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Bilateral Investment Treaties Of Uzbekistan: Investor-State Dispute Resolution

ELDOR TULYAKOV, MP[†]

TABLE OF CONTENTS: 1. Introduction; 2. Available Forums for the Settlement of Disputes Under Uzbek Bits; 3. Uzbekistan's Tendency of Concluding Bits; 4. Source of Uzbekistan's Consent to Arbitration; 5. Waiting Periods and Amicable Settlement; 6. "Fork in the Road" Provision; 7. Most-Favoured-Nation and Umbrella Clauses; 8. Final Awards; 8.1. Costs of Arbitration; 8.2. Diplomatic Interference; 8.3. Operation of Bits in Practice; 9. Summary and Recommendations.

ABSTRACT: The main purpose of this paper is to familiarise the reader with how foreign investors are protected in Uzbekistan under its BITs. Thus, the paper will analyse BIT clauses of Uzbekistan and investor-state dispute resolution mechanisms available under Uzbek BITs. Throughout the following paper, the reader will notice that although Uzbek BITs contain some provisions inherent in modern BITs in terms of investor-state dispute settlement there is still room for improvement. Therefore, recommendations for improvement will be provided at the end of this article.

KEYWORDS: *Investment*; *BIT*; *Uzbekistan*; *Protection*; *International Law*; *Investor-State Arbitration*; *Dispute*

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1. INTRODUCTION

Any rational person who is considering making direct investments abroad wants to make sure that these will be safe. Of course, there are many risks inherent in such investments, such as, market risks, currency exchange risks, political risks, legal risks some of which are measurable while some of them are not, and some of which are manageable while some of them are not. But the bottom line is that a rational investor carefully assesses all these risks before making his final decision. They normally decide to invest only if a return that they expect from the investment would justify the risks taken. If a host country's risk profile is lower, it will be easier and cheaper for the country to attract foreign investment because in this case investors will have access to relevant information for them to take the decision on making the investment. Therefore, it may reduce the time and cost of some otherwise necessary due diligence.

Bilateral investment treaties (hereinafter BITs) play an important role in this paradigm.[1] They often provide some level of comfort against political and legal risks for foreign investors. They reflect agreements between two countries (the so-called "host" and "home" countries) containing reciprocal undertakings for the promotion and protection of private investments made by nationals of both signatory countries in each other's territories. These agreements provide the terms and conditions under which nationals of a home country invest in the host country, including their rights and protections. As the BITs' terms vary and they differ in the protections they provide, investors often check the

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[†] B.A. (Hons.), University of Westminster, 2008, LL.M., Institute for Law and Finance, 2011. The author is currently a Member of the Committee on Budget and Economic Reforms, Legislative Chamber of Oliy Majlis (Parliament) of the Republic of Uzbekistan. The views expressed in this article belong to the author and do not reflect the view of the Parliament of the Republic of Uzbekistan.

[1] According to the U.N.C.T.A.D., in 2016, countries concluded thirty-seven new International Investment Agreements (hereinafter I.I.A.): thirty bilateral investment treaties (BITs) and seven treaties with investment provisions (hereinafter T.I.Ps.). In addition, twenty-six I.I.As. entered into force. This brought the size of the I.I.A. universe to 3,324 agreements (2,957 BITs and 367 T.I.Ps.) by year-end UNCTAD, World Investment report 2017, Investment and Digital Economy, U.N. Sales No. E.17.II.0.3 (2017), http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

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availability of such treaties and their provisions. BITs typically include rights and protections such as: (a) National and Most-Favoured Nation Treatment, (b) Protection against Expropriation, (c) Fair and Equitable Treatment, (d) Full Protection and Security, (e) Free transfer of investment-related payments, returns and movable property, (f) Umbrella clauses, (g) Compensation for Losses, and (h) Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party, all of which have the effect of reducing risks for the foreign investor.[2]

Briefly stated, these protections help ensure that foreign governments treat investors from the other BIT signatory country in the same way as domestic companies ("national treatment"), and guarantee that investors in the host country are given the same types of benefits that other foreign investors receive ("most-favoured nation treatment"). Through BITs, host governments often agree to treat investors from the home country on a "fair and equitable" basis in accordance with international law. This can, for example, protect investors from licensing requirements that do not apply to other, domestic or foreign companies or from discriminatory treatment.

BITs also protect investors in a number of other ways. For example, some BITs limit foreign governments from nationalising or otherwise expropriating an investor's investments. Where an expropriation occurs, BITs often provide that the government must offer fair and timely compensation to the investor.

Perhaps the most important protection that many BITs provide is access to arbitration against the host government where a dispute arises.[3] Among other things, providing access to dispute resolution against the host government, this provision can be very useful in countries where the legal system is not favourable to foreigners or where the legal system is not transparent or well-developed.

[2] *See also* Peter T. Muchlinski, Multinational Enterprises & the Law (2nd ed. 2007).
[3] In 1969, I.C.S.I.D. published a series of model arbitration clauses for use in BITs.

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Therefore, it is important for a host country to honour its commitments made in BITs. At the end of the day, these commitments are relied on by investors.[4] It is also very important for an investor to be able to dispute the matter if the host state breaches its commitment. This leads to the main theme of this paper – the investor-state dispute settlement under bilateral investment treaties of Uzbekistan. The purpose of this paper is to familiarise the reader with investor-state dispute resolution mechanisms available under Uzbek BITs. Throughout the following paper, the reader will notice that although Uzbek BITs contain some provisions inherent in modern BITs in terms of investor-state dispute settlement there is still room for improvement. Therefore, recommendations for improvement will be provided at the end of this article.

2. AVAILABLE FORUMS FOR THE SETTLEMENT OF DISPUTES UNDER UZBEK BITS

In general, according to the BITs signed by Uzbekistan, an investor has a choice of national courts, ad hoc arbitration, or the World Bank's International Centre for the Settlement of Investment Disputes (hereinafter I.C.S.I.D.), when the dispute is with the government. It is well known that I.C.S.I.D. awards enjoy recognition and enforcement in all I.C.S.I.D. member states, whether or not they are parties to the dispute.[5] Along with 161 signatory states, Uzbekistan is a member of the I.C.S.I.D.Convention[6] and a signatory to the 1958 United Nations

[4] *See* U.N.C.T.A.D., THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES, U.N. SALES NO. E. 09.II.0.20 (2009); *see also* Kenneth J. Vandevelde et al., THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl P. Sauvant & Lisa E.Sachs eds., 2009).

[5] Nevertheless, one should also admit that due to certain particularities in practice sometimes difficulties may also arise in enforcing the award. *See, e.g.*, the case of Hösgsta Domstolen [HD] [Supreme Court] 2011-07-1 p. 12 No. Ö 170-10 (Swed.). (Mr. Sedelmeyer fought the Russian government for over a decade and launched over eighty different disputes to try to recover an S.C.C. arbitration award he had received against the Russian government).

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Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter New York Convention).[7] The importance of the New York Convention can be seen from the stated objectives which encompass common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.[8] Additionally, one should also note that the Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges parties to ensure such awards are recognised and generally capable of enforcement in their jurisdiction, in the same way as domestic awards.

For instance, with regard to settlement of disputes according to the Austria-Uzbekistan BIT , dispute settlement is divided into two parts. An investor is provided with a number of means of settlement to choose from, unless the dispute is settled by negotiation or consultation. The BIT also requires that sixty days' notice must be provided to the host state before filing a Request for Arbitration. An additional requirement is that the dispute should be submitted not later than five years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute. Exceptions to these requirements are not foreseen.

The Uzbekistan-Israel BIT only lists I.C.S.I.D. as means of investor-state dispute resolution.[9] This is of course different in relation to other BITs discussed which provide the investors with other options.

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[6] *See* I.C.S.I.D., List of contracting states and other signatories of the Convention, I.C.S.I.D./3 (Aug. 27, 2018). Of these, only 153 states have ratified the Convention. Uzbekistan is a member of the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (hereinafter I.C.S.I.D. Convention) since March 17, 1994 and it is in force for Uzbekistan since August 25, 1995; Uzbekistan ratified the New York Convention on February 7, 1996 and it has been in force for Uzbekistan since May 7, 1996.

[7] U.N.C.I.T.R.A.L., CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, JUN. 10,1958, Vol.15-05576.

[8] *Id.*

[9] *See* Agreement on the Reciprocal Promotion and Protection of Investments, Isr.- Uzb., art. VIII, Jul. 4, 1994 1997 U.N.T.S. 1-34213.

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3. UZBEKISTAN'S TENDENCY OF CONCLUDING BITS

In conformity with its commitment to respect international practice of dispute resolution between investors and states, Uzbekistan is ratifying and implementing international treaties[10] and concluding more and more BITs with states that foresee arbitration as a neutral and the most appropriate way of resolving disputes to guarantee the protection of investments made by foreign nationals and states. Hence, Uzbekistan has been actively involved in concluding BITs since the early stages of its independence[11]. In fact, more than 60% of Uzbekistan's BITs were signed between 1992 and 1999, about 30% were signed between 2000 and 2010, and 10% were signed after 2011. Currently, Uzbekistan is a party to around fifty BITs which are concluded with states such as; Austria, Azerbaijan, Bangladesh, Belgium and Luxembourg, China, Czech Republic, Finland, France, Germany, Hungary, Pakistan, the Russian Federation, the United Kingdom, and the United States, although not all of these treaties have been ratified and/or entered into force.[12]

4. SOURCE OF UZBEKISTAN'S CONSENT TO ARBITRATION

We know that international arbitration is a voluntary and consent-based method of dispute resolution. However, unlike in commercial arbitration, in investment treaty arbitration, a unilateral offer of consent to arbitration

[10] At the C.I.S. level, Uzbekistan also ratified the Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases, CIS, Jan.22, 1993, Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR, Vol. 4, 2007 and the Kiev Convention on settling Disputes related to Commercial Activities, CIS, Mar. 24, 1992.

[11] Following the breakup of the Soviet Union, it declared independence as the Republic of Uzbekistan on 31 August 1991.

[12] For example, despite the fact that the Treaty concerning the encouragement and reciprocal protection of investment, U.S. - Uzb., Dec.16,1994 S. TREATY DOC. No. 104-25 (1996). has been signed on December 16, 1994, it has not been ratified yet. *See also* U.N.C.T.A.D., *Database on BITs. of Uzbekistan*, INVESTMENTPOLICYHUB.UNCITAD.ORG, http://investmentpolicyhub.unctad.org/IIA/CountryBits/226.

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is given by the contracting states. Investors, on the other hand, typically express their consent to arbitration by filing a request for arbitration. As such one may ask where the host state's consent to arbitration is usually expressed. One source of consent may be found in a contract between the foreign investor and the host state. The second source can be the state's national legislation. A third place where one might find the consent of the state is in the state's BITs. (or more generally I.I.As.).[13]

Like most other states, the main source of Uzbekistan's consent to arbitration is reflected in its BITs. However, the fact that Uzbekistan's law "On Guarantees and Measures for Protection of Rights of Foreign Investors" (hereinafter R.F.I.L.) contains explicit consent of the state to arbitration was disputed in the past. In fact, the Constitutional Court of Uzbekistan held that R.F.I.L., does not reflect Uzbekistan's explicit consent to arbitration.[14] In this decision, the Court interpreted article 10(1) of R.F.I.L which states that a dispute, directly or indirectly concerning foreign investments (hereinafter investment dispute), can be resolved upon the agreement of the parties by means of consultations between them.[15] Furthermore, the article foresees that if the parties are not able to reach a consensus, such a dispute should be resolved by the economic court of the Republic of Uzbekistan or by means of arbitration according to the rules and procedures of the international treaties (agreements and conventions) on resolution of investment disputes which the Republic of Uzbekistan has joined.[16] Accordingly, the Constitutional Court of the Republic of Uzbekistan delivered a decision that article 10(1) of the R.F.I.L. did not include the notion of "agreement of

[13] UNCTAD, Special Update on Investor-State Dispute Settlement: Facts And Figures, IIA Issue Note, No. 3, (2017).
[14] Decision of the Constitutional Court of the Republic of Uzbekistan, "On Interpretation of the part one, article 10 of the Law of the Republic of Uzbekistan "On Guarantees and Measures for Protection of the rights of Foreign Investors"" (Nov. 20, 2006).
[15] Law of the Republic of Uzbekistan "On Guarantees and Measures for Protection of the Rights of Foreign Investors" (1994) (amended 1995), available in Russian at http://lex.uz/docs/8522.
[16] *Id.*

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the parties" within its meaning.[17] The Court further stated that the part of the provision that prescribed the resolution of investment disputes by means of arbitration in accordance with the rules and procedures of international agreements (treaties and conventions) on resolution of investment disputes that Uzbekistan has joined, could not be equated with the expression of agreement of the Republic in accordance with the I.C.S.I.D. Convention.

The Justifications given with regards to this decision were that the provision only provided options on the resolution of investment disputes and did not include the written consent of either party for the resolution of the disputes by any of those means of dispute resolution stated, whereas, in reference to Article 25 of the I.C.S.I.D. Convention, obligatory written consent of the parties of the investment dispute is required for an I.C.S.I.D. tribunal to resolve the dispute. Thus, the Court noted that the provision of the article set common rules with no reference to any concrete agreement or Convention.[18] As such, Global Arbitration Review (hereinafter G.A.R.) also noted that the Uzbek Constitutional Court said, with regard to the article 10(1) of the R.F.I.L. which provides for international arbitration "is not an expression of consent" in any particular case.[19]

From the point of view of a state's consent, it is widely accepted that BITs can be classified into several groups such as: explicit consent, implicit consent, agreement to provide consent in the future and reservation of consent to arbitration.[20]

By analysing the BITs of Uzbekistan one can see that most of them contain implicit consent to arbitration, as shown, for example in the Uzbekistan-Japan BIT :

[17] *Uzbekistan Court Queries Treaty Consent*, Global Arbitration Review (Dec. 8, 2006).
[18] *Id.*
[19] *Id.*
[20] *See* Andrew Newcombe Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment 44 (2009).

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> Article 16. . . . . 3. If the investment dispute cannot be settled through such consultations within three months from the date on which the investor requested the consultation in writing, the investment dispute shall at the request of the investor concerned be submitted to either:
>
> (1) conciliation or arbitration in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington D.C. on March 18, 1965 so long as the Convention is in force between the Contracting Parties, or conciliation or arbitration under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes so long as the Convention is not in force between the Contracting Parties . . . ..
>
> Nevertheless, explicit consent is also agreed in some Uzbek BITs, including the Uzbekistan-Greece BIT . According to Article 9 :
>
> 2. If such disputes cannot be settled within six months from the date either party requested an amicable settlement, the investor concerned may submit the dispute either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international arbitration.
>
> Each Contracting Party hereby consents to the submission of such dispute to international arbitration.[21]

Regarding the duration of consent or so-called “survival clauses” or “sunset clauses” most of the Uzbekistan BITs contain expressly agreed

[21] *See also* Bilateral Investment Treaties, Uzbek. – Poland, art. X, Jan. 11, 1995 and Agreement between the Government of the Republic of Singapore and the Government of the Republic of Uzbekistan on the Promotion and the Protection of Investments, Sing - Uzbek., art. XIII, July 15, 2003, respectively.

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terms which guarantee that the provisions of the treaty remain in effect for ten years even if it is denounced, as stated in, among others, the BITs with Poland, Russia, Turkey, Malaysia, United Arab Emirates, Latvia, Portugal, Georgia, Turkmenistan. However, what is more interesting and a sign of long time consistency, is that the Uzbekistan-Germany BIT contemplates that the BIT will remain in effect for an additional twenty years after it has been denounced.[22] We should acknowledge that due to certain geopolitical issues, diplomatic relations between states may come to an end. Therefore investors may fear losing investments due to the complications beyond their control. Whereas, according to Article 13 of Uzbekistan-Germany BIT investors are additionally protected under the BIT even in absence of a diplomatic or consular relation between the states.[23] Moreover, the BITs between Uzbekistan and Switzerland, Finland, Sweden, Netherlands and Greece provide for a sunset clause of fifteen years.

Additionally, in order to benefit foreign investors, Uzbekistan's "Law on Foreign Investments" (hereinafter 1998 FIL) also fixed the period during which the investor would be protected from any legislation that "adversely affects the conditions of investment" at a full ten years.[24] Thus, if the subsequent legislation of the Republic of Uzbekistan was to worsens the conditions for investment, then the laws applicable at the date of investment will continue to be applicable for the next ten years. In addition to that, foreign investors will have the right to apply the provisions of the new legislation that improve the conditions of their investments. Accordingly, even though a state may unilaterally terminate

[22] Gesetz zu dem Vertrag vom 28. April 1993 zwischen der Bundesrepublik Deutschland und der Republik Usbekistan Ober die Forderung und den gegenseitigen Schutz von Kapitalanlagen [Law of the 28 April 1993 Treaty between the Federal Republic of Germany and the Republic of Uzbekistan on the Claim and Mutual Protection of Capital Investments], Germany - Uzbek., art. XIV, Apr. 28, 1993.

[23] Similar provisions are also foreseen in Bilateral Investment Treaties, Uzbek-Kuwait , art. XI, Jan. 19, 2004.

[24] Law of the Republic of Uzbekistan "On Foreign Investments", No. 609-I (1998) (as amended by the Law of the Republic of Uzbekistan No. 832-I of August 20, 1999), available in Russian at s/7452http://lex.uz/docs/7452.

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a BIT, its consent to investor-state arbitration and privileges provided for the investors will not usually terminate at the same time.[25]

5. WAITING PERIODS AND AMICABLE SETTLEMENT

Almost all BITs of Uzbekistan in the initial stage provide for an investor-state resolution of disputes by friendly means like negotiations, consultations and through diplomatic channels. For example, the BIT between Uzbekistan and the Belgium-Luxembourg Economic Union[26] apart from the above mentioned means of negotiations also sets forth settlement by means of third-party expert opinion.

Similarly, the Uzbekistan-France BIT also foresees dispute settlement by means of friendly negotiations. We should note that these procedures are often not formal and thus legal rights and obligations are not emphasized unlike strict procedural laws and regulations in the courts. Accordingly, parties may attract a neutral third party who aims to help the parties reach consensus. often this person is highly qualified in the area of investments or speaks the same language[27] of the parties. Therefore, as long as the solution reached is just and reasonable, the parties may adhere to it.

Furthermore, almost all BITs of Uzbekistan set a requirement for reaching the dispute settlement by peaceful means within six months. A three-month period has been agreed on, only with Oman, Japan, United

[25] It should be noted that as of 20th of October 2018 government of Uzbekistan has announced of its completed work on the concept paper regarding the draft law on further substantially strengthening the available rights and guarantees of foreign investors.

[26] Accord entre l'Union économique belgo-luxembourgeoise, d'une part, et le Gouvernement de la République d'Ouzbékistan, d'autre part, concernant l'encouragement et la protection réciproques des investissements [Agreement between the Belgo-Luxembourg Economic Union and the Government of the Republic of Uzbekistan concerning the Reciprocal Promotion and Protection of Investments], BLEU - Uzbek., Apr. 17, 1998.

[27] By that we mean not only the common language the parties speak but also all the particularities which may arise during the communication due to various factors like the background of the parties, tradition, culture, business and technical terminology, etc.

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Kingdom and Finland. Although a six-month period is common in BITs and seems to be realistic, in most circumstances this period is still not sufficient. A three-month period might be even too short. One might wonder how an amicable settlement is possible within such a short period of time and what the communication will be like between foreign partners. Additionally, decision-making processes within the host government may take longer, especially if the dispute is over a significant investment in terms of financial amount and/or close partner or if the investment is made in a strategic sector.

Despite the fact that amicable ways of dispute settlement can help to save time and money, find a mutually acceptable solution, prevent escalation of the dispute and preserve a workable relationship between the disputing parties, still one can see that BITs of Uzbekistan with Kazakhstan, Turkmenistan, Azerbaijan, Kyrgyzstan, Latvia, Bangladesh, Moldova, Netherlands, Israel, and Georgia do not foresee or require dispute resolution by friendly means at the initial stage. Notwithstanding this fact, Uzbekistan enjoys a good relationship with many of these states, particularly with neighbouring countries such as Kazakhstan. As a result, disputes between parties under these investment treaties will be typically resolved using amicable means of dispute resolution. It would not be surprising if the relevant BITs were amended to memorialize this practice in writing.

6. "FORK IN THE ROAD" PROVISION

Despite the fact that most investment treaties do not require an investor to exhaust local remedies, and permit an investor to have direct recourse to international arbitration, the investor-state dispute resolution part of the Republic of Uzbekistan-United Arab Emirates BIT provides that upon failure to resolve the dispute by friendly means within six months, at the

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request of the investor, the dispute should be submitted to the court where the investment is made.[28] Though paragraph 3 further provides recourse for I.C.S.I.D. arbitration only after twenty-four months have elapsed, as such this period is available to the local court to resolve the dispute.

Here we should also mention that there are many advantages to having the case heard in a national court. The first and most important one is that it may be easier and faster to enforce a court decision in Uzbekistan rather than an award of an international arbitral tribunal. Because, to take a simple example of a language barrier, one can already face certain complications translating judicial decisions into the official language of Uzbekistan for them to be recognized and enforced. Of course, nowadays it is not really hard to find a proper translator, but it may cost the parties additional time, money and efforts. Other advantages can be cost and time savings, at least in terms of international flights, legal counsel, interpreters, and arbitration costs.[29] This will especially work and be beneficial for both parties when the non-Uzbek party has an office and personnel in Uzbekistan, including legal personnel (also local lawyers with proper national legislation background) to handle the case. This might eliminate the need to travel internationally and thus save resources. Also, court proceedings may allow parties to control the confidentiality of the case and thus avoid harm to their reputation be it a host state or the foreign investor.[30] This is especially important when a dispute is over a significant or sensitive matter . In some cases details of

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[28] Agreement between the Government of The United Arab Emirates and the Government Of The Republic Of Uzbekistan for the Promotion and Reciprocal Protection of Investments, United Arab Emirates - Uzbek., Oct. 26, 2007.

[29] Because national courts are available for a reasonable fee only. Additionally, according to article 330 of the Tax Code of Uzbekistan business entities are exempted from payment of state duty to the courts when applying to the courts over the decisions of state and other bodies, actions (inaction) of their officials, violating the rights and legal interests of business entities in relation to the implementation of entrepreneurial activities. *See* TAX CODE art. 30, No. ZRU-136 (2008).

[30] Local court will also often have the authority to order more varied types of relief, such as declaratory or injunctive relief, in addition to monetary damages. We should note that although these types of relief are of course also available to arbitrators, they may be less likely to award such types of damages than courts.

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the arbitration can be available to the public; whereas, Uzbek legal proceedings (unlike court proceedings in some other countries) are guaranteed to be confidential. For example article 8 of the Economic Procedural Code foresees that the hearing of the case in a closed session is allowed when it is necessary to preserve the state secret or commercial secret. As such, to avoid harm in the market (for example, stock prices of the investor, investment reputation of the state or others) parties may sometimes consider referring their disputes to national courts.

Nonetheless, if there is a lack of trust in the local court's independence, impartiality and competence, a "fork in the road" provision[31] may inhibit the fair resolution of the dispute, because a foreign investor might feel a local court would be biased toward the host state. Therefore, it may take a longer time period to reach a fair decision (at least from the point of view of the investor) which may deteriorate the investment and diminish or destroy its value.

7. MOST-FAVOURED-NATION AND UMBRELLA CLAUSES

Analysis of the BIT clauses show that where a matter is governed simultaneously, both by the BIT and by another international agreement to which both Contracting Parties are parties, the investor is free to take advantage of whichever rules are the more favourable to his case.[32] The Uzbekistan-Korea BIT and Hungary-Uzbekistan BIT also provide that where a matter is governed simultaneously both by the BIT and by

[31] Preventing duplicative claims i.e. "Fork-in-the-road" clauses require investors to choose between domestic courts and international arbitration at the outset. Once an investor starts domestic proceedings, it loses the right to resort to arbitration, and vice versa. See U.N.C.T.A.D., Investor - State Dispute Settlement - UNCTAD Series on Issues in International Investment Agreements II, UNCTAD/DIAE/IA/2013/2 (2014), 86. for more information. Available at en.pdfhttp://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf.

[32] This is of course only true where the other international agreement provides for international arbitration.

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another international agreement to which both Contracting Parties are parties, nothing in the BIT shall prevent an investor of one Contracting Party who owns investments in the territory of the other Contracting Party from taking advantage of whichever rules are the more favourable to his case. Furthermore, BITs of Uzbekistan also foresee that if the laws and regulations of the other Contracting Party provide more favourable treatment than the BIT concluded, more favourable treatment shall be accorded.[33]

8. FINAL AWARDS

Another issue of concern is the matter of the final awards. For example, differences between the BITs can be seen in directly agreeing to the fact that the arbitral awards shall be final and binding for both parties to the dispute and enforced in accordance with the domestic laws of the Contracting Party concerned. One can see that these issues are agreed in the BITs with the Russian Federation, Sweden, China, Lithuania, Greece, Poland, Kuwait, Bahrain, Oman, Hungary, Bulgaria, Saudi Arabia, BLEU, Finland whereas other ones do not contain such provisions.

8.1. COSTS OF ARBITRATION

Arbitration historically was considered to be a prompt and inexpensive way of dispute resolution. However, one should note that these factors may not always be the case nowadays. Because of the changes within the

[33] See for further examples Agreement between the Government of the Republic of Korea and the Government of the Republic of Uzbekistan for the Promotion and Reciprocal Protection of Investments, Uzbek- ROK, art. XII, June 17, 1992; Agreement between the Government of the People's Republic of Bangladesh and the Government of the Republic of Uzbekistan for the Promotion and Reciprocal Protection of Investments, Uzbek-BD, artt. IV, X, XI, July 18, 2000; Agreement between the Government of the Hellenic Republic and the Government of the Republic of Uzbekistan for the Promotion and Reciprocal Protection of Investments, Uzbek- GR, artt. IX, X, Apr. 1, 1997.

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society and the business environment, arbitration might take longer than litigation. The advancement of technology, legislation requirements and the complications in the business are factors that may delay arbitration proceedings. Therefore, costs of arbitrating must be carefully considered before referring to it for dispute resolution. The remuneration of arbitrators alone can amount to a sizeable part of the overall arbitration costs.[34] Subsistence allowances and reimbursement of travel expenses may also be extensive. Under the United Nations Commission on International Trade Law (hereinafter U.N.C.I.T.R.A.L.) Rules, costs can be even higher, as arbitrators generally set their own fees taking into account the monetary amount in dispute, the complexity of the subject-matter, and the amount of time spent by the arbitrators. Here we could also refer to Professor Kreindler's findings and implement the most suitable approach for the country where he states that tribunals have taken at least seven different approaches to costs: (1) costs follow the event — victor takes all; loser pays all costs of the arbitration and all attorneys' fees; (2) costs follow the event "pro rata" — loser pays all costs and prevailing party's attorneys' fees proportional to the outcome; (3) costs follow the event "modified" — loser pays all costs but does not pay prevailing party's attorneys' fees; (4) costs shared equally, including attorneys' fees and irrespective of differences in their amount; (5) costs shared equally, but attorneys' fees borne by the party retaining the attorneys; (6) the "American Rule" — each party bears its own costs and attorneys' fees; (7) the "American Rule" exception — if there is manifest fraud, corruption, or the like, the culpable party would bear some or all of the costs of arbitration and/or some or all of the opposing side's attorneys' fees[35].

[34] In the I.C.S.I.D. system, arbitrators' fees are set according to the schedule — currently US$3,000 per day per arbitrator. See for further information at I.C.S.I.D., https://icsid.worldbank.org/en/Pages/icsiddocs/Schedule-of-Fees.aspx, (Mar. 26, 2018).

[35] Richard Kreindler, *Final Rulings on Costs: Loser Pays All?*, TRANSNATIONAL DISPUTE MANAGEMENT, (Jan. 10, 2018), https://www.transnational-dispute-management.com/article.asp?key=1505.

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Accordingly, in BITs with China, Poland and Bulgaria it is agreed in the written form that each Contracting Party shall bear the cost of its own arbitrator and its representation in the arbitral proceedings and the cost of the President of the arbitration board in discharging his or her duties and the remaining costs of the arbitration board shall be borne equally by the Contracting Parties. Other BITs do not expressly regulate the issue. The Uzbekistan-Poland BIT also sets an exception to the rule. This BIT envisages that the arbitral tribunal may allocate the expenses incurred by one of the sides based on a different proportion, and that the decision is mandatory for both. According to the Uzbekistan-China BIT the arbitral tribunal may award one disputing party to bear a higher proportion of the costs. Thus, exceptions to the provision have also been foreseen in the BIT itself. The BIT goes further regarding the fate of cost distribution in case of frivolous claims. Thus, it establishes the norm that if the tribunal deems that the claim or the objection of one disputing party is frivolous, it may order the losing party to bear reasonable costs as well as the attorney's fee incurred by the prevailing party which opposed the objection with a reasonable cause.

We should note that there is no uniform rule with respect to the final allocation of costs by the tribunal. Some arbitral rules contain presumptions about the allocation of costs. For example, Article 42(1) of the U.N.C.I.T.R.A.L. Rules (2010) provides that: "The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case."

An illustrative example would be the *Romak* case.[36] As stated in the award, the BIT was silent with respect to the allocation of the arbitration costs and the costs of legal representation of the parties. Therefore, the tribunal applied provisions on costs contained in Articles 38 to 40 of the

[36] Romak S.A. (Switzerland) v. The Republic of Uzbekistan, U.N.C.I.T.R.A.L. PCA Case No. AA280 (2009) available at https://www.italaw.com/sites/default/files/case-documents/ita0716.pdf.

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U.N.C.I.T.R.A.L. Arbitration Rules. Thus, the arbitral tribunal fixed the costs of the arbitration in the amount of EUR 293,462.27 (including VAT).[37] When deciding how the arbitral costs should be apportioned between the parties, the arbitral tribunal noted its discretion in allocating costs and expenses in accordance with the U.N.C.I.T.R.A.L. Rules. As a result, the tribunal firstly noted that the Respondent had prevailed entirely as a matter of jurisdiction.[38] The question therefore became whether the Claimant should bear more than half of the arbitration costs and/or pay the Respondent's legal fees and expenses. The tribunal ordered that the parties should bear the arbitration costs of EUR 293,462.27 in equal shares, to be satisfied out of the advance on costs already paid by the parties. The tribunal also ordered that each party should bear its own costs for legal representation and assistance.[39]

Similarly, in *Oxus Gold* the arbitral tribunal recalled Articles 40 and 42 of the U.N.C.I.T.R.A.L. Arbitration Rules which were the relevant provisions regarding costs.[40] The Claimant claimed total fees and expenses (including those for witnesses and experts and its Hearing expenses) of USD 9,546,369.53. Respondent's total fees and expenses (including those for witnesses, experts, translation and the hearing) amounted to USD 15,672,698.10 and EUR 28,852.50. Considering the wording of Article 42(1) of the U.N.C.I.T.R.A.L. Arbitration Rules and the cases discussed in the award, the arbitral tribunal therefore considered that where there is not a clear winner or loser, costs should in principle be awarded "following the event", i.e. taking into account the parties' relative success regarding their claims and defenses. In limited circumstances, a party's conduct during the proceedings such as deficiencies in its presentation of the case or obstructive behavior may justify a deviation from that principle. The tribunal determined that the

[37] Said amount included both arbitrators' fees and the expenses of the arbitral tribunal.
[38] Romak S.A. (Switzerland) v. The Republic of Uzbekistan, *supra* note 36.
[39] *Id.*
[40] Oxus Gold plc v. Uzbekistan, U.K. - Republic of Uzbekistan U.N.C.I.T.R.A.L. (ad hoc tribunal) IIC 779 (2015) https://www.italaw.com/sites/default/files/case-documents/italaw7238_2.pdf.

