products is not required to test the necessity of its measures on beef.[67]

South Korea further submitted that, even though the Panel considered four less trade-restrictive alternatives, the Panel failed to link them to the objective sought.[68] South Korea insisted that the alternative measures could not achieve its objective to secure compliance with its Unfair Competition Act.[69] The Respondents and the third-country participants, however, agreed with the Panel's findings.[70] The US, one of the Respondents, went on to state that the Panel's examination on other imported food products was a relevant factor in determining whether other means were reasonably available to achieve the same result.[71]

In addressing Korea's appeal, the Panel first examined the ordinary meaning of the word "necessary." It referred to *Black's Law Dictionary*, which cautions that:

> [t]his word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity.[72]

Here, the Panel took a broad view and considered that the word "necessary" is not limited to measures which are "indispensable" or "of absolute necessity" or

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Beef, Appellate Body Report]; *General Agreement on Tariffs and Trade 1994*, *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (entered into force 1 January 1995) [*GATT 1994*].

63. *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Panel Report, WTO Doc. WT/DS161/AB/R, WT/DS169/R (31 July 2000) [*Korea–Various Measures on Beef*, Panel Report] at para. 659.
64. *Ibid*., at paras. 660–4.
65. *Ibid*., at para. 666.
66. *Ibid*., at paras. 674–6.
67. *Korea–Various Measures on Beef*, Appellate Body Report, *supra* note 62 at para. 22.
68. *Ibid*., at para. 23.
69. *Ibid*., at para. 25.
70. *Ibid*., at paras. 55, 63, 73.
71. *Ibid*., at para. 56.
72. *Ibid*., at para. 160.

"inevitable" to secure compliance, but other measures may also fall within this scope.[73] It perceived the term "necessary" in a spectrum between "indispensable" and "making a contribution to".[74] In conclusion, it held that:

> … determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[75]

The Panel deemed that an examination of related product areas was relevant to test the necessity of South Korea's measure. It, however, rejected the introduction of a "consistency" requirement into the necessary test. It clarified that an examination of enforcement measures taken against the same illegal activity relating to similar products was useful to evaluate the *availability* of alternative measures.[76] To be necessary, therefore, South Korea had to show that alternative measures were not reasonably available or unreasonably burdensome, financially or technically.[77] Having found that possible alternative measures existed in other related product areas, the Panel concluded that the dual retail system was a disproportionate measure to the objective sought.[78]

In the *M/V Virginia G* case, Judge Paik gave a separate opinion which examined the term "necessary" within Article 73(1) of UNCLOS.[79] Similar to *Korea–Various Measures on Beef,* his standard of necessity was that "if there is a choice between several appropriate measures, the least onerous (to other protected interests) and equally effective (in achieving the intended objective) needs to be chosen".[80] In *Korea–Various Measures on Beef*, the Panel also considered the extent to which the measure contributes to the realization of the end pursued. It asserted that "the greater the contribution, the more easily a measure might be considered to be necessary".[81] Judge Paik adopted the same view but with an additional safeguard which suggested that "the greater the contribution and *the less the encroachment*, the more likely the measure will be considered to be necessary".[82]

Judge Paik submitted that the objective of an Article 73 measure is to ensure compliance with the coastal state's domestic law, which can involve the acts of remedying

73. *Ibid*., at para. 161.
74. *Ibid*.
75. *Ibid*., at para. 164.
76. *Ibid*., at para. 170.
77. *Ibid*., at para. 173. By asking South Korea to demonstrate that there were no reasonably available alternative measures which are consistent with WTO rules, the Panel thus followed the standard in *United States*–Section 337 *of the Tariff Act of 1930*, Panel Report WTO Doc. L/6439-36S/345 (adopted 7 November 1989), at para. 5.26.
78. *Korea–Various Measures on Beef*, Appellate Body Report, *supra* note 62 at paras. 174, 179, 182.
79. *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik.
80. *Ibid*., at para. 9.
81. *Korea–Various Measures on Beef*, Appellate Body Report, *supra* note 62 at para. 163.
82. *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik at para. 25 (emphasis added).

past wrongs and deterring future wrongs.[83] Interestingly, he referred to the term "necessary" found in Article XX(d) of GATT 1994 which was discussed at length in *Korea–Various Measures on Beef*.[84] He also took some examples from international human rights instruments to emphasize the accomplishment of the policy objectives enumerated in the provisions.[85]

Judge Paik took a similar approach with the Panel in *Korea–Various Measures on Beef*, in which he treated "necessary" on a scale between "a positive obligation to be imposed on a State taking permissible measures" and "an exceptional condition to justify measures otherwise inconsistent with treaty obligations".[86] He classified Article 73(1) of UNCLOS to fall within the ambit of the former, but Article XX(d) of GATT 1994 within the latter.[87] If the term "necessary" within Article XX(d) of GATT 1994 falls into the box of "an exceptional condition to justify measures otherwise inconsistent with treaty obligations", it will make it identical to the "state of necessity" under Article 25 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts [ILC Draft Articles on State Responsibility].[88] It should be noted, however, that the Panel in *Korea–Various Measures on Beef* also interpreted the term "necessary" within Article XX(d) of GATT 1994 in a spectrum between "making a contribution to" and "absolute necessity". Thus the Panel does not only refer to the term "necessary" as a ground for precluding treaty obligations.

Nonetheless, due to the nature of the term "necessary", which is fact-intensive and circumstance-dependent, Judge Paik observed that, while international courts or tribunals may be more neutral and impartial, they are "not well positioned to assess the complexities of local conditions, an understanding of which is critical to [a] proper determination of necessity",[89] whereas states taking necessary measures generally have more knowledge of their own circumstances, although they may be more biased.[90] Judge Paik concluded that a certain degree of discretion should be allowed to national authorities on a case by case, and issue by issue basis.[91]

B. *The Context of the Term "Necessary"*

Interpreting the terms of a treaty "in their context" requires looking at the treaty as a whole. Therefore, the entire text of a treaty must be considered as a "context". The

83. *Ibid*., at para. 7.
84. *Ibid*., at para. 10.
85. *Ibid*., at para. 11.
86. *Ibid*., at para. 15.
87. *Ibid*.
88. Necessity refers to extraordinary situations where the only means by which a state can protect an essential interest of its own is by suspending its performance of an international obligation. See *Article 25 of the Draft Articles on the Responsibilities of States for Internationally Wrongful Acts, with Commentaries* (2001) 2 Yearbook of the International Law Commission 31; UN Doc. A/CN.4/L.602/Rev.1; *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 3 August 2001, UN Doc. A/56/10 (2001) [*ILC Draft Articles on State Responsibility*], art. 25.
89. *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik, at para. 18.
90. *Ibid*.
91. *Ibid*., at paras. 19–20.

use of the same term elsewhere in the treaty can also be a consideration.[92] However, the term "necessary" occurs more than one hundred times within UNCLOS;[93] thus, finding the term "necessary" in the other parts of UNCLOS may not offer much help to the interpretation. Broad use of the same term "necessary" across different UNCLOS provisions may indicate that the meaning may differ depending on the context.

As in the *Juno Trader* case, in which the Tribunal held that Article 73(2) of UNCLOS must be read in the context of Article 73 as a whole,[94] this paper also suggests that interpreting Article 73(1) of UNCLOS requires looking at the remaining paragraphs of Article 73. This paper concurs with Judge Paik's Separate Opinion in the *M/V Virginia G* case that the context of Article 73(1) is "more flexible and less compulsory" due to the presence of the modal auxiliary verb "may".[95] It is also in accord with the ordinary meaning of the term "necessary" as found in *Korea–Various Measures on Beef*, which signifies a spectrum between "indispensable" and "making a contribution to".

Besides Judge Paik, Judge Jesus also submitted his Separate Opinion in the *M/V Virginia G* case, in which he argued that Article 73(1) of UNCLOS contains a "general policy" of what measures a coastal state may take in exercising its sovereign rights in the EEZ.[96] While paragraph 2 provides for a flag state's right of prompt release action, paragraph 3 establishes restrictions to paragraph 1 measures.[97] By reading paragraphs 1, 2, and 3 together, it can be implied that paragraph 1 is the general rule of a coastal state's enforcement measures in the EEZ, and paragraph 2 is a safeguard to other states' protected rights, whereas paragraph 3 is an exception to the paragraph 1 rule. Judge Jesus, Judge Ndiaye, and Judge ad hoc Servulo Correia also shared the same opinion that, if the drafters of UNCLOS desired limitations to the paragraph 1 measures, they would have included them in the text, as they did in paragraph 3.[98]

All in all, Article 73(1) of UNCLOS contains a non-exhaustive list of permitted coastal state's enforcement measures. The word "including" within Article 73(1) of UNCLOS also signifies that "boarding, inspection, arrest and judicial proceedings" are "part of a particular group"[99] or "part of the whole being considered";[100] in

92. Dorr and Schmalenbach, *supra* note 58.
93. For instance, within Part V of *UNCLOS*, the term "necessary" also occurs in arts. 60(4) and 63(1), in addition to art. 73(1). In art. 60(4), the term "necessary" comes within the purpose of establishing safety zones around artificial islands, installations, and structures which fall under the coastal state's jurisdiction, whereas in art. 63(1), the term "necessary" arises out of the context of conservation of species occurring within the EEZ of two or more coastal states.
94. *The Juno Trader Case (Prompt Release) (St. Vincent and the Grenadines v. Guinea-Bissau)*, Case No. 13, Judgment of 18 December 2004 [*The Juno Trader Case*] at para. 77.
95. *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik at para. 23.
96. *Ibid*., Dissenting Opinion of Judge Jesus at para. 15.
97. *Ibid*., at para. 16.
98. See *ibid*., Dissenting Opinion of Judge Jesus at para. 17, Dissenting Opinion of Judge Ndiaye at 290, Dissenting Opinion of Judge Servulo Correia at para. 20.
99. Cambridge Dictionary Online, online: Cambridge Dictionary <https://dictionary.cambridge.org/>.
100. Oxford Dictionary Online, *supra* note 61.

other words, these measures are merely examples. The Virginia Commentaries also indicate that a coastal state's enforcement measures under Article 73(1) of UNCLOS are a "broad but limited authority", meaning that a coastal state can take enforcement measures needed in the exercise of its sovereign rights in relation to the "living resources" specified in Article 56(1).[101] A broad interpretation of a coastal state's enforcement measures would give the coastal state the opportunity to protect its sovereign rights by means other than those expressly provided for in Article 73(1) of UNCLOS. According to Harrison, the coastal state's enforcement measures should only be overruled in extreme circumstances when they are arbitrary or patently unreasonable or exercised in bad faith.[102]

Such a broad interpretation, however, should not be taken in a manner that would harm the guaranteed flag state's rights of prompt release actions. This paper argues that Article 73(2) of UNCLOS also holds a critical consideration to balance such a broad enforcement power on the part of the coastal state. Article 73(2) states that "arrested vessels and their crew shall be promptly released upon the posting of a reasonable bond or other security".[103] It provides a reminder that, no matter how broad a coastal state's discretion to enforce its laws and regulations, a coastal state must have due regard to the right of other states, including the right to prompt release. By taking into account the ordinary meaning of the term "necessary" in paragraph 1, a coastal state is generally allowed to take any measure as long as it is within the framework of "necessary" enforcement measures with due regard to the flag state's right of prompt release, and does not include imprisonment or corporal punishment—unless otherwise agreed.

C. *The Object and Purpose of Article 73*

The ordinary meaning of the term "necessary" is not to be determined in the abstract but in the context of the treaty and its object and purpose. Object and purpose are a unitary concept that refers to "the goals that the drafters of the treaty hoped to achieve".[104] It is generally understood that the preamble of a treaty reflects the treaty's object and purpose. This paper suggests that the object and purpose of Article 73(1) can be found in the preamble of UNCLOS and within the provision itself.

Pursuant to the preamble, the drafters of UNCLOS desired "a legal order for the seas and oceans" which will promote "peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment".[105]

101. Myron H. NORDQUIST, *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. II (The Hague: Martinus Nijhoff, 1993) at 794.

102. James HARRISON, "Safeguards against Excessive Enforcement Measures in the Exclusive Economic Zone–Law and Practice" in Henrik RINGBOM, ed., *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Leiden: Brill Nijhoff, 2015), at 221.

103. *UNCLOS*, *supra* note 7, art. 73(2).

104. David S. JONAS and Thomas N. SAUNDERS, "The Object and Purpose of a Treaty: Three Interpretive Methods" (2010) 43 Vanderbilt Journal of Transnational Law 565 at 578.

105. *UNCLOS*, *supra* note 7, preamble.

This indicates that the drafters not only hoped to benefit economically from the ocean but also to conserve it. No single purpose is above the other since UNCLOS is a compromise between competing interests.[106] That is to say that UNCLOS is aiming for sustainable use of the ocean that reflects a balance between economic and environmental interests.

It is also worth noting that the preamble also takes consideration of the "special interests and needs of developing countries".[107] This special consideration indicates that the drafters may have tolerated some degree of flexibility to accommodate those special interests and needs. Based on this notion, Article 73(1) of UNCLOS, which authorizes enforcement of a coastal state's laws and regulations to what is "necessary to ensure compliance",[108] could be interpreted with the same degree of flexibility in harmony with the treaty's object and purpose. This degree of flexibility is consistent with the ordinary meaning of the term "necessary", as discussed in the previous section, which indicates a margin of appreciation to the coastal state's enforcement measure.

In the *Monte Confurco* case, ITLOS suggested that the goal of Article 73 of UNCLOS is to strike a fair balance between the interests of coastal states and flag states,[109] whereas in the *M/V Virginia G* case, Judge Paik also saw this need to balance conflicting interests as the heart of Article 73.[110] This paper is of the opinion that UNCLOS always rests on the balancing requirement between relevant interests, either to harmonize the interests between economic uses of the ocean and environmental conservation, the interests between developed and developing states, the interests between coastal and land-locked and geographically disadvantaged states, or the interests between coastal and flag states. The inclusion of a prompt release provision in Article 73(2) of UNCLOS also provides a stronger suggestion that a balance of interests is of relevant importance and should always be maintained to attain an international legal order for the oceans.

D. *A Test to Determine the Necessity of Indonesia's Measures*

In the *M/V Virginia G* case, the Tribunal applied a two-tiered test in determining the necessity of Guinea-Bissau's measure. It first took into account "the practice of coastal states on the sanctioning of violations of fishing laws and regulations".[111] Second, it considered some "mitigating factors" in a particular case.[112] Harrison has pointed out that the Tribunal's necessity test was too prescriptive, thus giving little discretion

106. Roman DREMLIUGA, "A Note on the Application of Article 234 of the Law of the Sea Convention in Light of Climate Change: Views from Russia" (2017) 48 Ocean Development and International Law 128 at 130.

107. *UNCLOS*, *supra* note 7.

108. *Ibid*., art. 73(1).

109. *The Monte Confurco (Prompt Release) (Seychelles v. France)*, Judgment of 18 December 2000, at para. 70.

110. *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik at para. 24.

111. *The M/V Virginia G*, *supra* note 9 at para. 253.