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Respondent failed in its attempted jurisdictional defense against the Claimant's standing, its other jurisdictional and admissibility objections as well as the Respondent's counterclaims . It also rejected the Claimant's claims in their essential part. The tribunal also found that the parties were equally at fault for any aggravation or complexity of the arbitration. In light of this and because it determined the parties' success and defeat were "equally distributed", the tribunal concluded that each party should pay half of the arbitral tribunal's fees and expenses and should bear its own fees and expenses, including those for witnesses and experts.[41]

In *Metal-Tech Ltd. v. Republic of Uzbekistan*[42] the Claimant's total costs incurred in connection with the proceedings amounted to USD 1,687,966.86, comprising legal fees and expenses of USD 1,112,966.86 and payments to I.C.S.I.D. of USD 575,000.00. The Respondent's costs in connection with the arbitration were USD 7,985,954.95, comprising legal fees and expenses of USD 7,435,954.95 and payments to I.C.S.I.D. of USD 575,000.00. Each party requested that their costs be borne by the other party. The tribunal decided that the costs of the proceedings, including the fees and expenses of the tribunal and the fees of I.C.S.I.D., should be borne by the parties in equal shares. Additionally, it was decided that each party should bear the legal fees and other expenses it incurred in connection with the arbitration. The reasoning of the tribunal on the allocation of costs was essentially the following:

It is true that the Respondent prevails. At the same time, it is also true that the Claimant sought to minimize the costs of the proceedings, which is not the case of its opponent, as the disparity of the cost figures shows. The choice not to bifurcate jurisdiction and liability, but only quantum, does not plead against the tribunal's apportionment. Indeed, if jurisdiction was not bifurcated it is because the Respondent's objections addressed facts that related to both jurisdiction and merits. More important, the tribunal's determination is linked to the ground for denial

[41] *Id.*
[42] Metal- Tech Ltd v. Republic of Uzbekistan, I.C.S.I.D. Case No. ARB/10/3, https://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf.

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of jurisdiction. The tribunal found that the rights of the investor against the host State, including the right of access to arbitration, could not be protected because the investment was tainted by illegal activities, specifically corruption.[43]

8.2. DIPLOMATIC INTERFERENCE

Research shows that another difference lies in the fact that BITs with Portugal, Kuwait and United Arab Emirates foresee that neither Contracting Party shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have terminated and until a Contracting Party has failed to abide by or to comply with the award rendered by the arbitral tribunal. Nevertheless, it is worth noting that the Kuwait BIT also provides a positive exception by stating that an unofficial exchange of diplomatic writings for the purposes of facilitating the process of dispute settlement does not constitute diplomatic protection envisaged in that paragraph.[44]

8.3. OPERATION OF BITS IN PRACTICE

It was mentioned above that states give their advance consent to all of the forums/rules in several ways; for what concerns for Uzbekistan we noted that BITs serve as a main source for that. Therefore, states typically have no influence on the choice of the arbitral forum/rules when a dispute arises. The forum is usually chosen by the claimant alone.

So far, out of ten investment claims brought against Uzbekistan eight of them were brought under I.C.S.I.D. Convention Arbitration Rules (I.C.S.I.D. Additional Facility - Arbitration Rules) and two under U.N.C.I.T.R.A.L. Arbitration Rules.[45] In I.C.S.I.D. cases, the instruments

[43] *Id.*
[44] *See generally* Bilateral Investment Treaty, Uzbekistan-Kuwait, art. 9, Jan. 1, 2004.
[45] *See, e.g.*, Romak S.A. (Switzerland) v. The Republic of Uzbekistan, *supra* note 36; Oxus Gold plc v Uzbekistan, *supra* note 40.

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invoked included: in three cases the Turkey - Uzbekistan BIT (1992), in two cases the 1998 FIL, in one case the Netherlands - Uzbekistan BIT (1996), Uzbekistan - Kazakhstan BIT (1997) and Israel - Uzbekistan BIT (1994), respectively. In the two U.N.C.I.T.R.A.L. cases, the instruments invoked were the Switzerland - Uzbekistan BIT (1993) and United Kingdom - Uzbekistan BIT (1993).[46] Regarding the status of the cases , six out of ten were concluded and four of them are currently pending. It is worth noting that among the concluded cases one was resolved in favour of the investor[47], two in favour of the state[48], for one, data is not available[49] and for two the tribunal issued a procedural order taking note of the discontinuance of the proceedings.[50]

Analysis of the subject matters raised in investor-State disputes involving Uzbekistan include: Textile Enterprise, Textile manufacturing activities, Retail enterprise, Oil, Gas & Mining, Cement production enterprise, Telecommunications enterprise, Molybdenum plant and Gold extraction enterprise.

The most renowned case against Uzbekistan was *Romak vs. Uzbekistan*. The claim was brought under the rules of U.N.C.I.T.R.A.L. and it did touch upon the issue of defining the term ”investment” and the claimant initially claimed an investment dispute protected under the Switzerland-Uzbekistan BIT However, the arbitral tribunal issued the award, where it clarified how “investment” should be understood in contradiction to the claimant’s view and resolved the case in favour of the Republic of Uzbekistan, thereby making an essential contribution to

[46] We should note that unlike arbitration under the I.C.S.I.D. Convention, arbitration under U.N.C.I.T.R.A.L. Rules can be subject to greater confidentiality. For example, the very existence of a dispute can be kept secret if both parties so wish.

[47] *See Oxus Gold plc v. Uzbekistan*, *supra* note 40.

[48] *See Metal-Tech Ltd. v. Republic of Uzbekistan*, *supra* note 42, and *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, *supra* note 36.

[49] *See* Spentex Netherlands, B.V. v. Republic of Uzbekistan, I.C.S.I.D. Case No. ARB/13/26.

[50] *See* In Newmont USA Limited and Newmont (Uzbekistan) Limited v. Republic of Uzbekistan, I.C.S.I.D. Case No. ARB/06/20, the tribunal issues an order taking note of the discontinuance of the proceedings pursuant to I.C.S.I.D. Arbitration Rule 43(1) on July 25, 2007. In Mobile TeleSystems OJSC v. Republic of Uzbekistan, I.C.S.I.D. Case No. ARB(AF)/12/7, the tribunal issued a procedural order taking note of the discontinuance of the proceedings pursuant to Article 49(1) of the Arbitration (Additional Facility) Rules on November 14, 2014.

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investment treaty arbitration. The facts of the case are widely known and the decision of the tribunal is also openly available.[51]

The fact that *Romak* relied upon various provisions of the BITs of Uzbekistan with other states[52] was also irrelevant in the end as these references concerned "investment" issues, whereas Romak's claim was found not to be an investment claim. In the end of 2006, Newmont, the world's second largest gold producer, brought two investment claims against Uzbekistan. The first claim was filed at I.C.S.I.D. and covered the alleged expropriation of assets. The second claim was launched at the Arbitration Institute of the Stockholm Chamber of Commerce and related to a joint venture agreement. Newmont Mining was operating in the gold mining industry in Uzbekistan. It entered into a joint venture with two Uzbek state entities in 1992 - the State Committee for Geology and Mineral Resources and the Navoi Mining and Metallurgical Combine of Uzbekistan. Newmont's stake was worth US 450 million. The dispute arose when, according to Newmont, Uzbekistan expropriated that stake without compensation. Uzbekistan claimed that Newmont failed to pay taxes in the amount of US 48 million.[53] Newmont and Uzbekistan reached a settlement less than a year after the arbitration claim was initiated and the details of the proceedings have been kept secret. Accordingly, throughout the arbitration, the process could not be observed by interested persons, especially external analysts and investors. However, the good news was that the parties were pleased that they could reach an

[51] *See* The Award of the tribunal is available at: https://www.italaw.com/sites/default/files/case-documents/ita0716.pdf.

[52] *See generally* Agreement between the Government of the Italian Republic and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments, Uzbek. - Italy, Annex B art. II (c), Sept. 17, 1997; Accord entre le Gouvernement de la Republique Française et le Gouvernement de la Republique d'Ouzbekistan sur l'Encouragement et la Protection Reciproques des Investissements [Agreement between the Government of the French Republic and the Government of the Republic of Uzbekistan for the Promotion and Protection of Investments], Uzbek. - France., art. III(1), Oct. 27, 1993; Agreement between the Republic of Austria and the Republic of Uzbekistan for the Promotion and Protection of Investments, Uzbek. - Austria, art. IV (1), June 2, 2000.

[53] *See* Global Arbitration Review, *Tribunals Constituted in Newmont Claims,* globalarbitrationreview.com (Apr. 17, 2007), http://www.globalarbitrationreview.com/news/article/13825/tribunals-constituted-newmont-claims/.

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amicable and durable agreement. Although no financial details were given, based on filings with the US Securities and Exchange Commission, G.A.R. estimated that Newmont was to receive $80 million as part of the settlement.[54]

Another case was *Metal-Tech Ltd. v. Republic of Uzbekistan.* In that case, an I.C.S.I.D. panel unanimously dismissed an investment claim by an Israeli investor filed pursuant to the Israel-Uzbekistan BIT against Uzbekistan. In the award,[55] the tribunal found that it lacked jurisdiction to hear the parties' claims and counterclaims brought under the Israel-Uzbekistan BIT and Uzbek law due to corruption related to Metal-Tech's investment in Uzbekistan. In particular, the tribunal found that payments of approximately USD 4 million made by Metal-Tech to several individuals, while presented as remuneration for various consultancy services, in fact constituted corruption and were illegal under Uzbek law.[56]

9. SUMMARY AND RECOMMENDATIONS

In conclusion, it can be said that there is some degree of difference within BITs of the Republic of Uzbekistan. These differences can be specifically observed in terms of length of the BITs, dispute settlement provisions that either provide only one option or several options or even have "fork in the road" provisions. Moreover, differences in procedural matters also exist as some BITs provide a time bar issue and some others do not; also, some BITs provide for cost allocation and others do not.

[54] *See* Global Arbitration Review, *Goldminer Settles with Uzbekistan,* globalarbitrationreview.com (Aug. 3, 2007), http://www.globalarbitrationreview.com/news/article/13976/goldminer-settles-uzbekistan/.

[55] *See* The BIT and award are available online at https://www.italaw.com/cases/227.

[56] *See* Albina Gasanbekova, *Metal-Tech Ltd. v. Republic of Uzbekistan*, cisarbitration.com (Nov. 17, 2015), http://www.cisarbitration.com/2015/11/17/metal-tech-ltd-v-republic-of-uzbekistan.

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Accordingly, to ensure a continued flow of FDI, Uzbekistan should adopt several measures to help further strengthen investor confidence. First, we have mentioned above the role of amicable ways of dispute settlement, including its advantages. For that reason, before referring the dispute to formal ways of dispute settlement taking into account all the advantages it has, we should consider amicable ways of dispute resolution or alternative dispute resolution (A.D.R.). It is worth noting that Uzbekistan has an institutional basis for that. For example, Uzbekistan could use the services of the Business Ombudsman[57] and the Chamber of Commerce and Industry of Uzbekistan for those purposes. If organizations like these take the lead when a conflict with an investor arises, this can help resolve investment disputes early on, as well as assess the prospects of international arbitration.

Second, procedural rules on dispute settlement should be more specific and detailed in some BITs in order to set a clearer mechanism for dispute resolution. In other words, it should be stated in the BIT that the investor can either go to a local court to protect his or her rights, or refer to arbitration. Investors should not be confused as to which mechanism comes after which. Prerequisites should be clearly identified to properly refer to any means of dispute settlement.

Third, time limit issues to bring a claim should be taken into consideration while concluding agreements on protection of investments. It is advised that there should be a time limit set to restrict bringing a claim if more than a certain period of time (usually from three to five years) has elapsed. This practice is for example observed in the Austria-Uzbekistan BIT[58] or the United States model BIT, under which no claim may be submitted to arbitration if more than five and three years

[57] *See* Decree of the President of the Republic of Uzbekistan ”On establishing the Institute of Authorized Body on the Protection of the Rights and Legal Interests of the Subjects of Entrepreneurship under the auspices of the President of the Republic of Uzbekistan”.
[58] *See* Agreement between the government of the People’s Republic of China and the government of the Republic of Uzbekistan on the promotion and protection of investments art. 12, China-Uzbekistan, Apr. 19, 2011.

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have respectively elapsed from the date on which the claimant first acquired knowledge of the alleged violation of the agreement.[59]

Fourth, taking into account the wide reforms in all sectors happening now in Uzbekistan, the state should have a properly drafted model BIT ready for further negotiations with its partners and increase the number of concluded BITs.[60]

Fifth, measures should be taken to promote encouraging investors to seek local remedies for a variety of reasons, including state reputation, confidentiality issues, and saving financial, human resources, time, etc. For that purpose, Uzbekistan should first of all take all possible measures to make its judicial system completely independent so that anyone, including foreign investors and our partners, has no doubt on the independence and impartiality of the judges. Here, it should be noted that although all required guarantees for reaching this aim are provided in the laws of the country, further practical measures should be taken so that they properly work in the real life. For instance, establishing complete financial independence of the judges by increasing their salaries substantially would be a way to start because currently their salaries are not market based. Furthermore, strengthening the role of the recently established Supreme Council of Judges of the Republic of Uzbekistan in nominating, appointing and later protecting the judges from external threats may be another means to achieve this goal.

Sixth, cost allocation mechanisms should be clear and concise Because if they are of a confusing character the process may be time consuming in the end. Additional misunderstandings between the parties to the dispute may make it harder to reach later consensus, and as a result, the tribunal will have to deal with an additional issue, thus increasing the necessary time to adopt its decision. As such, the Republic

[59] *See also* United States model BIT, Article 26.

[60] *See* Jonathan Bonnitcha, Substantive Protection under Investment Treaties: A Legal and Economic Analysis 336 (2014); *See also* Andrew Newcombe, *Developement in IIA Treaty-making, in* Improving International Investment Agreements 15, 21 (Armanda De Mesrtal & Céline Lévesque eds., 2013).

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of Uzbekistan may consider the option that its BITs can specifically require that each party to the dispute shall bear its own costs and fees, or that the losing party shall pay the costs and fees.

The discussions above show that BITs concluded by Uzbekistan do provide the choice of application of laws other than local laws for dispute settlement. This is mostly guaranteed by the BITs themselves. Moreover, local law also provides that international law provisions shall prevail if an international treaty of Uzbekistan foresees more beneficial conditions for investors.[61] Because of the principle of pacta sunt servanda which states that every treaty in force is binding upon the parties to it and must be performed by them in good faith, Uzbekistan is bound by the BITs and other treaties to which it is a party.[62] Otherwise it would be a breach of international law. Therefore, it is a priority of Uzbekistan to respect its obligations and provide investors to choose from the most beneficial provisions of the laws.

We believe that if the above mentioned recommendations are taken into consideration along with the other reforms happening in the Republic of Uzbekistan, the investment environment will be even friendlier and the country will become an even more reliable economic partner in the world arena.

[61] *Supra* note 17, art. 2.
[62] *See generally* Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331.

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Provisional Measures in Investor-State Arbitration: States Playing Games in Local Courts by Invoking the Trump Card (Police Powers)

YLLI DAUTAJ & BRUNO GUSTAFSSON†

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ABSTRACT: This paper outlines arbitral tribunals' power to order provisional measures under the auspices of I.C.S.I.D. Arbitration; that is, investor-state arbitration. The scope of a tribunal's power is cumbersome to discern, especially when there are possible interferences with state sovereignty. More recently, tribunals have ordered provisional measures to suspend a domestic criminal investigation or proceeding. Is this an infringement on a states sovereign prerogatives or a response to, for example, dilatory tactics by a rogue state? The crux of the issue is this: a state will always be in a position to utilize its prosecutorial powers in order to frustrate the arbitration by putting immense pressure on the investor, its employees, or its witnesses, in other words: "playing games" in local courts. In order to guarantee procedural integrity of the arbitration and, as a corollary, the legitimacy of investor-state arbitration in its entirety, the provisional measure is a practical tool that can be used effectively. On a similar vein, "sovereignty" should not force tribunals to tie their hands when serious interference with the arbitral procedure is making the procedure unfair at best, or a nullity at worst. However, legal text both empowers and constrains the tribunal. The I.C.S.I.D. Convention only allows a tribunal to "recommend" provisional measures. As seen in light of investor-state case law, in an informal (perhaps de facto) stare decisis context, a number of tribunals seem to have justified the ordering of provisional measures. In the shadow of this construction lurks the de-legitimizing of the entire investor-state arbitration system. At the same time, rogue sovereigns playing games in local courts have the same de-legitimizing effect.

KEYWORDS: *Investment Treaty Arbitration*; *Interim Measures*; *Sovereign Immunity; Suspension of Criminal Procedures*; *Treaty Interpretation*

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1. INTRODUCTION

Investment treaties (bilateral and multilateral) offer significant protection to investors operating globally. When a state breaches the substantive protection offered through the investment treaties, an investor may bring a claim in investor-state arbitration. However, the precise scope of the tribunal's power is more cumbersome to discern. This paper will focus on the tribunals jurisdiction to order provisional measures under the I.C.S.I.D. regime. To illustrate the potential scope of interference with state sovereignty, this paper will highlight the recent development where tribunals' have ordered provisional measures to suspend a domestic criminal investigation or proceeding.

The host-state, in its capacity as a sovereign, can interfere with the arbitration in a myriad of ways. For example, a host-state can conduct criminal investigations or proceedings against individuals involved in the arbitration. A state can thus utilize its prosecutorial powers in order to frustrate the arbitration by putting immense pressure on the investor, its employees, or its witnesses. As a corollary, a variety of issues can arise at the intersection of domestic criminal law and investment-arbitration.[1] In essence, the respondent host-state will always have the power to "play games" in the local courts. The crux of the matter is what powers the tribunal has to guarantee the procedural integrity on an interim basis and whether those powers are explicit, implicit or not given at all.[2]

† Ylli Dautaj, Senior Research Associate, O.P. Jindal Global University, Jindal Global Law School (India). He holds an LL.B. degree from University College Cork (Ireland) and LL.M. degrees from Uppsala University (Sweden) and Pennsylvania State University (USA). Currently a PhD Candidate at the University of Edinburgh (UK). This author is indebted to his friend, mentor, and rolemodel, Professor William F. Fox. Under his supervision and guidance the author has gained a lot of energy, motivation, and acquired much new knowledge. Many thanks also to Assistant Dean Stephen G. Barnes, a role-model and excellent individual. Bruno Gustafsson, Associate at Roschier Attorneys, Ltd, in Stockholm. He holds an LL.M. degree from Stockholm University (Sweden). However, the views and opinions expressed in this article are the author's own and are not to be ascribed to Roschier as a firm.

[1] Henry G. Burnett & Jessica Beess und Chrostin, *Interim Measures in Response to the Criminal Prosecution of Corporations and Their Employees by Host State in Parallel with Investment Arbitration Proceedings*, 30 Md. J. Int'l. L. 31, 32 (2015).

[2] In this paper "procedural integrity" includes a wider range of procedural guarantees, such as the right to a fair procedure, a good faith procedure, etc.

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This paper will address the following questions. May an I.C.S.I.D. tribunal order a sovereign to refrain from certain conduct on a provisional basis? Does an I.C.S.I.D. tribunal have the authority to, for example, suspend domestic criminal procedures? How have previous tribunals justified an "order" that suspends criminal investigations or procedures under the I.C.S.I.D. framework?

2. PROVISIONAL MEASURES

A provisional measure may serve as a procedural safeguard which provides the tribunal with a mechanism that can help all parties to be "equally heard".[3] It can be argued that a tribunal's authority to order provisional measures is a corollary to the parties' consent to arbitration.[4] Born writes that:

> [P]rovisional measures rest on a simple premise: in order for a dispute resolution process to function in a fair and effective manner, it is essential that a tribunal possess broad power to safeguard the parties' rights and its own remedial authority during the pendency of the dispute resolution proceedings. Unless the tribunal is able to grant the provisional measures, its ability to provide effective, final relief may be frustrated, one party may suffer grave damage, or the parties' dispute may be unnecessarily exacerbated during the pendency of the dispute resolution process.[5]

[3] Gary Born, International Commercial Arbitration 2425 (2nd ed. 2014).

[4] *See* Louis Yves Fortier, *Interim Measures: An Arbitrator's Provisional Views, in* Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 49 (Arthur W. Rovine ed., 2008).

[5] Born, *supra* note 3, at 2425. Born also outlines some limitations on the arbitral tribunal's power to order provisional relief, e.g. (a) lack of power to order provisional relief against third-parties; (b) lack of power to enforce such relief; (c) limited scope of power to subject-matter of the dispute; (d) lack of power to order relief until the tribunal is constituted; etc.

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Arguably, provisional measures make the arbitration procedure more effective and can serve for various purposes. A provisional measure can facilitate the conduct of arbitral proceedings; preserve a right that is subject to the dispute; maintain or restore the status quo; protect the tribunal's jurisdiction; preserve evidence; facilitate the enforcement of a future award; etc.[6] Nonetheless, provisional measures can infringe on state sovereignty. Therefore, tribunal discretion should be exercised with special common sense, care and restraint.[7]

2.1. I.C.S.I.D. CONVENTION AND RULES

Both Articles 39 and 47 deal with the power to recommend provisional measures. Rule 39 of the I.C.S.I.D. Arbitration Rules reinstates the tribunal's power and discretion to recommend provisional measures. Article 47 of the I.C.S.I.D. Convention reads as follows: "Except as the parties otherwise agree, the Tribunal *may*, if it considers that the circumstances so require, *recommend* [emphasis added] any provisional measures which should be taken to preserve the respective rights of either party."

The Tribunal *may* "recommend" a provisional measure. Does this mean that the respondent state *may* accept the recommendation? On a similar footing, does this mean that the respondent state *may* refuse to comply with the recommendation? Is it a recommendation that the parties can agree to turn into an order? Has the language been interpreted to mean something else, and on what basis? Does the tribunal have the explicit or implicit power to order a provisional measure pursuant to another article in either the Convention or the rules? Why did the drafters

[6] *See* Munir Maniruzzaman, *Protection in International Investment Arbitration: Challenge to State Sovereignty*?, *in* INTERIM AND EMERGENCY RELIEF IN INTERNATIONAL ARBITRATION (Diora Ziyaeva et al. eds., 2015). *See also* BORN, *supra* note 3, at 2483-2502.
[7] BORN, *supra* note 3, at 2502.

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choose "recommendation" as opposed to "order"?[8] The question and its meaning has to be analyzed in the proper context; that is, within a legal framework dominated by respect for state sovereignty and textual interpretation? In its literal interpretation, the article does not offer to the tribunal the power to "order" a provisional measure. Schreuer wrote that "a conscious decision was made not to grant the tribunal the power to *order binding* [provisional measures]."[9] To reiterate this point, Redfern and Hunter explained that:

> The use of the word "recommend" in this context stems from the concern of the drafters of the I.C.S.I.D. Convention to be seen as *respectful of national sovereignty* [emphasis added] by not granting powers to private tribunals to order a state to do or not do something on a purely provisional basis. [10]

However, the language and its original meaning is not always the entire story. Decisional law might offer a different interpretation of the statutory language. Born highlights an important fact in this respect: "[I]ts reference to 'recommendations' for provisional relief was originally motivated by concerns about interfering with state prerogatives and sovereignty, but I.C.S.I.D. arbitral awards have consistently interpreted [Article 47] as also permitting the ordering of binding provisional measures."[11]

It can be argued that investment-arbitration has tangible and intangible features of safeguarding and guaranteeing procedural integrity. Therefore, in light of the I.C.S.I.D. Convention's object and purpose, a tribunal may possess implicit tools to safeguard the procedural integrity of the arbitration.

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[8] Black's Dictionary defines a "recommendation" as: (1) "[a] specific piece of advice about what to do . . ." and (2) as "[a] suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious. *See* BRYAN A. GARNER, BLACK'S LAW DICTIONARY (10th ed. 2014).

[9] CHRISTOPH H. SCHREUER ET AL., THE I.C.S.I.D. CONVENTION: A COMMENTARY 758 (2001).

[10] ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 333 (4th ed. 2004).

[11] BORN, *supra* note 3 at 2429.

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When deciding on a request for a provisional measure, the tribunal is bound by the language of the articles or rules. Regardless of the considerable guidance it offers in investment-arbitration, decisional law cannot trump express language of the provision. The Tribunal in *Italba v. Uruguay* articulated this by stating that:

> [T]he Parties produced and cited numerous awards and decisions dealing with matters that they consider relevant to these provisional measures. The Tribunal has considered these documents carefully and may take into account the reasoning and findings of these and other tribunals. However, in coming to a decision on the matter of provisional measures and temporary relief requested by Italba, the Tribunal must perform, and in fact has performed, an independent analysis of the I.C.S.I.D. Convention, the Arbitration Rules, and the particular facts of this case.[12]

The exact scope of a tribunal's authority to order provisional measures is in dispute. Most jurisdictions have rejected the historic prohibitions against provisional measures, provided that the authority is expressly and firmly given.[13] Does I.C.S.I.D. expressly or firmly empower a tribunal operating under its auspices with the authority to order provisional measures? If not expressly given, is the power given firmly? A "firm power" can possibly be implied from either the convention as a whole or specific parts of it.

It is submitted that legal authority empowering a tribunal to render an order may exist. However, it is not to be found in the language of Article 47 or Rule 39. Rather, the justification might exist implicitly in the text; that is, in the overriding purpose of protection to procedural integrity of the arbitration. In *Maffezini v. Spain* the tribunal decided that a provisional measure should be binding. The tribunal observed as follows:

[12] Italba Corporation v. Oriental Republic of Uruguay, I.C.S.I.D. Case No. ARB/16/9, Claimant's Application for Provisional Measures and Temporary Relief ,¶107, (Feb.15, 2017).
[13] *See* BORN, *supra* note 3, at 2432.

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> While there is a semantic difference between the word "recommend" as used in Rule 39 and the word "order" as used elsewhere in the Rules to describe the Tribunal's ability to require a party to take a certain action, the difference is more apparent than real . . . The Tribunal does not believe the parties to the Convention meant to create a substantial difference in the effect of these two words. The Tribunal's authority to rule on provisional measures is no less binding than that of a final award. Accordingly, for the purposes of this Order, the Tribunal deems the word "recommend" to be of equivalent value as the word "order."[14]

Subsequently, more tribunals followed suit. The Tribunal in *City Oriente v. Ecuador* held that "[f]rom a substantive view, the difference between a recommendation and an order is mainly a question of terminology. [And even] where named recommendation, a decision on provisional measures is substantially binding."[15] The tribunal, furthermore, held that "[i]t is only if provisional measures are effective that they can achieve their purpose with respect to the outcome of the proceedings (citations omitted)."[16] This is nowadays the generally held view. However, there is some disagreement among scholars, arbitrators, and arbitration practitioners, especially when the provisional measure is interfering with a state's sovereign prerogatives.

This line of cases can be questioned on a number of grounds. Is the role of a tribunal to determine the effectiveness of the I.C.S.I.D. regime? Can decisional law be a feasible evolutionary tool in international adjudication? Should a tribunal determine semantics without engaging in a consideration of language differences?

[14] Emilio Augustìn Maffezini v. Kingdom of Spain I.C.S.I.D., Case No. ARV/97/7, Decision on Request for Provisional Measures, ¶5 (Oct. 28, 1999).
[15] City Oriente Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), I.C.S.I.D. case No. ARB/06/2, Decision on Provisional Measures, ¶52, (Nov. 19, 2007).
[16] *Id.*

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2.2. UNCITRAL MODEL LAW AND ARBITRATION RULES

Article 17 of the U.N.C.I.T.R.A.L. Model Law (hereinafter Model Law) grants a tribunal the power to order an interim measure, which can take the form of an award. In 2006 the language of the Model Law was revised to be more expansive.[17] This language might empower a tribunal to, among other things, suspend criminal investigations or procedures. A tribunal operating under the Model Law could justify such an order by arguing that they are seeking to maintain or restore the status quo. The Model Law seems to require an agreement withdrawing such power that potentially interferes with state sovereignty, and not the other way around, as with I.C.S.I.D.[18]

The U.N.C.I.T.R.A.L. Rules were amended in 2010. It was discussed whether interim measures should be applicable to procedural challenges and issues.[19] "The focus of the 2010 U.N.C.I.T.R.A.L. Rules' provision on [interim measures was] both to make the rules applicable to all types of arbitration regardless of the subject matter of the dispute and to provide increased guidance on the circumstances, conditions, and procedures for granting [interim measures]."[20] Article 26 of the 1976 version referred to the "subject-matter", which provides protection for substantive issues but not for procedural ones. The amendment to Article 26 indicates that the prior language was undesirable for pragmatic and functional reasons. This change made it possible to order an interim measure for procedural irregularities; for example, in order to prevent "prejudice and aggravation to the arbitral process" due to inequality of arms or procedural "mala fides".

The drafting parties explicitly chose "order" as opposed to "recommendation". The choice of a text with such imperative character is reflective of the fact that interim measures in the context of

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[17] *Id.*

[18] *See* Born, *supra* note 3, at 2434.

[19] E.g. due to procedural fairness, procedural irregularity, lack of equality of arms, lack of good faith procedure, etc.

[20] Burnett et al., *supra* note 1, at 39.

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U.N.C.I.T.R.A.L. arbitration are to be viewed as legally binding. This conception can easily be derived from the preparatory works and it is arguably closely connected with the notion of interim measures as a feature necessary to ensure the effectiveness of arbitral procedure, especially in the context of international commercial arbitration.[21] As expressed by the U.N.C.I.T.R.A.L. Commission in connection with the 2006 update of the Model Law: "[t]he provisions had been drafted in recognition not only that interim measures were increasingly being found in the practice of international commercial arbitration, but also that the effectiveness of arbitration as a method of settling commercial disputes depended on the possibility of enforcing such interim measures."[22]

Fortunately for U.N.C.I.T.R.A.L. arbitrations, the negotiating parties' awareness of the importance of a binding interim measure will mitigate future ambiguity where states will try to invoke state sovereignty to justify non-compliance. It is clear that the negotiating parties were well aware that "recommendation" did not mean "order." In sharp contrast with the I.C.S.I.D. Convention, both the 1976 and 2010 Rules will enforce an interim measure as a final award.[23]

3. TREATY INTERPRETATION IN LIGHT OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

The Vienna Convention on the Law of Treaties (hereinafter V.C.L.T.) is an essential part of understanding public international law. In the context of I.C.S.I.D. arbitrations, the V.C.L.T. has proved useful for the interpretation of bilateral investment treaties. As the I.C.S.I.D. Convention carries the legal status of a treaty, an interpretation in light of the V.C.L.T. is

[21] *See* THOMAS H. WEBSTER, HANDBOOK OF UNCITRAL ARBITRATION 391 (2nd ed. 2015).
[22] UNCITRAL Rep. of the United Nations Commission on the International Trade Law on its 39th Sess., June 19 - July 7, 2006, U.N. doc A/61/17. 15-16.
[23] *See* Maniruzzaman, *supra* note 6, at 17.

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warranted in relation to the Convention itself.[24] Therefore, the V.C.L.T. could be important in shaping the meaning and solve the alleged ambiguity in the I.C.S.I.D. Convention. V.C.L.T. interpretation carries several advantages for legal uniformity; for example, foreseeability, clarity and predictability. As explained by one commentator:

> To put it simply, Article 31 of the Vienna Conventions on the Law of Treaties (V.C.L.T.) offers clear guidance for the interpretation of treaties, and its rigorous application would bring more consistency and predictability in international investment law. These two ideas follow on from each other, and they have become central in the extensive literature already dedicated to the interpretation of investment treaties by arbitral tribunals (citations omitted).[25]

The V.C.L.T. was implemented after the I.C.S.I.D. Convention entered into force. As a corollary – and in accordance with Article 4 of the V.C.L.T. – it is not directly applicable to interpret the I.C.S.I.D. Convention. Nonetheless, many of the provisions of the V.C.L.T. are recognized as articulating principles of customary international law. This applies particularly with respect to the provisions regarding treaty interpretation.[26] For instance, the International Court of Justice (I.C.J.) has repeatedly expressed that Article 31 and 32 of the V.C.L.T. constitute part of customary international law.[27]

Article 31 of the V.C.L.T. provides the general rule of treaty interpretation; the first paragraph states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its

[24] For a short and interesting article on the V.C.L.T. as reflective of international customary law, see ROBERTO CASTRO DE FIGUEIREDO, *Interpreting Investment Treaties,* Kluwer Arbitration Blog (Oct. 21, 2014), http://arbitrationblog.kluwerarbitration.com/2014/10/21/interpreting-investment-treaties.

[25] Hervé Ascensio, *Article 31 of the Vienna Convention of the Law of Treaties and International Investment Law*, 31. I.C.S.I.D. REV. 366, 366 (2016).

[26] *Id.* at 367-368.

[27] *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 207 (3rd ed. 2013).

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object and purpose." The requirement to interpret treaty text in good faith derives from the principle of pacta sunt servanda, which attributes importance to the intention of the parties as expressed in the text of the treaty.[28] Accordingly, the most reliable evidence to support what the parties intended is the express, ordinary meaning of the text in light of its context, i.e. object and purpose.[29]

Article 32 of the V.C.L.T. establishes the secondary means of interpretation, mainly interpreting any ambiguity in light of preparatory works and other extrinsic sources of law. Article 31 and 32 is laid out systematically and in hierarchical order. This clearly indicates that recourse to supplementary means of interpretation are uncalled for unless the proper good faith interpretation is clouded – or tainted – by uncertainty, or if a textual interpretation leads to an unacceptable result. Nonetheless, if the preparatory works are indicative of the intentions of the parties to the treaty, the good faith requirement expressed in Article 31 may indirectly give them higher value than what Article 32 of the V.C.L.T. would otherwise suggest.[30]

In public international law, protection for an investor and its investment is usually outlined in a Bilateral Investment Treaty (hereinafter B.I.T.). Disputes between investors and the host-state are most often settled by arbitration according to a dispute settlement provision containing recourse to I.C.S.I.D. arbitration in the B.I.T. Therefore, these agreements generate disputes subsumed under the realm of public international law. The protection as well as jurisprudence creates a regime of international investment law. Therefore, understanding treaty interpretation is crucial when analyzing investor-state and investment treaty arbitration. Naturally, reflecting on the leading public international authority is highly relevant – for substantive as well as procedural guidance. As investment treaty

[28] *Id.* at 208-209.
[29] *Id.* at 209.
[30] *See* AUST, *supra* note 27, at 218.

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arbitration is still in the search for its turf upon which to stand,[31] analyzing best practices promulgated in the International court of Justice (hereinafter I.C.J.) might be necessary. That is not to say that a privately chosen tribunal has the same jurisdiction as a permanent court. Of particular importance in this context is the fact that: first, I.C.J. has interpreted similar vague language as the one in Article 47 of the I.C.S.I.D. Convention to have binding effect. Second, the I.C.J. has in that capacity ordered states to both refrain from taking positive actions.[32] This approach seems to have been based solely on preserving the status quo, and thus the I.C.J. seems to have adopted a functional/dynamic approach to safeguard the procedural fairness in adjudicating issues of public international law.

Choice of language in a treaty is seldom a stand-alone phenomenon. The way in which the I.C.J. has applied the V.L.C.T. in order to evaluate the binding force of provisional measures under the I.C.J. Statute proves this. Article 41 (1) of the I.C.J. Statute states that "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." The used language has an inherently similar issue of vagueness and ambiguity as that of the I.C.S.I.D. Convention.

In *LaGrand*,[33] the I.C.J. assessed the binding force of a provisional measure. In this case the provisional measures ordered the United States to stay the execution of a German citizen. The I.C.J. referred to Article 31 of the V.C.L.T. as reflective of customary law and underlined that its interpretation was directed towards establishing the "ordinary meaning to be given to [the] terms in their context and in light of the treaty's object and purpose."[34]

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[31] Probably more so than ever considering E.U.'s proposal of a permanent Investment Court System.
[32] *See* KAJ HOBÉR, SELECTED WRITINGS ON INVESTMENT TREATY ARBITRATION 41-42 (2013).
[33] LaGrand case (Ger. v. U.S.), I.C.J. 2001/16, (Jun. 27, 2001).
[34] *Id.* at 501.

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The U.S. denied that Article 41 had mandatory effect and underlined the choice of the words "indicate", "ought", and "suggested" in the English version. However, the French version of the text uses the verb "devoir", which arguably is of more imperative character.[35] Subsequent to reaching the understanding that the French and English versions are of equal dignity, the court proceeded to establish the "meaning which best reconciles the texts, having regard to the object and purpose of the treaty".[36] The court stated that the purpose of the Statute is to "enable the Court to fulfil the functions provided therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions". The I.C.J. held that in order for it to effectively exercise its basic functions provided for in the treaty, interim measures must be attributed binding effect.[37]

The Court further stated that "[g]iven the conclusions reached . . . it does not consider it necessary to resort to the preparatory work to determine the meaning of that article".[38] However, "[it] would nevertheless point out that the preparatory work of the Statute does not preclude the conclusion that orders under Article 41 have binding force".[39] The Court stated that "[t]he preparatory work of Article 41 shows that the preference given in the French text to "indiquer" over "ordonner" was motivated by the consideration that the Court did not have means to assure the execution of its decisions."[40] Thus, the I.C.J. ascribed the particular choice of the word "ordonner" not to the binding nature per se of interim measures, but to the fact that the Court does not have the power necessary to enforce a state's compliance with an interim measure. The Court further stated that "[t]he fact that the Court does not itself have the means of execution of orders made pursuant to Article 41 is

[35] *See* John Quigley, *LaGrand: A Challenge to the U.S. Judiciary*, 27 YALE J. INT'L L. 435, 439 (2002).
[36] LaGrand case (Ger. v. U.S.), I.C.J. 2001/16, (Jun. 27, 2001), at 502.
[37] *See Id.* at 503.
[38] *Id.*
[39] *Id.* at 503-504.
[40] *Id.* at 505.

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not an argument against the binding nature of such orders." In other words, the I.C.J. argued that there is nothing in the preparatory works that seems to contradict the notion that interim measures have binding force.

The I.C.J. derived the binding force of its provisional order according to the treaty interpretation in light of the treaty's text, object and purpose.[41] The conclusion of the Court has found scholarly support in the international law community. One commentator described the judgement as "consistent with long-held principles of international law" and further stated that "[t]he ICJ's ruling in LaGrand . . . is sound as a matter of treaty interpretation [and] [i]f a court cannot, by issuing orders of an injunctive character, preserve its own ability to render a final, binding judgment, then its ability to render a final, binding judgment is illusory."[42] This approach affirms a prevalent and concurrently pragmatic view exercised by the I.C.J. *vis-à-vis* the "object and purpose" of the I.C.J. Statute. The question may be posed, however, whether this approach is properly anchored in a good faith treaty interpretation; that is, inter alia, with sufficient consideration of what the negotiating parties had in mind (objectively) when the treaty was drafted. In this respect, the I.C.J.'s interpretation of the object and purpose of the Statute has received criticism; for example, due to a lack of nuance.[43] For instance, Hugh Thirlway stated:

> [W]hen assessing the object and purpose of a treaty, it is in principle necessary to place oneself at the date of the conclusion of the treaty. In the case of the Statute of the ICJ, this would prima facie be 1946; but that statute was in effect no more than a re-enactment . . . . of the PCIJ Statute in 1920 . . . . The idea of a standing international tribunal has sprung from arbitral practice, and . . . . it was not the concept of a body to

[41] *See* Hironobu Sakai, *New Developments of the Orders on Provisional Measures by the International Court of Justice*, 52 JAPANESE Y.B. INT'L L. 231, 237 (2009).
[42] Quigley, *supra* note 35, at 439.
[43] *See* Sakai, *supra* note 41, at 237.

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> which recourse could be had in order to *compel* other States to comply with their obligations (citations omitted).[44]

Thus, Thirlway accentuates that international tribunals as judicial bodies exercising compelling force towards states is a result of an arbitral practice not yet developed in 1920. As to the choice of language in Article 41 of the I.C.J. Statute, he further stated that "the inconsistencies and uncertainties reflect the uncertain extent to which a State could be told what it ought to do to preserve status quo."[45]

Thirlway's notes on *LaGrand* shed light upon what may appear as an obvious notion, namely that the choice of particular wording of a treaty text is not made arbitrarily. It is arguably more conceivable than not that when a treaty text does not explicitly express that a certain provision has legally binding effect, there are underlying reasons for it. This conception is substantiated by how provisions on interim measures have been formulated in other international treaties, such as the United Nations Convention on the Law of the Sea (hereinafter U.N.C.L.O.S.). For example, Article 290 (6) of the U.N.C.L.O.S. states that "[t]he parties to the convention shall comply promptly with any provisional measures prescribed in this article." A textual interpretation aimed at establishing the ordinary meaning of this particular choice of wording hardly leaves any room for doubt as to the binding force of provisional measures in the context of international disputes under U.N.C.L.O.S.[46]

When giving proper consideration to *good faith*, it may be questionable whether focusing too much on "object and purpose" holistically is the right approach in determining what explicitly chosen words mean. The holistic approach, furthermore, seems to be derived from "the spirit of the treaty." How do we know what that is, and does it change? This evolutionary approach, albeit effective, might not sit well with all states. This approach may be said to carry an inherent potential to

[44] Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989: Part Twelve,* 72 BRIT. Y.B. INT'L L. 37, 115-116 (2002).
[45] *Id.* at 116.
[46] *Id.* at 121.

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impede clarity and foreseeability. In relation to *LaGrand*, it is, furthermore, disputable whether or not the I.C.J.'s interpretation of Article 41 complies with the good faith requirement pursuant to treaty interpretation. That assumption is underpinned by the fact that the signatory countries arguably did not enter into the treaty with the intention of giving the I.C.J. the power to issue legally binding provisional measures.

In *LaGrand,* the I.C.J. held that in order for the Court to effectively exercise its basic functions provided under the treaty, the power to render binding interim measure must be upheld.[47] By analogy, this argument can be applied by tribunals operating under the auspices of I.C.S.I.D.. However, there is a case to be made for the rejection of this approach, both in I.C.J. and I.C.S.I.D. proceedings.

When conducting textual interpretation, the "purpose" and "object" of a legal document is to be understood in the context in which the reader has to give the words meaning. On the one hand, the "presumption against ineffectiveness" may convince the interpreter that provisional measures in the context of investment-arbitration are in fact to be construed as orders. On the other hand, the interpreter may ascribe a very different meaning to the convention; that is, that the text means what it says, and says what it means, objectively.

Furthermore, Article 32 of the V.C.L.T. provides for reliance on supplementary means of interpretation in order to "confirm the meaning resulting from the application of article 31" or in other case "to determine the meaning when the interpretation according to Article 31 ". . . leaves the meaning ambiguous or obscure; or . . . leads to a result which is manifestly absurd or unreasonable." Schreuer wrote that "a conscious decision was made not to grant the tribunal the power to order binding [provisional measures]".

We wish to follow-up with three questions: (1) did the drafters choose the terminology out of "courtesy," thereby leaving the power to

[47] LaGrand case (Ger. v. U.S.), I.C.J. 2001/16, (Jun. 27, 2001), at 503.

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demand compliance optional? (2) Did the drafters explicitly exclude an ordering power due to the possible interference with state sovereignty? Or (3) did the drafters intend to advise against interference but not limit its availability in case of extreme procedural irregularity or bad faith? The second is probably correct.

This ambiguity may "benefit" from tribunals shedding light upon the issue. Unfortunately for clarity and foreseeability purposes, this line of decisions has yielded mixed results. One stream of I.C.S.I.D. cases seem to have stretched the meaning of a recommendation based on jurisprudential and doctrinal evolution. This approach culminates in the theory that provisional measures in the context of I.C.S.I.D. arbitration have emerged to become "binding".

Some limited judicial discretion is needed in the I.C.S.I.D. regime. Born wrote as follows vis-à-vis Tribunal discretion:

> The granting of provisional measures is not a "discretionary" or arbitrary exercise, but must instead conform to principled standards and the evidentiary record. Although the standards applicable to the granting of provisional measures continue to develop, it is wrong to treat the subject as a matter of discretion or arbitration ex aequo et bono, and not of legal right. The better view is that statements about the arbitrators' "discretion" refer to the [T]ribunal's need to make pragmatic assessments of the risk, the extent of possible harm, the balance of hardships and the merits of the parties' underlying positions in reaching a decision whether or not to issue provisional measures. These assessments are complex and require judgment and care, but they are not matters of pure discretion and must instead proceed in accordance with a principled legal framework and set of standards.

However, this seem to have slowly moved towards an acceptance for "judicial activism". The latter is an unwelcomed feature in I.C.S.I.D.

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arbitration. In response some may argue that investment arbitration is an institution that is "evolving" and with it widening the tribunal's jurisdiction. This prudential theory welcomes the tribunal to consider various "procedural tools" needed due to the context in which they operate.

It is hoped that future Tribunals will err on the side of caution and take a more formalistic approach in interpreting treaties – V.C.L.T. textualism. The role of the Tribunal is not to speculate on what would be more or less effective (consequential thinking), but rather it is bound to give effect to the words of the text. The text empowers the Tribunal, but it also constrains it. When scholars write, they opine. When arbitrators interpret, they decide. This distinction is important. Academia has an intrinsic value to legal development (*de lege ferenda*), but scholarly thinking is not always compatible with legal interpretation (*de lege lata*).

In determining the preferred means to understand and interpret the I.C.S.I.D. Convention, we respectfully submit that an analogy can be made to the U.S. Constitutional debate, but with the opposite outcome. That is, do you think that the I.C.S.I.D. Convention is a living document, evolving jurisprudentially and doctrinally, making the convention a sort of "emergency convention"? If you think that the tribunal can interpret the I.C.S.I.D. Convention in the context of functionalism, then it is a living document. This pragmatism makes, among other things, a binding provisional order valid and legitimate. It makes the I.C.S.I.D. regime more "effective." However, as outlined throughout, the formalistic method of interpretation has its justifications, too. Formalism in this context facilitates non-infringement on the sovereignty without textual support, it provides for clarity and foreseeability, and it provides for a framework of interpretation that is based on the actual agreement of the negotiating parties. We will leave you with one concern; that is, it is not completely unlikely that states will be pulling out of the I.C.S.I.D. regime or refrain from complying with awards. If they do, it may be on the basis of the tribunal having interfered with their sovereignty without textual support.

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4. CASE ANALYSIS – I.C.S.I.D.

A case study merits attention because although historically, arbitrators were hesitant to grant provisional relief, even when authorized by national law in recent years tribunals have shown greater willingness to do so.[48] The justification for the evolution is of interest. For instance, does the tribunal assess the damage a state suffers when a tribunal infringes on its sovereignty? What if the state refuses compliance? If a state refuse to comply with the provisional measure then the tribunal is really in between a rock and a hard place. Therefore, tribunals are hesitant to order provisional measures that risk interfering with state sovereignty. However, hesitant does not equal unwilling, as this part will demonstrate.

To illustrate this issue, this part will analyze the reasoning among tribunals in deciding whether to render a provisional measure ordering the suspension of a domestic criminal investigation or proceeding. In *Tokios Tokelés v. Ukraine*,[49] an investment-arbitration tribunal decided that a provisional measure ordering a host state to enjoin a criminal proceeding can be ordered.[50] This was the first decision of the kind and it was effectively established that criminal proceedings "may properly be the subject of [provisional measures]."[51] However, the order was not granted due to lack of urgency and necessity. This paper will not outline every I.C.S.I.D. arbitration where the tribunal has been requested to order the suspension of a criminal investigation or order.[52]

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[48] BORN, *supra* note 3, at 2460.
[49] Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Order No. 1, (Jul. 1, 2003).
[50] Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Order No. 3, ¶11 (Jan. 18, 2005).
[51] Burnett et al. , *supra* note 1, at 42.
[52] *See e.g.* Border Timbers Ltd. V. Republic of Zimbabwe, ICSID case No. ARB/10/25, (Jun. 13, 2012); Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, (Dec. 4, 2014); City Oriente Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID case No. ARB/06/21, (Nov.19, 2017); Italba v. Oriental Republic of Uruguay ,ICSID Case No. ARB/16/9 , (Feb. 15, 2017); Nova Group Investments, B.V. v. Romania, ICSID Case No. ARB/16/19, (Mar. 29, 2017); Teinver S.A., Transportes de Cercanías S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1, (Apr. 8, 2016). For UNCITRAL Arbitration, *see* Hesham T.M. Al Warraq v. Republic of, Indonesia, U.N.C.I.T.R.A.L., Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims (June 21, 2012); Chevron Corporation v. The Republic of Ecuador, U.N.C.I.T.R.A.L., P.C.A. Case No. 2009-23, Claimant's Request for Interim Measures (Apr. 1, 2010); China Heilongjiang International Economic &

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The pressing question is whether doctrinal and jurisprudential evolution in investment-arbitration has made the original language in Article 47 of the I.C.S.I.D. Convention null and void. Can procedural safeguard mechanisms trump express language? For instance, do the concepts of "equality of arms" and "procedural good faith" implicitly empower an I.C.S.I.D. tribunal to make a "recommendation" binding?

Notwithstanding the doctrinal and jurisprudential developments in investment-arbitration, right or wrong, the fact remains that tribunals most often apply deference when deciding whether to render provisional measures.[53] The deference is most likely a mixture of respecting state sovereignty and pure adherence to the V.C.L.T. and textualism.

4.1. QUIBORAX V. BOLIVIA

The claimant claimed compensation for the revocation of eleven mining concessions.[54] The claimant brought a claim against Bolivia pursuant to the I.C.S.I.D. Arbitration Rules. Some years into the arbitration, Bolivia initiated criminal proceedings on the allegations that the main shareholders of Quiborax had forged documents in order to become "protected investors" under the Bolivia-Chile B.I.T. Bolivia's Ministry for Foreign Affairs ordered an audit. The Bolivian authorities continued to review corporate documentation and "noted irregularities," and as a result brought proceedings regarding "forged documents".[55]

Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia, UNCITRAL, PCA Case No. 2010-20, (Jun. 30, 2017); Sergei Viktorovich Pugachev v. The Russian Federation, U.N.C.I.T.R.A.L., Interim Award (July 7, 2017).

[53] *See* Thomas W. Wälde, *"Equality of Arms" in Investment Arbitration: Procedural Challenges, in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 161 (Katia Yannaca-Small ed., 2010).

[54] Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015). The Tribunal consisted of Marc Lalonde (Claimant appointee); Brigitte Stern (Respondent appointee); and Gabrielle Kaufmann-Kohler (Chair).

[55] Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶22-45 (Feb. 26, 2010). Bolivia's support for the allegations and the persons accused are further listed in these paragraphs.

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The claimants alleged that the criminal proceedings were utilized as a defense strategy and litigation tactic in order to limit the claimant's access to important documents.[56] Claimants requested the Tribunal to order Bolivia or Bolivia's agencies or entities to:

> (1) . . . . refrain from engaging in any conduct that aggravates the dispute between the parties and/or alters the *status quo*, including any conduct, resolution or decision related to criminal proceedings in Bolivia against persons directly or indirectly related to the present arbitration;
>
> (2) . . . . discontinue immediately and/or to cause to be discontinued all proceedings in Bolivia, including criminal proceedings and any course of action relating in any way to this arbitration and which jeopardize the procedural integrity of these proceedings;
>
> (3) . . . . discontinue immediately and/or to cause to be discontinued all proceedings in Bolivia, including criminal proceedings and any course of action relating in any way to this arbitration and which threaten the exclusivity of the I.C.S.I.D. arbitration. . . . [57]

Pursuant to Article 47 of the I.C.S.I.D. Convention and Rule 39 of the I.C.S.I.D. Arbitration Rules, it was held that the tribunal generally has wide discretion to render provisional measures.[58] It then moved on to address the requirements to be met in order for the tribunal to suspend the criminal proceedings. The claimant satisfied all three requirements established; (1) an existence of rights requiring preservation; (2) existence of urgent protection; and (3) necessity of the provisional measure.[59]

[56] *See* Malcolm Langford et al., *Backlash and State Strategies in International Investment Law*, *in* THE CHANGING PRACTICES OF INTERNATIONAL LAW 70, 90 (Tanja Aalberts & Thomas Gammeltoft-Hansen eds., 2018).
[57] Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶1(Feb. 26, 2010).
[58] *Id.* para. 105.
[59] *Id.* para. 113-165.

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The "existence of rights requiring preservation" was determined by analyzing (a) rights that may be protected by provisional measures; (b) whether there is a right to exclusivity of the I.C.S.I.D. proceedings pursuant to Article 26 of the I.C.S.I.D. Convention; (c) whether there is a right to the preservation of the status quo and the non-aggravation of the dispute; and (d) whether there is a right to the procedural integrity of the arbitration proceedings.[60]

The tribunal held that rights

> to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights, including the general right to the preservation of the *status quo* and the non-aggravation of the dispute . . . . [but bears a relation to the dispute].[61]

It held that the criminal proceedings are "related to this arbitration due to conduct alleged and harm allegedly caused related closely to the Claimant's standing as investors in the I.C.S.I.D. proceeding."[62] The tribunal held that it has "every respect" for Bolivia's sovereign right to prosecute crimes within its territory, but that the evidence suggests that the proceedings were initiated because of the arbitration. It also noted that the actions were taken after the inter-ministerial committee recommendation that Bolivia should try to find flaws in the mining concessions as a "defense strategy" in relation to the I.C.S.I.D. arbitration.[63]

The tribunal recognized that Bolivia has the sovereign power to investigate whether there is any criminal conduct and also to prosecute criminal conduct accordingly; however, such powers must be "exercised in good faith and respecting claimants' rights, including their *prima facie*

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[60] *Id.* para. 116-148.
[61] *Id.* para. 117-18.
[62] *Id.* para. 120.
[63] Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶121-22 (Feb. 26, 2010).

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right to pursue this arbitration."[64] It was clear to the tribunal "that there [was] a direct relationship between the criminal proceedings and [the arbitration] that may merit the preservation of Claimants' rights in the [proceeding]."[65]

To solve the "preservation of exclusivity", the tribunal referred to Article 26 of the I.C.S.I.D. Convention: "[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy." The tribunal held that the right to exclusivity was "susceptible of protection by way of provisional measures" and it, furthermore, held that the criminal proceedings did not threaten the exclusivity as it does not extend to criminal proceedings (i.e. disputes not dealing with investments).[66]

In relation to the "preservation of the *status quo* and the non-aggravation of the dispute", the tribunal noted that "the criminal proceedings do not deal with the same subject matter as [this arbitration, but are] sufficiently related to merit the protection of Claimants' rights to the non-aggravation of the dispute and the preservation of the *status quo* . . . ."[67] However, for various reasons the tribunal did not consider the criminal proceedings to place "intolerable pressure" on the claimants to drop their arbitration claim, and in a similar vein the tribunal did not think that turning them into defendants in Bolivia changed the status quo.[68] "If there are legitimate grounds for the criminal proceedings, Claimants must bear the burden of their conduct in Bolivia."[69]

The tribunal, however, found that it had the power to grant provisional measures to "preserve the procedural integrity" of the proceedings, and it opined that the criminal proceedings "may indeed be

[64] *Id.* para. 123.
[65] *Id.* para. 124.
[66] *Id.* para. 127-29.
[67] *Id.* para. 132.
[68] *Id.* para. 138.
[69] Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶138 (Feb. 26, 2010).

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impairing Claimants' right to present their case in particular with respect to their access to documentary evidence and witnesses."[70] For these reasons, the tribunal found that there was a threat to the procedural integrity of the arbitration.[71]

Second, the Tribunal looked to the "urgency" requirement, which it opined is satisfied when "a question cannot await the outcome of the award on the merits" (this is in line with the practice of the I.C.J.).[72] The parties agreed that urgency appears "when there is a need to safeguard rights that "are in imminent danger of irreparable harm before a decision is made on the merits."[73]

Third, having concluded that (1) the criminal procedure threatens the procedural integrity of the arbitration, and (2) a provisional measure is urgent, the tribunal turned to the third requirement; "necessity." The tribunal opined that "an irreparable harm is a harm that cannot be repaired by an award of damages."[74] The tribunal agreed with the Claimants and held that:

> Regardless of whether the criminal proceedings have a legitimate basis or not (an issue which the Tribunal is not in a position to determine), the direct relationship between the criminal proceedings and this I.C.S.I.D. arbitration is preventing Claimants from accessing witnesses that could be essential to their case . . . . Under these circumstances, the Tribunal considers that Claimants' access to witnesses may improve if the criminal proceedings are stayed until this arbitration is finalized or this decision is reconsidered.[75]

The tribunal seems to have accepted the alleged view that the criminal proceedings were utilized as a defense strategy or litigation tactic.

[70] *Id.* ¶141-142.
[71] *Id.* ¶148.
[72] *Id.* ¶149.
[73] *Id.*
[74] *Id.* ¶154-57.
[75] Quiborax S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶163 (Feb. 26, 2010).

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Therefore, pending the outcome in the arbitration, it ordered the suspension of the proceedings against the claimants and their witnesses.[76] The tribunal held as follows:

> The Tribunal has been convinced that there is a very close link between the initiation of this arbitration and the launching of the criminal cases in Bolivia. It has become clear to the Tribunal that one of the Claimants is being subjected to criminal proceedings precisely because he presented himself as an investor with a claim against Bolivia under the I.C.S.I.D./B.I.T. mechanism. Likewise, the Tribunal has been convinced that the other persons named in the criminal proceedings are being prosecuted because of their connection with this arbitration (be it as Claimants business partners or counsel, or as authors of a report ordered by a state agency). Although Bolivia may have reasons to suspect that the persons being prosecuted could have engaged in criminal conduct, the facts presented to the Tribunal suggest that the underlying motivation to initiate the criminal proceedings was their connection to this arbitration, which has been expressly deemed to constitute the harm caused to Bolivia that is required as one of the constituent elements of the crimes prosecuted.[77]

The tribunal was "convinced" that a sovereign state engaged in highly criminal conduct and abuse of its sovereign powers. Accordingly, it was determined that suspending criminal proceedings – and ordering the state from initiating new actions – that would "jeopardize the procedural integrity of this arbitration" was an appropriate measure until the arbitration was completed.[78] Whilst the reasoning is quite controversial and infringing on state sovereignty, the tribunal did justify their

[76] *See* Langford et al., *supra* note 56, Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, . 1-2 (Feb. 26, 2010) .

[77] Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶164 (Feb. 26, 2010) .

[78] *Id.* 1-2.

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discretion by common sense and did engage in an extensive and thorough legal analysis. However, the fundamental question remains; that is, does an I.C.S.I.D. tribunal have the jurisdiction to engage in this kind of exercise? Although the reasoning was sound, was it really supported by the legal framework? Another concern is whether states will allow this extensive interference from a tribunal appointed to litigate investment claims.

4.2. HYDRO V. ALBANIA

The claimant initiated I.C.S.I.D. arbitration against Albania for alleged breaches of honoring commitments for their electricity generation enterprises in the host-state.[79] Subsequently, Albania sought to extradite two of the claimants from the U.K. on the alleged basis of money laundering and fraud. The claimants, in turn, sought an interim measure requesting Albania to desist its action. The tribunal recommended that Albania (a) suspend the criminal proceedings until the issuance of a final award and (b) take the necessary actions to suspend the extradition proceedings.[80] The "recommendation" was given under the heading "Tribunal's Order." Despite most provisional measures rendered as "orders", it remains quite convoluted in light of the language in Article 47 and Rule 39.

Pursuant to the applicable legal framework the tribunal determined first whether there is a sufficient basis for the Tribunal to decide the questions subject of the request for a provisional measure.[81] It went on to assess the "appropriate test" to be applied (i.e. the requirements for a provisional measure); that is, whether the application is (1) necessary to protect the applicant's rights; (2) urgent; and (3)

[79] Hydro S.r.l. and others v. The Republic of Albania, ICSID Case No. ARB/15/28, Order on Provisional Measures (Mar. 3, 2016).
[80] Hydro S.r.l. and others v. The Republic of Albania, ICSID Case No. ARB/15/28, Order on Provisional Measures, ¶5.1 (Mar. 3, 2016).
[81] *Id.* ¶3.9.

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proportionate.[82] The tribunal has to establish the appropriate test when interfering with the exercise of a state's right to investigate and prosecute crimes.[83] The tribunal was satisfied that a real question arising from the respondent's conduct was the extent of interference with the "procedural integrity" of the arbitration proceedings. However, not all situations of incarceration may disrupt an arbitration. Therefore, not every request of this kind makes tribunal intervention proper. Despite this, when the requirements are met the tribunal "sees no difficulty in recommending an order."[84]

As a result of the particular circumstances, the tribunal took the view that it had the jurisdiction to – and was fully capable of – taking any measure to preserve status quo.[85] On the other hand, the tribunal was not persuaded by the argument that a provisional order be made in order to protect the exclusivity of the arbitration.[86] Recall the *Quiborax* discussion (see above).

First, in relation to the necessity requirement, the tribunal held that the claimants' ability to participate in this arbitration was extremely important, and thus the criminal proceedings could potentially cause irreparable harm to the integrity of the arbitration and hinder their ability to effectively present their case. Second, in relation to the urgency requirement, the tribunal considered that there was an imminent risk to the claimants' ability to effectively participate in the arbitration and that the measures sought were of an urgent nature.[87] Third, in relation to the proportionality requirement, the tribunal found the provisional measure warranted and held that "[t]he extradition and criminal proceedings concern or relate to the factual circumstances at issue in this arbitration."[88] The tribunal justified its decision as follows:

[82] *Id.* ¶3.11.
[83] *Id.* ¶3.14.
[84] *Id.* ¶3.18-20.
[85] *Id.* ¶3.21-23.
[86] Hydro S.r.l. and others v. The Republic of Albania, ICSID Case No. ARB/15/28, Order on Provisional Measures, ¶3.21-23 (Mar. 3, 2016).
[87] *Id.* ¶3.29-30.
[88] *Id.* ¶3.41.

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> The effect of the provisional measures proposed would affect the Respondent's ability to proceed with the criminal prosecution in the immediate future. However a stay would not put an end to the criminal proceedings. They would be delayed but not terminated. The Respondent also adverts to the possibility of the Claimants dissipating assets if the criminal proceedings are stayed. Given that the investments are physically located in Albania, it is difficult to accept that this would be a major risk. The balance of proportionality comes down in favour of protecting the Claimants' rights.

In line with Quiborax, the tribunal seems to have assigned to itself the de facto discretion to stay domestic criminal proceedings.

4.3. CHURCHILL MINING AND PLANER MINING V. INDONESIA

The claimant initiated I.C.S.I.D. arbitration as a result of Indonesia terminating their mining licenses.[89] The respondent initiated criminal proceedings on the basis that the licenses had been procured through forged documents. This was targeted at the Ridlamata Group, with which the claimant had a partnership and through which they gained their licenses. Furthermore, the Regent of East Kutai had expressed an intention to bring criminal proceedings against witnesses.[90] As a corollary, Indonesia raided the offices of the investors and confiscated numerous documents and computer hard drives.[91]

The claimant argued that the criminal proceedings were brought to cause surprise and disruption, namely that it was a defense strategy and litigation tactic directly connected with the investment arbitration.[92] In

[89] Churchill Mining Plc and Planet Mining Pty Ltd v. The Republic of Indonesia, ICSID Case No. ARB/12/14 and ARB/12/40, Award (Dec. 6, 2016).
[90] Churchill Mining Plc and Planet Mining Pty Ltd v. The Republic of Indonesia, ICSID Case No. ARB/12/14 and ARB/12/40, Procedural Order No.9 (Jul. 8, 2014).
[91] Langford et al., *supra* note 56, at 92.
[92] Jarrod Hepburn, *Arbitrators again decline to order Indonesia to desist with criminal investigation into alleged forgery of mining license in Churchill & Planet Mining case,* INVESTMENT ARBITRATION REPORTER, (Dec. 30, 2014),

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other words, the claimant argued that Indonesia as a sovereign misused and abused its powers in contravention of the "equality of arms" principle.[93]

The claimant filed an application for a provisional measure, requesting Indonesia to refrain from threatening, commencing criminal investigations and proceedings and to suspend criminal proceedings (including investigations) against the claimant or any person associated with such.[94] However, the Tribunal pursuant to the legal framework (Article 47 and Rule 39) found no urgency nor necessity.
In relation to the rights requiring preservation, the tribunal looked at: (1) the exclusivity of the arbitration pursuant to Article 26 of the I.C.S.I.D. Convention; (2) the preservation of status quo and non-aggravation of the dispute; and (3) the right to procedural integrity of the arbitration.[95] The tribunal held that the claimant seeking provisional measures to ensure and secure their right in the present proceeding by not having their witnesses subject to criminal investigations is indeed acting within his rights pursuant to the legal framework in Article 47 and Rule 39.[96]

First, in relation to the exclusivity pursuant to Article 26, the tribunal determined that the threat of criminal investigations and proceedings against the claimants, their witnesses, and potential witnesses do not per se threaten the exclusivity of the I.C.S.I.D. proceedings; furthermore, the criminal charges against a non-party (Ridlamanta Group) did not threaten the exclusivity and did not undermine the Tribunal's jurisdiction to resolve the claims.[97]

Second, in relation to the preservation of status quo and the non-aggravation, the tribunal opined that it is "undisputed that the right

https://www.iareporter.com/articles/arbitrators-again-decline-to-order-indonesia-to-desist-with-criminal-investigation-into-alleged-forgery-of-mining-license-in-churchill-planet-mining-case/.

[93] Langford et al., *supra* note 56, at 92.

[94] Churchill Mining PLC v. Indonesia, ICSID Case No. ARB/12/14 and ARB/12/40, Procedural Order No.9, at 1(Jul. 8, 2014).

[95] *Id.* at 72.

[96] *Id.* at 78-79.

[97] *Id.* at 87.