112. *Ibid*., at para. 268.

to the coastal state.[113] Several judges also criticized the approach taken by the Tribunal. Vice President Hoffman and Judges Rangel, Rao, Kateka, Gao, and Bouguetaia stressed the importance of the margin of appreciation to the coastal state's enforcement measures, and noted that the Tribunal's power of review was limited to those measures taken arbitrarily or based on non-existence and patently erroneous facts.[114]

In his Separate Opinion, Judge Paik proposed a different standard to evaluate whether a coastal state's measure could be considered "necessary" within the ambit of Article 73(1) of UNCLOS. In the spirit of leaving some degrees of discretion to the coastal states, he proposed considering:

> the availability of other measures (equally effective and less onerous); the importance to Guinea-Bissau of the objective sought in taking the confiscation measure (*i.e.*, protection of living resources in the EEZ); the impact of that measure on protected rights of Panama (the *M/V Virginia G*) and other states; and the circumstances and manner in which the confiscation measure was taken.[115]

The critical determination to the necessity of a coastal state's enforcement measure according to Judge Paik is, therefore, whether there are "available alternatives" that the coastal state could employ to ensure compliance with its laws and regulations. Alternatives exist when they are "equally effective" to reach the same end, and "less onerous" of other states' protected rights. Meanwhile, the WTO Appellate Body in *Korea–Various Measures on Beef* considered alternatives to be available when they were capable of achieving the same result and not "unreasonably burdensome" to perform, either financially or technically. Both agreed, however, that the contribution of a measure to the objectives sought is of paramount importance to the availability consideration. In *Korea–Various Measures on Beef,* the Panel asserted that:

> a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account *the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect*. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.[116]

It also took into account the consistency of measures taken against a similar violation as a vital element of availability. Even though Judge Paik's separate opinion suggested an "effectivity" test, the Tribunal in the *M/V Virginia G* case seemed to follow a similar "consistency test" in *Korea–Various Measures on Beef*. [117] The Tribunal noted

113. Harrison, *supra* note 102 at 244.

114. *The M/V Virginia G*, *supra* note 9, Dissenting Opinion of Vice President Hoffman and Judges Marotta Rangel, Chandrasekhara Rao, James L. Kateka, Zhiguo Gao, and Boualem Bouguetaia. at paras. 54–5.

115. *Ibid.*, Separate Opinion of Judge Paik at para. 29.

116. *Korea–Various Measures on Beef*, Appellate Body Report, *supra* note 62 at para. 162 (emphasis added).

117. *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik at para. 36.

that the first two fishing vessels (*Amabal I* and *Amabal II*), which were arrested together with the *Virginia G* for "a violation of similar gravity", were only fined and not confiscated, whereas the other two fishing vessels (*Rimbal I* and *Rimbal II*) were neither arrested nor fined.[118] This inconsistency may indicate that Guinea-Bissau had less intrusive alternatives to either sanction the offence or deter future offences.

Judge Paik and the Panel in *Korea–Various Measures on Beef* also showed different approaches concerning the "impact of a measure" to evaluate the availability of an alternative. Judge Paik's model is more outward-looking in that it requires a careful examination of the impact of a measure on the protected rights of the flag state and other states. The measure taken must therefore not deny the guaranteed flag state's rights for prompt release actions and other states' high seas freedom that are compatible with the EEZ regime. On the other hand, the Panel in *Korea–Various Measures on Beef* is more inward-looking by way of examining the burden borne by the coastal state to carry out a measure. Although the test proposed by Judge Paik did not explicitly mention any consideration of the financial and technical burdens that a coastal state may have, he did devote a section to Guinea-Bissau's economy. He further suggested that Guinea-Bissau's challenges as a developing country in policing its vast EEZ, the severe problem of IUU fishing it faces, and the importance of protecting its EEZ resources, should all be taken into account in assessing the necessity of the enforcement measure taken by Guinea-Bissau.[119]

Although the ordinary meaning of the term "necessary" indicates a spectrum between absolute necessity and reasonable contribution, this paper suggests that necessity within Article 73(1) of UNCLOS does not rise to the level of "necessity" within Article 25 of the ILC Draft Articles on State Responsibility.[120] In other words, the term "necessary" within Article 73(1) is not used to justify an act that otherwise breached the Convention. Employing all the elements of necessity under Article 25 of the ILC Draft Articles on State Responsibility to determine a coastal state's enforcement measures in its EEZ would set a higher bar that goes beyond the meaning of Article 73(1) of UNCLOS. The coastal state is likely to have a broad margin of appreciation because, if the bar were too high, it would hamper the coastal state's conservation and management measures in the EEZ.[121] In the

118. Harrison, *supra* note 102 at 244.

119. *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik at paras. 31–3.

120. The International Law Commission has codified the concept of "state of necessity" in art. 25 of the *ILC Draft Articles on State Responsibility*. A state seeking to invoke the necessity defence must meet several conditions: (1) the state's "essential interest" must have been threatened by a "grave and imminent peril"; (2) the act must be the "only means" to safeguard that essential interest; and (3) the state must not have "contributed to the occurrence of the state of necessity". See *Article 25 of the Draft Articles on the Responsibilities of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 88; *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, *supra* note 88.

121. James HARRISON, "Article 73: Enforcement of Laws and Regulations of the Coastal State" in Alexander PROELSS, ed., *United Nations Convention on the Law of the Sea: A Commentary* (Oxford: Hart Publishing, 2017), at 558.

light of modern technology, options of innovative measures could be wide open as long as the margin of appreciation is preserved.[122]

An analysis of the Tribunal's decision in the *M/V Virginia G* case, including the judges' separate and dissenting opinions, and the WTO Appellate Body's finding in the *Korea–Various Measures on Beef*, presents a possible two-part necessity test to determine whether a non-listed enforcement measure is necessary within the meaning of Article 73(1) of UNCLOS. This test would weigh whether alternative measures exist to render Indonesia's measure of burning or sinking vessels as unnecessary. The first part of the test will examine the contribution of a measure to the objective sought by Indonesia. The second part of the test will take into account the impact of a measure to both Indonesia and other states, including the flag states.

III. APPLYING THE NECESSITY TEST TO INDONESIA'S MEASURES

Even though burning or sinking a vessel is not expressly permitted under Article 73(1) of UNCLOS, it should be permissible if it meets the necessity test. To be necessary within the meaning of Article 73(1) of UNCLOS, Indonesia must demonstrate that other means are unable to ensure compliance with its laws and regulations, and that the impact of the preferred measure is less onerous upon other states' rights and not unreasonably burdensome for itself. If less severe measures are later found to be adequate to achieve the same level of compliance, the measure to burn or sink a vessel may not be necessary any more.

Moreover, Indonesia must show that such a measure is applied on a case-by-case and issue-by-issue basis in the light of the particular circumstances of the case and the gravity of the violation. Accordingly, this part will examine all measures taken by Indonesia against illegal fishing in its EEZ, namely, fines, expropriation, and burning or sinking vessels (vessel destruction). The first part of the necessity test will investigate the contribution of each measure to the objective sought by Indonesia—to ensure compliance with Indonesia's Fisheries Law. The second part of the necessity test will examine the impact of each measure on both Indonesia and other states, including the flag states. Each of the measures will then be examined to determine whether Indonesia's measures to burn or sink foreign vessels are within the scope and meaning of Article 73(1) of UNCLOS.

A. *Fines*

1. *The contribution of the measure to the objective sought*

Fines are a common type of sanction imposed against fisheries violations under Indonesia's Fisheries Law. They are applied in several instances, such as the use of

122. Camille GOODMAN, "Striking the Right Balance? Applying the Jurisprudence of International Tribunals to Coastal State Innovations in International Fisheries Governance" (2017) 84 Marine Policy 293 at 298.

unsustainable fishing practices or fishing gear, fishing without permits, destruction of the marine environment, forgery of fishing permits, absence of port clearance, and unlicensed fisheries research.[123] In most illegal fishing cases occurring after 2014, Indonesian courts charged vessels' captains with fines in a range between IDR1bn (around US$70,000) and IDR6bn (about US$425,000).[124] One might argue that the fines imposed by the courts are relatively low compared to the value of resources fished. However, this amount is more than ten times the amount of those charged in 2006, as captured by the OECD High Seas Task Force.[125] Despite a significant increase in fines, Indonesia still suffers from IUU fishing. Even worse, Indonesia is unable to recover payment of such fines from the offenders due to their inability to pay.

2. *Impact on Indonesia and other states*

The problem of such inability to pay may arise from the fact that the actual owners of IUU fishing vessels are often not exposed, and one must look behind the corporate structure of the IUU fishing vessels to possibly compel payment of such fines or to confiscate assets as deemed necessary. The remaining problem would be how Indonesia could obtain information regarding who provides the capital and planning for IUU fishing activities and take legal action against them. In the *Volga* case, which involved an arrest of a Russian vessel by Australia for illegally fishing in Australia's EEZ,[126] ITLOS refused Australia's request to disclose the owner and ultimate beneficial owners of the vessel as a condition of the vessel's release.[127] This case illustrates one of the difficulties of obtaining information regarding the beneficial owners of the IUU fishing vessels. Even though Indonesian courts have attempted to summon the owners of the IUU fishing vessels, these efforts have proven futile because Indonesia does not have sufficient access to information and resources to find them.[128]

123. See *Law 31/2004 as amended by Law 45/2009*, *supra* note 19, arts. 84, 86, 87, 88, 89, 90, 91, 92, 94, 95, 96, 97, 99; *Law 45/2009*, *supra* note 5, arts. 85, 93, 94A, 98.

124. See Supreme Court Decision No. 1355 K/Pid.Sus/2014 (*Indonesia v. Dao Van Tuan*); Supreme Court Decision No. 131 K/Pid.Sus/2014 (*Indonesia v. Nguyen Phan Sy*); Supreme Court Decision No. 168 K/Pid.Sus/2014 (*Indonesia v. Nguyen Van Be*); Supreme Court Decision No. 170 K/Pid.Sus/2014 (*Indonesia v. Le Van Vuong*); Supreme Court Decision No. 174 K/Pid.Sus/2014 (*Indonesia v. Bui Han Hanh*); Supreme Court Decision No. 618 K/Pid.Sus/2014 (*Indonesia v. Tran Ngoc Quang*); Decision of High Court of Pekanbaru No. 46/Pid.Sus/2016/PT PBR (*Indonesia v. Huynh Duy Phu*); Decision of District Court of Medan No. 2/Pid.Sus.PRK/2016/PN MDN (*Indonesia v. Khin Maung Win*); Decision of High Court of Langsa No. 79/Pid.Sus/2016/PN LGS (*Indonesia v. Montree Sama-Ae*); Decision of High Court of Jayapura No. 70./Pid.Sus-Prk/2015/PT JAP (*Indonesia v. Guo Yunping*); Supreme Court Decision No. 2563 K/Pid.Sus/2015 (*Indonesia v. Chen Xiangqi*); Decision of District Court of Tanjungpinang No. 23/Pid.Sus.Prkn/2015/PN.TPg (*Indonesia v. Dang Ngoc Quy*).

125. See High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas,* Governments of Australia, Canada, Chile, Namibia, New Zealand, and the UK, WWF, IUCN, and the Earth Institute at Columbia University (Bellegarde: Sadag, 2006) at 34.

126. *The Volga Case (Prompt Release) (Russia v. Australia)*, Case No. 11, Order of 23 December 2002, 42 I.L.M. 159 at para. 34.

127. *Ibid*., at paras. 75, 88.

128. Interview with the District Court of Ranai (author's personal communication, 2016).

Under Article 30(2) of Indonesia's Penal Code, in cases where fines are not paid, a "subsidiary punishment" in the form of confinement or jail[129] shall substitute for the fines.[130] However, Article 102 of the Fisheries Law prohibits "imprisonment"[131] for fishing violations occurring in the EEZ unless there is a prior agreement between Indonesia and the other country.[132] The relationship between Article 30(2) of Indonesia's Criminal Code and Article 102 of the Fisheries Law has been the central debate in many of Indonesia's Supreme Court decisions on illegal fishing in the EEZ.

Since Indonesia does not follow the *stare decisis* rule, decisions in prior cases are not binding in future cases. Consequently, there are two different views on the relationship between Article 30(2) of Indonesia's Penal Code and Article 102 of the Fisheries Law. The majority of court opinions found that imprisonment cannot be applied as a secondary punishment for illegal fishing conducted by foreign nationals in the EEZ.[133] On the other hand, the minority opinions held that imprisonment as a substitute for fines does not contradict Article 73(3) of UNCLOS.[134] They asserted that a second-layer punishment in the form of imprisonment should be allowed to give the law some teeth. Without this option, accused persons will go unpunished, and Indonesia would have to seek legal or diplomatic efforts to compel them to pay fines.[135] Even if the accused persons attempt to leave the country, Indonesian immigration will not allow them to leave the country and eventually they will be detained for an indeterminate period which may cost Indonesia a lot more money than to put them in jail for a specified period.[136]

The fact that there are many unpaid fines may explain why there is no uniformity in the courts' decisions. On the one hand, courts are bound to interpret the law by international treaties to which Indonesia is a party. On the other hand, if implemented consistently by Indonesia's treaty obligations, the treaty's provisions may not be effective in providing an appropriate response to fisheries violations in the EEZ.

Even if imprisonment is permissible, some of the Indonesian district courts are located in remote islands and are not equipped with adequate confinement facilities

129. Under Indonesian law, confinement/jail or *pidana kurungan* only lasts for a minimum of one day and maximum of one year but can be extended up to one year and four months. See *Penal Code of Indonesia*, arts. 18(1), 18(3).

130. *Penal Code of Indonesia*, art. 30(2).

131. The exact wording of art. 102 of the *Law 31/2004 (as amended)* is *pidana penjara* or "imprisonment" which, under Indonesia's criminal law, can last for a lifetime. See *Penal Code of Indonesia*, art. 12.

132. *Law 31/2004 as amended by Law 45/2009*, *supra* note 19, art. 102.

133. See Supreme Court Decision No. 471 K/Pid.Sus/2013 (*Indonesia v. Nguyen Van Hai*); Supreme Court Decision No. 168 K/Pid.Sus/2014 (*Indonesia v. Nguyen Van Be*); Supreme Court Decision No. 99 K/Pid.Sus/2014 (*Indonesia v. Duong Van Tien*); Supreme Court Decision No. 170 K/Pid.Sus/2014 (*Indonesia v. Le Van Vuong*); Supreme Court Decision No. 131 K/Pid.Sus/2014 (*Indonesia v. Nguyen Phan Sy*); Supreme Court Decision No. 618 K/Pid.Sus/2014 (*Indonesia v. Tran Ngoc Quang*); Supreme Court Decision No. 1355 K/Pid.Sus/2014 (*Indonesia v. Dao Van Tuan*).

134. The Court used the term "substitute punishment" and "subsidiary punishment" interchangeably. See Supreme Court Decision No. 174 K/Pid.Sus/2014 (*Indonesia v. Bui Han Hanh*) at 11, 12; Supreme Court Decision No. 608 K/Pid.Sus/2013 (*Indonesia v. Tran Van Se*) at 7, 12, 13, 16.

135. Supreme Court Decision No. 174 K/Pid.Sus/2014 (*Indonesia v. Bui Han Hanh*) at 12.

136. *Ibid*., at 13.

—having neither jails nor even minimum immigration detention facilities. The District Court of Ranai in the Islands of Natuna[137] is one example of Indonesia's fisheries courts without such proper confinement facilities. The closest detention facility is in the city of Tanjung Pinang—about 1.5 hours by plane—and in Pontianak on the island of Borneo where there is no direct flight available. This illustrates the financial and technical difficulty that Indonesia may have to face to impose this measure.