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to the preservation of the *status quo* and the non-aggravation of the dispute may find protection by way of provisional measures . . . ., procedural rights may be preserved by provisional measures like substantive rights (citations omitted)."[98] In this case, the tribunal was of the opinion that the initiation of criminal charges did not alter the status quo nor did it aggravate the dispute.[99]

Third, in relation to the right to the procedural integrity of the arbitration proceedings, the parties did not disagree that the right to the integrity of the arbitration proceedings (including fundamental "due process" right to present their case) may be protected by provisional measures.[100] Both relied on *Quiborax*, but reaching opposite conclusions. The tribunal distinguished *Quiborax* since "[that arbitration] dealt with actual investigations against a co-claimant and persons involved in the setting up of the investment."[101]

For the combined reasons, the tribunal denied the claimant's application for a provisional measure.[102] Two practitioners opined the following:

> This case follows the line of precedent adopting a high threshold for imposing [provisional measures] on States to prohibit the institution or continuation of criminal proceedings. Here, because the threat was exactly that – merely a threat –, the tribunal found that the requirements for [a provisional measure] had not been satisfied.[103]

Churchill Mining does, indeed, seem to suggest that a mere threat should not be enough for a tribunal to render a provisional measure. This reasoning is respectful of state sovereignty and aware that a lack of deference might be damaging to the tribunal and the I.C.S.I.D. system.

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[98] *Id.* at 90.
[99] *Id.* at 92
[100] Churchill Mining PLC v. Indonesia, ICSID Case No. ARB/12/14 and ARB/12/40, Procedural Order No.9, at 98 (Jul. 8, 2014).
[101] *Id.* at 99.
[102] *Id.* at 106.
[103] Burnett et al. , *supra* note 1, at 49.

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The threshold seems high and general tribunal discretion sound, but the contra-argument among commentators is not in concurrence only (arguing for a more stringent threshold), but in dissent too. The dissenting views wish to eliminate the binding power of a provisional order, especially those interfering with the sovereign powers of the state.

4.4. LAO HOLDINGS V. THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

The claimant initiated I.C.S.I.D. arbitration for alleged expropriation of their investment.[104] Pre-dating the initiation of the arbitration, there were on-going court proceedings against the claimant for alleged back taxes and money laundering. The tribunal granted an interim measure and held that the respondent must not "[take] any steps that would alter the *status quo ante* or aggravate the dispute."[105] The respondent consented to stay the criminal proceedings as part of a "conciliatory effort" and to let the arbitration proceed "in an environment conducive to timely action by the Tribunal."[106] In the midst of the proceedings, the respondent sought to modify the decision on provisional measures, but the tribunal held that such action would threaten the integrity of the arbitral process and that the respondent had not established a change of circumstances as to justify such modification.[107]

The fact that the respondent "consented" to stay their proceedings seems to suggest that they saw the interim measure merely as a recommendation as opposed to an order. The fact that they respected the investment arbitration procedure seems to suggest that they were in full adherence to their duty to proceed in "good faith" as agreed between the parties. The fact that they later asked to modify the provisional measure seems to suggest that they would not, without the tribunal's acceptance,

[104] *See generally*, Lao holdings N.V. v. Lao People's Democratic Republic, ICISD Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (May 30, 2014).
[105] *Id.* § 1.
[106] *Id.* § 4(i).
[107] *See Id.* § 4(iii).

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endanger the procedure or improperly misuse their prosecutorial powers to unbalance the "equality of arms" as agreed to in advance, not as inherent in the investment arbitration per se.

4.5. CONCLUDING REMARKS – DOCTRINAL LEGACY?

The natural question is rather simple: what effects will the doctrinal developments in these (and related) cases have on the nature of provisional measures in I.C.S.I.D. arbitration? The answer is, however, cumbersome to distill due to two primary factors. First, there is generally no rule of binding precedents in international arbitration.[108] And second, the issue is intimately linked with interference with state sovereignty.

On the one hand, it can be argued that "recommendation" does not have binding force and that the legitimacy of the system benefits from a rules-based, certain approach to interpreting the meaning of the I.C.S.I.D. Convention. Generally speaking, *in dubio mitius* (the "restrictive principle") means that treaties should be interpreted with deference to the sovereignty of the state (see discussion on state sovereignty below).[109] Moreover, Article 31 and 32 (as discussed above) mandate a textual interpretation. The provisional measure provision is part of a treaty, and therefore, should be interpreted accordingly. Like other clauses, its meaning depends on the particular language. A strict textual interpretation, in conjunction with deference for the sovereign, could lead to interpreting a recommendation as lacking binding force.

On the other hand, the jurisprudential developments seem to have established a doctrine that broadens an I.C.S.I.D. tribunal's jurisdiction by adopting a flexible, dynamic, and value-based adjudicatory methodology and approach. These tribunals seem to have justified extensive arbitral powers. These cases appear to stand for the proposition that "functional adjudication" must sometimes move outside the legal rigidity in order to

[108] *See generally* HOBÉR, *supra* note 32, at 30–31.
[109] *See Id. at* 310-311.

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produce substantive as well as procedural fairness and justice (see discussion on procedural safeguards below). The essence of the cases outlined above (which constitute a non-exhaustive selection of examples), is a development which puts pure legal theory somehow on its head. It is a value-added approach which supersedes certainty, i.e. the approach prevails over strict rules.

The policy unveiled in these cases can be understood as follows. The I.C.S.I.D. Convention should be interpreted in a dynamic manner and must be able to adopt to changing circumstances. This kind of reasoning is not limited to this procedural issue alone, and therefore has a larger encompassing legacy. Adding to this, arbitral case law in investment treaty arbitration has generally been recognized to have standing and currency as quasi-binding case law.[110] Investment treaty arbitration's future is different from that of its commercial counterpart because it implicates public international law. Therefore, the *status school of thought* which attributes some sort of quasi-judicial role on the arbitrator seems inevitable in investment treaty arbitration.

5. I.C.S.I.D. TRIBUNALS' JURISDICTION – PROCEDURAL SAFEGUARDS AND STATE SOVEREIGNTY

As discussed in the previous section, dynamic interpretation (e.g. allowing for procedural efficiency at the expense of rules-based interpretation) sometimes clashes with, for example, state sovereignty. Ultimately, the question on whether the provisional measure regime in I.C.S.I.D. arbitration can mandate a sovereign to refrain from exercising sovereign powers is one where the text (the rule) and the sovereign prerogatives clash with necessary, dynamic interpretation.

[110] *Cf.* Pedro J. Martinez-Fraga & Harout Jack Samra, *A Defense of Dissents in Investment Arbitration*, 43 U. Miami Inter-Am. L. Rev. 445, 445-7 (2012). *See also* Mary Ann Glendon et al., Comparative Legal Traditions in a Nutshell 133-4 (3rd ed. 2008).

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It has been said that "equality of arms" is a key concept for a fair adjudication process.[111] The concept was developed through public international law. However, the concept can be traced back to ordinary principles of law; such as, "due process" and the "right to a fair trial." I.C.S.I.D. arbitration is an adjudication system that operates under the auspices of public international law, and therefore an argument can be made that the tribunal has inherent – implicit and explicit – powers to restore the equality of arms.[112] Professor Wälde wrote as follows:

> "Equality of arms" a foundation principle of investment arbitration procedure. A government sued on the basis of an investment treaty, signed to encourage foreign and private investment by promising effective protection, should prosecute its case vigorously but within the framework of the principles of "good faith" arbitration, the applicable arbitration rules, and with respect to "equality of arms".[113]

Arguably, rendering a provisional measure is a means through which the tribunal can sanction procedural abuse and restore the equality of arms between the parties. For example, if a host-state abuses or misuses its prosecutorial powers to gain a litigation tactic, tribunals may have a duty to restore "equality of arms."[114] Some stretch it so far that a breach of that duty can lead to annulment under Article 52 of the I.C.S.I.D. Convention.[115]

After all, "[p]rinciples of law that have received universal acceptance by frequent embodiment in international instruments bear heavily on, and are likely to be recognized by, domestic courts."[116] The "equality of arms" principle might be one of the "universally accepted principles." However, whether this principle can trump deference to state sovereignty or the pure text of the convention is debatable.

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[111] *See* Wälde, *supra* note 53, at 161, 188.
[112] Wälde, *supra* note 53, at 182.
[113] Wälde, *supra* note 53, at 161-162.
[114] Wälde, *supra* note 53, *at* 180.
[115] Wälde, *supra* note 53, at 180.
[116] Rowland J.V. Cole, *Validating the Normative Value and Legal Recognition of the Principle of Equality of Arms in Criminal Proceedings in Botswana,* 56 J. AFR. L. 68, 85 (2012).

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"Access to justice" is another broad, ambiguous, and loose concept upon which justification may be found. The International Covenant on Civil and Political Rights and the European Convention on Human Rights guarantee a fair trial to litigants. Arguably this should be mirrored in investment-arbitration. The right to a fair trial is central to, and a fundamental aspect of, the constitutional rule of law and any procedural well-being of a court or tribunal. Born makes a valid point in that:

> [R]easonable parties cannot be presumed to intend that their chosen dispute resolution mechanism should lack important procedural protections, or should reward dilatory tactics by one party, or should require recourse to national courts for effective relief. Accordingly, absent explicit contrary indication in the parties' agreement, it is both sensible and necessary to presume that arbitration agreements impliedly include a grant of authority to order interim relief.[117]

Now, whether "judicialization" of investment-arbitration is inevitable or not is a discussion for another time. It suffices to say that more court-like procedures would mean that investment-arbitration would be more akin to the I.C.J. rather than modelled after an I.C.A. tribunal. That evolution has been going on for many years, probably leading towards the adoption of an investment court system (I.C.S.). Whether public policy concerns in investment-arbitration are stressing enough to press for this development has to be answered in the years to come.

As a final observation, many Tribunals that eventually end up denying the request for a provisional measure, still render a de facto *recommendation* in order to protect the "equality of arms" and "procedural fairness" but without interfering with state sovereignty or implying tribunal powers outside the text. For example, the tribunal in *Churchill Mining* observed as follows: "While the request for provisional measures must be denied, the Tribunal wishes to expressly stress the

[117] Born, *supra* note 3, at 2435.

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Parties' general duty, which arises from the principle of good faith, not to take any action that may aggravate the dispute or affect the integrity of the arbitration."[118]

The tribunals that still deny this evolution and proceed with extreme deference to state sovereignty have their reasons too. Many find their reasoning in pure textualism and others probably prefer a holistic view in order to preserve investment-arbitration. The latter agree that efficiency is needed but disagree in how their decisional law will affect the investment-arbitration system as a whole. We need to scratch beneath the surface and ask: how will provisional measures interfering with state sovereignty adversely affect the investment-arbitration regime in the long-term? When a tribunal refuses to order a provisional measure, it is either because (1) it thinks that they lack the authority to order it, (2) that negative inferences are a sufficient remedy, or (3) that rendering an order would damage the legitimacy of the tribunal and the investment-arbitration system due to the risk of non-compliance. Thus, many tribunals might be safeguarding against non-compliance while still stressing a particular point that needs to be made.

Therefore, I.C.S.I.D. tribunals' recognition of their power to order provisional measures in the criminal prosecution context may be based on the essential need to preserve the procedural integrity of investment-arbitration, in general, and for the protection of the investor's access to arbitration, in particular.[119] Notwithstanding this, the I.C.S.I.D. regime is constrained by the text of the convention and to deference for state sovereignty.

In the context of ordering provisional measures in investment-arbitration, a tribunal has to balance various considerations that may affect state sovereignty.[120] "It should be noted that in

[118] Churchill Mining PLC v. Indonesia, ICSID Case No. ARB/12/14 and ARB/12/40, Procedural Order No.9, at 104 (Jul. 8, 2014).
[119] Burnett et al. , *supra* note 1, at 53.
[120] Maniruzzaman, *supra* note 6, at 2. *E.g.*, sovereign immunity, public interest, international obligations, etc.

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negotiating and drafting [the I.C.S.I.D. Convention] the state parties were [directly] involved through their representations (hence sticking to the orthodox notion of sovereignty) unlike in other cases such as the U.N.C.I.T.R.A.L. Arbitration Rules."[121] Maniruzzaman identified three different perspectives of sovereignty to be applied as a matter of course and practical exigency; that is, the classical perspective, the teleological perspective, and the objective perspective.[122]

First, the classical perspective is premised on the idea that provisional measures are not mandated to be binding on states. The drafters of the I.C.S.I.D. Convention (and the I.C.J. statute) had this in mind when drafting respective legal framework and the drafting history bears testimony to this fact.[123] The power in Article 47 of the I.C.S.I.D. Convention to "prescribe," rather than "recommend," was opposed (especially by China) and the "idea to authorize the Tribunal to make "interim awards" on provisional measures (citations omitted) did not prevail."[124] The choice of language, originates from the drafters intention to be respectful of State sovereignty. For example, by not granting a tribunal the power to order a state to do something provisionally.[125] Maniruzzaman identified the following in relation to the classical perspective: "It is thus clear that the sovereignty of the state party was considered to be a factor for not making I.C.S.I.D. provisional measures binding on it. However, the I.C.S.I.D. tribunal in its landmark decision in the *Maffezini* case in 1999 pronounced the binding character of provisional measures recommended by a tribunal."[126]

Hence, despite the reason for choosing a particular language, jurisprudential and doctrinal evolution might have changed the meaning of a recommendation to become an order.

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[121] Maniruzzaman, *supra* note 6, at 6-7.
[122] Maniruzzaman, *supra* note 6, at 8.
[123] Maniruzzaman, *supra* note 6, at 8-9.
[124] SCHREUER ET AL., *supra* note 9, at 746, 758.
[125] *E.g.,* Zannis Mavrogordato & Gabriel Sidere, *The Nature and Enforceability of I.C.S.I.D. Provisional Measures*, 75 ARB. 38, 40 (2009).
[126] Maniruzzaman, *supra* note 6, at 10.

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Second, the teleological perspective of State sovereignty offers another view; that is, although the choice of word is vague, it is based on the thought that the parties are obliged not to frustrate their agreement to arbitrate.[127] For example, in *Maffezini v. Spain* the tribunal noted that "the lack of precedent is not necessarily determinative of [its] competence to order provisional measures in a case where such measures fall within the purview of the Arbitration Rules and are required under the circumstances."[128] A "lack of precedent" is not determinative in a regime without a doctrine of binding precedent. Albeit some argue that there is a de facto doctrine of binding precedent in investment arbitration. Notwithstanding, a lack of legislative intent is determinative; a notion which the interpretive framework provided in the V.C.L.T. substantiates. The general rule of treaty interpretation, as expressed by article 31 of the V.C.L.T. does include a teleological approach insofar as a treaty text must be read in light of its object and purpose. However, as stressed above, the interpretive framework gives precedence to the textual approach. As laid out by Anthony Aust:

> The determination of the ordinary meaning cannot be done in the abstract, only in the *context* of the treaty and in the light of its *object and purpose*. The latter concept, as we have seen in relation to reservations to treaties, can be elusive. Fortunately, the role it plays in interpreting treaties is less than the search for the ordinary meaning of the words in their context. In practice, having regard to the object and purpose is more for the purpose of confirming an interpretation. If an interpretation is incompatible with the object and purpose, it may well be wrong. Thus, although paragraph (1) contains both the textual (or literal) and the effectiveness (or teleological) approaches, it gives precedence.[129]

[127] Maniruzzaman, *supra* note 6, at 13.
[128] Emilio Augustìn Maffezini v. Kingodom of Spain ICSID Case No. ARV/97/7, Decision on Request for Provisional Measures, para. 5 (Oct. 28, 1999).
[129] Aust, s*upra* note 27, at 209.

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Accordingly, although a teleological approach is central feature of treaty interpretation, it is the "object and purpose" that confirms the party intention as it is expressed in the "ordinary meaning" of the text, and not the other way around. Thus, in order to adhere to the principles of interpretation laid out in the V.C.L.T., the conclusions derived from a teleological approach have to be anchored in the treaty text. The sources of law upon which a teleological approach is based, are mainly extrinsic. Preparatory works are explicitly addressed as a supplementary means of interpretation in Article 32 of the V.C.L.T.. Notwithstanding the explicit hierarchy provided in the V.C.L.T., preparatory works are often important when applying the general rule of interpretation insofar as what can be derived therefrom is indicative of party intention and the "object and purpose" of a treaty. Therefore, a teleological method of interpretation is in many cases best performed by glancing at the preparatory work of the relevant convention or rules. To reiterate Schreuer's comment: "a conscious decision was made not to grant the tribunal the power to *order binding* [provisional measures]."[130]

Third, the objective perspective of State sovereignty "allows the [tribunal] to delve into the objective application of the notion of sovereignty so that the state's position as a sovereign is respected and is not impacted in a way that turns out to deprive it of its fundamental status of being a state."[131] Certain powers should not be interfered with in accordance with the objective perspective; unless an agreement has been made. Exactly what those powers are is uncertain and possibly changing. A state's prosecutorial powers might very well fit within those powers. Another question is exactly when and how an agreement has been made and whether provisions can be implied or evolved through doctrine and jurisprudence.

Scholars, arbitrators and practitioners are divided when it comes to the provisional measures binding character. The main concern being

[130] SCHREUER ET AL., *supra* note 9, at 758.
[131] Maniruzzaman, *supra* note 6, at 8.

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interference with state sovereignty. For example, the Tribunal in *SGS v. Pakistan* opined that "[the tribunal] cannot enjoin a State from conducting the ordinary processes of criminal, administrative and civil justice within its own territory."[132] The Tribunal in *Italba* stated that: " . . . . Uruguay has the right to investigate alleged criminal conduct in its territory. There can be no legitimate expectation on the part of Claimant that the prosecution of an I.C.S.I.D. arbitration against Uruguay confers a blanket immunity upon its principals and witnesses from a criminal investigation in Uruguay."[133]

The Tribunal in *Teinver v. Argentina* articulated a similar restrictive view but with a caveat for "exceptional circumstances", opining as follows: "As has been held by a number of arbitral tribunals, Respondent clearly has the sovereign right to conduct criminal investigations and it will usually require exceptional circumstances to justify the granting of provisional measures to suspend criminal proceedings by a State."[134]

As evident, there is no agreement and there are valid arguments on opposite sides. In *Hydro S.R.I. v. Albania*, the Claimants argued that the Respondent had accepted the Tribunal's interference with its sovereign rights by signing the I.C.S.I.D. Convention.[135] However, the tribunal, sensibly, came down in the middle of the two extremes and opined as follows:

> In the Tribunal's view adherence to the I.C.S.I.D. Convention has some ramifications on the sovereign rights of a member state. The Tribunal also accepts the Respondent's submission that when a State investigates a crime, particularly in circumstances where the State is under an international

[132] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Order on Procedural measures No. 2, para. 36 (Oct. 16, 2002).
[133] Italba v. Oriental Republic of Uruguay, ICSID Case No. ARB/16/9, Claimant's Application for Provisional Measures and Temporary Relief ,¶118, (Feb.15, 2017).
[134] Teinver S.A. and Transportes de Cercanías S.A. v. The Argentine Republic, I.C.S.I.D. Case No. ARB/09/1, Decision on Provisional Measures, para 190 (Apr. 8, 2016).
[135] Hydro S.r.l. v. Republic of Albania, I.C.S.I.D. Case No. ARB/15/28, Order on Provisional Measures, ¶3.40 (Mar. 3, 2016).

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> obligation to do so, "[t]he strongest of reasons need to be shown for impeding such an investigation."[136]

The Tribunal seems to have opined that the I.C.S.I.D. Convention interferes with states sovereign rights, but that some interference is justified and agreed to. However, the tribunal seems to have determined that a provisional measure enjoining criminal procedures is a kind of interference that carries a high burden and is not easily available.

The provisional measure is a holistic procedural tool and its outcome is highly determinative on specific facts. However, there are still pure textualists that adhere strictly to the V.C.L.T.. Pure textualists look strictly at words or lack thereof. The tribunal in *Quiborax S.A.* opined as follows vis-á-vis I.C.S.I.D. arbitration exclusivity: "Neither the I.C.S.I.D. Convention nor the B.I.T. contain any rule enjoining a State from exercising criminal jurisdiction, nor do they exempt suspected criminals from prosecution by virtue of their being investors."[137]

Tribunals have decided that they have extensive powers to, among other things, preserve the status quo and to take measures needed for the parties to not "aggravate" the dispute further. Despite the extreme deference for state sovereignty, the Tribunal in *Quiborax S.A.I.* opined the following concerning sovereignty:

> [T]he Tribunal insists that it does not question the sovereign right of a State to conduct criminal cases. As mentioned in paragraph 129 above, the international protection granted to investors does not exempt suspected criminals from prosecution by virtue of their being investors. However, the situation encountered in this case is exceptional [emphasis added] . . . . [T]he Tribunal is of the opinion that a mere stay of the criminal proceedings would not affect Respondent's sovereignty nor require conduct in violation of national law.

[136] *Id* para 3.40.
[137] Quiborax S.A. v. Bolivia, I.C.S.I.D. Case No. ARB/06/2, Decision on Provisional Measures, ¶129 (Feb. 26, 2010).

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> Respondent's expert in criminal procedure . . . . notes that the prosecutor may request the competent judge to refrain from prosecuting a criminal action in certain cases, such as when the event is of little social relevance or judicial pardon is foreseeable . . . . In any event, the harm that such a stay would cause to Bolivia is proportionately less than the harm caused to Claimants if the criminal proceedings were to continue their course. Once this arbitration is finalized, Respondent will be free to continue the criminal proceedings, subject to the Tribunal terminating or amending this Decision prior to the completion of this arbitration.[138]

The tribunal decided that a stay would preserve the procedural integrity of the arbitration but not infringe on the sovereign's right to prosecute, the harm calculus makes sense in theory but it remains to be seen how well it will sit in practice.

As has been said in relation to international law, "[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[139] An obvious trap is that the tribunal lacks the power to enforce a provisional order.[140] The practical implication is that a non-complying states may be willing to sacrifice the "negative inferences" in exchange for a significant litigation or tactical benefit that will be arising out of the non-compliance.[141] Neither the I.C.S.I.D. Convention nor the institutional rules "carve out" the authority to "interfere with rights of a sovereign nature." If this was so important to the drafting parties, it would have been ventilated and articulated with frequency.

If the tribunal lacks "explicit powers" to order provisional measures, it might have "implied powers" to, among other things,

[138] *Id.* para. 164-65.
[139] *E.g.,* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2nd ed. 1979).
[140] BORN, *supra* note 3, at 2445. The court can draw "negative inferences" from a lack of compliance.
[141] *See* BORN, *supra* note 3, at 2447.

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restore equality of arms, preserve the status quo, secure non-aggravation, and guarantee procedural fairness and integrity. If a provisional order is the only means of securing these procedural rights, then an order might be rendered with justification.

In summary, the debate on whether an I.C.S.I.D. Tribunal has jurisdiction to *order* a sovereign to refrain from exercising its sovereign powers is sensitive. Sovereign immunity and textual interpretation clashes with necessary procedural protection that has been in the making in public international law for many years. It is in this context that investment treaty arbitration differentiates the most with its commercial counterpart. It is also because of the sovereign element that investment treaty arbitration is becoming judicialized. Whether concepts such as "equality of arms" and "procedural good faith" should allow a privately appointed tribunal to restrain sovereign activity is hard to determine. The answer has to be determined whether I.C.S.I.D. Tribunals should have jurisdiction that is either value and approached based or whether the tribunal should be strictly limited to rules and constrained by deference towards the sovereign. In other words, should I.C.S.I.D. tribunals have the flexibility to respond to the dynamic changes necessary in order to provide substantive and procedural fairness or should the tribunals be constrained by rules, which at the same time have the benefit of establishing a certain regime? A certain regime has related virtues of predictability and uniformity. Either approach can be justified or de-justified on the basis of contributing to the legitimacy of the system.

6. CONCLUDING REMARKS

The provisional measure is a practical tool for a tribunal in order to guarantee procedural integrity, e.g. on the basis of "equality of arms" or "procedural good faith." It can be said that the concept of "sovereignty"

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should not force tribunals to tie their hands when serious interference with the arbitral procedure is making the procedure unfair at best, or a nullity at worst. However, pragmatic thinking does not alter the language explicitly adopted by the negotiating parties. Legal text both empowers and constrains the tribunal. Jurisdiction, powers, and duties are extracted from the legal authority.

Despite the unclear language of the I.C.S.I.D. Convention, tribunals seem to have justified "ordering" these measures. They have done so either by relying on doctrinal understanding developed in arbitral case law or by relying on their duty (perhaps "best efforts") to facilitate for procedural fairness and good faith, perhaps attributing to themselves a quasi-judicial role in accordance with the *status school of thought.*
I.C.S.I.D. Tribunals seem to have relied on the justifications without major short-term implications. It is doubted, however, that this dynamic functionalism can continue without long-term repercussions. Tribunals have to balance two factors if states refuse compliance due to interferences with state sovereignty. First, tribunals have to consider the impact on the legitimacy of the I.C.S.I.D. tribunal itself and, second, the legitimacy of the entire regime of investment arbitration. If states eventually refuse to comply with provisional orders, it will inevitably de-legitimize investment arbitration. This would undermine an already fragile and perhaps overly politicized system. As a result, more states may refuse compliance, or worse, pull-out altogether.

Therefore, the great paradox in extending arbitral jurisdiction to maximize procedural fairness – albeit well intended and sensible – might be that there will eventually no longer be a system to safeguard. In this context, the coin of pragmatism triggers two questions, the answer of which will be crucial for the long-term sustainability of the investment-arbitration regime. These questions are: (1) what approach is "pragmatically the better" in order to safeguard procedural fairness in investment-arbitration, and (2) what approach is "pragmatically the better" in order to safeguard the regime of investment-arbitration

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altogether? Hopefully the answer will be found in the amended I.C.S.I.D. Rules or in influential scholarly dissemination. Investment arbitration is not meant to be perfect, but it represents a successful experiment in international adjudication because it is workable and produces reasonable substantive and procedural justice as well as fairness. The regime has also been efficient in levelling the playing field to a reasonable standard. To promote longevity of the regime, perhaps greater precaution is merited in order to strike a workable balance between these two interests, which are both of utmost importance.

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Corporate Social Responsibility, Business Opportunities and States' Fragility or Failure: Colombia and DR Congo

ALBERTO JIMÉNEZ-PIERNAS GARCÍA †

TABLE OF CONTENTS: 1. Corporate Activities in Fragile and Failed States: Risks and Opportunities; 1.1. Introduction; 1.2. Understanding Fragile and Failed States; 1.3. The S.D.Gs.: a New Momentum for a Proper C.S.R. in High Risk Areas; 1.4. C.S.R. and Business Opportunities in Fragile and Failed States; 2. Study-Case (1): Post-Conflict C.S.R. in Colombia; 2.1 The Situation in Colombia and the Peace Agreement with F.A.R.C.; 2.2. C.S.R. Clauses in the Peace Agreement with F.A.R.C.; 2.3. The Potential of the Private Sector in Rural Colombia; 3. Study-Case (2): Recurrent Violence and Natural Resources in the D.R.C.; 3.1. Overview of the Situation in D.R.C.: not a Simple Good-Evil Plot; 3.2. The Precedent of the Kimberley Process: C.S.R. in the Security Council; 3.3. Tin, Tantalum, Tungsten and Gold: the Merit of the New EU Regulation. An Appropriate Policy Balance; 3.4. Misunderstandings of the Private Sector and Inconsistencies of the EU Role: Regulatory Lacunae, Cobalt and Last Elections in D.R.C.; 4. The Potential of a Proper C.S.R.: Some Recommendations.

ABSTRACT: The recurring allegations of human rights violations directly or indirectly caused by the activities of M.N.Es. pose many challenges and particularly affect developing States in contexts of fragility and conflict. In such situations, transnational corporate structures, limited liability veils, fragmented jurisdictions and unwilling or unable States are overwhelmingly quoted as the main obstacles for a fairer globalization. This article is aimed at shedding some light on the last of these factors: why some States seem to be unable or unwilling to protect human rights, in general terms and with regard to transnational corporate activities. A proper and pertinent Corporate Social Responsibility can help break this vicious circle, but companies need a paradigm shift to reasonably operate in those difficult circumstances.

KEYWORDS: *Corporate Social Responsibility; Fragile and Failed States; Sustainable Development Goals; Colombia; Democratic Republic of Congo*

JEL CODES: *E02, F53, K33, O19*

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1. CORPORATE ACTIVITIES IN FRAGILE AND FAILED STATES: RISKS AND OPPORTUNITIES

1.1. INTRODUCTION

It is commonplace to observe that economic globalization is not a zero-sum phenomenon: there are advantages and opportunities along with deficiencies and adverse effects. States have historically been the most responsible for human rights violations and tensions have traditionally been present between populations and States' power.[1] However, globalization has increased the importance of non-State actors, in particular multinational enterprises (hereinafter M.N.Es.), generating a triangle of tensions between States, economic actors and societies. Globalization has also led to the multiplication of asymmetric transnational (but not always international) conflicts.[2] International Law (hereinafter I.L.) faces a number of challenges such as piracy, terrorism, transnational crime and massive streams of refugees. To some extent,

† Ph.D. in European Law, University of Bologna (Italy) and Scholar of the Royal College of Spain. Ph.D. in Latin American and European Studies, University of Alcalá (Spain). Founder of the Spanish platform on C.S.R. NegocioResponsable.Org.

[1] I.H.R.L. is, in origin, a way to alleviate the tension between societal expectations and States' power, limiting the latter to a precise framework. It was traditionally assumed that States were the major – and, at a time, almost the only- human rights' violators so the historically most important tension was between States and Societal Expectations. Globalisation has added new tensions and corporate activities are able to cause as many violations of human rights as States. Moreover, in the words of Prof. Carrillo Salcedo, the government's treatment of its own nationals is no longer an "internal matter", but has become a concern under contemporary I.L.:

> [S]*i el trato que un Estado diera a sus nacionales era en el derecho internacional tradicional un cuestión de jurisdicción interna (ya que el Derecho internacional no regía esta cuestión y se limitaba a regular la posición jurídica de los extranjeros), en el Derecho Internacional contemporáneo ocurre lo contrario como consecuencia de . . . . los derechos humanos. [If in traditional international law the treatment that a State gave its citizens was a matter of internal jurisdiction (since international Law has not governed this problem and has limited itself to regulating the legal position of foreigners), in contemporary International Law the opposite happens as a consequence of. . . . human rights]*

see JUAN ANTONIO CARRILLO SALCEDO, SOBERANÍA DE LOS ESTADOS Y DERECHOS HUMANOS EN DERECHO INTERNACIONAL CONTEMPORÁNEO 19 [SOVEREIGNTY OF STATES AND HUMAN RIGHT IN CONTEMPORARY INTERNATIONAL LAW] (1995).

[2] *See* Rafael Calduch Cervera, *Procesos de cooperación y conflicto en el sistema internacional del siglo XXI [Processes of cooperation and conflict in the international system of the XXI century], in* HISTORIA DE LAS RELACIONES INTERNACIONALES CONTEMPORÁNEAS [HISTORY OF CONTEMPORARY INTERNATIONAL RELATIONS] 701, 709-713 (Juan Carlos Pereira Castañares ed., 2009).

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there is a need to "rethink jurisdiction" in light of recent developments after which the "idea of jurisdiction as purely an expression of the rights and powers of sovereign States requires reconceptualization",[3] since problems are ever more interconnected. The concept of sovereignty has always moved between "autonomy and responsibility",[4] but these developments tend to increase the relative weight of the latter. This has to come with the understanding that there are no self-contained regimes under I.L., so that international trade and investments do not take place in a legal vacuum or in a totally separate legal bubble.[5]

Moreover, both individuals and transnational companies (hereinafter T.N.Cs.) have gradually become partial legal subjects of contemporary I.L. For instance, International Human Rights Law (hereinafter I.H.R.L.) has greatly contributed to the recognition of a limited locus standi of individuals in some regional subsystems (the Inter-American Court of Human Rights and the European Court of Human Rights) and through some United Nations (hereinafter U.N.) Committees (in a quasi-jurisdictional manner).[6] Then, Criminal I.L. might also turn against individuals. In parallel, business enterprises can

[3] *See* Alex Mills, *Rethinking Jurisdiction in International Law*, 84 Brit. Y.B. Int'l L. 187, 218-19 (2014) ("This development suggests the need to rethink the idea of jurisdiction in international law. To the extent that States have agreed to individually enforceable rights for foreign investors which extend to a right of access to civil or administrative remedies . . . . they have apparently agreed that they owe jurisdictional obligations not only to foreign States but also to individuals. It is true that these rights may be considered as products of State consent through treaties or even (more controversially) customary international law, suggesting that the individual rights thus created can be accommodates within the existing framework of jurisdictional rules. It can nevertheless also be argued that through the recognition of individuals as positive actors and jurisdictional rights-bearers, the idea of jurisdiction as purely an expression of the rights and powers of sovereign States requires reconceptualization.").

[4] T. GAMMELTOFT-HANSEN and T. E. AALBERTS: "Sovereignty at Sea: The Law and Politics of saving lives in the Mare Liberum", in *Working Papers of the Danish Institute for International Studies*, No. 18, Copenhagen 2010, 31 pp., at pp. 8-13.

[5] *See* Ralph Alexander Lorz, *Fragmentation, Consolidation and the Future Relationship between International Investment Law and General International Law*, *in* Investment Law within International Law: Integrationist Perspectives 482, 482-493 (Freya Baetens ed., 2013).

[6] To date, eight of the human rights treaty bodies receive individual communications (under certain admissibility criteria): the Human Rights Committee, the Committee on Elimination of Discrimination Against Women, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of Persons with Disabilities, the Committee on Enforced Disappearances, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child.

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also sue and be sued under International Investment Law (arbitration procedures established in multilateral and bilateral investment treaties or, more simply, in international contracts).

In this context, social demands target both States and T.N.Cs. In summary, globalization has deepened the imbalances between States' power, markets' influence and social expectations in terms of human rights, with tragic consequences in contexts of fragility and conflict, which deserve specific attention. The initiatives of Corporate Social Responsibility (hereinafter C.S.R.), with its lights and shadows, may help alleviate these tensions.

In a globalised world, opportunities and risks are two sides of the same coin: one of the most illustrative examples precisely regards the impact of corporate activities on human rights in high risk areas, usually rich in natural resources and in need of opportunities for economic development. The recurring allegations of human rights violations directly or indirectly caused by the activities of M.N.Es. pose many challenges. In such situations, transnational corporate structures, limited liability veils, fragmented jurisdictions and unwilling or unable States are overwhelmingly quoted as the main obstacles for a fairer globalization. This article is aimed at shedding some light on the last of these factors: why some States seem to be unable or unwilling to protect human rights with regard to transnational corporate activities and, in general terms, how C.S.R. can help break this vicious circle and how companies should analyse the situation to reasonably operate in those difficult circumstances. From an empiric[7] and consensual[8] approach to I.L. and

[7] To understand todays defies of the international system it is utterly important to keep close to the material reality, since international norms and other international political initiatives generally follow an empirical-inductive path. *See* Carlos Jiménez Piernas, Introducción al derecho internacional público. Práctica de España y de la Unión Europea [Introduction to Public International Law. Practice of Spain and the European Union] 50, 65-66 (2nd ed., 2011).

[8] This approach is guided by pragmatism and built upon the understanding that a certain level of consensus is difficult but necessary within the international society to address its current challenges and for I.L. to progress. *See* Jaume Ferrer Lloret, El consenso en el proceso de formación institucional de normas en el Derecho internacional [The consensus in the process of institutional training of rules in International Law] (María Teresa De Gispert Pastor et al. eds., 2006). *See also* Carlos Jiménez Piernas, *El derecho*

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International Relations, this article also proposes two study cases: a scenario of post-conflict fragility under control (Colombia) and one of clear institutional failure (Democratic Republic of the Congo, hereinafter D.R.C.).

As a preliminary warning, it should be borne in mind that some "business and human rights" cases are actually *epiphenomena* where the conflicts against companies hide an instrumentalization of wider problematics between social agents, affected communities and government officials. That's also why it is utterly important to properly take into account the institutional terrain.

1.2. UNDERSTANDING FRAGILE AND FAILED STATES

Besides the population of these States, which is the first victim of instability and violence, T.N.Cs. and other business enterprises also suffer from States' fragility, mainly because of the abundant misunderstandings or misinterpretations of this phenomenon. Fragile and failed States represent a real challenge for the international system at many levels because they numb economic exchanges and threaten stability and security. At the same time, this phenomenon causes serious humanitarian crisis. The consequences derived from fragile and failed States firstly affect punctual regions of the world, while they are amplified as a result of globalization. Hence this phenomenon produces undesirable effects at different scales: from regional subsystems to the global system. The core of this problem is mainly political and historical. However, taking into consideration some I.L. issues may decisively contribute to its clarification.

This phenomenon, intensified since the end of the Cold War, requires some transversal research, especially cautious in using terminology so as to avoid neo-colonialist, imperialist and hegemonic

internacional contemporáneo: una aproximación consensualista [*Contemporary international law: a consensualist approach*], *in* XXXVII CURSO DE DERECHO INTERNACIONAL [XXXVII INTERNATIONAL LAW COURSE] 1, 24-31 (2011).

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discourses. For this reason it is crucial to explain what we understand by fragile and failed States:[9] we are not characterizing these States ontologically; we just allude to their current situation of fragility and failure depending on the case. States in a situation of fragility and failure are unable to put into effect their functions. Despite the multiplicity of actors in international affairs, the U.N. Charter still identifies States as the stem cell of the international system. But not all States are able to satisfactorily comply with their obligations: ad intra, they stagnate in political and economic underdevelopment; and ad extra, the uncertainty around their international engagements is manifest. Even though these States have been suffering several political and humanitarian crises since their independence, the international society started paying more attention to their failing situation only when their various problems acquired international dimensions damaging wider political and economic interests.

A fragile State lives a political and economic deterioration process that considerably weakens its authority and reduces its capacity to provide the essential public services, generally expected from a State based on the rule of law. Without entering a paralysis situation, the fragile States functions are bogged down and insufficient. Two exemplary cases are the Republic of Mexico and Colombia, that face a hard-fought war against organised criminality and illegal drugs trade, which profits from a slow and dysfunctional justice and police administration. A fragile State may get worse and even become a failed State; however, it does not necessarily follow this evolution. Actually, a failed State is completely unable to warrant the rule of law because of its institutional collapse and due to its political fragmentation, which frequently degenerates into serious violence within the framework of non-democratic traditions. In

[9] *See* a rigorous systematization and, in particular, a typology to distinguish fragility from failure at Carlos Jimenez Piernas, *Estados Débiles y Estados Fracasados,* 65 Revista Española de Derecho Internacional [R.E.D.I.], no. 2, 2013, at 11, 17-28. *See also* Governance and Social Development Resource Centre (G.S.D.R.C.), http://www.gsdrc.org. *See also*, C. Mcloughlin, Topic Guide on Fragile States, August 2009, pp. 8-15 & 28-30 and h. haider and Fragile States Forum, www.fragilestates.org.

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fact, it is very common as well that the territory of a failed State partly or totally falls outside the government control. D.R.C. and Somalia are perfect examples, where the government has evidently lost the monopoly on the use of force. All in all, the most noticeable difference between a failed and a fragile State is possibly that the latter rarely creates a threat to international peace and security.

Various sources suggest there could be 30 to 50 States in a situation of fragility and failure in the world, with chronic cases in Sub-Saharan Africa. In 2016, the Organization for Economic Co-operation and Development (hereinafter O.E.C.D.) defined it as "the combination of exposure to risk and insufficient coping capacity of the State, system and/or communities to manage, absorb or mitigate those risks", eventually leading to "violence, the breakdown of institutions, displacement, humanitarian crisis or other emergencies".[10]

The causes of this phenomenon are extraordinarily complex. To get an approximate idea of these causes, we should not forget the colonial inheritance. For example, the artificial borders in Africa have been at the origin of many conflicts, both international and internal (like civil wars). In this regard, we need to point out that a State in civil war is not a synonym for a failed State, as a civil war does not automatically lead to failure albeit the furtherance of such a conflict is likely to do so. In other cases the emphasis should be placed on the contradictions between western political institutions and a traditional political culture which privileges a multiplicity of religious and ethnic communities, as well as tribes and clans. All these circumstances frequently overlap with an exceptional richness in natural resources, or with big investment projects aimed at developing infrastructures, essential to improve their human rights records. However, such investment projects may have social and environmental adverse effects. Very particularly within the framework of authoritarian and corrupt regimes, many companies are sort of put

[10] O.E.C.D. Publishing, p. 16, O.E.C.D.: States of Fragility 2016: Understanding Violence, Paris (2016), O.E.C.D. Publishing, p. 16, http://dx.doi.org/10.1787/9789264267213-en.

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between a rock and a hard place, as if they had to choose between human rights standards and some kind of loyalty towards the Government contracting their services.

Studying causes may help to elaborate a typology or classification of fragile and failed States as there are different phases of fragility and failure. The Fragile States Index Score, a Fund for Peace (N.G.O.) proposal annually published by Foreign Policy review, is a good starting point to the extent it offers a list to work with. There are however, ambiguous cases; for example, north Korea which could be considered a fragile State but probably not a failed one.[11] In North Korea, despite most western indexes, the obvious lack of economic development and respect for human rights does not imply that institutions are weak, nor does it question the effectiveness of State functions. Similarly, China's alleged fragility is probably overestimated in most indexes (listed as being in a "warning" situation according to the Fund For Peace Index),[12] in the same way that Belgium's institutional stability is probably overrated just because of its E.U. membership and economic prosperity.[13]

This analysis will only include a fragile and a failed State (Colombia and D.R.C.), keeping aside those that bring up very different kinds of problems to the international scenario (such as the so-called "rogue States"). It goes without saying that a classification proposal should be theoretically and methodologically preceded by a discussion on which quantitative and qualitative factors should be taken into account, besides their order of preference, but this is not the priority of the present article.

[11] *Id.* at 28.
[12] FRAGILE STATES INDEX, http://fundforpeace.org/fsi/wp-content/uploads/2018/04/951181805-Fragile-States-Index-Annual-Report-2018.pdf.
[13] Abundant corruption scandals, the irreconcilable ethnic division between Flemish and Walloons, with its reflection in the judiciary system, and its inefficacy dealing with the latest terrorist attacks make of Belgium a more than discussable option for international investments, if Brussels was not the E.U. capital and N.A.T.O. headquarters. The international newspapers have abundantly reported in this sense, see for example, how The New York Times ridiculed Belgium describing it as the "world's most PROSPEROUS failed States": A. HIGGINS, *Terrorism Response Puts Belgium in a Harsh Light*, NEW YORK TIMES (Nov. 24, 2015), https://www.nytimes.com/2015/11/25/world/europe/its-capital-frozen-belgium-surveys-past-failures-and-squabbles.html.

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The diverse degree of fragility and failure of these States is a focal point for the development of organised criminality like terrorism (frequently mixed up with insurgency, like in Afghanistan) and piracy (a recent case is the Horn of Africa in the Indian Ocean benefiting from Somalia's situation). In contact with terrorism and piracy we cannot ignore illegal drugs, arms and art trafficking. Those illegal activities constitute a real threat to international peace and security, damaging the global economy as well (e.g. Red Sea and the Suez Canal). The challenges derived from fragile and failed States cause the serious humanitarian crisis as this phenomenon destabilizes the whole system, often via non-conventional and asymmetric conflicts.

On the other hand, we shall consider what the reaction to this socio-historical phenomenon has been. For the time being, the international society has not offered very original or creative attempts at finding a solution. The U.N. Charter consecrates the sovereign equality of States and this Principle has been interpreted in terms of sovereignty and territorial integrity, which has led to more or less virtuosic diplomatic cynicism. In reality, although States in a situation of failure cannot either comply either with their internal or international obligations, particularly for what concerns the maintenance of peace and international security, these States are nonetheless recognised as subjects with full rights in the international stage. More concretely, the U.N. practice (of the Secretary-General and of the Security Council)[14] has highlighted the necessity to formally safeguard the sovereignty and territorial integrity of failed States, above any empirical proof of their collapse (it does not apply to fragile States). The international system has faced the challenges originated by failed States promoting decentralisation (i.e. from U.N. to regional organisations such as the European Union (hereinafter E.U.) and the African Union). This finally regionalises any attempt at resolving the

[14] Along with the abundant documentation issued by the E.U., the African Union, the International Maritime Organisation, the World Bank, the O.E.C.D., the Secretary-General Reports and the U.N.S.C. Resolutions are also indispensable sources of information, all of which go beyond the scope of this article.

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problem, with initiatives that the U.N. Charter has certainly always incorporated under Chapter VIII (on Regional Arrangements). We may recall the E.U. leadership against piracy in the Horn of Africa; as it will be explained, we miss a similar proactive role in D.R.C.. To what extent has the international society been doing its best in selecting the most adequate solutions to the challenges arisen by fragile and failed States, remains an open question.

1.3. THE S.D.GS.: A NEW MOMENTUM FOR A PROPER C.S.R. IN HIGH-RISK AREAS

C.S.R. is an interdisciplinary area under development and its detailed analysis is outside the scope of this article. But many of its defining elements are becoming clear by now, most notably its difference with corporate philanthropy. In 2001 the European Commission (hereinafter E.C.) considered it as the "concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis";[15] ten years later, the E.C. proclaimed it had simply become the "responsibility of enterprises for their impacts on society",[16] which seems a better version. The O.E.C.D. speaks of the "private efforts to define and implement responsible business conduct";[17] for the O.E.C.D., *responsible business conduct*

> entails above all complying with laws, such as those on human rights, environmental protection, labour relations and financial accountability, even where these are poorly enforced . . . *[and]* responding to societal expectations communicated by channels other than the law, e.g. inter-governmental

[15] *Commision proposal for a European Framework promoting Corporate Social Responsibility*, at 6, C.O.M. (2001) 366 final (Jul. 18, 2001).

[16] *Commision Proposal for a Renewed E.U. Strategy 2011-14 for Corporate Social Responsibility*, at 6, C.O.M. (2011) 671 final (Oct. 25, 2011). The documentation of the E.U. is studied in detail in chapters III and IV.

[17] Organisation for Economic Co-operation and Development [O.E.C.D.], *O.E.C.D. Guidelines for Multinational Enterprises*, at Para. 7 of the preface (May 25, 2011).

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> organisations, within the workplace, by local communities and trade unions, or via the press.[18]

The O.E.C.D. further clarifies that "*[p]*rivate voluntary initiatives addressing this latter aspect of R*[esponsible]* B*[usiness]* C*[onduct]* are often referred to as corporate social responsibility".[19] For the U.N., C.S.R. is simply defined as "the corporate responsibility to respect human rights."[20]

Interestingly enough, even I.S.O. 26000 standard on C.S.R., which is a private non-governmental initiative, takes the trouble to underline the difference between philanthropy and responsibility, very commonly confused by companies both in developed and developing States: "Philanthropy (in this context understood as giving to charitable causes) can have a positive impact on society. However, it should not be used by an organization as a substitute for integrating social responsibility into the organization".[21] I.S.O. 26000 has become, within the private sector, an unavoidable cornerstone. This is in contrast with most private initiatives that tended to avoid, at the beginning, a strong human rights' language. For example, the private-led World Business Council for Sustainable Development defined C.S.R. as "the continuing commitment . . . . to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large".[22] The Global Reporting Initiative (hereinafter G.R.I.), also private,[23] tends to focus on sustainability and economic development.

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[18] O.E.C.D., *Policy Framework for Investment User's Toolkit*, at Chp. VII (2011) (2015 edition of the same is available at http://www.oecd.org/investment/toolkit/).
[19] *Id.*
[20] Special Representative of the Secretary-General, *Protect, respect, and remedy: a framework for business and human rights*, O.H.C.H.R. Doc. A/H.R.C./8/5 (Apr. 7, 2008).
[21] Int'l Organization for Standardization [I.S.O.], *I.S.O. 26000:2010 Guidance on social responsibility* (2010-11).
[22] Lord R. Holme & P. Watts, Corporate Social Responsibility: Making Good Business Sense (2000) www.wbcsd.ch.
[23] Founded in Boston in 1997, G.R.I. is one of the earliest purely private initiative, initially centred on environmental business sustainability, comprising periodic reports, and later expanded to more general "human rights and corruption" objectives. It has issued up to four updates of their own guidelines. Global Reporting Initiative (G.R.I.), www.globalreporting.org.

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In line with the U.N. Guiding Principles and the EC, non-profit and non-Governmental Organizations (hereinafter N.G.Os.), like Amnesty International and Human Rights Watch, early emphasised the need to analyse "corporate behaviour through human rights lens",[24] correctly putting the accent on the human rights dimension of C.S.R. For Transparency International, there is a "missing link" with anti-corruption and it should include, beyond "the management of economic, social and environmental impacts", also the "relationships within the workplace and marketplace, along the supply chain, in communities and among policymakers."[25] Corruption requires two parties: the corrupter and the corrupted, which brings us back to the institutional terrain of fragile States.

The most common mistake in contexts of fragility and conflict can be expressed more crudely: C.S.R. does not consist of building a hospital or a school in exchange for polluting a river. Despite the diversity of definitions of C.S.R., three basic characteristic elements can be deduced, taken as categories or as an approximation to Weberian ideal types:[26] *1)* the close connection of C.S.R. with the type of business and its inherent operations in the field (the criterion of relevance that distinguishes it from philanthropic actions); 2*)* a sustainability criterion, i.e., to prioritise long-term preventive effects in social and environmental issues, leaving aside circumstantial, reactive and contingent approaches; and *3)* a solid vocation to respect human rights, which is its specific legal basis.

Clearly, C.S.R. seems to have lost considerable *momentum*, mainly as a result of the upsurge of the new U.N. development agenda, the

[24] Human Rights Watch [H.R.W.], *Corporate Accountability: A Human Rights Watch Position Paper*, (Sept. 8, 2005), https://www.hrw.org/news/2005/09/08/corporate-accountability-human-rights-watch-position-paper.

[25] Transparency International, *Corporate Responsibility and Anti-Corruption: the Missing Link?*, at 2, (Apr. 6, 2010).

[26] Alberto Jiménez-Piernas García, *La definición de la responsabilidad social corporativa a la luz de los principios rectores: una perspectiva de derechos humanos [The definition of corporate social responsibility in the light of the guiding principles: a human rights perspective]*, in EMPRESAS Y DERECHOS HUMANOS [COMPANIES AND HUMAN RIGHTS] 67-86, 82-83 (Carlos Rámon Fernández Liesa & María Eugenia López-Jacoiste Diaz eds., 2018).

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Sustainable Development Goals (hereinafter S.D.Gs.) for 2030.[27] A good part of the private sector has enthusiastically welcomed the S.D.Gs. because they easily fit their emotional marketing strategies and, again, they leave room for companies to pursue philanthropic social actions hiding the lack of a proper C.S.R. Many enterprises just choose which S.D.Gs. better serve their public image needs without analysing their concrete impact and supply chains. This trend reflects an attempt to extinguish C.S.R. when, in fact, the S.D.Gs. constitute an end and C.S.R. is one of the means to achieve them. Without corporate respect for human rights, business enterprises will "contribute" to the S.D.Gs. only with difficulty, among which international institutions should prioritise No. 16 and 17 that precisely refer to strong institutions, democracy, rule of law and public-private partnerships (hereinafter P.P.Ps.).[28]

Further still, most S.D.Gs. actually refer to procedural aspects of human rights,[29] mainly economic and social rights (water and sanitation, food, health, protection of the environment and climate change) but also some civil and political rights (very prominently, access to justice and non-discrimination).

If properly designed as the responsibility to minimise adverse corporate impacts, it is precisely in least-developed countries (hereinafter L.D.Cs.) and developing countries that the external or global dimension of C.S.R. converges even more closely with the S.D.Gs., reinforcing each other. In this sense, it can be stated that the S.D.Gs. could

[27] G.A. Res. 70/1, U.N. Doc. A/RES/70/1 (Sept. 25, 2015).

[28] Alberto Jiménez-Piernas García, *Importancia y características de los planes nacionales de empresas y derechos humanos en relación con el desarrollo sostenible [Importance and features of national business plans and human rights in relation to sustainable development]*, *in* OBJETIVOS DE DESARROLLO SOSTENIBLE Y DERECHOS HUMANOS: PAZ, JUSTICIA E INSTITUCIONES SÓLIDAS / DERECHOS HUMANOS Y EMPRESAS [OBJECTIVES OF SUSTAINABLE DEVELOPMENT AND HUMAN RIGHTS: PEACE, JUSTICE AND SOLID INSTITUTIONS/ HUMAN RIGHTS AND COMPANIES] 289 (Diana Marcela Verdiales López, Cástor Miguel Díaz Barrado & Carlos Rámon Fernández Liesa eds., 2018).

[29] The new S.D.Gs., at the end of the day, "seek to realize the human rights of all". In this development agenda, it is acknowledged that the "*[p]*rivate business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creations" so that the U.N. "call*[s]* upon all businesses to apply their creativity and innovation to solving sustainable development challenges". U.N. Doc. A/RES/70/1, supra, preamble and para. 67 (quotes).

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mark a turning point or a new *momentum* for a pertinent C.S.R. in developing countries.

1.4. C.S.R. AND BUSINESS OPPORTUNITIES IN FRAGILE AND FAILED STATES

As explained before, State fragility is measured by combining qualitative and quantitative factors, from institutional legitimacy to social inequalities and economic indicators. That said, one cannot affirm that there is a priori, a direct correlation between fragility and economic underperformance. In practice, however, different degrees of State fragility often correspond to L.D.Cs. and developing countries, which suffer from high public debt and low income rates, so that their economic needs tend to shadow their I.H.R.L. obligations.

With respect to M.N.Es., it would be manichaean and inaccurate to lay all blame on them, as if companies felt at ease or were eager to operate in fragile States or in conflict zones. Indeed, quantitative studies have begun to question previous assumptions and prejudices in this respect, such as the "symbiotic relationship between repressive governance and foreign capital."[30] While it is certainly true that corporate behaviour is more likely to *adapt to undesirable situation*s so as not to put at risk investments and benefits,[31] it would also be dangerous to ignore the growing reputational and even operational consequences of corporate misbehaviours. It is evident that companies do not necessarily and always feel at home in authoritarian or repressive States, but "rhetoric has exceeded empirical research."[32] Many authors have enthusiastically started to conduct quantitative analysis in search of mathematical models to investigate eventual C.S.R. returns on benefits.[33] It is called the C.S.R.

[30] Shannon L. Blanton & Robert G. Blanton, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, 69 J. Pol. 143, 145 (2007).
[31] This explains, by the way, why C.S.R. should not be left purely to self-regulatory schemes.
[32] Concerning, foreign investment, Blanton's research would show that mathematical models refute the "dominant traditional perspective [assuming] F.D.I. and human rights to be inherently incongruous". *Id.* p. 152.
[33] Maria F. Izzo, *Bringing Theory to Practice: How to Extract Value From Corporate Social Responsibility*, 5 J. Global Resp, 22 (2014).

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"business case"; for better or worse, business finds its way through. Among other results, theories of "shared value"[34] emerged to point out that C.S.R. could create value for both companies and stakeholders, being measurable in terms of "social performance". In sum, it can contribute to reduce business risks and, even, increase benefits by creating value for both the enterprise and society.

Critics claim that such reasoning leads to a merely instrumentalist or utilitarian perspective. From this point of view, C.S.R. and human rights respect would become a simple management issue of "goodwill-nomics":[35] violations would be read as a risk and, sometimes, this approach can treat violations as unavoidable costs of production, while the word *stakeholders* could end up hiding victims, i.e. rights-holders. This cost-effective way of thinking has an additional problem as far as it would "allow corporations to prioritise some human rights"[36] (those more costly, for example). All these quantitative manias may reflect a certain "dissemination of the corporate form of thinking".[37]

It is not so difficult to avoid confusing stakeholders with right-holders and the above-mentioned risk of permitting a "private-led prioritization or marketization of human rights". For that, companies should first ensure that C.S.R. is really aimed at addressing the impact of their operations in the field and do not constitute arbitrary donations to social causes, which can be tricky and a double-edged sword in countries with factionalised elites and institutional weaknesses (unless they really want to meddle in politics). Secondly, companies should accept that C.S.R. is only partially quantifiable and, more importantly, that C.S.R. is not automatically profitable: sometimes it is, but not always and necessarily.

[34] Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism – and Unleash a Wave of Innovation and Growth*, HARV. BUS. REV., Jan.-Feb. 2011, at 1, 63-70.

[35] SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS. HUMANIZING BUSINESS 139 (2012).

[36] Robert McCorquodale, *Pluralism, Global Law and Human Rights: Strengthening Corporate Accountability for Human Rights Violations,* 2 GLOBAL CONST. 287, 307 (2013).

[37] S. E. MERRY, *Measuring the World: Indicators, Human Rights and Global Governance: with C.A. Comment by John M. Conley*, 52 Current Anthropology S3, (Supplement to April *Corporate Lives: New Perspectives on the Social Life of the Corporate Form*, edited by D.J. PARTRIDGE, M. WELKER and R. HARDIN), pp. S-83-S-95, at p. S-83.

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In other occasions, it will simply reduce risks, which are only dramatically quantifiable when they materialize. Credible due diligence protocols are an essential part of this work.[38]

That said, if companies find out that their economic results are improved thanks to C.S.R., there should not be anything wrong with that. The problem only arises when you put the cart before the horse, i.e., when marketing motivations shape and distort C.S.R. The trap of marketing motivations can be summarised in some simple questions that C.E.Os. and executive directors should ask their marketing departments: why build a hospital and not a school? Is it not a rather political choice alien to our corporate role? Would it not be better to assign that money to reduce our concrete impact on the environment or to improve working conditions, for example? Why spend 100,000€ to reduce our negative impact and 1,000,000€ in the marketing department to communicate it, and not the other way round, now that communication costs are lesser thanks to the internet and social media? This is exactly what we mean by putting the cart before the horse. This is not thought to totally deny the importance of communication and marketing departments, but we urgently need to rethink their creeping predominance in the Boards of Directors of companies. The excessive weight of marketing departments generate multitude of misunderstandings, with companies repeatedly tripping over the same stones: the overreliance on philanthropic and emotional marketing strategies will only accentuate the lack of awareness on institutional, regulatory and socio-historical risks in fragile contexts.

Western, marketing-based and self-referential C.S.R. strategies are generally (and erroneously) oriented to rich societies and built upon the self-perceived interest of companies (the so-called *business case*), where philanthropy and responsibility are usually mixed up. Being also inadequate in developed countries, it is crystal clear that such C.S.R. falls short of the challenges in fragile or failed States and results in the

[38] For information purposes, *see* O.E.C.D., O.E.C.D. DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT (2018), http://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm.

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companies falling into the same traps again and again. In those scenarios, the key is the institutional terrain where business operations take place and the best way to deal with it is avoiding both undue cynicism and excesses of idealism.

Moving to the perspective of policy-makers, studies on China's economic penetration into the African Continent have revealed that European conditionalities have led to some fatigue and frustration amongst many African governments. China has taken advantage of western "credibility gaps as development partners".[39] The "language of South-South cooperation",[40] "explicitly rejecting Afro-pessimism",[41] continues to inspire Chinese post-Tiananmen and post-Darfur foreign policy. At the same time, its "categorical support for non-intervention in domestic affairs"[42] is still valid, but has been slightly balanced and nuanced since the 1990s, now less reluctant towards international cooperation through regional and international organizations.

In other words, it takes two to tango: policy makers should know that the punitive approach is losing ground against more constructive hybrid pressures. On the other hand, company directors should realise that a proper C.S.R., integral and integrated, could become a crucial comparative advantage in many developing countries, where there are plenty of opportunities in terms of natural resources and infrastructures. This approach may also help western companies to avoid politics, regain credibility and to better face growing competition from China and India.

[39] Deborah Brautigam, The Dragon's Gift 311 (1st ed. 2009).
[40] Gerald Segal, *China and Africa*, 519 Annals Am. Acad. 115, 125 (1992).
[41] China returns to Africa 7 (Chris Alden, Dan Large & Ricardo Soares de Oliveira eds., 2008).
[42] *Id.*, p. 22.

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2. STUDY-CASE (1): POST-CONFLICT C.S.R. IN COLOMBIA

2.1. THE SITUATION IN COLOMBIA AND THE PEACE AGREEMENT WITH F.A.R.C.

The negative outcome of the referendum held in October 2016 triggered concerns regarding the future of Colombia, after so many efforts to reach an agreement between the government and the Revolutionary Armed Forces of Colombia (hereinafter F.A.R.C.) Up to 50 articles of the first text (rejected by the electorate) were amended in an attempt to address the lack of consensus, after which the then-President Santos still decided to adopt the agreement through a legislative act by the end of 2016. We have seen in different scenarios the "referenda curse", ranging from Brexit to Colombia, or the secessionist Catalan region in Spain: what they all share is a variety of situations where institutional legitimacies are under pressure.

The most polemic points of the Peace Agreement concerned its provisions on transitional justice (a special tribunal and a partial amnesty that finally excluded major crimes), together with a sort of political insurance by virtue of which F.A.R.C. are guaranteed for the next two electoral periods 5 seats in the Congress and 5 seats in the Senate (including security and financial support to compete in the elections). After 50 years of open armed confrontation, most Colombians judged it to be excessively conciliatory and saw the 2018 elections as a second opportunity to express their discontent. In June 2018, the majority voted for the right-wing Duque, now President of Colombia, who had fiercely opposed the Peace Agreement and even brought it before the Constitutional Court.

However, the Constitutional Court has ruled that only a President has the faculty to negotiate and close peace agreements, therefore backing outgoing President Santos, who has received more international than internal support. The Congress is then obliged to remain within the framework of the spirit of the agreement, although it has some room for

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manoeuvre during its implementation: "*[E]l ámbito de regulación del Congreso respecto de la implementación del Acuerdo Final radica en la presentación de diferentes opciones de regulación, pero todas ellas deben estar dirigidas a facilitar dicha labor de implementación del Acuerdo.*"[43]

From an international perspective, article 3 common to the four Geneva Conventions of 1949, has deliberately been used to give the peace agreement a broader base of legitimacy and even some "legal resiliency"[44] to handle the vicissitudes of national politics. In this sense, I.L. interestingly connects with Constitutional Law: the agreement is presented as "internationally binding" and, actually, the separation between its international legal life and its internal one is artificial,[45] not to say a fiction intended to protect it from the vagaries of forthcoming governments. This smart use of I.L. could be a source of inspiration for other conflict-affected regions.

In more general terms, taking into consideration the active engagement of Norway, Cuba, the Holy See, Venezuela and Chile, the Peace Agreement can also be interpreted as a success for multilateralism. In a speech at the headquarters of the E.U. in Brussels, the Executive Secretary of the U.N. Economic Commission for Latin America and the Caribbean, Alicia Bárcena, said that the negotiation process showed "in this uncertain time the tangible value of multilateral endeavours."[46]

In the meantime, the U.S., a traditional ally in the fight against drugs, has taken a tougher line. President Donald J. Trump has "considered designating Colombia as a country that has failed demonstrably to adhere to its obligations under international

[43] Colombian Constitutional Court: *Judgement C-332/17*, 17 May 2017, available at: http://www.corteconstitucional.gov.co/relatoria/2017/C-332-17.htm.

[44] Carlos R. Fernàndez Liesa, *El Derecho Internacional en el Acuerdo de Paz*, [International Law in the Peace Agreement], *in* El Acuerdo de Paz entre el gobierno de Colombia y las F.A.R.C. *[The Peace Agreement between the Colombian government and the F.A.R.C.]* 39, 48 (Carlos R. Fernandez Liesa et al. eds., 2017).

[45] *Id.* p. 45.

[46] Press Release, U.N. Economic Commission for Latin America and the Caribbean, Alicia Bárcena, Peace Process is Achievement of Colombians, Demonstrating Relevance of Multilateralism and Value of the Region's Constructive and Respectful Support (May 31, 2018) https://www.cepal.org/en/pressreleases/alicia-barcena-peace-process-achievement-colombians-demonstrating-relevance.

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counternarcotics agreements due to the extraordinary growth of coca cultivation and cocaine production over the past 3 years, including record cultivation during the last 12 months."[47] For now, Colombia has not been included in the list of non-complying countries. But such statement is all the more poignant when one realises that it was issued just a year after the entry into force of the Peace Agreement. Hence, it casts a serious shadow over its effective implementation and explicitly poses a threat, which had previously been expressed only sotto voce.

The difficulties of Colombia have become more apparent due to the flows of people that cross the border fleeing from Venezuela. Beyond the present humanitarian crisis, the long Colombian boundary line with Venezuela, Ecuador, Peru, Panama and Brazil constitutes a real hub of organized criminality, mainly linked to illegal arms trade and drug cartels. In sum, the State finds itself in big difficulties in exercising an effective control of the territory. Furthermore, the problematic presence of the Ejército de Liberaciòn Nacional (hereinafter E.L.N.) persists and is "further complicated by the internal division within the E.L.N., unlike F.A.R.C."[48] In the event of a similar agreement with this rebel group, dissidents are more than foreseeable. Against this background, it goes without saying that the achievement of an agreement with F.A.R.C. should not be over estimated.