B. *Expropriation*

1. *The contribution of the measure to the objective sought*

Under Article 104(2) of the Fisheries Law, objects or tools used in or produced from a fisheries crime can be expropriated.[138] These may include fishing gear, catches, and the vessels used to capture or to transport fish.[139] This expropriation clause is also reiterated in Article 76A of the Fisheries Law, while Article 76C of the Fisheries Law suggests that an auction could follow an expropriation.[140] Though Article 76A signifies that expropriation requires approval from the Head of the District Court,[141] the Supreme Court has clarified that such approval is only required to demolish or auction a vessel before trial.[142] If a trial has commenced, the approval is issued by the Head of the respective District Court or other judges.[143]

If not auctioned,[144] an object or tool of fisheries crime could be delegated to a business group of fishers or a fisheries co-operative.[145] However, donating vessels to a group of small fishers may be ineffective partly because some of them do not have adequate financial capacity to cover the high operational cost of the vessels.[146] Going beyond what the law designates, the vessels have also been given away to selected local governments and educational institutions, but they ended up being unused and eventually broke down.[147]

Indonesia's criminal procedural law also permits "confiscation" when investigation or trial is still underway, depending on the safety and durability of the objects or tools, or financial considerations to store them safely.[148] If a vessel is sold in a public auction

137. The Natuna Islands consist of about 272 islands that are located in the South China Sea, off the northwest coast of Borneo. Natuna is bordering Vietnam and Cambodia in the north, Singapore in the west, and Malaysia in the east. See "Natuna Archipelago", online: Indonesia Tourism <http://www.indonesia-tourism.com/riau-archipelago/natuna.html>.

138. *Law 31/2004 as amended by Law 45/2009*, *supra* note 19, art. 104(2).

139. *Ibid*., commentary, art. 104(2).

140. *Law 45/2009*, *supra* note 5, arts. 76A, 76C(1).

141. *Ibid*., art. 76A.

142. *Supreme Court's Directive No. 1 of* 2015 on the evidence in the form of vessel in fisheries cases [*Supreme Court's Directive 1/2015*], at para. b.

143. *Ibid*., at para. c.

144. *Law 45/2009*, *supra* note 5, art. 76C(1).

145. *Ibid*., art. 76C(5).

146. Interview with the MMAF Civil Servant Investigator of Ranai (author's personal communication, 2016).

147. Interview with the MMAF Civil Servant Investigator of Bitung (author's personal communication, 2017).

148. *Law No. 8 of 1981 on the Code of Criminal Procedures*, art. 45(1).

during a trial, the revenue from the auction is held by the court as evidence,[149] pending a final court order. In practice, if the accused is found innocent, the revenue will be returned to him. In contrast, if the court finds the accused to be guilty, the revenue will be expropriated for the state.

This measure, however, results in little deterrence because it opens the possibility for a vessel to find its way back to sea or, worse, to the same owner or other IUU fishing operators. The price for an auctioned vessel is generally less than the market price, ranging from IDR8m (about US$550) to IDR48m (about US$3,400).[150] The owner of the vessel—who is not necessarily the accused vessel captain—often buys back the vessel through an agent.[151] Thus, sometimes the same vessel would get caught again for the same violation.[152] In short, this measure will be less likely to affect the owners of the IUU vessels who remain anonymous and untouchable.

For this reason, Indonesia's Minister of Marine Affairs and Fisheries has strongly urged the fisheries courts not to allow illegal fishing vessels to be auctioned.[153] Even though this statement may seem to interfere with judicial independence, it points out the Ministry's preferred measure, which favours vessel destruction over other measures. In some cases, courts have used the public policy argument to justify their decisions. In the *Huynh Duy Phu* case, the High Court of Pekanbaru stated that to support the government programme and in the light of an alarming rate of "fish theft" in Indonesia's EEZ, all evidence—including vessels—must be expropriated for demolition.[154] In the *Guo Yunping* case, the High Court of Jayapura also took the position that all stakeholders, including the courts, must actively take a role to deter "fish theft" in Indonesia's EEZ.[155]

2. *Impact on Indonesia and other states*

In the EEZ, other states enjoy the right to high-seas freedom as referred to in Article 87 of UNCLOS as long as it is compatible with the EEZ regime under Part V.[156] Where there is incompatibility or conflict, the EEZ provisions will prevail.[157] Freedoms other than those exclusively reserved for the coastal state are still available

149. *Ibid*., art. 45(2).

150. In *Dao Van Tuan* and in *Nguyen Van Be*, the vessels were sold at auction for IDR 8.910.000 (approximately US$650) and IDR 48m (approximately US$3,400), respectively. See Supreme Court Decision No. 1355 K/Pid.Sus/2014 (*Indonesia v. Dao Van Tuan*) and Supreme Court Decision No. 168 K/Pid.Sus/2014 (*Indonesia v. Nguyen Van Be*).

151. Interview with the District Court of Ranai, *supra* note 128.

152. In *Dao Van Tuan*, the Supreme Court considered Tuan's prior and prolonged acts of illegal fishing. The Court specifically stated that Tuan had been illegally fishing in Indonesia's EEZ for "a long period" and "dozens of times". See Supreme Court Decision No. 1355 K/Pid.Sus/2014 (*Indonesia v. Dao Van Tuan*) at 14.

153. "Menteri Susi Kecewa Kapal Asing yang Disita Malah Dilelang" *CNN Indonesia*, (5 January 2015), online: CNN Indonesia <http://www.cnnindonesia.com/ekonomi/20150105163430-92-22497/menteri-susi-kecewa-kapal-asing-yang-disita-malah-dilelang/>.

154. Decision of High Court of Pekanbaru No. 46/Pid.Sus/2016/PT PBR (*Indonesia v. Huynh Duy Phu*).

155. Decision of High Court of Jayapura No. 70./Pid.Sus-Prk/2015/PT JAP (*Indonesia v. Guo Yunping*).

156. *UNCLOS*, *supra* note 7, arts. 58(1), (2).

157. *Ibid*., art. 58(2).

for other states, such as rights to navigation and other non-economic uses of the EEZ. In addition to a guarantee of exemption from imprisonment or any form of corporal punishment, other states also have the avenue to request the prompt release of their vessel and crew.[158]

The prompt release of vessel or crew is a guaranteed right that strikes a balance between the interests of the coastal state in carrying out its measures against those of the flag state in preventing excessive measures by the coastal state.[159] Article 292 of UNCLOS lists certain conditions for other states to invoke prompt release actions.[160] In the event of an arrest or detention of foreign vessel, a combined reading of Articles 73(2), 73(4), and 292 of UNCLOS shows that there is a condition for both coastal and flag states to act promptly. First, the coastal state shall promptly notify the flag state of the action taken and of any penalties that may be imposed to the flag state's vessel and crew.[161] After being notified, the flag state must promptly apply for a release within ten days from the time of the detention.[162] Upon the posting of a reasonable bond by the flag state, the coastal state shall promptly release the detained vessels and crew.[163]

To this day, ITLOS has decided nine prompt release requests. Some cases may even provide some hints on the application of an unlisted enforcement measure. In the *Grand Prince* case,[164] the *Juno Trader* case,[165] and the *Tomimaru* case,[166] the detaining states asserted that confiscation of a vessel renders an application for its release without object. In *Tomimaru,* the Tribunal held that, even though the confiscation of vessels is not expressly permitted in UNCLOS, it must not upset the balance of the interests of the flag state and the coastal state.[167] The Tribunal went on to say that:

> [a] decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. Such a decision should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag state from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law.[168]

158. *Ibid*., art. 73(3).
159. See Heiki LINDPERE, "Prompt Release of Detained Foreign Vessels and Crews in Matters of Marine Environment Protection" (2005) 33 International Journal of Legal Information 240 at 240–1.
160. *UNCLOS*, *supra* note 7, art. 292(1).
161. *Ibid*., art. 73(4).
162. *Ibid*., art. 292(1).
163. *Ibid*., art. 73(2).
164. *The Grand Prince Case (Prompt Release) (Belize v. France)*, Case No. 8, Judgment of 20 April 2001 at para. 61.
165. *The Juno Trader Case*, *supra* note 94 at paras. 52, 53, 58.
166. *The Tomimaru Case (Prompt Release) (Japan v. Russia)*, Case No. 15, Judgment of 6 August 2007 [*The Tomimaru Case*] at para. 59.
167. *Ibid*., at paras. 72, 75.
168. *Ibid*., at para. 76. Similarly, in the *Juno Trader* case, the Tribunal also recognized that humanity and due process of law considerations are pivotal in exercising the duty of prompt release. See *The Juno Trader Case*, *supra* note 94 at para. 77.

The Tribunal further found that, while a decision is still under review by the domestic court of the detaining state, the Tribunal is still competent to consider the application to release a vessel or crew.[169] Consequently, until the decision is final and binding, the flag state still preserves the right to request a release of its vessel or crew upon the posting of a bond, and the coastal state still bears an obligation to release them promptly. Arguably, even when a decision is already final and binding, a flag state may still be able to bring a claim of release on the ground of inconsistency with international standards of due process of law and obstruction of possible recourse to national or international remedies.[170] Despite the absence of a requirement of exhaustion of local remedies,[171] by not acting promptly once being notified of any action taken to its vessel and crew, the flag state faces the risk of measures that could render its prompt release application without object.[172] In conclusion, even though coastal states may determine other necessary measures that are not explicitly referred to in Article 73 (1) of UNCLOS, such measures should be carried out when its duty of prompt release is no longer incumbent upon them or in a manner that does not interfere with the flag state's right to release its vessel and crew upon the posting of a bond.

Indonesia's fisheries law has incorporated the system of prompt release of a vessel or crew who commits a fisheries crime in Indonesia's fisheries management zone. Any proposal to release a vessel or crew must be submitted at any time before a court's decision.[173] The court will decide the amount of the "reasonable bond" that the parties must post to release the detained vessel or crew,[174] which may vary based on the value of the vessel, its equipment, catches, and the maximum applicable fine.[175]

Despite the guaranteed right to prompt release action under Indonesian law, the reason that most accused persons have not utilized this avenue might be because, once the accused persons and their vessels are detained, the actual owners of the vessels will abandon the vessels and their crew.[176] In other words, Indonesia's obligation to promptly release detained vessels and crew is contingent on the accused or its flag state to post a bond or other financial security promptly. By not posting such a bond, the flag state waives its right to request a release of the vessels and crew.

Even though the purpose of a bond or other security for a release is only as a guarantee of any penalties that may be imposed by the coastal state, one might argue that the bond required as a condition for a release should be significantly heavy to provide adequate deterrence against IUU fishing. The case of *Camuoco* illustrates that full compliance with the UNCLOS prompt release provision does not necessarily deter IUU fishing. *Camuoco* was a vessel flying the flag of Panama that was arrested by

169. *The Tomimaru Case*, *supra* note 166 at para. 78.
170. *Ibid.*, at para. 79.
171. See *The Camuoco Case (No. 5) (Panama v. France)*, Case No. 5, Order of 7 February 2000, 39 I.L.M. 666 [*The Camuoco Case*] at para. 57.
172. Bernard H. OXMAN, "*The 'Tomimaru' (Japan v. Russian Federation)*. Judgment. ITLOS Case No. 15" (2008) 102 American Journal of International Law 316 at 321.
173. *Law 31/2004 as amended by Law 45/2009*, *supra* note 19, art. 104(1).
174. *Ibid.*
175. *Ibid.*, commentary, art. 104(1).
176. Interview with the District Court of Ranai, *supra* note 128.

France in 1999 for illegally fishing in the French EEZ around the Crozet Islands.[177] ITLOS granted Panama's request for a prompt release after posting a reasonable bond of 8m French francs (about €1.2m).[178] However, after its release, *Camuoco* was back at sea and fishing under a new flag of Uruguay, with a new name of *Arvisa I* but operating under the name *Eternal*.[179] In 2002, the French authorities eventually arrested *Arvisa I* for illegal fishing in the French EEZ around Kerguelen Island.

All in all, even if a bond is posted, it will not necessarily guarantee that the vessel will refrain from continuing its IUU fishing activity. This would provoke a question as to whether these circumstances could preclude Indonesia's duty of prompt release on bond. Necessity within this spectrum is beyond the scope of "necessary" within Article 73(1) of UNCLOS. To justify non-compliance with an international obligation to release a vessel or crew upon the posting of a bond, Indonesia would have to demonstrate that it meets a much stricter standard of necessity under Article 25 of the ILC Draft Articles on State Responsibility.[180]

C. *Burning or Sinking Vessels*

1. *The contribution of the measure to the objective sought*

Article 69 of Indonesia's Fisheries Law authorizes Indonesia's patrol vessels to stop, inspect, bring, and detain any vessel suspected of conducting a "fisheries crime" in Indonesia's fisheries management zone.[181] It also grants them the power to take "special measures" by burning or sinking foreign fishing vessels based on "sufficient preliminary evidence".[182] The phrase "sufficient preliminary evidence" is defined as any preliminary evidence to suspect a fisheries crime by foreign vessel,[183] which can include a vessel that is caught red-handed fishing or transporting fish in Indonesia's fisheries zone without the required permits.[184] The commentary to Article 69 further explains that Indonesia cannot burn or sink a foreign vessel unless such vessel is "plainly committing a fisheries crime" even though it opens another question as to what standards used to determine whether a vessel is "plainly committing a fisheries crime".[185]

Based on the wording of Article 69, these so-called "special measures" are specifically intended for foreign vessels, not domestic vessels. Even though the law explicitly discriminates foreign vessels, in practice, Indonesian vessels are not exempted.[186]

177. *The Camuoco Case*, *supra* note 171 at para. 29.
178. *Ibid*., at para. 78.
179. High Seas Task Force, *supra* note 125 at 33.
180. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 3 August 2001, UN Doc. A/56/10 (2001), art. 25.
181. *Law 45/2009*, *supra* note 5, art. 69(3).
182. *Ibid*., art. 69(4).
183. *Ibid*., commentary, art. 69(4).
184. *Ibid*.
185. *Ibid*.
186. See Supreme Court Decision No. 2563 K/Pid.Sus/2015 (*Indonesia v. Chen Xiangqi*).

Article 69 also does not specify what it considers as a fisheries crime worthy of burning or sinking. It can be implied that Article 69 may apply to all crimes under the Fisheries Law.

Even though Indonesia has several maritime law enforcement authorities, including a coast guard established in 2014,[187] only the Navy and MMAF Civil Servant Investigator [MMAF Investigator] possess the power to investigate a fisheries crime occurring in Indonesia's EEZ.[188] Therefore, in the context of enforcement measures in the EEZ, the terms "patrol vessels" within Article 69 refer to vessels operated by the Navy and MMAF Investigator. The Supreme Court underlined that the court has no authority to approve the implementation of Article 69, which suggests that Article 69's special measures may fall within the discretion of the Navy and MMAF Investigator.[189] Earlier in 2014, MMAF had issued a technical directive for its investigators to implement Article 69's special measures. The Navy may not necessarily follow this Directive; thus, different practices may occur.

The MMAF Directive indicates that the initial instruction for the "special measures" was "deliberate" and "direct" destruction of vessels at sea based on safety considerations. It prescribes subjective and objective requirements to implement such extraordinary measures. The subjective requirements can be met:

(a) if a vessel's Captain or crew resist or engage in manoeuvres that could endanger a patrol vessel;
(b) if weather conditions make it impossible to bring the vessel to port; *or*
(c) if the foreign vessel is so severely damaged that it could endanger the life of the accused and the patrol vessel.[190]

On the other hand, the objective requirements consist of cumulative *and/or* alternative requirements.[191] The cumulative requirements are met if a vessel:

(a) has no valid permit,
(b) manifestly carries out illegal fishing or illegal transporting of fish in Indonesia's fisheries management zone, and
(c) is a foreign vessel with all foreign nationals' crew.[192]

187. *Presidential Regulation No. 178 of 2014 on Maritime Security Agency*. The current coast guard [Maritime Security Agency] is a modification from a previous institution of a similar function called Maritime Security Coordination Agency which was established in 2005. See *Presidential Regulation No. 81 of 2005 on Maritime Security Coordination Agency*. Nevertheless, the Indonesian coast guard is only authorized to conduct hot pursuit, stopping, inspecting, arresting, bringing, and delivering a vessel to the relevant authority which has the power to conduct further maritime law enforcement. See *Presidential Regulation No. 178 of 2014 on Maritime Security Agency*, art. 4, para. 1.

188. *Law 45/2009*, *supra* note 5, art. 73(2).

189. *Supreme Court's Directive 1/2015* at para. a.

190. *Regulation of the Director General of Surveillance for Marine and Fisheries Resources No. 11/Per-DJDSDKP/2014 on the Technical Guidance in Enforcing Special Measure to Foreign Fishing Vessel* [*Director's Regulation 11/2014*], art. 7.

191. *Ibid.*, art. 8(1).

192. *Ibid.*, art. 8(2).

In addition or alternative to cumulative requirements, the foreign vessel must have no high economic value, and/or is impossible to be brought to the nearest port because:

(a) it endangers the safety of navigation or quarantine purposes;
(b) it carries communicable disease or hazardous substance;
(c) the number of the vessel caught is impossible to be brought to the nearest port; *and/or*
(d) the high cost to pull or to bring the vessel.[193]

For the MMAF Investigator, the approval to burn or sink a foreign vessel lies in the hands of the MMAF Director General of Surveillance for Marine and Fisheries Resources.[194] To obtain such approval, the MMAF patrol vessel must give a verbal or written report[195] stating (1) the name of the vessel, (2) the vessel's location and co-ordinates, (3) the vessel's origin and nationality, (4) the nationality of the crew, (5) the alleged violation, and (6) the evidence.[196] After gaining approval, but before sinking the fishing vessel, the patrol vessel must warn the fishing vessel's crew:

(a) to abandon the vessel,
(b) to save all the crew,
(c) to make efforts to remove the vessel's flag,
(d) to document the action, *and*
(e) to take note in the logbook of the position where the vessel is burnt or sunk.[197]

During the discharge, another safety consideration is also ensured. The patrol vessel must determine a safe range for a shot by taking into account the wind, current, and any safety considerations; use explosives; and/or direct the shot towards the engine room to ensure a quick result.[198] It implies that means other than explosives are permissible, as MMAF has done some evaluations to require prior environmental impact assessment and to avoid the use of explosives in order to minimize environmental harm.[199]

Despite these extensive requirements on the burning or sinking of a vessel, recent practices have significantly deviated from the initial directions. This paper observes that the implementation of Article 69 has seen a declining trend as patrol vessels have avoided direct destruction at sea and resorted to judicial recourse as the basis of the measure. In other words, the Navy and MMAF Investigator have opted for Article 76A, which provides a legal basis for the destruction of an object or tool of

193. *Ibid.*, art. 8(3).
194. *Ibid.*
195. *Ibid.*, art. 9(2).
196. *Ibid.*, art. 9(1).
197. *Ibid.*, art. 10.
198. *Ibid.*, art. 11.
199. Interview with the MMAF Civil Servant Investigator of Ranai, *supra* note 146.

fisheries crimes, including vessels.[200] Some cases have mentioned Article 69, but judges treated its application very loosely as a matter of fact, without reviewing the legality on a case-by-case basis. The courts seem to assert a pre-judgment sinking to be legal so long as there was proof of correspondence between the patrol vessel authorities and the Head of a relevant District Court to approve such measures.[201]

The application of Article 69 is often confused with Article 76A. Even though Article 76A uses a more general term of "destroy", its implementation usually involves the act of burning or sinking. Similarly, measures under Article 69 and 76A are generally carried out before a final and binding court decision. Contrary to the popular opinion, however, Indonesia's more recent practices may not invoke either Article 69 or Article 76A, but rather a higher standard by resorting to a final and binding court decision.[202] Regardless, the technicalities of vessel destruction, based either on Article 76A or a final and binding decision, are inspired by Article 69, which is by burning or sinking.

The number of foreign vessels in Indonesian waters has dropped significantly from 1,128 units in the early 2014 to 164 units by the end of 2014.[203] A report based on an analysis of the automatic identification system [AIS] data indicated that there had been a decline of foreign fishing vessels' activities in Indonesian waters by more than ninety percent since 2014, with most of the decline from China, Thailand, Taiwan, and South Korea.[204] Even though the moratorium of foreign and ex-foreign vessels issued by MMAF may have contributed to the decline, one might argue that vessel destruction is not the "only means" available to effectively deter IUU fishing in Indonesia's EEZ. However, the two measures are different: vessels moratorium is an executive policy targeted at all foreign and ex-foreign vessels, whereas burning or sinking a vessel is an enforcement measure against a particular vessel for a specific offence. Interpretation of Article 73(1) of UNCLOS entails a condition that the measure taken should be the only "enforcement measure" capable of ensuring compliance to a coastal state's laws and regulations.

2. *Impact on Indonesia and other states*

Even though Indonesia has a margin of appreciation to determine its preferred measures against infringement to its laws and regulations in the EEZ, Indonesia must not employ any measure that would hinder the flag state's right to release its vessel or

200. *Law 45/2009*, *supra* note 5, art. 76A.

201. Decision of District Court of Medan No. 2/Pid.Sus.PRK/2016/PN MDN (*Indonesia v. Khin Maung Win*).

202. "Hari Kemerdekaan, Pemerintah Tenggelamkan 125 Kapal Pelaku Illegal Fishing", *supra* note 35; "Lanal Ranai Laksanakan Penenggelaman Kapal Ikan Asing Pelaku Tindak Pidana Illegal Fishing di Perairan Natuna" (22 August 2018), online: KoArmada I <https://koarmada1.tnial.mil.id/BERITA/Beritamiliter/tabid/71/articleType/ArticleView/articleId/8506/Default.aspx>.

203. "Susi Gets Angry Over Illegal Fishing Vessel Auction–Rakyat Merdeka" (6 January 2015) online: Atlas Information Monitors <http://aim-services.co.id/susi-angry-illegal-fishing-vessel-auction-rakyat-merdeka/>.

204. Reniel B. CABRAL et al., "Rapid and Lasting Gains from Solving Illegal Fishing" (2018) 2 Nature Ecology and Evolution 650 at 653.

crew upon the posting of a bond. As ITLOS has confirmed in the *Tomimaru* case, as long as the domestic court has not reached its final judgment on the merits, the flag state may request a release.[205] Thus, the execution of a decision to burn or sink a vessel must wait until the decision is no longer under appeal. If the flag state has not submitted an appeal or petitioned for review within the time limit provided for under Indonesian law, the decision is then final and binding, and the vessel can be expropriated for further measures, including destruction by burning or sinking.

Sinking or burning a vessel before investigation or even with a court's approval is still problematic to some extent. In a case where a vessel is auctioned off while the trial is still in progress, and the court later decides that the accused is not guilty, the accused will receive monetary compensation for the vessel in the amount corresponding to the auction. However, if the vessel is burned or sunk before the investigation or during the judicial proceedings, the remedy for the accused if he is later found innocent will be questionable. Moreover, the accused is also at risk of lodging a prompt release application without objection.

Even though burning or sinking a vessel is currently the only effective means to deter IUU fishing, it should only be necessary where it has less severe impact on other states and the coastal state. As the world's largest archipelago,[206] Indonesia shares maritime boundaries with ten countries. Most of Indonesia's territorial sea boundaries have been settled and ratified in national legislation, such as some parts of the territorial sea boundaries between Indonesia and Malaysia,[207] and between Indonesia and Singapore,[208] as well as between Indonesia and Papua New Guinea.[209] Contrary to territorial sea boundaries, most of Indonesia's EEZ boundaries are unresolved. The only settled EEZ boundaries are between Indonesia and Papua New Guinea,[210]

205. *The Tomimaru Case*, *supra* note 166 at para. 78.

206. Even though Indonesia submitted 13,466 names of its islands at the 10th United Nations Conference on the Standardization of Geographical Names, and an additional 875 islands in 2017, it has claimed that the total number of its islands is 17,504 islands, pending official names to be submitted to the United Nations. See E/*Conf.101/119 on the National Report of the Republic of Indonesia*, submitted by Indonesia, 30 May 2012; E/*Conf.105/86/Crp.86 on the Report of the Government of the Republic of Indonesia*, submitted by Indonesia, 23 June 2017; *E/Conf.105/115/Crp.115 on the Identification of Islands and Standardization of Their Names*, submitted by Indonesia, 30 June 2017.

207. See *Treaty Relating to the Delimitation of the Territorial Seas of the Two Countries in the Straits of Malacca, Indonesia-Malaysia*, 17 March 1970, online: <https://treaty.kemlu.go.id/apisearch/pdf?filename=MYS-1970-0010.pdf>.

208. See *Treaty Relating to the Territorial Seas of the Two Countries in the Strait of Singapore, Indonesia-Singapore*, 25 May 1973, online: <https://treaty.kemlu.go.id/apisearch/pdf?filename=SGP-1973-0007.pdf>; *Treaty Relating to the Delimitation of the Territorial Seas of the Two Countries in the Western Part of the Strait of Singapore, Indonesia-Singapore*, 10 March 2009, online: <https://treaty.kemlu.go.id/apisearch/pdf?filename=SGP-2009-0035.pdf>; and *Treaty relating to the Delimitation of the Territorial Seas in the Eastern part of the Strait of Singapore, Indonesia-Singapore*, 3 September 2014, online: <https://treaty.kemlu.go.id/apisearch/pdf?filename=SGP-2014-0047.pdf>.

209. See *Agreement Concerning Certain Boundaries Between Indonesia and Papua New Guinea, Indonesia-Australia*, 12 February 1973, online: <https://treaty.kemlu.go.id/apisearch/pdf?filename=AUS-1973-0010.pdf>.

210. *Agreement Concerning Maritime Boundaries Between the Republic of Indonesia and Papua New Guinea and Cooperation on Related Matters, Indonesia-Papua New Guinea*, 13 December 1980, <http://treaty.kemlu.go.id/apisearch/pdf?filename=PNG-1980-0003.pdf>, art. 4.

and Indonesia and Australia,[211] as well as between Indonesia and the Philippines,[212] in 1980, 1997, and 2014, respectively. It should be noted that the 1997 boundary agreement between Indonesia and Australia has not entered into force and is currently being reviewed. From this vantage point, a potential clash against Indonesia's enforcement measures in its undelimited EEZs is very likely.

The absence of a precise EEZ boundary between Indonesia and Vietnam, for example, has generated several tensions. Indonesia and Vietnam concluded their continental shelf boundary in 2003,[213] but they have not reached an agreement on the EEZ because they agreed not to use a single boundary line. In 2017, the Vietnamese Coast Guard intercepted an Indonesian patrol vessel while it arrested five Vietnamese fishing boats in waters near the Natuna Islands.[214] A similar incident occurred in 2019, when two Vietnam Fisheries Resources Surveillance [VFRS] patrol vessels interrupted the Indonesian Navy's efforts to capture four Vietnamese fishing boats, which were claimed to be illegally fishing in Indonesian waters, in the northern part of the Natuna Islands.[215] To date, Indonesia still maintains its position to arrest and prosecute Vietnamese fishing boats, despite the ongoing delimitation talks.

Of all unresolved EEZ boundaries with six neighbouring states, Indonesia has an agreement only with Malaysia on common guidelines on the treatment of fishers in all areas of their pending maritime boundaries.[216] In the event of an encroachment incident involving their fishing boats, they agree to limit their maritime law enforcement activities to "inspection and request to leave", except for those fishing boats using illegal fishing gear, such as explosives, electrical, and chemical fishing gear.[217] In practice, an Indonesian court would take into account such an arrangement when deciding a case involving a Malaysian fishing boat, but it would still impose fines and sink the boat for the use of unlawful fishing gear—which is exempted from the guidelines.[218]

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211. *Treaty Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, Indonesia-Australia*, 14 March 1997.

212. *Agreement Concerning the Delimitation of the Exclusive Economic Zone Boundary, Indonesia-Philippines*, 23 May 2014.

213. *Agreement Concerning the Delimitation of the Continental Shelf Boundary, Indonesia-Vietnam*, 26 June 2003, online: <http://treaty.kemlu.go.id/apisearch/pdf?filename=VNM-2003-0021.pdf>.

214. "Vietnamese Coast Guard Prevented Indonesia from Arresting Poachers" *The Straits Times* (23 May 2017), online: The Straits Times <https://www.straitstimes.com/asia/se-asia/vietnamese-coast-guard-prevented-indonesia-from-arresting-poachers>.

215. See Arya DIPA and Agnes ANYA, "Indonesia Slams Vietnam for Disrupting Arrests" *The Jakarta Post* (27 February 2019), online: The Jakarta Post <https://www.thejakartapost.com/seasia/2019/02/27/ri-slams-vietnam-for-disrupting-arrests.html>; Aloysius UNDITU, "Sinking Captured Fishing Boats is Deterrent, Not Retaliation, Indonesia Says After South China Sea Clash with Vietnam" *South China Morning Post* (2 May 2019), online: South China Morning Post <https://www.scmp.com/news/asia/southeast-asia/article/3008485/sinking-captured-fishing-boats-deterrent-not-retaliation>.

216. *Memorandum of Understanding in Respect of the Common Guidelines Concerning Treatment of Fishermen by Maritime Law Enforcement Agencies of Malaysia and the Republic of Indonesia, Indonesia-Malaysia*, 27 January 2012, online: <http://treaty.kemlu.go.id/apisearch/pdf?filename=MYS-2011-0127.pdf>, art. 5.

217. *Ibid*., art. 3.

218. See Decision of District Court of Medan No. 2/Pid.Sus.PRK/2016/PN MDN (*Indonesia v. Khin Maung Win*) at 18; *Directive of the Head of Coordinating Body of Maritime Security No.1/Ketua/*

Given its strong political will to take active measures to eliminate IUU fishing, resolving its undelimited EEZ boundaries should be a pressing priority for Indonesia. Without rigid EEZ boundaries, Indonesia and its neighbours cannot know for sure the extent of their respective EEZs, and thereby cannot enforce laws and regulations based on a clear jurisdictional area. In other words, unresolved boundaries would hinder enforcement of Indonesia's laws and regulations. Excessive enforcement actions in undelimited areas may also disrupt the negotiation process between Indonesia and its counterparts in reaching a final delimitation line.