Still, it is not all bad news. In May 2018 O.E.C.D. member States invited Colombia to become a full member of the Organization, after talks and negotiations since 2013. The signing ceremony took place on the 30th of May.[49] After satisfying the national or internal procedure to that effect, accession will become effective once Colombia deposits its instrument of accession with the French government, the depositary of the Convention.

[47] Memorandum from the Presidential memoranda, Presidential Determination No. 2017-12 (Sept. 13, 2017) https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-2/.
[48] Int'l Inst. for Strategic Studies, The Armed Conflict Survey 335 (Routledge ed., 2018).
[49] Press Release, O.E.C.D., O.E.C.D. countries agree to invite Colombia as 37th member (May 25, 2017) http://www.oecd.org/countries/colombia/oecd-countries-agree-to-invite-colombia-as-37th-member.htm.

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This may explain why Colombia does not even figure in the O.E.C.D. fragile States Index, despite its obvious institutional fragilities. Similarly, Mexico should also figure in the list of fragile States of the O.E.C.D., but it does not because it is a full member of the Organization.

2.2. C.S.R. CLAUSES IN THE COLOMBIAN PEACE AGREEMENT WITH F.A.R.C.

As is logical, C.S.R. is far from being the top priority of the Peace Agreement between Colombia and F.A.R.C. However, a careful reading of its provisions reveals that economic aspects are critical in helping the government re-establish control of remote rural areas, where the social fabric is used to obey a variety of rebels, warlords and drug cartels. The promotion of the formal economy and an effective control of the territory are therefore closely intertwined. The Peace Agreement is additionally right in its combination of regulation and policies; the text is peppered with legislative plans and appropriate accompanying policies. The common axis is built upon their complementarity, since laws do not suffice on their own without enabling policies.

Specifically, it acknowledges that the State needs the private sector to take root in remote areas. Even though the English translation does not reflect it, the Spanish original uses the verb "*adelantar*" (literally, "advance") in art. 1.1.8: to create mechanisms to facilitate that "*las empresas del sector privado que adelanten su actividad económica en los territorios rurales*" [the companies in the private sector that advance the economic activity in rural areas]. The temporal nuance is not without significance, even more so as organised crime groups and drug dealers are quickly filling the power vacuum left by F.A.R.C.'s demobilisation.[50] The most famous example is the Gulf Clan, which has expanded its influence and now has now consolidated in 142 municipalities, even though minor

[50] International Institute for Strategic Studies: *The Armed Conflict Survey 2018*, July 2018, Routledge Ed., p. 329.

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drug cartels have also profited from the relative slowness of State institutions in filling the gap left by F.A.R.C..
Without idealising its role, the private sector is certainly quicker than public institutions and could act as the spearhead of a long-term stabilisation process. That is where P.P.Ps. make more sense than ever. Moreover, the private sector can further help in the promotion of formal economy and the formalisation of labour relations.

A corollary of State control is one of the strict requirements foreseen in the agreement to revise private security licences (art. 3.4.10), "placing an emphasis on the prohibition of the privatisation" of functions typically performed by the State (mainly, military and intelligence activities). As for public services, the agreement accepts that private companies may "provide domiciliary public services" but within a general framework of "accountability" (art. 2.2.5).

At this point, it is worth citing at length the C.S.R. clauses present in the Peace Agreement.

(See table in the next page)

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Table 1: C.S.R. clauses in the Colombian Peace Agreement with F.A.R.C.

C.S.R. Dimensions	Clauses of the Peace Agreement
Business role in affected rural areas; Public-Private Partnerships; Institutionalised dialogue and cooperation	**Art. 1.1.8:** "Set up mechanisms for **social dialogue** between national, regional and local authorities, small-scale farmer communities and also indigenous, black, afro-descendent, raizal and palenquero communities, in addition to other communities where different ethnic and cultural groups coexist, and **private sector companies doing business in rural areas,** with a view to creating **formal spaces for discussion** between actors with diverse interests, which allow the promotion of a **common development agenda focusing on socio-environmental sustainability, he well-being of rural populations and economic growth with equity**".
Gender gaps	**Art. 1.3.3.5:** "Promoting the recruitment of women in non-traditional areas of production".
Labour relations (in agriculture); Capacity building; Formal economy	**Art. 1.3.3.5:** "**Training** agricultural workers and businesses in the area of **employment rights and obligations**, and promoting the culture of **formalisation** of the labour market".
Public services and accountability	**Art. 2.2.5:** "Strengthen the mechanisms for **accountability of** . . . . and **companies providing domiciliary public services**".

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Private Security Forces	**Art. 3.4.10:** "**Strengthen** . . . . territorial supervisionand inspection of private security and surveillance services . . . . **placing an emphasis on the prohibition of the privatisation of military, police or intelligence functions** . . . .; it shall **ensure** that **they do not perform state** military, police or security **functions**".
Control of the economic production; Illicit drugs; Mix of hard and soft law measures	**Art. 4.3.3:** "Review and establish **strict State controls on the production, import and selling of chemicals** precursor and input require for the production of illicit drugs. . . . It shall put in place **rules and mechanisms to engage companies who produce, import and sell the above to adopt measures of transparency and control**".

2.3. THE POTENTIAL OF THE PRIVATE SECTOR IN RURAL COLOMBIA

It is well-known that State institutions need some time to consolidate. If adequately guided by public policies, the private sector can serve as a catalyst for institutional stability. A usual problem in these situations is the over-abundance of well intended but vague public policies or, sensu contrario, the absence of concrete policies to meaningfully assist business enterprises in the field. Of course, the Peace Agreement does its job and one should not ask it to be more concrete (it could be worse for the negotiating strategy); more concrete accompaniment of the private sector will be decisive, however, in the implementation policies that will follow. Companies' role, in summary, is to take over the private functions previously fulfilled by what we might call "illegal private actors". In this manner, the social tissue gradually recovers from mafia-style loyalties and tensions. Formal economy and formal labour relations are a crucial aspect of this post-conflict transition.

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Nonetheless, local communities need to feel comfortable with this transition period: in particular, they should not fear an abrupt end of their traditional lifestyle, nor a threat to their natural environment. Otherwise, the risk is that they end up missing previous informal powers and illicit activities. In view of the above considerations, each economic actor has an intrinsic responsibility depending on the concrete activities carried out. For example, when the Spanish oil company, *Repsol*, congratulates itself on promoting cacao production instead of coca plantations in rural Colombia. In doing so, this company is assuming an improper role for which it has not been instructed, nor for which it has been trained. A foreign company does not have the legitimacy to promote cacao instead of other crops (the question could be: why cacao and not coffee?). On the contrary, as indicated by its Head of Relations with Communities and Human Rights in America, it seems more relevant to channel its C.S.R. through mechanisms of "socio-environmental monitoring in collaboration with the neighbouring Guarani populations", as done in Bolivia.[51] This is the most pertinent way of involving local communities in sustainable rural development and favouring the country's institutional stability. P.P.Ps. are not meant to be a private bypass of State functions, but a complementary help and coordination process during which each actor must remain in his respective place. An oil company faces many challenges before worrying about what is the best crop to replace coca cultivation, and by doing that assumes unnecessary legitimacy risks in its relationship with the local communities.

It should not be deduced that the role of the private sector is underestimated. In fact, in the era of globalization, companies function as important pollinators of regulatory and political options in the territories where they operate. A certain degree of "private legal transplant of E.U. Law"[52] is already detected in the extractive industry and, in general, in

[51] Examples taken from a special issue of a Spanish newspaper: Supplement *Responsabilidad Social Corporativa [Corporate Social Responsibility]*, El Paìs, Nov. 29, 2017, at 80.

[52] Tomaso Ferrando, *Codes of conducts as private legal transplant: the case of European extractive M.N.Es., in* Eur. L. J. 779, 809 (2013).

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standards and codes of conduct. It consists of a private horizontal policy and legal transfer: indeed, Codes of Conduct and good practices can have a de facto extraterritorial reach through T.N.Cs.' activities. Of course, it is necessary to adapt these codes of conduct to the particularities of fragile or conflict-affected States: for instance, in Colombia it would be a mistake not to contract with any company or individual that had been involved in illegal activities, given that in certain areas it would practically mean not hiring anyone.

3. STUDY-CASE (2): RECURRENT VIOLENCE AND NATURAL RESOURCES IN D.R.C.

3.1. OVERVIEW OF THE SITUATION IN D.R.C.: NOT A SIMPLE GOOD-EVIL PLOT

The commonly used and cited Fragile States Index (2018) lists D.R.C. as the 6th most fragile country in the world, with all indicators situated at the upper limit of the alarm range. This index particularly highlights group grievances, factionalised elites, lack of State legitimacy and safety, human rights violations and forced displacements. Thus, it does not come as a surprise that D.R.C. has started 2018 with Ebola and polio outbreaks,[53] extending the alarm beyond its borders. That contrasts markedly, as usual in Sub-Saharan Africa, with its richness in natural resources, ranging from sawn wood, crude petroleum and diamonds to cobalt (including its ores), raw and refined copper, in order of importance.

Power vacuum is evident in the eastern provinces (Ituri, North and South Kivu and Tanganyika), where ethnic divisions appear to be the perfect place for the proliferation of militia and armed groups, by the way, increasingly politicised on the murky expectation that future elections

[53] A new polio vaccine is being tested and, according to the World Health Organization, the Ebola outbreak seems to be "largely contained" after two months of alarm. See the latest press release, U.N. NEWS, *Ebola Outbreak in Democratic Republic Congo is "largely contained": W.H.O.* (June 26, 2018), https://news.un.org/en/story/2018/06/1013122.

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may change the political chess-board. The region of Tanganyika constitutes a paradigmatic example, where the confrontation between Luba and Twa communities has led to massacres and, ultimately, to approx. 50,000 forcibly displaced persons.

In this context, we have to reject simplistic analyses of goodies and baddies. But the classic story comes first, no matter how well-known it is. Of course, Sub-Saharan presidents have good friends in the extractive industry and the other way round, heavyweights of mining T.N.Cs. are usually close to, at least, one President in the region: Kabila (D.R.C.) and the Israeli businessman Dan Gertler, Kagame (Rwanda) and the Swiss Chris Huber, Museveni (Uganda) and Dubai-based Belgian businessman Alain Goetz.

This includes some expectable links to arm dealers (and warlords): for example, to get the ore out of Rwanda during 1998-2003 war, Huber used the same aircraft as the Russian Viktor Bout (now in a US prison for selling arms to terrorists).[54] Additionally, independent research suggests that Goetz gold supply chains are financing conflicts and that important amounts of gold are smuggled out from the eastern provinces of D.R.C. into Uganda and Rwanda, where Goetz also enjoys a predominant position.[55] The porosity of D.R.C. eastern border further contributes to the division of local communities, not to mention the economic losses for the State. Then, the lack of effective control of the territory makes it possible for rebel groups to finance themselves through the exploitation of minerals.

So far, the classic story; now, we shall add some nuances. One cannot understand why Goetz paid for the cocktail party at the end of the

[54] *Clashes Over "Clean Coltan"* AFR. CONFIDENTIAL, May 18, 2018. All articles of this review are available under subscription at: AFRICA CONFIDENTIAL, https://www.africa-confidential.com.

[55] Dubai, the home of Goetz, has become "the most important trading partner *[of Rwanda]* and gold far outstrips Rwanda's other staple exports, like coffee and tea". As for Uganda, it surprisingly exports 5 tonnes more of gold that it produces, coinciding with a spike of activity of Goetz controlled companies. In the overall, Goetz could be involved in the smuggling of approx. 20 tonnes of conflict-gold out of eastern Congo into Rwanda and Uganda. See: "The Great Lakes Gold Rush", *Africa Confidential*, Vol. 59 No. 6, 23rd March 2018.

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International Conference of the Great Lakes Region, held in July 2017 and sponsored by the U.N. Special Envoy for the Great Lakes, Saïd Djinnit. The U.N. should be rather more cautious, especially after some deadly attacks against M.O.N.U.S.C.O. and its lack of popular support.

On the other side, artisanal mining in D.R.C. should not be idealised: it is generally organised through cooperatives that sharply reflect tribal divisions, with regular spikes in ethnic violence, which cannot always be attributed to corporate-related causes (although, we may consider the historic role of the Belgian colonial administration exacerbating and using ethnic divisions). This is why we warned in the introduction that sometimes "business and human rights" issues are just *epiphenomena* of wider latent problematics.

Besides, cooperatives are often accused of stealing mineral to launder it through other concessions and some companies are, in turn, accused of illicit exports to neighbouring countries. But even local small-scale miners illegally export raw minerals, incurring non-negligible risks to their personal safety. One of the most recent outbreaks of violence took place in Kivu after the closure of Bibatama coltan mine, which led to the reappearance of serious Hutu-Tutsi tensions (many miners are ex-combatants who kept their weapons).[56] In the province of Ituri, rich in gold, Lendu and Hema ethnic groups have also clashed since December 2017.

In 2016, President Kabila and the opposition reached an agreement to hold elections by 2017 (the so-called Saint Sylvester Agreement) but the President is delaying its implementation. In principle, the Constitution prevents Kabila from running for a third term, but the uncertainty around his own future was a source of concern. In the meanwhile, the first opposition party (Union for Democracy and Social Progress) is widely divided after the death of its historic leader Tshisekedi on 1st February 2017, especially because many members of the party do not look favourably upon the leadership of his son Felix Tshisekedi.

[56] *Africa Confidential*, *supra* note 54, at Vol. 59 No. 10.

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Before the elections, some Ministers of the Government started raising the tricky question of whether next "elections could possibly take place in a situation of war".[57] The President even saw an opportunity in this crisis to "sell himself" as the guarantor of unity and public safety, through an alleged "professionalization" of security forces,[58] while he had increased government repression of public demonstrations and protests. Joseph Kabila, President since 2001 when he succeeded his father, has also played it well in the relations with neighbouring countries emphasizing the ideas of south-south solidarity and sovereignty. This does not apply to the relations with Rwanda and Uganda, which are not exactly going through their finest moment, since they benefit from smuggled minerals and, in particular, due to Rwanda's support to rebel group M-23.

Only after a visit to D.R.C. of the U.S. Ambassador to the U.N., Nickki Haley, the pressure became more tangible and Kabila announced a concrete electoral calendar. Elections were held on 23 December 2018.[59] Felix Tshisekedi is the new President of D.R.C. with the unexpected support of Kabila, since the latter's coalition still controls the Parliament. Some media have suggested that Kabila and Tshisekedi agreed on a "backroom deal over the disputed poll". For the time being, social unrest and political instability raise doubts about the near future of D.R.C. while ebola outbreaks persist.

3.2. THE PRECEDENT OF THE KIMBERLEY PROCESS: C.S.R. IN THE U.N. SECURITY COUNCIL

Illicit diamond trade, particularly associated with Sierra Leone but affecting the Great Lakes region, led to an unprecedented engagement of the U.N. Security Council (hereinafter U.N.S.C.). In a totally unexpected way, corporate behaviour was placed at the top of the U.N.S.C. agenda, but there were plenty of reasons to do so: the virulence of the conflict had

[57] *Kabila's survival strategy*, AFR. CONFIDENTIAL, Mar. 9, 2018.
[58] International Institute for Strategic Studies: *The Armed Conflict Survey 2018*, July 2018, Routledge Ed., pp. 172-173.
[59] *Id.* at 171-172.

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destabilized Sierra Leone and the entire Great Lakes region. The highest executive body of the U.N. went well beyond its usual resolutions in terms of international peace and security. On the assumption that the conflict was fueled by illicit trade in diamonds, in 2000 the U.N.S.C. called upon the private sector to establish "an effective Certificate of Origin regime" to cut off the financing of the armed conflicts, while "welcoming" the cooperation of the diamond industry, the World Diamond Council and N.G.Os. and experts.[60]

This represented a turning point in the usual strategies since it was the first time that P.P.Ps. were backed at such a high political level in order to address the crosscutting challenges of fragile and failed sub-Saharan States, with ramifications in a multitude of institutional, political, economic and human rights' issues.

To the satisfaction of the U.N.S.C., the certification scheme started to deliver results only one year after, making it possible for Sierra Leone to gradually overcome violence.[61] The initiative was then extended to Guinea and, in 2003, to D.R.C. . By the end of 2002, the U.N.S.C. began to support a private-led initiative for the co-regulation of diamond trade. Apart from certificates of origin established by law in the producing countries, the industry got involved in the so-called Kimberley Process (hereinafter K.P.), described by the U.N.S.C. as a "significant progress."[62] Quite exceptionally, the U.N.S.C. issued a Resolution with the sole purpose to back the K.P., explicitly expressing its "strong support"[63] and praising the fact that it was a "voluntary system of industry self-regulation."[64]
But over time, it has evolved into a mix of self- and co-regulation. Illicit trade in diamonds and Kimberley Certification Scheme provides us with an excellent example of the crucial role of the institutional terrain where business operations take place, on how C.S.R. can make a distinctive

[60] *See generally* S.C. Res. 1306, U.N. Doc. S/RES/1306 (June 5, 2000).
[61] *See* S.C. Res. 1385, para. 2, U.N. Doc. S/RES/1385 (Dec. 19, 2001).
[62] *See* S.C. Res. 1446, recital 6, U.N. Doc. S/RES/1446 (December 4, 2002).
[63] S.C. Res. 1459, para 1, U.N. Doc. S/RES/1459 (January 28, 2003).
[64] *Id.* at 2.

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contribution including "carrots and sticks."[65] The relative success of the K.P. is explained by the combination of compulsory elements (hard law) and complementary voluntary actions (soft law): on the one hand, certificates of origin were incorporated in the national legislation of producing countries; on the other hand, the world industry engaged in frank negotiations with States, N.G.Os., Civil Society Organisations (hereinafter C.S.Os.) and other producers in order to clean their supply chains. To make it work, all subjects and actors must have a proven legitimacy: States should be preferably democratic and have strong and reliable institutions; N.G.Os. and C.S.Os. have to demonstrate a legitimate interest and be representative of the stakeholders on behalf of which they act; and the industry should have agreed a viable starting point (to begin with, a strong commitment to minimise the adverse effects of the exploitation of resources).

The institutionalisation of these processes is the key for moving C.S.R. from rhetoric to concrete actions.[66] As said before, D.R.C. joined the Kimberley certification system in 2003. In the long run, K.P. data show that D.R.C. annual rough diamond exports have significantly decreased between 2006 and 2016,[67] from over 30 million carats (more than 679 million USD in value) to almost 15 million carats (worth 229 million USD). Conflict diamonds now represent around 1% of total trade in diamonds, which is a pronounced improvement. In the short term (the last two years), data are also influenced by the fact that the market "has trended towards smaller stones and lower qualities", due to its higher global demand, according to the Gemological Institute of America.[68] Another problem in D.R.C. is the accuracy of statistics themselves, given

[65] *See* Franziska Bieri & John. Boli, *Trading Diamonds Responsibility: Institutional Explanations for Corporate Social Responsibility*, 26 Soc. F. 501, 507 (2011).
[66] *Id.* at 502.
[67] *See* 2016 is the latest year data has been available; check figures at: KIMBERLY PROCESS, https://www.kimberleyprocess.com/en/democratic-republic-congo#2007.
[68] *See* Russell Shor, *Diamond Producers Aim for Lower Qualities in Today's Market,* GIA.EDU (Sept. 18, 2017), https://www.gia.edu/gia-news-research-diamond-producers-aim-lower-qualities-todays-market.

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that extensive alluvial diggings and state-owned exploitations are more likely to provide imprecise data.

Among the lessons to be learned from the K.P. , we shall highlight a general commitment to put into practice more proactive pressures instead of traditional sanctions, which end up punishing civil population without delivering structural improvements. Then, even regardless of its actual effectiveness, the K.P. has become a useful forum for dialogue between all subjects and actors, a place for coordination and harmonization of mining fiscal regimes within the Sub-Saharan region. Nevertheless, it should be recalled that diamonds only represent 8.4% of D.R.C. exports.[69]

3.3. TIN, TANTALUM, TUNGSTEN AND GOLD: THE MERIT OF THE NEW E.U. REGULATION. AN APPROPRIATE POLICY BALANCE.

The E.U. has recently made a move to extend the control of conflict minerals, including tin, tantalum, tungsten, their ores, and gold. Back in 2010 the European Parliament (hereinafter E.P.) asked the Commission to imitate the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act (in this case, Section 1502),[70] built upon the O.E.C.D. Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.

The Commission prepared a proposal that consisted of a hard norm, which would serve as a framework for self-regulation (certifications and good practices) so as to foster responsible supply chains. The public competent authorities would help implement self-certifications and provide the structures for review, reporting and claiming, being thus a relatively daring initiative. The Commission

[69] Observatory of Economic Complexity (O.E.C.), *Democratic Republic of Congo*, atlas.media.mit.edu, https://atlas.media.mit.edu/en/profile/country/cod/.

[70] *See generally Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-regulation of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high risk areas,* recital 7 at 3, C.O.M.(2014) 111 Final (March 5, 2014).

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advocated for a mixed *hard* and *soft law* approach, in which companies partly manage self-certificates as "responsible importers" but, once in, they must fully comply with the O.E.C.D. guidelines and accept supervision and reporting.

Another option would have been to make it compulsory to join the system, so that the number of Companies would be higher, but the requirements would eventually persuade them to leave certain risk areas looking for an alternative sourcing, to make it easier to comply with the standards. This would probably generate serious market distortions when abandoning already weak countries, in which companies would not source anymore. What is more, with these conflict-affected or high-risk areas abandoned, at the end, nothing would point to improvements on the ground.

Since 2010, after the approval of Dodd-Frank Act, D.R.C. has undergone it has been assessed a drastic reduction of exports and increase of informal trade networks in and neighbouring countries of the Great Lakes Region where, again, we face the problem of failed States (D.R.C.). This negative impact, according to the Commission,[71] could be minimised if the Regulation maintains the half-voluntary character of this self-certification system, so as to avoid worsening the problems at source by simply abandoning these areas.

The fact is that the E.P. called on the Commission to regulate this matter in 2010 but the proposal was only drafted and published in 2014. The outcome was unclear for a long time and constitutes an interesting example of the regulatory process chemistry. Politically speaking, the Commission united to the High Representative of the E.U. for Foreign Affairs and Security Policy to put pressure on the Council and the Parliament, stressing the development and human rights coherence of adopting such a regulation, in the exposed terms, consistently with the

[71] *See* Commission Staff Working, *Executive Summary of the Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council Setting Up a Union System for Supply Chain Due Diligence Self-Certification of Responsible Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating in Conflict-Affected and High-Risk Areas*, S.W.D. (2014) 52 final (Mar. 5, 2014).

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values that should inform E.U.'s external action.[72] For instance, the Parliament reacted with a profusion of amendments adopted on 20 May 2015, even asking for a tougher regulation and accentuating the human rights aspects.[73]

The E.P. ignored that a too strict regulation would stimulate companies to leave these countries at their own mercy, thereby raising economic and social problems. Although the negotiations seemed to be delayed sine die, this E.U. Regulation was finally adopted in May 2017.[74] Its most positive aspect is precisely this balance between the necessary requirement of responsible imports and the development needs of those areas.

In conclusion, both policy makers and T.N.Cs. should know that States' fragility is only worsened if we just encourage companies to abandon high-risk areas: it is necessary to design more imaginative strategies. The K.P. and the smart mix of hard and soft law of this E.U. regulation are good examples, even if the latter could be improved as we will see next. We will have to wait until 2021 before it enters into full force and be vigilant on the concrete criteria, guidelines, lists of countries and companies.

3.4. MISUNDERSTANDINGS OF THE PRIVATE SECTOR AND INCONSISTENCIES OF THE E.U. ROLE: REGULATORY LACUNAE, COBALT AND LAST ELECTIONS IN D.R.C.

As explained above, Saint-Silvester Agreement foresaw an electoral process in 2017 that has been put off several times. The escalation of the

[72] *See* Joint Communication to the European Parliament and the Council, *Responsible Sourcing of Minerals Originating in Conflict-affected and High-Risk Areas. Towards an Integrated E.U. Approach*, J.O.I.N. (2014) 8 final (Mar. 5, 2014).

[73] *See also* Eur. Parl., *Amendments adopted on the proposal for a regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importer of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas,* P8_TA-PROV(2015)0204 (May 20, 2015).

[74] European Parliament and Council Regulation 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflicto affected and high-risk areas, 2017 O.J. (L 130/1) (E.U.).

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crisis may help President Kabila to hold on to power. In this context, a new U.S. Executive Order has established severe actions against a variety of global "malign actors". One of these actors is the Israeli Dan Gertler, who has benefited from his friendship with President Kabila, thus diverting from D.R.C. "over 1.36 billion in revenues from the underpricing of mining assets that were sold to offshore companies linked to Gertler"; for example, "in 2013, Gertler sold to the D.R.C. government for $ 150 million the rights to an oil block that Gertler purchased from the government for just $ 500,000, a loss of $ 149.5 million in potential revenue."[75] Being close to Kabila, Gertler has become almost an indispensable partner for many T.N.Cs. operating in D.R.C. U.S. sanctions comprise companies doing business with Gertler. In the wake of this U.S. Executive Order, Glencore directors find themselves in an awkward position trying to desperately break the ties with Gertler, to whom they have pending payments for royalties and other concepts (as explained, he is an indispensable "facilitator" of the extractive industry in D.R.C.).

Shamingly enough for the E.U., Glencore may have found a way to bypass U.S. sanctions: make payments to Dan Gertler in euros, amid the silence of European institutions. At the same time, the N.G.O. Global Witness reports that Glencore has also settled another possible dispute originated by U.S. sanctions, but in this case with State-owned companies, "agreeing to pay hundreds of millions to opaque Congolese State-owned Company Gécamines."[76] These funds may end up financing Kabila's strategy to remain in power. The E.U.'s silence could be explained by the fact that some E.U. member States have strong economic interests in the Sub-Saharan country. Indeed, Belgium, Luxembourg and Spain are respectively the fourth and fifth top export destinations of D.R.C. , while France is the fifth among the top import origins of D.R.C. (amounting to

[75] Press Release, U.S. Department of the treasury, United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe (Dec 21, 2017), https://home.treasury.gov/news/press-releases/sm0243.

[76] Margot Mollat Du Jourdin, *What Price Will Glencore Pay For Its Murky Deals in D.R. Congo?*, Global Witness (June 22, 2018), https://www.globalwitness.org/en/blog/what-price-will-glencore-pay-its-murky-deals-dr-congo/.

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261 million dollars).[77] By the way, diamonds are the top import of Israel,[78] which brings us back to Dan Gertler. Given this complex constellation of interests, it is rather inconvenient that the E.U. is the Chairmanship of the K.P. in 2018.[79]

According to some analysts,[80] the lack of funds eventually caused by U.S. sanctions could have motivated a recent important reform of the D.R.C. Mining Code, which includes a considerable rise in taxes in a clear confrontation with the seven most important T.N.Cs. operating in D.R.C. Kabila probably hopes that the strength of global demand of copper and cobalt will neutralize the boycott announced and headed by Glencore and Randgold.[81] In any case, if declared a strategic mineral, royalties for cobalt could amount to 10% so that it would be difficult to defend its confiscatory character before an Arbitration tribunal. In such hypothetical arbitration, the State can reasonably argue its right to regulate and that such measures are not discriminatory (i.e., applicable to all investors) and proportionate. Moreover, "the expectation of the investor to receive certain treatment is opposed to the State's expectation to freely conduct its legitimate activities", and "arbitral tribunals presume that the investor is an experienced and savvy businessman who has carried out adequate due diligence about the business and country

[77] *See* Observatory of Economic Complexity (O.E.C.), *supra* note 69.

[78] *See* Latest data from 2018 of the World Integrated Trade Solutions, an initiative of the World Bank in collaboration with the U.N. Conference on Trade and Development and in consultation with organizations such as the International Trade Center, the U.N. Statistical Division and the World Trade Organization. See Israel's trade profile at: World Integrated Trade Solution (W.I.T.S.), *Israel Trade at Glance: Most Recent Values*, wits.worldbank.org, https://wits.worldbank.org/CountrySnapshot/en/ISR.

[79] It is remarkable that the E.U. External Action Service website cites projects in Côte d'Ivoire, Guinea, Liberia and Sierra Leone, but completely forgets D.R.C. *But cf.* European Union External Action, *E.U.Engagement in Kimberley Process: A Pledge to More Sustainable Livelihoods of Mining Communities, EEAS.*europa.eu (June 19, 2018), https://eeas.europa.eu/headquarters/headquarters-homepage/46605/eu-engagement-kimberley-process-pledge-more-sustainable-livelihoods-mining-communities_en.

[80] *See* International Institute for Strategic Studies: *The Armed Conflict Survey 2018*, July 2018, Routledge Ed., p. 178.

[81] *See Making The Miners Sweat*, 59 Africa Confidential, June 15, 2018.

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conditions and how they may change, including how they may be affected by forthcoming political changes."[82]

Against the new mining code and taxes, a C.E.O. of Randgold has expressed his bitter disappointment recalling that they have "invested $3 billion over eight years, *[and]* built three hydropower plants."[83] Precisely at this point it is worth underscoring that Randgold main business does not consist of building hydropower plants for the State, but extracting minerals. It would have been better to consecrate those financial resources to improve its social and environmental performance in D.R.C. , thereby convincing local authorities that the company does its best – in its field of activity – to contribute to the countries' sustainable development and stability. When a company sticks to its concrete social and environmental impacts, it will more easily avoid being drawn into conflict-ridden political scenarios and will possibly reduce the risk of arbitrary government decisions against its investments. Even from a merely cost-effective perspective, a proper C.S.R. designed in conjunction with public authorities is surely less expensive than three hydropower plants.

Finally, even though the E.U. regulation on some minerals maintains an apparently positive balance between voluntary and compulsory aspects, it also has some negative points. For instance, final consumers, small-scale importers (for example, for dentistry), intermediaries, transporters and secondary or recycled products are all outside the control of this regulation. Of course, it goes without saying that many other "conflict-minerals" fall beyond the scope of the European regulation, such as copper and cobalt, which actually represent the most important exports of D.R.C. (56% refined or raw copper and 17% cobalt).[84] The final paradox is that the E.U. is actively promoting electric cars for environmental reasons but rechargeable batteries use between 6

[82] Andres Rigo Sureda, Investment Arbitration: Judging under Uncertainty 78, 80 (1st. ed. 2012).
[83] *Kabila Squeezes The Miners,* Afr. Confidential, Feb. 23, 2018.
[84] *See* Observatory of Economic Complexity (O.E.C.), *supra* note 69.

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and 15 kg. of cobalt per car and D.R.C. has around two-thirds of the global mine resources of cobalt (reportedly using child labour).[85]

Cobalt and governmental deals with T.N.Cs. will determine the near future of the country and the credibility of last elections. President Kabila could find new ways of financing his offshore corporate structures in order to remain in power. In an interview with *Radio France* before the elections, the opposition leader Felix Tshisekedi suggested again that they might not take place "*ou à défaut d'élections crédibles*" [in the absence of credible elections]. At the same time he promised that if he would have won the general election he would have not planning any "*chasse aux sorcières*" [witch-hunt] meaning that Kabila should not fear a judicial prosecution: "*Au nom de la stabilité de l'État, je crois qu'il faut fermer les yeux sur certaines choses*" [in the name of national stability I believe it is necessary to turn a blind eye on certain things.][86] The situation remains extremely fluid even after the post-electoral coalition Kabila-Tshisekedi.

What is clear is that some companies have misinterpreted their role in the country, deliberately influencing local politics. Companies' own actions have partly contributed to increase political and regulatory risks, in a totally unnecessary way: in different statements, the Swiss firm Glencore had reassured shareholders saying that the new Congolese mining code would be amended to include a ten-year grace period before new taxes affect the already established mining companies. None of that happened of course; on the contrary, Glencore received a subpoena from the U.S. Department of Justice to investigate their deals in D.R.C., for suspected corruption and money laundering. A bribery probe is also being considered in the United Kingdom. Glencore is certainly aware that the U.K.'s Bribery Act has extraterritorial reach including foreign companies

[85] *See* ZANDI SHABALALA, *Cobalt to be declared a strategic mineral in Congo*, REUTERS.COM (Mar. 14, 2018), https://www.reuters.com/article/us-congo-mining-cobalt/cobalt-to-be-declared-a-strategic-mineral-in-congo-idUSKCN1GQ2RX.

[86] *See generally* CHRISTOPHE BOISBOUVIER, *Félix Tshisekedi: «Je n'ai ni l'intention ni l'ambition de me mesurer à ce qu'a été mon père» [I have neither the intention nor the ambition to measure myself against what my father was]*, LES VOIX DU MONDE [THE VOICES OF THE WORLD] (Apr. 5, 2018), http://www.rfi.fr/emission/20180405-felix-tshisekedi-je-ai-intention-ambition-me-mesurer-ete-pere.