The extent to which Indonesia could employ enforcement measures in its undelimited EEZs is therefore limited by Article 74(3) of UNCLOS, which obliges states to enter into provisional arrangements of a practical nature and to not jeopardize or hamper the reaching of the final delimitation agreement.[219] In practice, there are several varieties of provisional arrangements, such as mutually agreed moratoriums on all activities in overlapping areas, joint development or co-operation on fisheries, agreements on environmental co-operation, and agreements on the allocation of criminal and civil jurisdiction.[220] The phrase "not to jeopardize or hamper the reaching of the final agreement" within Article 74(3) does not mean that the states concerned are entirely barred from conducting any activity in the disputed area. Some activities are permissible so long as they would not have the effect of prejudicing the final agreement, as confirmed by the Arbitral Tribunal in the *Guyana v. Suriname* case.[221] The Arbitral Tribunal established that activities that are prejudicial to the reaching of a final delimitation are those "unilateral acts that cause a physical change to the marine environment".[222] However, the ITLOS Special Chamber in the *Ghana v. Côte d'Ivoire* case had declined to grant provisional measures which required Ghana to cease its ongoing unilateral drilling in an area in dispute with Côte d'Ivoire because the Special Chamber considered that a halt would cause financial loss to Ghana and damage to the marine environment.[223] This finding was despite the fact that the Special Chamber found that there is a risk that Ghana's unilateral activities would significantly and permanently modify the physical characteristics of the disputed areas.[224] The Special Chamber also did not spell out how the suspension of drilling activities, particularly from deterioration of equipment, would result in danger to the marine environment.[225] This case has, unfortunately, given greater

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Bakorkamla/II/2013 on the Technical Guidance on the Treatment of Fishers by Maritime Law Enforcement Agencies of Indonesia in Unresolved Maritime Boundaries of Indonesia-Malaysia.

219. *UNCLOS*, *supra* note 7, art. 74(3).

220. Tara DAVENPORT, "Southeast Asian Approaches to Maritime Boundaries" (2014) 4 Asian Journal of International Law 309 at 333.

221. *Guyana v. Suriname*, Award of 17 September 2007, PCA Case No. 2004-04 [*Guyana v. Suriname*] at para. 465.

222. *Ibid.*, at para. 480.

223. *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (No. 23) (Ghana v. Côte d'Ivoire)*, Case No. 23, Provisional Measures Order of 25 April 2015 at para. 99.

224. *Ibid.*, at para. 89.

225. Yoshifumi TANAKA, "Article 74: Delimitation of the Exclusive Economic Zone Between States with Opposite or Adjacent Coasts" in Proelss, *supra* note 121 at 581.

discretion for states to carry out unilateral activities in an undelimited maritime area.[226]

In *Guyana v. Suriname,* Guyana also asserted that Suriname's actions of sending its navy and air force to expel Guyana's oilrig and drillship from a disputed maritime area were not law enforcement activities.[227] Suriname responded that its measures were "reasonable and proportionate law enforcement measures to preclude unauthorised drilling in a disputed area".[228] The Arbitral Tribunal accepted that force may be used in law enforcement activities provided that it is unavoidable, reasonable, and necessary.[229] It found that Surinamese actions were closer to a threat of military action than a law enforcement activity; thus it declared such actions as a threat of use of force.[230] The findings in *Guyana v. Suriname* signal that an exercise of law enforcement activity in a disputed area may be permissible so long as it does not amount to military action and only if it is unavoidable, reasonable, and necessary. The distinction between "law enforcement activity" and "military activity" is therefore crucial in understanding whether a coastal state could apply its measures in a disputed EEZ, either against vessels flying the flag of the other party to the unsolved EEZ or other foreign flag vessels. However, an enforcement action against third party states' vessels should not be an issue, as the sovereign rights over the undelimited EEZ are exclusive for the disputing parties.[231]

Law enforcement activity is always linked to states' ability to prescribe laws and regulations, as it is the underlying basis for exercising enforcement jurisdiction. It is lawful when it rests on a well-founded jurisdictional basis under international law.[232] In unresolved boundaries, past cases have seen states referring to naval patrols and enforcement activities as proofs of effective control, as well as a basis for compensation claims against forcible expulsion of their licensed vessels in an area in dispute.[233] It may indicate that, despite questionable jurisdiction due to unresolved boundaries, it is a common state practice to undertake law enforcement activities in disputed areas. Kwast has cautioned, however, that there is a fine line between "law enforcement" and "use of force" in that context.[234] She suggests using three criteria to distinguish them: the functional objective of the action, the status of the subjected vessel, and the location of the incident.[235]

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226. Millicent MCCREATH and Zoe SCANLON, "The Dispute Concerning the Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire: Implications for the Law of the Sea" (2019) 50 Ocean Development and International Law 1 at 15.
227. *Guyana v Suriname*, *supra* note 221 at paras. 202, 274.
228. *Ibid.*, at para. 441.
229. *Ibid.*, at para. 445.
230. *Ibid.*
231. Irini PAPANICOLOPULU, *Enforcement Action in Contested Waters: The Legal Regime*, online: International Hydrographic Organization <https://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf6/S7P2-P.pdf>.
232. Patricia Jimenez KWAST, "Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award" (2008) 13 Journal of Conflict and Security Law 49 at 55, 86.
233. *Ibid.*, at 70.
234. *Ibid.*, at 89.
235. *Ibid.*, at 49.

In the light of Indonesia's intensified efforts against IUU fishing, as well as the existence of an adjacent South China Sea dispute which might have a spill-over effect, Indonesia must make every effort to enter into any conflict-management type of provisional arrangement with the states concerned until they reach an agreement on a delimitation line. In the absence of such arrangements, Indonesia and the other party to the undelimited EEZ should refrain from doing anything that may spark any conflict or hamper the reaching of a final agreement, including fishing or arresting each other's fishers in the overlapping area. Indonesia must carefully evaluate its choice of measures in its unresolved EEZs to avoid those that could give rise to military activities akin to the use of force.

In practice, states have protested arrests of fishers for alleged fishing in disputed zones.[236] Burning or sinking vessels of another party of the contested zone for fishing without permits will likely cause contention by the other party, given that the rights to issue fishing permits are pertinent to the sovereign rights over the EEZ in dispute. Thus, in an undelimited EEZ, measures to burn or sink vessels of the other party are only necessary within the spectrum of indispensable or absolute necessity. The practice of unsustainable fishing practices could be an example of when such measures may be applied in good faith, as they may cause a physical change to the marine environment of the unresolved EEZ, which could be prejudicial to the final settlement of the boundary. This practice has been a reality between Indonesia and Malaysia, where they have agreed to arrest fishing vessels of the other party only when such vessels employ unlawful fishing gear. A mere act of fishing would only warrant an expulsion from the unresolved area, not an arrest or further enforcement measures, such as burning or sinking vessels.

In an ideal world, coastal states patrol their EEZ while flag states exercise control over their vessels. In reality, many coastal states face significant challenges to ensure compliance with their laws and regulations mainly because they lack the resources to cover a vast 200nm of EEZ throughout their coastline. Therefore, the role of flag states is also crucial to ensure that their vessels and crew conform to the coastal states' laws and regulations.

Flag states have a due diligence obligation to ensure that their vessels comply with the coastal state's laws and regulations. In the ITLOS Advisory Opinion on IUU Fishing, the Tribunal held that flag states should apply sanctions "sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities".[237] The Tribunal further held that the action taken by the flag states in this regard is without prejudice to the rights of the coastal state to take measures

236. See Khanh LYNH, "Vietnam Opposes Indonesia's Use of Force on Fishers" *VN Express International* (2 May 2019), online: VN Express International <https://e.vnexpress.net/news/news/vietnam-opposes-indonesia-s-use-of-force-on-fishers-3917475.html>; "China Detains Vietnamese Fishermen in Disputed Water" *Reuters* (22 March 2012), online: Reuters <https://www.reuters.com/article/china-vietnam/china-detains-vietnamese-fishermen-in-disputed-water-idUSL3E8EM3YJ20120322>.

237. *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, ITLOS Case No. 21, 2 April 2015, at para. 138.

under Article 73 of UNCLOS.[238] Accordingly, along with sinking/burning IUU fishing vessels, Indonesia may also bring actions against flag states, not for the IUU fishing activities per se, but for their failure to meet their due diligence obligation to take all necessary and appropriate measures to ensure that their vessels do not engage in IUU fishing activities in Indonesia's EEZ.

IV. CONCLUSION

IUU fishing threatens Indonesia's interest in conserving its EEZ for sustainable use of its resources, and causes substantial losses to the Indonesian economy and environment. Lack of political will, capacity, and resources of both coastal and flag states to implement relevant international instruments on IUU fishing also contribute to the ineffectiveness of the available sanctioning measures under existing international instruments. An interpretation of the term "necessary" within Article 73(1) of UNCLOS indicates that, in order for a coastal state's enforcement measures to be "necessary", it must be the only available means capable of ensuring effective compliance with the coastal state's laws and regulations. Moreover, this "only means" must be less onerous on other states' protected rights and must not be unreasonably burdensome for the coastal state to undertake. Indonesia's measures to sink or burn a foreign vessel engaged in IUU fishing activities in its EEZ will remain necessary until lesser measures are adequate to punish and deter IUU fishing activities. Such measures should be applied on a case-by-case basis in the light of the particular circumstances of the case and the gravity of the violation. Even then, consistency of the measures is also important to demonstrate that less intrusive alternatives are not capable of reaching the same end. The nature of IUU fishing as an increasingly cross-border activity requires co-operation and political will between Indonesia and the relevant flag states whose vessels are engaged in IUU fishing activities in Indonesia's EEZ. Until the relevant flag states are committed to co-operate with Indonesia's efforts to punish and deter IUU fishing, Indonesia may have no other means than to take more stringent enforcement measures by burning or sinking IUU vessels.

238. *Ibid*., at para. 139.

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The Implementation of Crimes Against the Peace and Security of Mankind in the Penal Legislation of the Republic of Kazakhstan

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Abstract
The penal legislation of the Republic of Kazakhstan includes a number of crimes against the peace and security of mankind. Among these are most of the traditional "core" crimes under international law—genocide, war crimes, and the crime of aggression—as well as some other crimes. Crimes against humanity are not included in the Criminal Code so far but some of their definitional features are shared by so-called "extremist crimes". In addition to other customary crimes against the peace and security of mankind—such as deliberately attacking internationally protected persons and organizations and abusing internationally protected emblems—the Code also includes more novel crimes, such as participation in foreign armed conflicts. This paper analyses the relevant provisions of the Criminal Code of Kazakhstan in the light of corresponding treaty-based and customary rules of international law, and suggests further improvements to be made to the Code.

INTRODUCTION

The concept of crimes against the peace and security of mankind is fundamental in international criminal law [ICL]. It reflects the essence of acts (and, more rarely, omissions), which are criminalized directly under international law, and classifies them according to protected interests and values. In the past decades, discussion has been ongoing in the Soviet and post-Soviet doctrines of ICL regarding the most appropriate terms reflective of crimes proscribed under ICL. In addition to "crimes against the peace and security of mankind", the most common terms in use were "international crimes" and "crimes of an international character".[1] However, since the

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1. See A.V. NAUMOV and A.G. KIBALNIK, eds., *Mezhdunarodnoye ugolovnoye pravo* [*International Criminal Law*] (Moscow: Uright Press, 2014) at 121–3.

publication of a Russian translation of Gerhard Werle's *Principles of International Criminal Law* in 2011, the post-Soviet doctrine of ICL increasingly employs the term "crimes under international law".[2] The "core" crimes under international law are genocide, crimes against humanity, war crimes, and the crime of aggression. Almost all of them (except crimes against humanity, see Section II below) have been implemented in Chapter 4 of the Special Part of Kazakhstan´s Criminal Code under a traditional heading of crimes against the peace and security of mankind.[3] This paper considers the quality of implementation of the "core" crimes under international law, and of other crimes against the peace and security of mankind, in Kazakhstan´s Criminal Code, and suggests useful amendments to the Code.

I. GENOCIDE

Although mass exterminations of various human groups by other human groups have happened throughout history, the term "genocide" only emerged in the twentieth century. It was suggested by a Polish-born American lawyer, Raphael Lemkin (1900–59).[4] Lemkin suggested developing a Convention on the Prevention and Punishment of the Crime of Genocide, since the substantive jurisdiction of the Nuremberg Tribunal with respect to crimes against humanity was limited to acts related to other crimes within the jurisdiction of the Tribunal[5]—and hence the Tribunal had no jurisdiction with respect to discriminatory manifestations of the Holocaust, which had occurred before 1 September 1939. The term "genocide" was composed from the roots of the Greek word γένος ("people") and the Latin word "caedare" ("to kill"), and was first used in Lemkin's book published in 1944.[6] The Genocide Convention was adopted on 9 December 1948, and since then the concept of genocide has been implemented in the domestic penal laws of many states, including the Republic of Kazakhstan.

Article 168 of Kazakhstan´s Criminal Code largely corresponds to Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, which lays down that genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, such as:

2. See Gerhard WERLE and Florian JESSBERGER, *Principles of International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2014) at 32.
3. The second edition of the Criminal Code of the Republic of Kazakhstan was adopted on 3 July 2014, and entered into force on 1 January 2015. See the text of the Criminal Code (in Russian), online: <https://online.zakon.kz/Document/?doc_id=31575252> (last accessed 13 January 2019).
4. See Philippe SANDS, *East West Street* (London: Weidenfeld & Nicolson, 2016) at 137–89. See also Sergey SAYAPIN, "Raphael Lemkin: A Tribute" (2009) 20 European Journal of International Law 1157.
5. Cf. art. 6(c) of the Nuremberg Charter.
6. See Raphael LEMKIN, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944).

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

The conventional definition of genocide became standard in that it formulates three attributes of genocide, which must exist cumulatively. First, the Convention protects only racial, national, ethnic, and religious groups. In other words, the Convention does not protect other identifiable human groups—for example, political parties or movements—and the use of the term "genocide" to designate persecution of political, professional, gender, or other social groups is incorrect.[7] Second, the crime of genocide can be committed by any method listed in Article II of the Convention, and, in accordance with Article III, the following acts are punishable:

(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

Third, genocide is distinguished from other crimes under international law (most importantly, from crimes against humanity and war crimes) by virtue of its *mens rea* (the contextual element of genocide). The qualification of genocide requires proving that the crime was committed with a special intent directed at a full or partial destruction of a respective racial, national, ethnic, or religious group as such. On the one hand, in the absence of such an intent, an act, even if it entails numerous victims, cannot technically be qualified as genocide (see Section II on crimes against humanity below). On the other hand, the commission of any acts listed in Article II of the Convention against at least one person with an intent directed at a full or partial destruction of the protected group of which the victim is a member must be qualified as genocide.

II. CRIMES AGAINST HUMANITY

It is commonly agreed that the term "crimes against humanity" dates back to 1915 when the UK, France, and Russia issued a joint declaration in response to the extermination of Armenians in Ottoman Turkey.[8] The cruel persecution of Armenians by

7. See Sergey SAYAPIN, "An Alleged 'Genocide of the Russian-speaking Persons' in Eastern Ukraine: Some Observations on the 'Hybrid' Application of International Criminal Law by the Investigative Committee of the Russian Federation" in Sergey SAYAPIN and Evhen TSYBULENKO, eds., *The Use of Force Against Ukraine and International Law: jus ad bellum, jus in bello, jus post bellum* (The Hague: T.M.C. Asser Press, 2018), 313 at 315–17.

8. See Werle and Jessberger, *supra* note 2 at 329.

Young Turks was referred to in the 1915 Declaration as a "crime against the laws of humanity" and later, when the relevant provisions of the Nuremberg[9] and Tokyo[10] Charters were drafted, with a view to criminalizing mass atrocities committed against the civilian populations of Europe and the Far East, this formula was transformed into "crimes against humanity".[11] The concept of crimes against humanity was also included in the 1954 Draft Code of Offences against the Peace and Security of Mankind, and in the International Law Commission's subsequent documents devoted to the codification of ICL.[12] In turn, in the Statutes of the International Criminal Tribunals for the Former Yugoslavia [ICTY] and Rwanda [ICTR], the elements of crimes against humanity were formulated with due regard to the respective realities: Article 5 of the ICTY Statute emphasized a nexus between crimes against humanity and international or non-international armed conflicts, and Article 3 of the ICTR Statute provided that crimes against humanity must have been committed "on national, political, ethnic, racial or religious grounds". Thus, the subject-matter jurisdiction of both Tribunals was limited. In turn, Article 7(1) of the International Criminal Court's [ICC] Statute contained no nexus between crimes against humanity and armed conflicts, and emphasized, as a "contextual element" characteristic of crimes against humanity, the circumstances of a widespread or systematic attack against any civilian population, with knowledge of the attack.

Technically, crimes against humanity include any acts listed in subparagraphs (a)–(k) of Article 7(1) of the ICC Statute, provided that they are committed as part of a widespread or systematic attack against any civilian population. It does not matter whether crimes against humanity are committed in an international or non-international armed conflict, or in the absence thereof. In the absence of an armed conflict, a widespread or systematic attack against a civilian population may qualify as a "situation of violence" under applicable international law. The criteria defining a widespread or systematic attack merit more attention. First, it should be noted that Article 7(1) of the ICC Statute mentions these criteria as alternatives: an attack against a civilian population must be *either* widespread, that is, must involve a significant number of victims as a result of a single mass crime, *or* systematic, that is, repeated at certain intervals.[13] ICL does not thereby set a minimum quantity threshold required to qualify criminal acts as crimes against humanity—this qualification is subject to a totality of factual and legal circumstances, which are reflected in Article 7(1), and whose existence and character must be established by law enforcement bodies and courts.

So far, the concept of crimes against humanity is alien to the penal legislation of the Republic of Kazakhstan. It may seem, at first sight, that the Criminal Code of Kazakhstan already contains the elements of many crimes[14] listed in Article 7(1) of

9. Cf. art. 6(c) of the Nuremberg Charter.
10. Cf. art. 5(c) of the Tokyo Charter.
11. See Sands, *supra* note 4 at 111.
12. See the 1954 Draft Code of Offences against the Peace and Security of Mankind, art. 2(11); the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, art. 18.
13. See Werle and Jessberger, *supra* note 2 at 339–40.
14. For example, cf. arts. 99 ("Murder"), 106 ("Deliberately causing grave harm to health"), 120 ("Rape"), 121 ("Violent acts of a sexual character"), 125 ("Kidnapping a person"), 126

the ICC Statute, and thus establishes criminal responsibility for their commission, with due regard to the provisions on the multiplicity of offences in the Code's General Part.[15] This is partly correct: the penal legislation of Kazakhstan does, indeed, contain the equivalents of most crimes against humanity in the sense of Article 7(1) of the ICC Statute. In particular, some of the so-called extremist crimes are reminiscent of some crimes against humanity.[16] However, under Kazakhstan's penal law, these do not fall (except Article 174) within the ambit of crimes against the peace and security of mankind (of which crimes against humanity are a part), and hence are not subject to the provisions of international and domestic penal law regarding the non-applicability of statutes of limitations. Such common crimes are also exempted from ICL rules on universal jurisdiction.[17] If crimes against humanity were integrated into Kazakhstan's penal legislation in the future, these aspects of the General Part of ICL should be taken into account.

III. THE CRIME OF AGGRESSION AND PROPAGANDA FOR WAR

Kazakhstan's Criminal Code establishes criminal responsibility for two distinct crimes against peace—aggression and propaganda for war. In the criminalization of aggression, the Criminal Code of Kazakhstan follows the so-called "Nuremberg and Tokyo model", which is based on the Charters and respective jurisprudence of the two International Military Tribunals, and of the Nuremberg follow-up trials.[18] In line with this legislative model, Article 160 of Kazakhstan's Criminal Code suggests that the crime of aggression would usually require special subjects—that is, the highest officials of a state. It appears that, in order to more effectively prevent this crime, the specified "threshold" of criminal responsibility could be lowered, for example, to "waging an aggressive war or aggressive hostilities".[19] Thus, the subject of this crime would become general, and the prospect of bringing lower-ranking individuals to criminal responsibility for conducting aggressive hostilities against the Republic of Kazakhstan might deter some foreign nationals from participating in such hostilities.

("Unlawful deprivation of liberty"), 128 ("Human trafficking"), and 146 ("Torture") of Kazakhstan's Criminal Code.

15. Cf. arts. 12–14 of the Criminal Code of the Republic of Kazakhstan. See also Sergey SAYAPIN, "The General Principles of International Criminal Law in the Criminal Code of the Republic of Kazakhstan" (2019) 9 Asian Journal of International Law 1.

16. For example, cf. arts. 174 ("Incitement of social, national, clan-based, racial, class-based or religious hatred"), 404 ("Establishing, leading and participating in the activity of unlawful public and other associations"), and 405 ("Organising and participating in the activity of a public or religious association or another organisation after a judicial decision to the effect of banning their activity or liquidation in connection with their carrying out terrorism or extremism") of Kazakhstan´s Criminal Code.

17. Cf. art. 8(1) of Kazakhstan´s Criminal Code.

18. See Sergey SAYAPIN, "The Compatibility of the Rome Statute's Draft Definition of the Crime of Aggression with National Criminal Justice Systems" (2010) 81 Revue Internationale de Droit Pénal 165 at 169–75.

19. Cf. art. 437 of the Criminal Code of Ukraine. On a recent trial under this art., see Sergey SAYAPIN, "A Curious Aggression Trial in Ukraine: Some Reflections on the *Alexandrov and Yerofeyev* Case" (2018) 16 Journal of International Criminal Justice 1093.

In turn, propaganda for war or public calls for initiating a war of aggression are criminalized under Article 161.[20] The second part of the same Article establishes criminal responsibility for an aggravated form of the same crime—that is, for its commission through the mass media or telecommunication networks, or by a state official. Article 161 reflects the requirement of Article 20(1) of the International Covenant on Civil and Political Rights, and merits only one critical remark: given the gravity of the crime, replacing "calls" (in the plural) with "a call" (in the singular) would make sense, since a single call for initiating a war of aggression is already worthy of criminalization.

IV. THE PRODUCTION, ACQUISITION, OR SALE OF WEAPONS OF MASS DESTRUCTION

Article 162 establishes criminal responsibility for the production, acquisition, or sale of weapons of mass destruction, which are prohibited by treaties to which the Republic of Kazakhstan is a party; and in particular, of chemical, biological, nuclear, and other weapons of mass destruction. Whereas chemical, biological, and nuclear weapons are "traditional" weapons of mass destruction, and Kazakhstan's critical position with respect to such weapons has been consistent,[21] the introduction of criminal responsibility for dealing with other weapons of mass destruction—such as the so-called new physical principles weapons—should be commended, as it anticipates prospective scientific developments and seeks to prevent their adverse effects.

V. WAR CRIMES

The current edition of Kazakhstan's Criminal Code contains three distinct provisions on war crimes (Articles 163–165). Formally, this is a useful development in comparison with the previous edition where there was only one provision on war crimes (it was transferred to the new edition of the Code verbatim and became Article 163). However, the specific wording of Articles 163–165 raises questions. First, all three provisions are quite inconveniently phrased in that they employ the plural forms of nouns to describe the victims of the respective crimes (e.g. the wounded, sick, prisoners of war, civilians, and other protected persons), or the crimes as such (e.g. the employment of prohibited methods and means of warfare, attacking the civilian population or civilian objects, etc.). A literal interpretation suggests that acts committed against singular victims, or isolated acts, would not constitute war crimes (whereas, under international law, they should). Also, it is unclear from the provisions

20. On the prohibition of propaganda for war, see *passim* Michael G. KEARNEY, *The Prohibition of Propaganda for War in International Law* (Oxford: Oxford University Press, 2007).

21. "Kazakhstan Signs Treaty on Prohibition of Nuclear Weapons" *The Astana Times* (11 March 2018), online: The Astana Times <https://astanatimes.com/2018/03/kazakhstan-signs-treaty-on-prohibition-of-nuclear-weapons/>.

how many victims or acts are required to constitute a crime. Obviously, this confusion should be remedied, and the plural forms of nouns should be replaced by singular ones.

Next, the titles of Articles 164 and 165 essentially mean the same thing, because the terms "laws and customs of war" and "international humanitarian law" are practically synonymous. Consequently, the titles of these Articles do not indicate with necessary accuracy the immediate objects of the respective crimes and the interests protected by criminal law. It would be correct to rearrange the crimes listed in Articles 163–165 in accordance with their direct objects—for example, war crimes against persons, property, the environment, etc. Finally, Article 165 is entitled "Criminal violations of international humanitarian law during armed conflicts". In this title, the words "during armed conflicts" are superfluous, because an overwhelming majority of International Humanitarian Law [IHL] rules apply in armed conflicts anyway, and only a few IHL rules apply in peacetime. Moreover, all crimes listed in Article 165 can only be committed in armed conflicts, and therefore the specific reference to armed conflicts in the title is an unnecessary repetition.

VI. THE RESPONSIBILITY OF COMMANDERS AND OTHER SUPERIORS AND SUPERIOR ORDERS

Article 166 of the Criminal Code deals with the responsibility of commanders and other superiors, and with superior orders. The first paragraph criminalizes the failure on the part of a commander or another superior to take all feasible measures within his or her competence to prevent the commission of criminal violations of the laws and customs of war or IHL rules. In turn, the second paragraph establishes criminal responsibility for issuing an order to give no quarter, or another manifestly unlawful order aimed at the commission of criminal violations of the laws and customs of war or IHL rules. As commendable as Article 166 is, the crime´s *corpus delicti* is limited to war crimes only, and does not formally encompass other crimes against the peace and security of mankind. Therefore, it would make sense to extend the regime of Article 166 to other crimes against the peace and security of mankind.

VII. THE UNLAWFUL USE OF SIGNS PROTECTED BY TREATIES

Article 167 criminalizes the deliberate use, in contravention of treaties during hostilities, of the Red Cross, Red Crescent, and Red Crystal emblems, of a distinctive emblem for the protection of cultural property, and of other emblems protected by international law, as well as the use of the state flag or insignia of the enemy, or of a neutral state, or the flag or the emblem of an international organization. Significantly, a literal interpretation suggests that Article 167 distinguishes between the *deliberate* use of a number of emblems (whose list is not exhaustive) and *any* unauthorized use of some other emblems (whose list is exhaustive)—that is, a negligent use of the former, or their improper use in peacetime, should not entail any criminal responsibility, whereas

any unauthorized use of the latter should be criminalized at all times. In the absence of an explicit prohibition of perfidy in the Criminal Code,[22] Article 167 usefully adds to the protection of civilian persons and objects.

VIII. ECOCIDE

Ecocide is defined in Article 169 as a mass destruction of flora or fauna, contamination of the atmosphere, or land or water resources, as well as the commission of other acts which have caused or might have caused an ecological disaster or an ecological emergency. Importantly, this Article does not distinguish between peacetime and armed conflict, and thus offers ecology general protection against massive harm at all times.

IX. MERCENARY ACTIVITY AND THE ESTABLISHMENT OF BASES (CAMPS) FOR TRAINING MERCENARIES

Articles 170 and 171 establish criminal liability, respectively, for mercenary activity and the establishment of bases (camps) for training mercenaries. Under the first paragraph of Article 170, mercenary activity means the recruitment, training, financing, or the provision of other material support to a mercenary, as well as using him or her in an armed conflict, hostilities, or other violent activities aimed at overthrowing or undermining the constitutional order or at encroaching upon the territorial integrity of a state. The third paragraph criminalizes, in addition, the participation of a mercenary in an armed conflict, hostilities, or other violent activities aimed at overthrowing or undermining the constitutional order or at encroaching upon the territorial integrity of a state. Article 170 does not itself define a mercenary, but instead refers to paragraph 15 of Article 3 of the Criminal Code, which was quite impractically inspired by Article 47 of the First Additional Protocol to the 1949 Geneva Conventions. Paragraph 15 of Article 3 implies that, in order to qualify as a mercenary, an individual must cumulatively possess all the attributes listed in the definition, and accordingly, the absence of at least one attribute should technically release the individual from criminal responsibility.[23] As a matter of fact, virtually any element in the definition can be circumvented quite easily—for example, by not letting an individual take a direct part in hostilities, granting him or her the nationality of a state concerned, formally making him or her a member of the armed forces, etc. Accordingly, it would make sense to adjust the definition of a mercenary contained

22. An implicit prohibition of perfidy is included in art. 163(1) of the Criminal Code ("… employment in an armed conflict of means and methods prohibited by a treaty of the Republic of Kazakhstan …"). Since perfidy is a method of warfare prohibited by art. 37 of the First Additional Protocol to the 1949 Geneva Conventions, to which Kazakhstan in a State Party, perfidy is criminal under art. 163(1) of the Criminal Code.

23. Cf. Geoffrey BEST, *War and Law Since 1945* (Oxford: Oxford University Press, 1994) at 350.

in paragraph 15 of Article 3 of the Criminal Code, in order to make Articles 170 and 171 workable.

Article 171 criminalizes the establishment of a base (camp) for training mercenaries, or offering premises or land for the same purpose, with knowledge of the purpose. The elements of this crime are quite clear, and the only observation pertains to the relationship between the plural form of the nouns "bases" and "camps" in the title of the Article, and their singular form in the body of the Article. The singular form is certainly correct, and criminal responsibility should be borne for contributing to the establishment of a single base or camp.

X. PARTICIPATION IN FOREIGN ARMED CONFLICTS

According to available data, some nationals of Kazakhstan are currently participating in armed conflicts in Afghanistan, Syria, Iraq, and Ukraine.[24] The public danger of such participation is compound: it includes the acquisition by individuals of dangerous (for example, separatist or religious) ideologies or skills (in particular, military skills), which could affect adversely the national security of Kazakhstan; indirect interference in other states' domestic affairs; and complications in international relations. Article 172 of Kazakhstan´s Criminal Code establishes responsibility for deliberate and unlawful participation of a national of the Republic of Kazakhstan in an armed conflict or hostilities in the territory of a foreign state, absent the elements of mercenary activity in the sense of Article 170 (cf. Section IX above). Unlike mercenaries who, as a matter of practice, are mostly driven by pecuniary interest, individuals who may be held responsible under Article 172 are motivated by other factors, such as ethnic or religious affiliation with a group participating in a foreign armed conflict, or a particular ideology, or simply by a sense of adventure. In any such event, Kazakhstan should be entitled to exercise criminal jurisdiction over its nationals, on the basis of the active personality principle or the protective principle,[25] and a number of trials under Article 172 have already taken place.