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with operations in the U.K., creating a backdrop which is anything but rosy. Glencore's stock lost 13 % in London in a single day and a group of shareholders considers bringing an action against the company.[87]

4. THE POTENTIAL OF A PROPER C.S.R.: SOME RECOMMENDATIONS

The objective of this article was not to provide a rosy view, and all subjects and actors involved have a share of responsibility. For example, the blame is frequently assigned to T.N.Cs. but we do not pay enough attention to the institutional terrain. It goes without saying that, in many occasions, it is the governments themselves that are interested in maintaining endemic corruption, by imposing opaque royalties, forced partnerships with State-owned companies and extraordinary taxes, which irregularly finance the ruling political party. Precisely in these situations it is justified that M.N.Es. exercise the less friendly side of their power of influence, threatening to withdraw investments or to source in other countries, as a mean of exerting pressure to ensure that the State does not request companies to perform tasks which are not part of the private sector duties.

Under I.L., human rights obligations fall on States; companies should not be asked to make social investments which have no relation with the impact of their daily activities. Companies must be clear in this regard: the private-sector contribution should be limited to responsibly conduct its operations, including human rights. This is predominantly a preventive task: to reduce the negative impact of business activities and, to the extent possible, to clean supply chains for the sake of sustainable economic development. If done, that is no small contribution. To go beyond that would risk putting companies on a slippery slope, in this sort

[87] Emily Gosden, *Shareholders Could Sue Glencore amid U.S. Inquiry*, TIMES (July 13, 2018), https://www.thetimes.co.uk/article/shareholders-could-sue-glencore-amid-us-inquiry-wz295xsqb.

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of externalization of State functions, which is particularly dangerous in conflict-affected or post-conflict scenarios with factionalised elites.

In terms of risks and opportunities, the criterion of relevance applied to C.S.R. can significantly reduce both operational and reputational risks if companies concretely prove how their business project contributes to the country's economic development. In order to do so, public-private dialogue is needed to design a relevant C.S.R. (not philanthropic and paternalistic actions). From a public image perspective, the government of these States will have great difficulties to explain to the public opinion that they fire a foreign company that just wanted to responsibly conduct its concrete business, in cooperation with public authorities, but did not want to meddle in politics (not paying improper taxes for the ruling party, or building infrastructures only in regions that support the government). Glencore would not be so bitterly disappointed in D.R.C., when, in return for building three hydropower plants, it received new mining code that increased taxes and, if it was not enough, found itself in the spotlight of the judicial authorities of the U.S. and the U.K. for possible corrupt practices.

Western companies can overcome traditional reluctances and more probably avoid arbitrary regulatory changes against their investments. In this line of work, responsible business conduct and P.P.Ps. can "provide a common reference point for constructive engagement in conflict-affected and high-risk areas, as opposed to divestment."[88] At this point it becomes clear to what extent the private sector and policy makers must prioritise S.D.G. No. 16[89] if we make the effort to design long-term strategies for sustainable and successful businesses.

[88] GLOBAL COMPACT: *Guidance on Responsible Business in Conflict-Affected and High Risk Areas: a Resource for Companies and Investors*, New York, 2010, p. 6.

[89] *See generally*, GLOBAL COMPACT: *STATEMENT:* "GOAL 16: HARNESSING THE POWER OF RESPONSIBLE BUSINESS TO PROMOTE SUSTAINABLE DEVELOPMENT", NEW YORK 2015, (2015) (last visited Nov 30 2018).
SURIA DEVA, *supra* note 35, at 208.

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Table 2: Recommendations for the private sector and policy makers

Recommendations for the private sector	Recommendations for policy makers
Paradigm shift from risk management to responsible management, from philanthropy to responsibility. The S.D.Gs. are an end; C.S.R. is one of the means.	Promote and design P.P.Ps., especially in areas where the State's effective control is under question, because the private sector is quicker (while public institutions root).
Move "from policies to processes" through due diligence protocols: *a)* Understand the context (legal and economic framework, without underestimating the socio-historical terrain); *b)* direct impact; *c)* indirect impact; *d)* follow-up.	Less information and vague guidelines and more concrete and active accompaniment of business enterprises in difficult scenarios. Work on common formats (codes of conduct) and avoid the multiplication and privatisation of certification schemes (lack of credibility and cost for companies).
Avoid maximalisms that are only viable in rich countries (example: "never contract with people who had contact with F.A.R.C. in the past") but also reject undue cynicism.	Balance policies and correctly understand the complementarity of soft law and hard law. Too rigid legal requirements can lead companies to leave risk areas, condemning them to poverty and violence. Only voluntary self-regulation also falls short.

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Reduce marketing based strategies and increase research development and innovation (hereinafter R.+D.+i.) for the sustainability of the operations in the field. An effective C.S.R. is technical and interdisciplinary.	Multilateral endeavours and international institutionalised cooperation. Use International Law as an umbrella to protect initiatives from changing internal politics. New forms of proactive hybrid pressures must be considered before resorting to traditional sanctions.

In contexts of fragility and conflict, almost never a risk will be turned into an opportunity, at least in the long term; only if we change the paradigm from managing risks to managing responsibilities, companies will be able to responsibly foster business opportunities in high-risk areas. Finally, it is crucial to highlight the positive effects of regional integration and, in more general terms, of institutionalised cooperation to alleviate internal tensions within some States – as it is even the case within some E.U. member States such as Belgium.

The potential of a proper C.S.R. is quite evident in conflict-affected and high-risk areas. If adequately designed, it can enable synergies with the S.D.Gs. Western companies need a paradigm shift to regain credibility, in their relationship with governments and with the population, and there is an opportunity to make C.S.R. a comparative advantage in the global economy. Reality shows more and more that, thanks to R.+D.+i., economic development and sustainability can be compatible.

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The Relocation of the U.S. Embassy from Tel Aviv to Jerusalem (Palestine v. United States of America): a Commentary on the Merits of the Case, Jurisdiction of the International Court of Justice and Admissibility of Palestine's Application

BASHEER ALZOUGHBI †

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ABSTRACT: This paper examines the legal status and historical context of the city of Jerusalem, specifically addressing the prohibition on establishment or maintenance of diplomatic missions within the Holy City. This will be undertaken firstly by exploring Security Council resolution 478 of August 1980, and secondly through a discussion of State practice and opinio juris. This paper was inspired by the recent developments regarding the conduct of the United States of America, the Republics of Guatemala and Paraguay in relocating their embassies from Tel Aviv to Jerusalem in May 2018. Unlike the Republic of Paraguay, which subsequently restituted its embassy to Tel Aviv in September 2018, the United States of America and the Republic of Guatemala have hitherto maintained their embassies in Jerusalem. This paper adopts a comparative approach by drawing on the particularities of Southern Rhodesia (Zimbabwe), South West Africa (Namibia) and Kuwait. It gradually examines the crux of the matter regarding the merits of the case initiated by Palestine against the United States of America in September 2018: namely the customary international diplomatic law underpinning the prohibition on establishing embassies in Jerusalem under the Vienna Convention on Diplomatic Relations. It further explores equally important issues relating to questions of jurisdiction of the International Court of Justice and admissibility of the application.

KEYWORDS: *Diplomatic Missions-Jerusalem; Sui Generis; Customary International Diplomatic Law; Monetary Gold Principle; Compulsory Settlement of Disputes*

JEL CODES: *K3, K33, K39, K30, K41*

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1. INTRODUCTION

Owing to its historical and religious uniqueness, Jerusalem has received special treatment known as *Corpus Separatum* to be administered by the United Nations across the whole part of Mandatory Palestine, as envisaged in the partition plan of General Assembly resolution 181 of 1947. General Assembly resolution 181 was substantial in its definition of the boundaries of the city of Jerusalem as it did not only include its traditional municipal borders but was greatly extended to include certain surrounding areas located in the district of Jerusalem. These are: Abu Dis to the east, Bethlehem to the south, Ein Karim to the west, and Shu'fat to the north.[1] Jerusalem's Corpus Separatum was not meant to be permanent. To the contrary, it was designed as a temporary measure whereby the status of the city would be determined by its citizens after ten years: "The residents of the City shall be then free to express by means of a referendum their wishes as to possible modifications of the regime of the City".[2] Neither the United Nations General Assembly special regime on Jerusalem nor the envisaged boundaries of the two Arab and Jewish States have come into fruition. The inhabitants of Jerusalem's Corpus Separatum who were supposed to determine the status of the regime of the City after the ten year period of its potential implementation found themselves torn between a division of their city and district in 1948: Eastern and Western sectors.

A succinct historical overview of Jerusalem has to be presented here following the partition plan of 1947 and particularly in the aftermath of the Arab - Israeli war in 1948 in which the western part of city fell under the control of the Israeli troops while Jordanian forces controlled

† PhD Candidate in Public Law, Koç University (Turkey), LLM in European Union Law (University of Reading-United Kingdom), Master in Human Rights (University of Malta-Malta), Master in International Relations Management (Catholic University of the Sacred Heart-Italy), Postgraduate Certificate in the Master Programme in Peace Studies (University of Innsbruck-Austria).

[1] *See* B. Boundaries of the City, G.A. Res. 181(II), U.N. Doc. A/RES/181(II) (Nov. 29, 1947). *See also* G.A. Res. 181(II), U.N. Doc. A/RES/181(II), map No. 104(b) (Nov. 29, 1947).

[2] D. Duration of the Special Regime, G.A. Res. 181(II), U.N. Doc. A/RES/181(II) (Nov. 29, 1947).

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the eastern part of the city, which encompassed the historical and magnificent old town. On the 30th of November 1948, the Israeli and Jordanian parties reached a cease-fire Agreement and on the 3rd of April 1949 both parties concluded an Armistice Agreement. Several small and narrow strips of territories in two distinct areas in the Latrun and Jerusalem regions known as "no man's land" were located between the Israeli and Jordanian front lines and were neither controlled by the Jordanian nor the Israeli forces until the latter's occupation in June 1967. The third paragraph of Article IV of the Jordan-Israel General Armistice Agreement of 1949 provides that "Rules and regulations of the armed forces of the Parties, which prohibit civilians from crossing the fighting lines or entering the area between the lines, shall remain in effect after the signing of this Agreement with application to the Armistice Demarcation Lines".[3] Accordingly, the West Bank of the Jordan River (including East Jerusalem as well as the narrow strips of territories known as the "no man's land" in the Latrun and Jerusalem regions) were among the territories which fell under the occupation of Israel.

Through its occupation in 1967 of the West Bank (including East Jerusalem as well as the narrow strips of territories known as the "no man's land" in the Latrun and Jerusalem regions), Israel has marked its boundaries under customary international law to exclude the territories located beyond the Armistice Line of 1949 (hereinafter Green Line).[4] The Israeli occupation of 1967 has met with strong opposition by the international community as a whole, as reflected in - amongst others - the Security Council and General Assembly resolutions, which resulted in the emergence of customary international law on the status of the occupied territory of Palestine. The suggestion of the Corpus Separatum by the General Assembly has gradually become ineffective and not

[3] General Armistice Agreement, HKJ-Isr., art. IV (3), Apr. 3, 1949. *See* Annex I: Map Delineating Armistice Demarcation Lines Palestine (North & South sheets), Jerusalem, Latrun. Document Sources: Hashemite Jordan Kingdom - Israel: General Armistice Agreement.

[4] This without prejudice to the other parts of the territory of Palestine which Israel occupied in 1967 i.e. Gaza Strip.

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feasible. Accordingly, it acquired no legal validity, as the West Bank - which includes East Jerusalem - became an integral part of the occupied territory of Palestine.

In *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion, the International Court of Justice (hereinafter I.C.J.) affirmed that "The territories situated between the Green Line . . . . and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 . . . . Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power".[5] The interim Peace Agreements between Israel and the Palestine Liberation Organization (representing the State of Palestine) which started in 1993 - best known as the "Oslo Accords" - neither changed the status of the occupied territory of Palestine, nor Israel's status as the occupying power.[6] This has been affirmed in the I.C.J. advisory opinion on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* by declaring that "Subsequent events in these territories . . . . have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying power."[7]

Not only does Jerusalem have a unique cultural importance, but its centrality also possesses a geographical significance. Jerusalem geographical centrality was not only pivotal to the whole territory of Mandatory Palestine but also to the geographical territory of what became to be known as the West Bank. In regards to the geography of the West Bank, Jerusalem is the connecting hub of the southern West Bank cities (such as Bethlehem and Hebron) to the central and Northern cities (such

[5] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 167, ¶ 78 (July 9).
[6] For more information on the peace process, see generally AlZoughbi, Basheer "The Operation of the Oslo Treaties and the Pacific Mechanisms of Conflict Resolution under Public International Law". Peace Research 45, no. 2 (2013): pp. 35-40.
[7] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 167, ¶ 78 (July 9).

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as Jericho, Nablus and Ramallah) and vice versa. The ordinary route from the southern West Bank cities to the central and Northern Palestinian cities and vice versa passes through Jerusalem city. Throughout its occupation, annexation and other measures such as the establishment of military checkpoints, Israel has cut-off East Jerusalem from the rest parts of the West Bank. Palestinian nationals (who do not have Israeli identity cards) wishing to enter the Holy City are required to obtain a pre-approval visa "permit" issued by the Israeli Civil Administration. The Israeli Civil Administration has the discretion to approve or reject the permit application requests made by the Palestinian nationals. The United Nations Economic and Social Council asserted in several of its resolutions that it "[s]tresses the need to preserve the territorial integrity of all of the occupied Palestinian territory and to guarantee the freedom of movement of persons and goods in the territory, including the removal of restrictions on going into and from East Jerusalem".[8]

East Jerusalem is a term of convenience adopted by the international community and the United Nations which is understood to be that part of the occupied territory which Israel annexed (this means the old city of Jerusalem, the "no man's areas" of Jerusalem, various villages and towns from the governorate of Jerusalem and other areas administratively located within the boundaries of other governorates of the West Bank e.g. Bethlehem). If for example, Israel implements the so-called E-1 plan by annexing Ma'ale Adumim settlement and its neighboring settlements (Qedar, Mishor Adumim and its industrial area, Kfar Adumim and Almon), it would then constitute an integral part of the occupied and annexed East Jerusalem. The locution "East Jerusalem and its expanded municipal boundaries" could be a better explanatory term to

[8] ECOSOC Res. 2007/22, Economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and the Arab population in the occupied Syrian Golan, ¶ 1, U. N. Doc. E/RES/2001/19 (Jul. 25, 2001). *See also* ECOSOC Res. 2002/31, ¶ 1, U.N. Doc E/RES/2002/31 (Jul. 25, 2002) & ECOSOC Res. 2012/23, ¶ 2, U.N. Doc E/RES/2012/23 (Jul. 26, 2012). *See also* for example, G.A. Res. 56/62, ¶ 5 , U.N. GAOR, 56th sess., U.N. Doc. E/RES/56/62 (Dec. 10, 2001).

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convey a meaning to that part of territory which was occupied in 1967 and was subsequently annexed and unilaterally declared by Israel to be within the boundaries of Jerusalem city.

2. ISRAEL'S MEASURES POST-JUNE 1967

Since June 1967 the legislative and executive organs of the State of Israel have been racing against time to change the geographical, demographical, administrative and economic character of the city of Jerusalem through a series of practices and laws which aim to annex parts of the occupied territory. The 1971 Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories affirmed that Eastern Jerusalem is an example of the policy of annexation.[9] During World War II, Nazi Germany annexed several occupied territories. For example, the United States Military Tribunal noted in the *Justice Case (The United States of America v. Josef Altstoetter, et al.)* that on 27 October 1939, the Polish Ambassador at Washington, D.C. informed the U.S. Secretary of State that the German Reich had decreed the annexation of part of the territory of the Polish republic.[10] The United States Military Tribunal further asserted that "the purported annexation of territory in the East . . . . was invalid and that in point of law such territory never became a part of the Reich, but merely remained in German military control under belligerent occupancy".[11] Article 47 of the Fourth Geneva Convention affirms that a change introduced as a result of the occupying power's annexation of the whole

[9] U.N. Special Committee, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*, ¶ 34, 44, U.N. Doc. A/8389 (Oct. 5, 1971).
[10] *The Justice Case (The United States of America v. Josef Altstoetter, et al.)*, Trials of War Criminals before the Nuernberg Military Tribunals Under Control Council Law No. 10. October 1946-April 1949, Volume III, United States Government Printing Office: Washington, 1951, p. 1027.
[11] *Id.*

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or part of the occupied territory does not deprive protected persons in an occupied territory of the benefits conferred by the present Convention.[12] The Commentary on Article 47 of the Fourth Geneva Convention provides that "the reference to annexation in this Article cannot be considered as implying recognition of this manner of acquiring sovereignty. The preliminary work on the subject confirms this".[13]

Since its occupation in 1967, Israeli measures were directed at Jerusalem in particular and the other cities, villages and localities in the occupied territories in general. For example, Israel dissolved the duly elected Arab Municipality Council in Jerusalem and dismissed the Mayor Rawhi Al- Khatib (who was subsequently deported to Jordan in 1968) and further abolished the Jordanian Dinar, which was the legal tender in the West Bank before the six-day war.[14] Similar to the German Reich which had decreed the annexation of parts of the territory of Poland, Israel decreed laws to annex parts of the occupied territory of Palestine, including East Jerusalem. On 27 June 1967, the Israeli legislative organ known in Hebrew as the "*Knesset*" adopted amendments to two existing laws based upon a proposal of the Israeli government, which aimed at annexing Jerusalem and expanding its boundaries. Under the Law and Administration Ordinance, 5708-1948 (Isr.), a new provision was introduced which extends the law, jurisdiction and administration of the Israeli State to any area which the Israeli Government considers to be part of the State of Israel.[15] The Municipalities Ordinance Law, 5727-1967 (as amended with amendment n. 6) (Isr.), gave the Israeli Minister of Interior the power to issue a proclamation to enlarge the area of a certain

[12] Geneva Convention Relative to the Treatment of Civilian Persons in Time of War art. 47, Aug. 12, 1949, 75 U.N.T.S. 287.
[13] Oscar M. Uhler et al., Int'l Comm. of the Red Cross, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 276 (Jean S. Pictet ed., 1958).
[14] *See* U.N. S.C., Rep. of the Security Council, Sept. 12, 1967, ¶ 1, 8 annex I, U.N. Doc. S/8146 (Sept. 12, 1967), relating to U.N. G.A., note by Secretary-General, Sept. 12, 1967,U.N. Doc. S/8153 (Sept. 12, 1967). See also U.N. Rep. of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, ¶ 77, U.N. Doc. A/RES/2727 (Dec. 1, 1970).
[15] Law and Administration Ordinance, 5727-1967, art. 11(b) (as amended with amendment n. 11).

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municipality by the inclusion of a designated area under the new amended provision of the Law 5708-1948.[16]

On 28 June 1967, the Israeli Minister of Interior issued a proclamation under the Municipalities Ordinance Law, 5727-1967, Article 8(a), extending the boundaries of the municipality of Jerusalem so as to include the entire Arab sector of Jerusalem and several neighboring villages.[17] Israel expanded the geographical boundaries of the city of Jerusalem municipality into the surrounding villages of Jerusalem governorate itself and other areas administratively located in other West Bank governorates i.e. Bethlehem while it gradually excluded other villages or neighborhoods located within Jerusalem governorate such as Bethany (AlEizariya) and Abu Deis. By expanding its traditional municipal boundaries, the occupying power sought to alter the geographical character of Jerusalem in order to increase the Jewish settler population and exclude as much as possible the Arab Palestinian population from the unilaterally declared municipal boundaries.

The 1973 Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories provided that "the Government of Israel is continuing with its policy of the unilateral annexation of the occupied part of Jerusalem and the enlargement of the municipal boundaries of the city by the incorporation of considerable areas of land forming part of the occupied West Bank".[18] The tipping point came when the legislative organ of the Israeli State enacted a Basic Law on the 30th of July 1980 entitled "Jerusalem, Capital of Israel". The 1980 Law provides that "Jerusalem, complete and united, is the capital of Israel. Jerusalem is the seat of the

[16] Municipalities Ordinance Law, 5727-1967, art. 8(a), (as amended with amendment n. 6).

[17] *See* B. Reply received from the Government of Jordan, U.N. Special Committee, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, U.N. Doc. A/8089 (Oct. 5, 1970).

[18] U.N. Special Committee, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*, ¶ 43, U.N. Doc. A/9148 (Oct. 25, 1973).

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President of the State, the *Knesset*, the Government and the Supreme Court”.[19]

Simultaneously, Israel has extensively transferred parts of its civilian population on the one hand, to the annexed East Jerusalem, and on the other, to the rest of the West Bank areas, which belongs to the de jure State of Palestine, so as to introduce demographical changes. Estimates of the Israeli settler population of the West Bank in 2012 vary between 500,000 and 650,000 settlers, including nearly 200,000 Israeli settlers living in settlements located in East Jerusalem.[20] Around 320,000 Palestinians currently reside in East Jerusalem.[21] Not only has Israel systematically and extensively seized immovable property, it has also systematically and extensively destroyed Palestinian property without military necessity in the occupied territory of Palestine including East Jerusalem. By way of example, the International Committee of the Red Cross (hereinafter I.C.R.C.) provided in its annual report of 1971 that: “[I]n view of the continued destruction of houses in the occupied territories, the President of the ICRC made a renewed appeal to the Israeli Prime Minister at the end of April that her Government should abandon a method to counter subversive activities”.[22] The United Nations Office for the Coordination of Humanitarian Affairs (hereinafter O.C.H.A.) provided that during 2016, Israel demolished or seized 1089 Palestinian–owned structures in the West Bank including East Jerusalem.[23]

The construction of the wall and its associated regime in the occupied territory of Palestine since 2002 has amplified the extensive

[19] Para 1 & 2, Basic Law: Jerusalem, Capital of Israel (30th July, 1980).
[20] U.N. Secretary-General, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan, Rep. of the Secretary-General, ¶ 7, U.N. Doc. A/67/375 (Sept. 18, 2012).
[21] United Nations O.C.H.A. occupied Palestinian territory, West Bank | East Jerusalem: key humanitarian concerns, (Dec. 21, 2017).
[22] I.C.R.C. Annual Report 1971, (Geneva, 1972), pp. 49-50. Quoted in U.N. Rep. of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, ¶ 47, U.N. Doc. A/8828 (Oct. 9, 1972).
[23] *See* Record number of demolitions in 2016; casualty toll declines, The United Nations O.C.H.A. (Dec. 29, 2016).

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appropriation and destruction of property which is not demanded by military necessity. The construction of the wall and its associated regime is directly linked to the annexation of East Jerusalem as well as annexation of several settlements located near the Green line (to the East of the Green line). The I.C.J. provided that "[t]he route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements".[24] The I.C.J. further provided that "it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention."[25] The I.C.J. ruled that: "Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated".[26] The I.C.J. did not shy away from affirming that the Israeli settlements in the Occupied Palestinian Territory including East Jerusalem are in breach of international law while further asserting on the applicability of the Fourth Geneva Convention.[27]

3. THE PROHIBITION ON ESTABLISHING OR MAINTAINING DIPLOMATIC MISSIONS IN JERUSALEM

The prohibition on establishing or maintaining embassies in Jerusalem was based on the Security Council in its resolution 478 of 20 August 1980 where it called upon "Those States that have established diplomatic

[24] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. ,¶ 184 (Dec. 8).
[25] *Id.* para 132, p. 189.
[26] *Id.* para 163, 3(B), p. 201.
[27] *See* Para 120 and para 101, *Id.* pp. 184 & 177.

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missions at Jerusalem to withdraw such missions from the Holy City."[28] Security Council resolution 478 was issued as a result of the Israeli *Knesset* enactment of the 1980 Basic Law entitled "Jerusalem, Capital of Israel". In relation to the Sending States' diplomatic missions to Israel, four legal obligations, stemming explicitly or implicitly from the Security Council resolution 478, are imposed on States. Firstly, States which are diplomatically represented in Israel and which have already established diplomatic missions in Jerusalem are under the legal obligation to withdraw their embassies from Jerusalem and as a corollary withdraw their diplomatic agents. Secondly, States which are diplomatically represented in Israel and which have already established their embassies in Tel Aviv are under the legal obligation not to relocate their embassies to Jerusalem. Thirdly, States which are about to establish diplomatic representations with Israel, must not locate their embassies in Jerusalem. Fourthly, the establishment of diplomatic missions in Tel Aviv should neither be interpreted as a recognition of Israel's sovereignty over Jerusalem nor recognize its null and void actions and practices.[29]

In addition to its call upon those States which have established diplomatic missions in Jerusalem to withdraw them, Security Council resolution 478 of 20 August 1980 affirmed that the enactment of the Israeli "Basic Law" of 1980 is a violation of international law and does not affect the continuity of application of the Four Geneva Conventions in the 1967 occupied Palestinian territory including East Jerusalem.[30] Furthermore, Security Council resolution 478 determined that all legislative and administrative measures and actions taken by Israel are null and void[31] and "Decided not to recognize the "Basic Law" and such other actions by Israel that, as a result of this law, seek to alter the

[28] S.C. Res. 478, para 5(b), U.N. Doc. S/RES/478 (Aug. 20, 1980).
[29] *See* BASHEER AL ZOUGHBI, *Trump's Plan to Move the US Embassy to Jerusalem: A discussion of International Humanitarian Law and International Diplomatic Law*, AL JAZEERA CENTRE FOR STUDIES (Mar. 30, 2017), http://studies.aljazeera.net/en/reports/2017/03/trumps-plan-move-embassy-jerusalem-discussion-international-humanitarian-law-interna-170330092849045.html.
[30] *See* S.C. Res. 478, *supra* note 28, para 2.
[31] *See id.* para 3.

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character and status of Jerusalem"[32] Much like the usage of the legislative organ of Nazi Germany for the purpose of enhancing its occupation and/or annexation, the legislative organ of the Israeli State enhanced the occupation and annexation of East Jerusalem and the expanded boundaries of the city of the occupied territory of Palestine. In the *Case of the S.S. Lotus (France v. Turkey) of 1927,* the Permanent Court of International Justice (hereinafter P.C.I.J.) provided that "the principle of freedom, in virtue of which each State may regulate its legislation at its discretion, provided that in so doing it does not come in conflict with a restriction imposed by international law".[33]

In the deliberations of the Security Council on the 20th of August 1980, the Representative of the Palestine Liberation Organization expressed his gratitude to the Governments of Venezuela, Ecuador, Colombia and Uruguay for having decided not to locate their diplomatic missions in Jerusalem.[34] Before the adoption of Security Council resolution 478 (1980), Chile, Ecuador and Venezuela had announced their decisions to withdraw their diplomatic missions from Jerusalem.[35] At the time of the adoption of resolution 478 (1980), there were only ten States which maintained diplomatic missions in Jerusalem.[36] In the course of August-September 1980, ten Governments (El Salvador, Costa Rica, Panama, Colombia, Haiti, Bolivia, the Netherlands, Guatemala, Dominican Republic and Uruguay) informed the Secretary-General that they had decided to withdraw their diplomatic missions from the Holy City.[37]

Yet Costa Rica and El Salvador, whom were among the States, which had withdrawn their embassies in 1980, moved their embassies back to Jerusalem respectively in 1982 and 1984. The letter dated 17 May

[32] *Id.* para 5.
[33] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. ¶ 51, (ser. A) No. 10 (Sept. 7).
[34] Security Council Official Records - Thirty-fifth Year, 2245th Meeting: Held in New York on Wednesday, 20 August 1980, at 4 p.m., SIPV.2245, p.19.
[35] *See* Report of the Secretary-General under Security Council resolution 478 (1980), Distr. General S/14248, 11 November 1980, Original: English, (Nov. 11, 1980).
[36] *See Id.*
[37] *See Id.*

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1982 from the *charge d'affaires* A.I. of Costa Rica to the United Nations addressed to the Secretary-General informed of the Costa Rican Government decision of 9 May 1982 to establish its diplomatic mission in the Western Sector of Jerusalem.[38] The Letter dated 19 April 1984 from the Acting Chairman of the Committee on the Exercise of the Inalienable Rights of the Palestinian People to the Secretary-General referred to a news item in the New York Times of 14 April 1984 in which it was reported that the Government of El Salvador has officially relocated its embassy in Israel from Tel Aviv to Jerusalem.[39]

It was only in August 2006 when El Salvador and Costa Rica decided to restitute their embassies from Jerusalem to Tel Aviv. The then President of the Republic of Costa Rica Oscar Arias decided on the 16th of August 2006 to move the Costa Rican embassy from Jerusalem to Tel Aviv.[40] On 25 August 2006 the Deputy Permanent Representative of El Salvador to the United Nations transmitted a copy of the letter from the Minister for Foreign Affairs of the Republic of El Salvador addressed to the Secretary-General entailing information on that the Government of the Republic of El Salvador has decided to transfer the embassy of El Salvador in Israel from Jerusalem to the Tel Aviv.[41] This decision of El Salvador Government was pursuant to the various resolutions on the status of Jerusalem, in particular Security Council resolution 478.[42]

Between September 1980 (upon the withdrawal of all States which had their diplomatic missions in Jerusalem) through to 1982, Jerusalem remained a city with no diplomatic missions. It was only in 1982 and 1984

[38] Distr. General s/15109, 24 May 1982, English, Original: Spanish, Letter dated 17 May 1982 from the Chargesd' Affairs A.I. of Costa Rica to the United Nations addressed to the Secretary-General, (May 24, 1982).
[39] General Assembly, Thirty-ninth session, Item 33 of the preliminary list(A/39/50)- Question of Palestine, Letter dated 19 April 1984 from the Acting Chairman of the Committee on the Exercise of the Inalienable Rights of the Palestinian People to the Secretary-General, (Apr. 19, 1984).
[40] Memoria Institucional del Ministerio de Relaciones Exteriores y Culto [Institutional Memory of the Ministry of Foreign Affairs and Worship] 2009-2010, San José, (May 8, 2010), 320.
[41] Annex to the letter dated 25 August 2006 from the Deputy Permanent Representative of El Salvador to the United Nations addressed to the Secretary-General, (Aug. 25, 2006).
[42] *Id.*

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when two Central American States i.e. Costa Rica and El Salvador relocated their diplomatic missions again to Jerusalem up until their decisions in August 2006 to restitute their acts. From 2006 (upon the withdrawal of Costa Rica and El Salvador Embassies) to April 2018, Jerusalem remained with no embassies until the United States of America, Guatemala and Paraguay relocated their embassies to Jerusalem in May 2018. Paraguay has, however, restituted its act and moved its embassy back to Tel Aviv within a short period of time in the same year i.e. September 2018.

The prohibition on establishing or maintaining embassies in Jerusalem established by Security Council resolution 478 must also be read in conjunction with other Security Council resolutions relevant to the issue of Jerusalem, both former and subsequent to resolution 478. For example, Security Council resolution 252 of 1968 "Consider[ed] that all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status";[43] Security Council resolution 465 of 1 March 1980 "[d]etermined that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof, have no legal validity".[44] Security Council resolution 476 of 30 June 1980 "[r]econfirm[ed] that all legislative and administrative measures and actions taken by Israel, the occupying Power, which purport to alter the character and status of the Holy City of Jerusalem have no legal validity and constitute a flagrant violation of the Geneva Convention."[45]

Security Council resolution 2334 of December 2016 "[u]nderlines that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through

[43] S.C. Res. 252, ¶ 2, U.N. Doc. S/RES/252 (May 21,1968).
[44] S.C. Res. 465, ¶ 5, U.N. Doc. S/RES/465 (Mar. 1,1980).
[45] S.C. Res. 476, ¶ 3, U.N. Doc. S/RES/476 (Jun. 30,1980).

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negotiations";[46] it further "[c]all[ed] upon all States, bearing in mind paragraph 1 of this resolution, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967";[47] Paragraph 1 of Security Council resolution 2334 reaffirmed the illegality of the Israeli settlements under international law in the Palestinian territory occupied since 1967, including East Jerusalem.[48] By locating their embassies in Jerusalem in the unilaterally declared boundaries of Jerusalem, the United States of America and Guatemala are not differentiating in their treatment of the territory of the State of Israel and the territories occupied since 1967. The United States of America and Guatemala are affirming the annexation of East Jerusalem and treating the boundaries of the municipality of Jerusalem as defined by Israel as single entity.