XI. ATTACKING INTERNATIONALLY PROTECTED PERSONS OR ORGANIZATIONS

Article 173 of Kazakhstan's Criminal Code establishes criminal responsibility for attacking an internationally protected representative of a foreign state or an employee of an international organization, or his or her cohabitating family members, as well as

24. The Prosecutor-General´s Office of the Republic of Kazakhstan, "Obrashcheniye Generalnoy prokuratury Respubliki Kazakhstan" [Address by the Prosecutor-General's Office of the Republic of Kazakhstan] (30 October 2014), online: PROKUROR <http://prokuror.gov.kz/rus/novosti/press-releasy/obrashchenie-generalnoy-prokuratury-respubliki-kazahstan>.

25. See Robert CRYER, Darryl ROBINSON, and Sergey VASILIEV, *An Introduction to International Criminal Law and Procedure*, 3rd ed. (Cambridge: Cambridge University Press, 2014) at 53–6.

the service or residential premises or means of transportation of internationally protected persons, as well as kidnapping or forcibly depriving such a person of liberty, or threatening to commit such acts. Notably, the protective scope of this provision is significantly broader than that of Article 19 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, which is limited to the "United Nations and associated personnel involved in a United Nations operation", and to acts committed "intentionally and in a systematic manner or on a large scale". In addition to the latter, Article 173 also provides protection to the personnel referred to in the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, and in other sources of diplomatic law, as well as to international organizations which concluded bilateral headquarters agreements with the Republic of Kazakhstan (such as the International Committee of the Red Cross), and to their personnel, with due regard to the rules of the respective agreements. It also criminalizes, quite laudably, single acts of hostility committed against internationally protected persons or objects. Article 173 is a good example of a domestic rule of criminal law to the effect that a state is not precluded from offering a higher level of protection than that required under international law, if it so desires. The protective scope of a domestic provision of criminal law should not be narrower than that of its counterpart under international law, but it may well be broader.[26]

XII. PIRACY

Finally, the *corpus delicti* of piracy, reflected in Article 271 of the Criminal Code, raises a few questions. Historically, piracy has been recognized as the first international crime; pirates were referred to as the *hostis humani generis* ("enemies of the human race"), and were subject to universal jurisdiction.[27] However, in the Criminal Code of Kazakhstan, the *corpus delicti* of piracy is placed in Chapter 10 of the Special Part ("Criminal offences against public safety and public order"). It appears that the objects which piracy attacks are more numerous and complex than that: they include the lives and health of people, the safety of navigation, as well as property—and therefore, piracy would be better placed in Chapter 4 of the Criminal Code's Special Part, along with other crimes against the peace and security of mankind. More specifically, in the current wording of Article 271, piracy essentially amounts to a crime against property,[28] and should find itself in Chapter 6 of the Special Part of the Criminal Code ("Criminal offenses against property"). On the other hand, if an attack took place not for the purpose of seizing property, but for another purpose (for example, to take hostages), the attack would not at all be

26. Cf. *ibid.*, at 81.

27. See *passim* Jacob W.F. SUNDBERG, "The Crime of Piracy" in Mahmoud Cherif BASSIOUNI, ed., *International Criminal Law: Volume I, Sources, Subjects, and Contents*, 3rd ed. (Leiden: Martinus Nijhoff), 799.

28. Cf. art. 271 of the Criminal Code of the Republic of Kazakhstan ("Piracy"): "Attack on a sea or river vessel with the aim of seizing someone else's property, committed with the use of violence or with the threat of its use … ."

covered by the definition of piracy. Last but not least, since piracy is not technically a crime against the peace and security of mankind, Kazakhstan would not be able to assert its criminal jurisdiction if a crime were committed on the high seas[29] by foreign nationals against foreign nationals. If, however, the *corpus delicti* of piracy were revised and transferred to Chapter 4 of the Special Part of the Criminal Code, all these issues would be resolved.

XIII. CONCLUSION

The Republic of Kazakhstan has accomplished important work to introduce individual criminal responsibility for crimes against the peace and security of mankind, in accordance with applicable sources of international law, but some of these implementation efforts require fine-tuning. As soon as a suitable opportunity arises, Chapter 4 of the Special Part of the Criminal Code could be revised, with a view to bringing it into fuller conformity with international law. In particular, crimes against humanity should be introduced as a distinct category of crime, and the *corpus delicti* of piracy should be revised and placed in Chapter 4. More attention should be devoted to war crimes, and the outdated definition of the crime of aggression should be optimized. Such measures would make Kazakhstan's Criminal Code even more progressive, and should contribute to a better maintenance of international and regional peace and security.

29. Cf. art. 101 of the United Nations Convention on the Law of the Sea.

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The Chagos Advisory Opinion and the Law of Self-Determination

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Abstract
The Advisory Opinion of the International Court of Justice [ICJ] on the Separation of the Chagos Archipelago from Mauritius in 1965 has been hailed as a major victory by the government of Mauritius and by representatives of the Chagossians who were forcibly removed from the islands to make way for the establishment of an American military facility on the island of Diego Garcia at the height of the Cold War. The opinion was categorical: the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968. The UK lost on every single argument it made before the Court and is under an obligation to bring its administration of the Chagos Archipelago to an end "as rapidly as possible". This comment focuses on what the ICJ said about self-determination, and whether the Advisory Opinion could have consequences for future cases at the Court.

The Advisory Opinion of the International Court of Justice [ICJ] on the *Separation of the Chagos Archipelago from Mauritius* in 1965, has been hailed as a major victory by the government of Mauritius and representatives of the Chagossians.[1] The opinion followed four decades of negotiations between the Mauritian and British governments over the future of the Archipelago, where an American defence facility was established on Diego Garcia, the largest of the islands, whose inhabitants were forcibly removed, and prevented from returning, to make way for the establishment of a new colony called the "British Indian Ocean Territory".[2] In a virtually unanimous decision (thirteen votes to one,[3] with Judge Donoghue dissenting), the ICJ expressed its opinion that "the process

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1. Owen BOWCOTT, "UN Court Rejects UK's Claim of Sovereignty over Chagos Islands" *The Guardian* (25 February 2019); Marlis SIMONS, "U.N. Court Tells Britain to End Control of Chagos Islands, Home to U.S. Air Base" *The New York Times* (25 February 2019); "UK Should Leave Chagos Islands Colony in Indian Ocean as soon as Possible, Top UN Court Says" *South China Morning Post* (25 February 2019); Kamlesh BHUCKORY, "World Court Says U.K. Should Return Control of Indian Ocean Islands" *Bloomberg* (25 February 2019).

2. Prior to the detachment, the UK undertook to cede the islands to Mauritius when they were no longer needed for defence purposes. In 2016, the UK and the US agreed to extend the lease for a further

of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago".[4] It further expressed its opinion that "the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible".[5] It finally expressed the view that "all Member States are under an obligation to co-operate with the United Nations in order to complete the decolonization of Mauritius".[6]

The Advisory Opinion could have far-reaching consequences, both in terms of the status of the Archipelago, and for other long-standing territorial disputes that arose during decolonization. This is because the ICJ concluded, for the first time, that UN General Assembly Resolution 1514 (the "Decolonization Declaration") reflected customary international law, and that it had attained this status in law some time between the years 1965 and 1968. Accordingly, it could be argued that other territorial disputes that arose as a result of the failure to complete the process of decolonization after 1965, to which the Decolonization Declaration was applicable, could bring their disputes before the ICJ in the form of Advisory Opinions.

Before considering the wider implications of the Advisory Opinion, this comment revisits the history of the establishment of the American military base on Diego Garcia. It then considers the questions formulated by the UN General Assembly for the Advisory Opinion, before considering what the Court had to say about self-determination.

I. THE ESTABLISHMENT OF THE BRITISH INDIAN OCEAN TERRITORY

The Chagos Archipelago, a group of islands located in the Indian Ocean 2,220 km north-west of Mauritius, was administered by the UK as a dependency of the Colony of Mauritius from 1814 and 1965.[7] The island of Diego Garcia—home to a US naval and air base—accounts for more than half of the archipelago's total land area of 1,950 sq km.[8]

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twenty years. See Jon LUNN, *Disputes over the British Indian Ocean Territory: March 2019 Update* (House of Commons Briefing Paper Number 6908, 14 March 2009), at 4.

3. There were only fourteen Judges on the ICJ as Judge Crawford had recused himself for having served as counsel to Mauritius in the UNCLOS arbitration. Judge Greenwood had also recused himself before he lost the election to Judge Bhandari. Greenwood had served as a Judge in the Arbitral Tribunal in the UNCLOS arbitration. See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Order of 14 July 2017, [2017] I.C.J. Rep. 282. On the UNCLOS arbitration, see *In the Matter of the Chagos Marine Protected Area Arbitration Before an Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea Between the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland (Award)*, see materials relating to this arbitration online: Permanent Court of Arbitration <https://pca-cpa.org/en/cases/11/>.

4. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, at para. 44, online: International Court of Justice <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf> [*Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*].

5. *Ibid*., at para. 183.

6. *Ibid*.

7. *Ibid*., at paras. 25–8.

8. *Ibid*., at para. 26.

In 1946, the UK listed Mauritius as a non-self-governing territory and transmitted reports to the General Assembly under Article 73(e) of the Charter of the United Nations. Significantly, in these reports the UK referred to the Chagos Archipelago as a dependency of Mauritius.[9] It should also be mentioned, although the ICJ did not refer to this, that the inhabitants of the Chagos Archipelago were considered citizens of the UK under the British Nationality Act 1948 before the separation of the Archipelago.[10]

In 1964, discussions commenced between the US and the UK regarding the use by the US of the island of Diego Garcia for the purposes of defence.[11] The US, embroiled in the Vietnam War, wanted to establish a military base in the Indian Ocean, where the UK still had a colony, having lost its other colonies in Malaya, India, Pakistan, Burma, and Ceylon.[12] They hoped that the new military facility would prevent the spread of Communist ideology to the Third World.[13]

On 8 November 1965, the UK established the British Indian Ocean Territory [BIOT], a new colony, consisting of the Chagos Archipelago, detached from Mauritius, and the Adalbra, Farquhar, and Desroches islands detached from the Seychelles.[14] Between 1967 and 1973, the entire population of the Archipelago were forcibly removed and prevented from returning.[15]

Prior to the independence of Mauritius on 12 March 1968, Prime Minister Seewoosagur Ramgoolam, and the Mauritian Council of Ministers, indicated their preference for a long-term lease of the islands, rather than detachment, but the UK was not willing to consider this alternative.[16] Accordingly, Sir Seewoosagur and the Council of Ministers were given no choice but to accept the separation of the Chagos Archipelago "in principle" as the price for independence.[17]

II. THE UN GENERAL ASSEMBLY'S REQUEST FOR AN ADVISORY OPINION

Since independence, Mauritius has consistently claimed that the separation of the Chagos Archipelago was imposed without its consent. However, the UN General Assembly only became involved with the issue on 22 June 2017, after a four-decade

9. *Ibid*., at para. 29. The ICJ cited the Report of 1948 that collectively referred to all the islands as "Mauritius".
10. See Stephen ALLEN, *The Chagos Islanders and International Law* (Oxford: Hart Publishing, 2014) at 68.
11. *Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, *supra* note 4 at para. 31.
12. See David VINE, *Island of Shame: The Secret History of the US Military Base on Diego Garcia* (Princeton, NJ: Princeton University Press, 2009).
13. *Ibid*., at 70–1.
14. *Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, *supra* note 4 at para. 33.
15. *Ibid*., at para. 43.
16. *Ibid*., at paras. 98–112.
17. *Ibid*., at para. 106. The UK claimed that it had the legal right to detach the Chagos by Order in Council, *without* Mauritian consent.

hiatus, when it requested an Advisory Opinion from the ICJ. Until that movement, the dispute between Mauritius and the UK had been addressed in bilateral negotiations between the two countries.

The General Assembly resolution requesting the Advisory Opinion was adopted by ninety-four votes to fifteen, with sixty-five abstentions.[18] The questions asked of the ICJ were framed as follows:

> (*a*) Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?;
>
> (*b*) What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?.

Despite the reference to sovereignty in the first sentence of the preamble,[19] the questions were formulated to avoid the appearance that there was a sovereignty dispute between the UK and Mauritius, which had arisen in their bilateral relations following the latter's independence. This was necessary in order to avoid the argument that the Advisory Opinion was being used to circumvent the absence of British consent to the judicial settlement of the bilateral dispute. Because the UK and Mauritius had submitted declarations to the ICJ that excluded disputes with other Commonwealth states from their acceptance of the Court's compulsory jurisdiction,[20] the UK was of view that the resolution had been drafted to provide a back-door route to the Court.[21]

18. General Assembly, 71st Session, 88th Plenary Meeting, 22 June 2017, UN Doc. A/71/PV.99, at 17–18. Tellingly, the states that voted against the request included those that are home to US military facilities. These states included: Afghanistan (e.g. Bagram Air Base); Australia (e.g. Darwin and Pine Gap); Bulgaria (e.g. Bezmir Air Base); Hungary (e.g. NATO base at Pápa); Japan (e.g. Okinawa, Tokyo); Korea (e.g. Camp Humphreys); and New Zealand (e.g. Harwood airport in Christchurch. The UK also hosts multiple US facilities, in addition to Diego Garcia. However, the correlation between hosting US/UK military bases and opposing the request for the Advisory Opinion was not uniform. Some of the states that host US bases either abstained from the vote or voted in favour of the request. Those states that supported the request included Cyprus (the Sovereign Base Areas); Cuba (Guantanamo Bay); Djibouti (Camp Lemonnier); Jordan (Muwaffaq Salti Air Base); and the United Arab Emirates (Al Dhafra Air Base). Those states that abstained included Bahrain (home to the US 5th fleet); Germany (multiple bases); Iraq (Al Asad Air Base); Italy (multiple bases); Kuwait (Ali Al Salem Air Base and Camp Arifjan); Micronesia (Naval Base Guam); Qatar (Al Udeid Airbase); and Turkey (Incirlik).

19. The first sentence of the preamble of the request reaffirmed "that all peoples have an inalienable right to the exercise of their *sovereignty* and the integrity of their territory" (emphasis added).

20. See the declaration filed by Mauritius on 23 September 1968 and the declaration filed by the UK on 22 February 2017, online: International Court of Justice <https://www.icj-cij.org/en/declarations>.

21. See the statement by Mr Rycroft, 88th Plenary Meeting, 71st Session of the General Assembly, 22 June 2017, UN Doc. A/71/PV.88, at 16.

The UK pointed out, for example, that the UN General Assembly had not adopted a single resolution on the question of Mauritius since its independence in 1968.[22]

Although the UN had not been involved with the decolonization of Mauritius for many years, decolonization has remained of special concern to the UN General Assembly. For example, in 2010, the General Assembly declared the period 2011–20 the Third International Decade for the Eradication of Colonialism.[23] And of course, colonial disputes are fundamentally disputes about sovereignty; namely, the process of transferring power to the people of a non-self-governing territory.[24] But they are an exceptional type of dispute; a dispute that does not always depend on the *consent* of the administering power, since not all cases of decolonization were consensual.

III. THE WRITTEN AND ORAL ARGUMENTS

In addition to the African Union, written statements were filed in the Registry of the Court by the following states: Belize, Germany, Cyprus, Liechtenstein, the Netherlands, the UK, Serbia, France, Israel, the Russian Federation, the US, the Seychelles, Australia, India, Chile, Brazil, the Republic of Korea, Madagascar, the People's Republic of China, Djibouti, Mauritius, Nicaragua, Guatemala, Argentina, Lesotho, Cuba, Viet Nam, South Africa, the Marshall Islands, Namibia, and Niger.[25]

Oral pleadings were made by Mauritius, the UK, South Africa, Germany, Argentina, Australia, Belize, Botswana, Brazil, Cyprus, the US, Guatemala, the Marshall Islands, India, Israel, Kenya, Nicaragua, Nigeria, Serbia, Thailand, Vanuatu, Zambia, and the African Union.[26]

Of the written and oral statements, only the UK, France, Israel, the US, Australia, Chile, and Korea framed the issue as a sovereignty dispute. All the other states viewed the dispute as being concerned exclusively with self-determination. The Russian Federation took a non-committal position, viewing the issue as one of self-determination but also expressing caution that the Advisory Opinion not be used to settle bilateral disputes.[27]

IV. THE ADVISORY OPINION

On 25 February, the ICJ delivered its Advisory Opinion. It made short shrift of the argument that there was a bilateral dispute between Mauritius and the UK regarding

22. *Ibid*., at 11.
23. See GA Res. 65/119, 10 December 2010.
24. See para. 5 of the Decolonization Declaration.
25. *Separation of the Chagos Archipelago from Mauritius in 1965*, *Advisory Opinion*, *supra* note 4 at para. 9. See the text of these statements, online: International Court of Justice <https://www.icj-cij.org/en/case/169/written-proceedings>.
26. *Ibid*., at para. 23. See the text of the oral statements, online: International Court of Justice <https://www.icj-cij.org/en/case/169/oral-proceedings>.
27. See the Russian statement, online: International Court of Justice <https://www.icj-cij.org/files/case-related/169/169-20180227-WRI-05-00-EN.pdf>.

sovereignty over the Chagos Archipelago that was at the core of the advisory proceedings. The ICJ observed that the General Assembly had:

> [N]ot sought the Court's opinion to resolve a territorial dispute between two States. Rather, the purpose of the request is for the General Assembly to receive the Court's assistance so that it may be guided in the discharge of its functions relating to the decolonization of Mauritius.[28]

In the Court's view the opinion was requested on the matter of decolonization, which is of particular concern to the UN.[29]

In answer to question (*a*), the Court explained that it had to first determine the relevant period of time for the purposes of identifying the applicable rules of international law before determining the content of the law.[30] After determining that the relevant period of time for identifying the applicable rules of international law was between the separation of the Archipelago in 1965 and the independence of Mauritius in 1968, the ICJ concluded that the adoption of the Decolonization Declaration by the General Assembly on 14 December 1960 was a "defining moment in the consolidation of State practice on decolonization".[31]

Although the ICJ was of the view that the Decolonization Declaration was formally a recommendation, it had a "declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption".[32] It added, "[t]he wording used in resolution 1514 (XV) has a normative character, in so far as it affirms that '[a]ll peoples have the right to self-determination'".[33]

The ICJ recalled that the right to self-determination applied to the entirety of a non-self-governing territory. In support of this view it referred to paragraph 6 of the Decolonization Declaration, which provided that "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".[34] According to the ICJ:

> Both State practice and opinio juris at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination. No example has been brought to the attention of the Court in which, following the adoption of resolution 1514 (XV), the General Assembly or any other organ of the United Nations has considered as lawful the detachment by the administering Power of part of a non-self-governing territory,

28. *Separation of the Chagos Archipelago from Mauritius in 1965*, *Advisory Opinion*, *supra* note 4 at para. 86.
29. *Ibid*., at para. 88.
30. *Ibid*., at para. 139.
31. *Ibid*., at para. 150.
32. *Ibid*., at para. 152.
33. *Ibid*., at para. 153.
34. See GA Res. 1514, 14 December 1960, at para. 6.

> for the purpose of maintaining it under its colonial rule. States have consistently emphasized that respect for the territorial integrity of a non-self-governing territory is a key element of the exercise of the right to self-determination under international law.[35]

The peoples of non-self-governing territories are entitled to exercise their right to self-determination, the Court said, in relation to their territory as an integral, complete, unit, and the integrity of that unit must be respected by the administering power at the moment of decolonization: "[i]t follows that any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination."[36]

Applying the law of self-determination to the separation of the Chagos Archipelago, the ICJ concluded that "heightened scrutiny" should be given to the issue of consent when part of a non-self-governing territory is separated to create a new colony. Having studied the circumstances in which the Council of Ministers of the Colony of Mauritius agreed to the detachment of the Archipelago "in principle", the Court considered that the detachment was "not based on the free and genuine expression of the will of the people concerned".[37] Accordingly, the ICJ concluded in answer to question (*a*) that "the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968".[38] Having reached this conclusion, the answer to question (*b*) was self-explanatory. The UK's ongoing administration of the Chagos Archipelago constituted "a wrongful act entailing the international responsibility of that State".[39] The ICJ described that wrongful act as being of a "continuing character".[40] Accordingly, it concluded that:

> [T]he United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination.[41]

The ICJ explained that it was for the General Assembly to decide on the modalities required to complete the decolonization of Mauritius, which all Member States are required to co-operate with in putting into effect, given that self-determination is an obligations *erga omnes*, giving these states a legal interest in protecting this right.[42]

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35. *Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, *supra* note 4 at para. 160.
36. *Ibid.*
37. *Ibid.*, at para. 172.
38. *Ibid.*, at para. 174.
39. *Ibid.*, at para. 177.
40. *Ibid.*
41. *Ibid.*, at para. 178.
42. *Ibid.*, at para. 180.

V. THE DISSENT AND SEPARATE OPINIONS AND DECLARATIONS

Of the thirteen Judges that participated in the Opinion, six issued Declarations (Vice-President Xue, Judges Tomka, Abraham, Gevorgian, Salam, and Iwasawa), four issued Separate Opinions (Judges Cançado Trindade, Gaja, Sebutinde, and Robinson), and one issued a Dissenting Opinion (Judge Donoghue). In addition, Judges Cançado Trindade and Robinson issued a Joint Declaration, in addition to their Separate Opinions.

In the sole dissent, Judge Donoghue expressed her view that the Advisory Opinion had "the effect of circumventing the absence of United Kingdom consent to judicial settlement of the bilateral dispute between the United Kingdom and Mauritius regarding sovereignty over the Chagos Archipelago and thus undermines the integrity of the Court's judicial function".[43] In her view, the ICJ should have exercised its discretion to decline to give the opinion.

In contrast, Vice-President Xue thought that framing the issue as a sovereignty dispute between Mauritius and the UK was devoid of historical context. She explained that, when the separation of the Chagos Archipelago was being contemplated by British officials in 1964–65, they were aware that they were establishing a new colony and that this was unlikely to escape criticism in the UN. The fact that Mauritius sought to resolve its dispute bilaterally with the UK did not change anything, as decolonization issues were often considered at both the bilateral and multilateral level: "[t]hey are not mutually exclusive under international law."[44]

For some Judges, the ICJ did not go far enough in its enumeration of the law of self-determination. Judges Cançado Trindade, Robinson, and Sebutinde thought the Court could have said much more about the status of self-determination in international law, which they thought had consolidated into a peremptory norm of a *jus cogens* character.[45] According to Cançado Trindade it was as if "the Court remains (in 2019) haunted by the Barcelona Traction ghost of 1970 (beholding only obligations erga omnes, without jus cogens), as well by the East Timor injustice (to its people) of 1995, resulting from its strictly inter-State outlook".[46]

VI. CONCLUSION

The Advisory Opinion could have far-reaching consequences not only for the UK's position in the Indian Ocean, but for other states that have long-standing self-

43. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 25 February 2019, Dissenting Opinion of Judge Donoghue at para.1.

44. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 25 February 2019, Declaration of Vice-President Xue at para. 19.

45. They noted that this claim had been made by more than a dozen states in their written and oral statements. See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 25 February 2019, Separate Opinion of Judge Cançado Trindade at paras. 120–69; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 25 February 2019, Separate Opinion of Judge Sebutinde, especially paras. 25-46; and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 25 February 2019, Separate Opinion of Judge Robinson at paras. 48–89.

46. Separate Opinion of Judge Cançado Trindade, *supra* note 45 at para. 169.

determination disputes to which the Decolonization Declaration is applicable.[47] However, with decolonization virtually complete, there are not that many disputes that are likely to come before the ICJ—certainly not a floodgate—and even where such disputes exist, the peoples concerned would need a state to take up their case and use its political capital to secure a majority vote in the UN General Assembly to request an Advisory Opinion.

The ICJ's opinion that self-determination had emerged as customary international law in 1965–68 could however be of assistance to a rather exceptional and long-standing dispute: that between Israel and Palestine. In this connection, it was probably no coincidence that, for the first time in over fifty years,[48] Israel took part in the oral proceedings at the ICJ on the Chagos Opinion, arguing that the ICJ should exercise its discretion to decline to give the opinion.[49] Undoubtedly, Israel's Foreign Ministry was aware of the parallels between the UK's administration of the Chagos Archipelago and Israel's occupation of East Jerusalem, the West Bank, and the Gaza Strip, which the Palestinians have long argued is unlawful.

On 28 September 2018, Palestine instituted proceedings at the ICJ challenging the Trump administration's decision to move its embassy to Jerusalem.[50] In the first phase of the case, Palestine will have to argue that it is a state, and, in this connection, it may have to argue that it has had a right to claim sovereignty over East Jerusalem, the West Bank, and the Gaza Strip since 1967, and which Israel has refused to withdraw from despite the adoption by the UN Security Council of Resolutions 242 (1967) and 338 (1973).[51] In this regard, the ICJ's conclusion in the Chagos Advisory Opinion that "the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State" could be cited to argue that Israel's continued administration of the territories it occupied on 4 June 1967 constitutes a wrongful act entailing the responsibility of that state. In his Declaration, Judge Gevorgian observed that, in the ICJ's Advisory Opinion in *Wall*, the Court "was able to rely on the United Nations Security Council's determination that the occupation of Palestinian territory was illegal, notably in resolution 242 (1967)".[52] Gevorgian mentioned the *Wall* opinion to distinguish the Chagos Opinion from the *Namibia* and *Wall* Advisory Opinions, where the Security Council had

47. For example, the West Papua dispute with Indonesia when West Papua was handed to Indonesia following a controversial plebiscite in 1969. See Melinda JANKI, "West Papua and the Right to Self-determination Under International Law" (2010) 34 West Indian Law Journal 1.

48. Raphael AREN, "Israel Takes Part in International Court Debate for First Time in Decades" *Times of Israel* (7 September 2018).

49. See the written statement of Israel at the website of the ICJ, online: <https://www.icj-cij.org/files/case-related/169/169-20180227-WRI-04-00-EN.pdf>. Israel had submitted a written statement to the ICJ in the *Wall* Advisory Opinion, but it did not take part in the oral proceedings.

50. See *Application Instituting Proceedings, State of Palestine v. United States of America*, 28 September 2018, online: International Court of Justice <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>.

51. See *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*, Order of 15 November 2018, online: International Court of Justice <https://www.icj-cij.org/en/case/176>.

52. See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 25 February 2019, Declaration of Judge Gevorgian at para. 6.

clearly expressed its view that the retention of those territories by South Africa and Israel was contrary to international law.

Intriguingly, the ICJ did not mention how the Decolonization Declaration came to reflect customary international law, other than to describe it as a "defining moment" in the consolidation of state practice on decolonization. Nor did the ICJ mention how that Declaration jettisoned an older tradition of self-government. Only Judge Gaja made the observation that:

> Under Article 73 of the Charter of the United Nations, an administering Power of a non-self-governing territory had to promote the well-being of the inhabitants and their self-government. Establishing a new colony (the British Indian Ocean Territory) in order to construct a military base on the Archipelago and expelling the indigenous population were not steps in that direction and could not be regarded as a form of decolonization consistent with the obligations flowing from the Charter.[53]

In paragraph 156 of the Advisory Opinion, the ICJ cited General Assembly Resolution 1541, which it claimed expressed the means of "implementing self-determination". Yet the word "self-determination" does not appear in Resolution 1541.[54] That resolution uses the word "self-government".[55]

The omission of the *South West Africa Cases* (1960–66) from the Opinion, and from the submissions to the ICJ, was also glaring, given that self-determination was raised by the Applicants in the merits of the *South West Africa Cases*, which covered a similar time period.[56] It will be recalled that Ethiopia and Liberia chose *not* to invoke the Decolonization Declaration in their argument on the merits, even in support of their argument that territorial apartheid was contrary to international law.[57] The UK could have argued that the omission of the Decolonization Declaration from the Applicant's memorial on the merits of the *South West Africa Cases* provided evidence that, in the view of the Applicants themselves, the Decolonization Declaration did not reflect customary international law in the 1960s. Why the UK did not cite the Applicant's memorial in the *South West Africa Cases* to support its view that the Decolonization Declaration did not reflect

53. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 25 February 2019, Separate Opinion Judge Gaja at para. 1. I reached a similar conclusion in Victor KATTAN, "Self-determination During the Cold War: UN General Assembly Resolution 1514 (1960), the Prohibition of Partition, and the Establishment of the British Indian Ocean Territory (1965)" (2015) 19 Max Planck Yearbook of United Nations Law 419 at 468.

54. "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 e of the Charter of the United Nations", GA Res. 1541, 15 December 1960.

55. *Ibid*. The difference between self-determination and self-government is explored in a chapter of mine. See Victor KATTAN, "Self-determination as Ideology: The Cold War, the End of Empire, and the Making of UN General Assembly Resolution 1514 (14 December 1960)" in Klara VAN DER PLOEG *et al.*, *International Law and Time: Narratives and Techniques* (New York: Springer, forthcoming).

56. *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, [1962] I.C.J. Rep. 1962 319. *South West Africa, Second Phase*, Judgment, [1966] I.C.J. Rep. 6.

57. See Victor KATTAN, "There was an Elephant in the Courtroom: Reflections on the Role of Judge Sir Percy Spender (1897–1985) in the South West Africa Cases (1960–1966) After Half a Century" (2018) 31 Leiden Journal of International Law 147, especially at 161–3.

customary international law by 1965, when the Chagos was detached from Mauritius, remains a mystery.

Finally, the ICJ was careful to say that the wording used in the Decolonization Declaration had a normative character, only *insofar as* it affirmed that "[a]ll peoples have the right to self-determination".[58] The Court did not go so far as to say that the Decolonization Declaration *as a whole* reflected customary international law. It did, however, concede that state practice and *opinio juris* confirmed the customary law character of the right to *territorial integrity* of a non-self-governing territory as a corollary of the right to self-determination.[59]

The only conclusion to be drawn from the Advisory Opinion is that the UK has been administering the Archipelago in violation of international law for over four decades, and that Mauritius has had sovereignty over the Archipelago since 1965, which the UK has been illegally administering. Regarding the future of the military facilities on Diego Garcia, Mauritius has assured the UK and the US governments that the exercise of effective control by Mauritius over the Chagos Archipelago would not in any way pose any threat to the military base: "Mauritius is committed to the continued operation of the base in Diego Garcia under a long-term framework, which Mauritius stands ready to enter into with the concerned parties."[60]

58. *Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, *supra* note 4 at para. 153.

59. *Ibid*., at para. 160.

60. See the statement made by Mauritian Prime Minister Pravind Jugnauth at the 88th Plenary Meeting, 71st Session of the General Assembly, 22 June 2017, UN Doc. A/71/PV.88, at 8.