It is also worth pointing out that several States opted to cut off their diplomatic relations with Israel particularly in 1973, which explains the relatively small number of embassies in Jerusalem or Tel Aviv by 1980. The 4th Summit Conference of Heads of State or Government of the Non-Aligned Movement adopted a resolution on 9 September 1973 where it provided that it "welcomes the decision of certain member countries to break off relations with Israel, and requests the other member countries to take steps to boycott Israel diplomatically, economically, militarily and culturally".[49] Between 21 September and 14 October 1973, seven African States cut off diplomatic ties with Israel (Togo, Zaire, Benin, Rwanda, Upper Volta "in 1984 renamed Burkina Faso", Cameroon, Equatorial Guinea).[50] Twenty-seven African States decided to sever diplomatic ties with Israel in less than one year and twenty-one of them during a period of forty days.[51] The African States which have resumed or otherwise

[46] S.C. Res. 2334, ¶ 3, U.N. Doc. S/RES/2334 (Dec. 23,2016).
[47] *Id.* para 5.
[48] *Id.* para 1.
[49] NAM (Government of the Non-Aligned Movement), *Resolution on the Middle-East situation and the Palestine Issue* (Sept. 5–9,1973).
[50] *See* Zach Levey, *Israel's Exit from Africa, 1973: The Road to Diplomatic Isolation*, 35 BRIT. J. MIDDLE E. STUD. 205, 217-8 (2008).
[51] *See Id.* p. 224.

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established diplomatic relations with Israel refrained from locating their embassies in Jerusalem.

3.1. STATE PRACTICE AND THE ELEMENT OF OPINIO JURIS

The obligation on all States, which are diplomatically represented in Israel not to relocate their embassies to Jerusalem, or otherwise establish embassies in Jerusalem, is not a courtesy or a comity but a binding custom that is not in paucity of the element of opinio juris sive necessitatis.[52] The I.C.J. stated in the *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)* that:

> The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[53]

The notion of the opinio juris sive necessitatis is what distinguishes a binding custom on all States from a mere courtesy, comity, convenience or tradition. In *the North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, the I.C.J. held that:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.* The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[54]

[52] *See* Al Zoughbi, *supra* note 29.
[53] North Sea Continental Shelf Case (Ger/Den; Ger/Neth.), Judgment, 1969 I.C.J. 44, ¶ 77 (Feb. 20).
[54] *Id.*

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There has been a widespread and consistent practice of sovereign States represented in Israel in not locating their embassies in Jerusalem, the declared de facto capital of Israel. States felt legally obliged not to locate or maintain their embassies in Jerusalem for several reasons: Israel's de facto declaration of Jerusalem as its capital and enactment of a law in 1980 as such, and its illegal annexation of an occupied territory acquired by the use of force.[55] Other Israeli measures that were directed at changing the status of Jerusalem included extensive transfer of Israeli civilians thereto and systematic and extensive appropriation and destruction of property without military necessity. In *Fisheries (United Kingdom v. Norway)*, the I.C.J. found that the method of straight lines which was established in the Norwegian system "had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law".[56] Similarly, the prohibition on establishing or maintaining embassies in Jerusalem is consolidated by a constant and sufficiently long practice.

If a State decided to relocate its embassy to West Jerusalem, (which was not seized in 1967, and which international law does not consider as an occupied territory), it would still be considered to have committed a breach of customary international law.[57] By its annexation of the occupied section of Jerusalem, Israel aimed at the de facto unification of the whole city and thus moving an embassy to any part of the city would explicitly and/or implicitly approve or recognize the de facto illegal unification, annexation and other measures taken by Israel which have been described by the Security Council and General Assembly as null and void.[58]

A Security Council draft resolution (S/2017/1060) of 18 December 2017 has not been adopted, owing to a negative vote of a permanent

[55] *See* Al Zoughbi, *supra* note 29.
[56] Fisheries Case (UK v. Nor.), Judgment, 1951 I.C.J. 139 (Dec. 18).
[57] *See* Al Zoughbi, *supra* note 29.
[58] *See Id.*

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member (the United States of America) while the fourteen other votes were in favour of the draft resolution (Bolivia, China, Egypt, Ethiopia, France, Italy, Japan, Kazakhstan, Russian Federation, Senegal, Sweden, Ukraine, United Kingdom of Great Britain and Northern Ireland, and Uruguay).[59] The draft resolution calls upon all States not to establish diplomatic missions in the Holy City of Jerusalem, in compliance with resolution 478 (1980) and "affirms that decisions and actions which purport to have altered, the character, status or demographic composition of the Holy City of Jerusalem have no legal effect, are null and void and must be rescinded".[60] The fact that the draft Security Council resolution (S/2017/1060) has been vetoed by the United States of America and as a result was not adopted does not undermine the provisions of customary international law as enshrined in this draft resolution.

In its explanation of the veto, the United States of America stated that its exercise was in defense of American sovereignty.[61] The United States of America further invoked the statement of then Secretary of State Ed Muskie on resolution 478, and specifically on the provision on diplomatic missions in Jerusalem, where he considered as nonbinding and without force.[62] Had the United States of America considered Security Council resolution 478 as non-binding, why it has refrained in all these past years from locating its embassy to Jerusalem? The United States of America claim that Security Council resolution 478 is not binding , thus subverting the Security Council, General Assembly resolutions and the existence of customary international diplomatic law relevant to the issue of the prohibition of establishing diplomatic missions in Jerusalem. In the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* advisory opinion asserted:

[59] 8139th meeting Monday, 18 December 2017, 12.25 p.m, New York S/PV.8139, The situation in the Middle East, including the Palestinian question, p. 3, (Dec. 18, 2017) http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.8139.
[60] S.C. Res. 1060, ¶ 1, U.N. Doc. S/RES/1060 (Dec. 18, 2017).
[61] *See* S.C. Prov. 8139, ¶ 4, U.N. Doc. S/PV.8139 (Dec. 18,2017).
[62] *See* S.C. Prov. 2245, ¶ 111, U.N. Doc. S/PV.2245 (Dec. 18,2017).

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> Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.[63]

In 1976, the U.S. Ambassador Scranton reiterated the U.S. position on Jerusalem quoting Ambassador Yost's words of 1969 in relation to Jerusalem: "The part of Jerusalem that came under the control of Israel in the June 1967 war, like other areas occupied by Israel, is occupied territory and hence subject to the provisions of international law governing the rights and obligations of an occupying Power".[64] Ambassador Scranton further quoted Ambassador Goldberg statement of 1968 that "The United States does not accept or recognize unilateral actions by any States in the area as altering the status of Jerusalem."[65] In its statement following the voting (S/2017/1060), Sweden agreed with the call on all States to refrain from the establishment of diplomatic missions in Jerusalem, in line with resolution 478 (1980) and stated clearly that the vote (S/2017/1060) does not impact the former resolutions adopted by the Security Council.[66] Sweden affirmed that the status of Jerusalem remains unchanged under international law.[67]

In its statement following the voting, the United Kingdom regarded East Jerusalem as part of the occupied Palestinian territories and disagreed with the United States decision to unilaterally recognize Jerusalem as the capital of Israel and the move of its embassy thereto.[68]

[63] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory opinion, 1971 I.C.J 57, ¶ 116 (21 June).
[64] Para 97, 1483rd meeting. Quoted in para 66, PROVISIONAL AGENDA (S/AGENDA/1896), S/PV.1896 23 MARCH 1976, (MAR. 23, 1976).
[65] S.C. Prov. 1424, ¶ 45, U.N. Doc. S/PV.1424 (May 9,1968).
[66] *See* S.C. Prov. 8139, ¶ 10, U.N. Doc. S/PV.8139 (Dec. 18,2017).
[67] *See Id.* p. 10.
[68] *See Id.* p. 5.

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France's statement affirmed that it neither recognized the annexation of East Jerusalem, which is part of the occupied territories under international law, nor Israel's unilateral acts concerning Jerusalem both before and after Israel's Basic Law of 1980.[69] China affirmed that it supports the establishment of a fully sovereign and independent State of Palestine based on its 1967 borders with East Jerusalem as its capital and further urged the international community to respect the relevant Security Council resolutions.[70] The Russian Federation affirmed that it is committed to an independent State of Palestine, with East Jerusalem as its capital.[71] Italy reaffirmed the well-established principles that are already enshrined in several relevant resolutions.[72] Ukraine affirmed that the issue of Jerusalem should be resolved in strict compliance with the relevant Security Council resolutions, including resolutions 476 (1980), 478 (1980) and 2334 (2016).[73] Ukraine further affirmed that the draft resolution (S/2017/1060) also reaffirms the inadmissibility of the acquisition of territory by force.[74]

In her statement on violence in Gaza and the latest developments as of 14 May 2018, the High Representative of the Union for Foreign Affairs and Security Policy/ Vice-President of the Commission, Federica Mogherini affirmed that "[t]he European Union has a clear, consolidated position on Jerusalem, which was reaffirmed in numerous Foreign Affairs Council conclusions. The EU will continue to respect the international consensus on Jerusalem embodied in, inter alia, U.N. Security Council Resolution 478, including on the location of diplomatic representations".[75]

[69] *See Id.* p. 6.
[70] *See Id.* p. 11.
[71] *See Id.* p. 9.
[72] *See Id.* p. 10.
[73] *See Id.*
[74] *See Id.*
[75] Strategic Communications Division, *Gaza: EU calls for restraint on both sides following deaths of dozens of Palestinian protesters*, EUROPEAN UNION EXTERNAL ACTION (May 14, 2018, 06:20 PM), https://eeas.europa.eu/diplomatic-network/middle-east-peace-process/44527/gaza-eu-calls-restraint-both-sides-following-deaths-dozens-palestinian-protesters_en.

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3.2. THE RELOCATION OF THE U.S., GUATEMALA AND PARAGUAY EMBASSIES TO JERUSALEM

Security Council draft resolution (S/2017/1060) of 18 December 2017 was drafted following Donald J. Trump Presidential Proclamation of the 6th of December 2017 where he recognized Jerusalem as the Capital of Israel and instructed the relocation of the United States embassy to Israel from Tel Aviv to Jerusalem in pursuance of Jerusalem Embassy Act enacted by the U.S. Congress in October 1995. The Jerusalem Embassy Act, 1995, recognizes Jerusalem as the capital of Israel and dictates that the U.S. embassy should be established in Jerusalem no later than 31 May 1999.[76] In *Case concerning certain German interests in Polish Upper Silesia (The Merits)*, the P.C.I.J. provided that "[t]he Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention".[77] The Jerusalem Embassy Act contained a waiver provision, which empowered the U.S. President to suspend it every six months if deemed necessary to protect the national security interests of the United States.[78] Presidents Bill Clinton, George W. Bush and Barack Obama had invoked this waiver clause repeatedly, whereas even Donald J. Trump himself did so – when he signed a six-month waiver in June 2017. Yet, In May 2018, the United States of America relocated its embassy from Tel Aviv to Jerusalem in pursuance to the 6th of December 2017 proclamation. The United States of America relocated its embassy to an interim building, which houses consular operations of its Consulate General of Jerusalem.[79]

[76] Jerusalem Embassy Act, Public Law 104–45, 1995, § 2 and 3, www.congress.gov/104/plaws/publ45/PLAW-104publ45.pdf.
[77] German Interests in Polish Upper Silesia (Germ. v. Pol.), Judgment, 1926 P.C.I.J. (ser. A) No. 7, ¶ 52 (May 25).
[78] Jerusalem Embassy Act, Public Law 104–45, 1995, § 1(a) and (2).
[79] Press Statement, Heather Nauert, Dep't Spokesperson, Opening of U.S. Embassy Jerusalem, U.S. DEPARTMENT OF STATE (Feb. 23, 2018), https://www.state.gov/r/pa/prs/ps/2018/02/278825.htm.

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Following the United States of America footsteps, Guatemala and Paraguay relocated their embassies from Tel Aviv to Jerusalem in the same month. However, in September 2018 Paraguay decided to revoke its decision and restitute its act by moving its embassy back to Tel Aviv. The Paraguayan Ministry for External Relations Statement on the relocation of Paraguay's embassy to the State of Israel on the 5th of September 2018 elucidated that in line with Article 143 of the Paraguayan Constitution in which it adheres to international law in its foreign policy, the Government of the Republic of Paraguay considers it appropriate to re-establish the embassy to the State of Israel to the location previous to the statement dated in May 9, 2018.[80] The act of Paraguay to relocate its embassy back to Tel Aviv is considered an act of restitution in line with one of the forms of the principle of reparation for the internationally wrongful act of the Republic of Paraguay.

The Sending States, which are diplomatically represented in Israel, cannot rely on their own domestic or foreign policies to justify their conduct of transferring their embassies to Jerusalem as they are violating their obligations under international law. In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America,* the I.C.J. held that "[a] State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems".[81]

3.3. GENERAL ASSEMBLY RESOLUTIONS

The General Assembly issued several resolutions in several instances when States have violated Security Council resolution 478 by locating

[80] *Comunicado sobre la ubicación de la Embajada de la República del Paraguay ante el Estado de Israel* [Statement on the location of the Embassy of the Republic of Paraguay to the State of Israel], MINISTERIO DE RELACIONES EXTERIORES [MINISTRY OF FOREIGN AFFAIRS] (Sept. 9, 2018), http://www2.mre.gov.py/index.php/noticias/comunicado-sobre-la-ubicacion-de-la-embajada-de-la-republica-del-paraguay-ante-el-estado-de-israel.

[81] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 131, ¶ 258 (June 27).

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their embassies in Jerusalem or otherwise when deciding to relocate their embassies to Jerusalem. It accordingly deplored States' conduct of establishing or maintaining their embassies in Jerusalem or otherwise called upon States to refrain from such conduct. For example, General Assembly resolution 37/123 of 1982 "[d]eplore[d] the transfer by some States of their diplomatic missions to Jerusalem in violation of Security Council resolution 478 (1980)";[82] General Assembly resolution 40/168 of 1985 "[d]eplore[d] the transfer by some States of their diplomatic missions to Jerusalem in violation of Security Council resolution 478 (1980) and their refusal to comply with the provisions of that resolution".[83] This act of deploring was at a time when El Salvador and Costa Rica had already relocated their embassies to Jerusalem. By way of another example, as a result of the United States of America decision on the 6th of December 2017 to relocate its embassy to Tel Aviv, General Assembly resolution A/ES-10/L.22 of 19 December 2017 called upon all States to refrain from establishing diplomatic missions in Jerusalem in line with Security Council resolution 478 (1980).[84]

In its numerous resolutions, the General Assembly have taken the same position as the Security Council which also enhance the existence of a rule and the emergence of an opinio juris that States diplomatically represented in Israel must refrain from locating their embassies in Jerusalem as established by Security Council resolution 478 of 20 August 1980. For example, General Assembly resolution 36/120 of 1981 reaffirmed its decision not to recognize the Israeli Basic Law of 1980 and called upon all States to comply with the present resolution and other

[82] G.A. Res. 37/123, ¶1, U.N. Doc. A/RES/37/123 (Dec. 16, 1982).

[83] G.A. Res. 40/168 (C), ¶2, U.N. Doc. A/RES/40/168 (Dec. 16, 1985). For the matter of deploring the transfer by some States of their diplomatic missions to Jerusalemsee e.g. other General Assembly resolutions: G.A. Res. 38/180, ¶2, U.N. Doc. A/RES/38/180 (Dec. 19, 1983), G.A. Res. 48/59 (A) , ¶2, U.N. Doc. A/RES/48/59 (Dec. 14, 1993), G.A. Res. 50/22 (A), ¶2, U.N. Doc. A/RES/50/22 (Dec. 4, 1995), G.A. Res. 54/37, ¶2, U.N. Doc. A/RES/54/37 (Dec. 1, 1999), G.A. Res. 56/31, ¶2, U.N. Doc. A/RES/56/31 (Dec. 18, 2001), G.A. Res. 57/111, ¶2, U.N. Doc. A/RES/57/111 (Dec. 3, 2002), G.A. Res. 59/32, ¶2, U.N. Doc. A/RES/59/32 (Dec. 1, 2004), G.A. Res. 60/41, ¶2, U.N. Doc. A/RES/60/41 (Dec. 1, 2005).

[84] G.A. Res. 10/L.22, ¶1, U.N. Doc. (A/ES-10/L.22 (Dec. 19, 2017).

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relevant resolutions.[85] General Assembly Resolution 36/120 further demanded Israel to comply with United Nations resolutions relevant to Jerusalem particularly Security Council resolutions 476 and 478 of 1980.[86] General Assembly resolution A/73/L.29 of November 2018 recalled among others Security Council resolution 478 and affirmed that the imposition of the occupying power of its laws, jurisdiction and administration on the Holy City of Jerusalem are illegal.[87]

In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*), the I.C.J. provided that it must "be satisfied that there exists in customary international law an *opinio juris* . . . . This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625".[88] The customary international diplomatic law underpinning the prohibition on establishing embassies in Jerusalem was also fundamental - as in the absence of it, Ambassadors of the sending States which are diplomatically represented in Israel are (or would be) accredited under these circumstances to the president of Israel.[89] In its advisory opinion on *the Legality of the Threat or Use of Nuclear Weapons*, the I.C.J. pointed out that:

> General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris.* To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of

[85] G.A. Res. 36/120 (E), ¶ 3, U.N. Doc. A/RES/36/120 (Dec. 10, 1981).
[86] *Id.*, para 4.
[87] G.A. Res. 73/22, Preamble and ¶ 1, U.N. Doc. A/RES/73/22 (Nov. 30, 2018).
[88] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 131, ¶ 188 (June 27).
[89] *See generally* for accreditation of ambassadors, envoys and *charges d'affaires* Vienna Convention on Diplomatic Relations art. 14, Apr. 18, 1961, 500 U.N.T.S. 95.

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> resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.[90]

3.4. THE PRINCIPLE OF INADMISSIBILITY OF ACQUISITION OF TERRITORY BY FORCE

By not establishing embassies in Jerusalem, States are also affirming the principle of the illegality and inadmissibility of acquisition of territory by force. The Security Council and General Assembly have affirmed in several instances this principle. For example, the preamble of Security Council resolution 242 affirmed on the inadmissibility of the acquisition of territory by war.[91] General Assembly resolution 2799 of 1971 "[r]eaffirm[ed] that the acquisition of territories by force is inadmissible and that, consequently, territories thus occupied must be restored"[92]. The illegality and inadmissibility of acquisition of territory was affirmed by several governments and intergovernmental organizations. For example, the Declaration of the nine Foreign Ministers of the European Economic Community of 6 November 1973 in Brussels, on the Situation in the Middle East provided that the nine member States consider that a peace agreement should be based on, among others, "the inadmissibility of the acquisition of territory by force; the need for Israel to end the territorial occupation which it has maintained since the conflict of 1967".[93] On the Jerusalem issue the Irish Minister for Foreign Affairs made it clear in 1979 that the then nine Member States of the European Economic Community did not support any unilateral moves concerning this city.[94] The European Council Venice Declaration of June 13, 1980

[90] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 254 ¶ 70 (Jul. 8).
[91] S.C. Res. 242, Preamble, U.N. Doc. S/RES/242 (Nov. 22, 1967). *See also* for example, S.C. Res. 298, U.N. Doc. S/RES/298 (Sept. 25, 1971).
[92] G.A. Res. A/RES/2799 (XXVI), ¶ 1, U.N. Doc. (Nov. 30, 2018). *See also* for example, G.A. Res. A/RES/36/120 (D) and (E), Preamble, U.N. Doc. (Dec. 10, 1981).
[93] para 3 (I) and (II), Declaration of the Nine Foreign Ministers of 6 November 1973, in Brussels, on the Situation in the Middle East, https://www.cvce.eu/content/publication/1999/1/1/a08b36bc-6d29-475c-aadb-0f71c59dbc3e/publishable_en.pdf.
[94] Michael O'Kennedy, Irish Foreign Minister, Speech at the 34th Session of the U.N. General Assembly in New York (Sept. 25, 1979), (A/34/PV.8).

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affirmed on that "[t]he nine stress that they will not accept any unilateral initiative designed to change the status of Jerusalem . . . . The nine stress the need for Israel to put an end to the territorial occupation which it has maintained since the conflict of 1967 . . . . the Israeli settlements . . . . are illegal under international law."[95]

3.5. THE PROHIBITION ON AID OR ASSISTANCE TO ISRAEL'S INTERNATIONALLY WRONGFUL ACTS

By relocating their embassies from Tel Aviv to Jerusalem, the United States of America and Guatemala are also aiding and assisting the internationally wrongful acts of transferring Israeli civilians into Israeli settlements in the occupied territory of Palestine, including its occupied section of Jerusalem, as well as Israel's annexation and colonization policies. For example, Security Council resolution 465 of 1980 "calls upon all States not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories".[96] General Assembly resolution 31/106 of 1976

> [r]eiterates its call upon all States, international organizations and specialized agencies not to recognize any changes carried out by Israel in the occupied territories and to avoid actions, including those in the field of aid, which might be used by Israel in its pursuit of the policies of annexation and colonization.[97]

[95] European Community (1980) "Venice Declaration". European Union, http://eeas.europa.eu/mepp/docs/venice_declaration_1980_en.pdf, retrieved 29/01/1980.

[96] S.C. Res. 465, *supra* note 44, ¶ 7. See also S.C. Res. 471, ¶ 5, U.N. Doc. S/RES/471 (Jun. 5, 1980).

[97] G.A. Res. 31/106, ¶ 8, U.N. Doc. A/RES/31/106 (Dec. 16, 1976). *See also* G.A. Res. 3092 (XXVIII) (B), ¶ 8, U.N. Doc. A/RES/3092 (XXVIII) (Dec. 7, 1973); G.A. Res. 3240 (XXIX) (A), ¶ 8, U.N. Doc. A/RES/3240 (XXIX) (Nov. 29, 1974); G.A. Res. 3525 (XXX) (A), ¶ 10, U.N. Doc. A/RES/3525 (XXX) (Dec. 15, 1975); G.A. Res. 32/91 (C), ¶ 8, U.N. Doc. A/RES/32/91 (Dec. 13, 1977); G.A. Res. 33/113 (A), ¶ 8, U.N. Doc. A/RES/33/113 (A) (Dec. 18, 1978); G.A. Res. 34/90 (A), ¶ 8, U.N. Doc. A/RES/34/90 (A) (Dec. 12, 1979); G.A. Res. 35/122 (C), ¶ 8, U.N. Doc. A/RES/35/122 (C) (Dec. 11, 1980); G.A. Res. 36/147 (C), ¶ 11, U.N. Doc. A/RES/36/147 (C) (Dec. 16, 1981); G.A. Res. 37/88 (C), ¶ 11, U.N. Doc. A/RES/37/88 (C) (Dec. 9, 1982); G.A. Res. 38/79 (D), ¶ 13, U.N. Doc. A/RES/38/79 (D) (Dec. 15, 1983); G.A. Res. 39/95 (D), ¶ 13, U.N. Doc. A/RES/39/95 (D) (Dec. 14, 1984); G.A. Res. 40/161 (D), ¶ 15, U.N. Doc.

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General Assembly resolution ES-7/4 of 1982 urged Governments "[to] renounce the policy of providing Israel with military, economic and political assistance, thus discouraging Israel from continuing its aggression, occupation".[98]

By recognizing Jerusalem as the capital of Israel and/or locating embassies in Jerusalem, States are violating Security Council resolution 2334 which required them to distinguish in their dealings between the territory of the State of Israel and the occupied territories of 1967. In addition, the conduct of any State that relocated its embassy to Jerusalem or otherwise maintained its embassy in Jerusalem after the initiation of the construction of the wall and its associated regime (which is also built in and around Jerusalem) is aiding or assisting this specific internationally wrongful act. The I.C.J. ruled in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion of 2004:

> All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[99]

The Security Council and the General Assembly have in other situations issued several resolutions in which they called upon all States to refrain

A/RES/40/161 (D)(Dec. 16, 1985); G.A. Res. 41/63 (D), ¶ 16, U.N. Doc. A/RES/41/63 (D) (Dec. 3, 1986); G.A. Res. 42/160 (D), ¶ 16, U.N. Doc. A/RES/42/160 (D) (Dec. 8, 1987); G.A. Res. 43/58 (A), ¶ 18, U.N. Doc. A/RES/43/58 (A) (Dec. 6, 1988); G.A. Res. 44/48 (A), ¶ 19, U.N. Doc. A/RES/44/48 (A) (Dec. 8, 1989); G.A. Res. 45/74 (A), ¶ 19, U.N. Doc. A/RES/45/74 (A) (Dec. 11, 1990); G.A. Res. 46/47 (A), ¶ 19, U.N. Doc. A/RES/46/47 (A) (Dec. 9, 1991); G.A. Res. 47/70 (A), ¶ 15, U.N. Doc. A/RES/47/70 (A) (Dec. 14, 1992).

[98] G.A. Res. ES-7/4, ¶ 9 (b), U.N. Doc. A/RES/ES-7/4 (Apr 28, 1982).

[99] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 ¶ 163 (3) (July, 9).

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from providing any assistance to the colonial powers, occupying powers and/or racist illegal regimes. Security Council resolution 218 of 1965 "[r]equests all States to refrain forthwith from offering the Portuguese Government any assistance which would enable it to continue its repression of the people of the Territories under its administration".[100] General Assembly resolution 2507(XXIV) of 1969 "urges all States . . . . to withhold or desist from giving further military and other assistance to Portugal which enables it to pursue the colonial war in the Territories under its domination."[101] Security Council resolution 216 of 12 November 1965 called upon all States not to render aid or assistance to the racist minority regime in Southern Rhodesia.[102] Security Council resolution 277 of 1970 noted that "[t]he Governments of the Republic of South Africa and Portugal have continued to give assistance to the illegal regime of Southern Rhodesia, thus diminishing the effects of the measures decided upon by the Security Council."[103]

In the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* advisory opinion, the I.C.J. ruled "that States Members of the United Nations are under obligation . . . . to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration";[104] Security Council resolution 301 of 1971 agreed with the I.C.J. as expressed in paragraph 133 of its advisory opinion and called upon Member States not to lend support or assistance to the illegal presence and administration of South Africa in Namibia.[105]

[100] S.C. Res. 218, ¶ 6, U.N. Doc. S/RES/218 (Nov. 23, 1965).
[101] G.A. Res. 2507 (XXIV), ¶ 13, U.N. Doc. A/RES/2507 (XXIV)(Nov. 21, 1969).
[102] S.C. Res. 216, ¶ 2, U.N. Doc. S/RES/216 (Nov. 12, 1965).
[103] S.C. Res. 277, Preamble, U.N. Doc. S/RES/277 (Mar. 18, 1970).
[104] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution (1970), Advisory Opinion, 1971 I.C.J. 58 ¶ 133 (2) (Jun. 21).
[105] S.C. Res. 301, ¶ 6 and ¶ 7, U.N. Doc. S/RES/301 (Oct. 20, 1971).

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3.6. THE OBLIGATION TO RENDER AID OR ASSISTANCE TO THE PALESTINIAN PEOPLE IN REALIZATION OF SELF-DETERMINATION

With the prohibition on rendering aid or assistance to Israel's policies of annexation and colonization in mind, the General Assembly issued several resolutions calling for provision of assistance and/or support for the Palestinian people in realization of their right to self-determination. For example, General Assembly resolution 2649 of 1970 provides that it "[r]ecognizes the right of peoples under colonial and alien domination in the legitimate exercise of their right to self-determination to seek and receive all kinds of moral and material assistance, in accordance with the resolutions of the United Nations and the spirit of the Charter of the United Nations";[106] General Assembly resolution 2649 further "[c]ondemns those Governments that deny the right to self-determination of peoples recognized as being entitled to it, especially of the peoples of southern Africa and Palestine"[107]; General Assembly resolution 3236 (XXIX) of 1974 "[r]eaffirm[ed] the inalienable rights of the Palestinian people in Palestine, including: (a) The right to self-determination without external interference; (b) The right to national independence and sovereignty";[108] General Assembly resolution 72/160 of 2017 "[u]rge[d] all States and the specialized agencies and organizations of the United Nations system to continue to support and assist the Palestinian people in the early realization of their right to self-determination".[109]

The relocation of the United States of America and the Republic of Guatemala of their embassies from Tel Aviv to Jerusalem are internationally wrongful acts in breach of their legal interests and obligations to protect the erga omnes right of self-determination of the Palestinian people. One of the purposes of the United Nations as

[106] G.A. Res. 2649, ¶ 2, U.N. Doc. A/RES/2649 (Nov. 30, 1970).
[107] *Id.* para 5.
[108] G.A. Res. 3236, ¶ 1, U.N. Doc. A/RES/3236 (Nov. 22, 1974).
[109] G.A. Res. 72/160, ¶ 2, U.N. Doc. A/RES/72/160 (Dec. 19, 2017).

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prescribed in its Charter of 1945 is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace";[110] in *East Timor (Portugal v. Australia)*, the I.C.J. provided that "[i]n the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable".[111] In *Barcelona Traction, Light and Power Company, Limited,* the I.C.J. provided that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".[112]

The transfer of Israeli civilians into the occupied territory of Palestine, the annexation of parts of the occupied territory of Palestine and the construction of the wall and its associated regime are but few measures which impede the Palestinian exercise to their right to self-determination and sovereignty over their occupied State. In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion, the I.C.J. provided "[t]hat construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right."[113]

3.7. RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

The execution of the Jerusalem Embassy Act by the U.S. President proclamation in December 2017 combined with his conduct of relocating the U.S. embassy from Tel Aviv to Jerusalem in May 2018 entails the responsibility of the United States of America for its internationally

[110] U.N. Charter, art. 1, para 2, Jun. 26, 1945.
[111] East Timor (Port. v. Austl.), 1995 I.C.J. ¶ 29 (June 27).
[112] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. ¶ 33 (Feb. 5).
[113] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 184 ¶ 122 (Jul. 9).

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wrongful act under the customary international law on State responsibility. Similarly, the decision of Jimmy Morales, President of Guatemala to relocate the Guatemalan embassy from Tel Aviv to Jerusalem in March 2018 combined with the implementation of his decision in May 2018, incurs the responsibility of the Republic of Guatemala for the internationally wrongful act under the customary international law on State responsibility. Article 2 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts mentions the elements of an internationally wrongful act of a State: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation".[114] Article 4 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts provides that

> [t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.[115]

The conduct of the USA and Guatemala in relocating their embassies from Tel Aviv to Jerusalem in May 2018 (which have hitherto maintained their embassies in Jerusalem) is a violation of their obligations under international diplomatic law. This is also true of other States who have formerly done so, i.e., Costa Rica in 1982 and El Salvador and 1984 and Paraguay in May 2018. The infraction of the rule of customary international diplomatic law which prohibits States which are

[114] Report of the International Law Commission to the General Assembly, 53rd Sess., 2001, art. 2, U.N. Doc. A/56/10. reprinted in [2007] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).
[115] *Id*. article 4.

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diplomatically represented in Israel, from establishing or maintaining their embassies in Jerusalem incurs State responsibility under the customary international law of State responsibility. In *the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the I.C.J. "deems it sufficient that the conduct of States should in general be consistent with such a rule; and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule".[116]

The United States of America and Guatemala are also under a legal obligation to make adequate reparation in the forms of restitution i.e, reestablishing their embassies to Tel Aviv and give satisfaction to the State of Palestine. This without prejudice to Israel's obligation to provide full reparation for its internationally wrongful acts under international law. The P.C.I.J. furnished in the *Case Concerning the Factory at Chorzów (Merits)* that: "[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".[117]

By relocating their embassies to Jerusalem, the United States of America and the Republic of Guatemala are internationally responsible for rendering aid or assistance to Israel's policies of annexation and colonization under the customary international law on State responsibility.[118] In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the I.C.J. ruled that "the United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under

[116] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 131, ¶ 186 (June 27).
[117] Factory at Chorzow (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, ¶ 73 (Sept. 13).
[118] On aid or assistance see for example, Report of the International Law Commission to the General Assembly, 53rd Sess., 2001, *supra* note 114, art. 16 and art. 41 at 65-67, 113-116.

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customary international law".[119] In addition, the act of the relocation of the United States of America and the Republic of Guatemala's embassies to Jerusalem is a breach of their obligation to protect the Palestinian people erga omnes right to self-determination and incurs responsibility of both States for their internationally wrongful acts. Both States have also violated their obligations under international law in that they have not rendered assistance to the Palestinian people so as to realize their right to self-determination.

3.8. THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

The United Nations Educational, Scientific and Cultural Organization (hereinafter UNESCO) adopted several resolutions where it affirmed the occupying power illegal measures in the Holy City of Jerusalem including its archaeological excavations. For example, the 1968 UNESCO's General Conference resolution 15C/3.343 called upon Israel "(a) to preserve scrupulously all the sites, buildings, and other cultural properties, especially in the old city of Jerusalem; (b) to desist from any archaeological excavations, transfer of such properties and changing of their features on their cultural and historical character".[120] The 1974 UNESCO's General Conference resolution 3.427 condemned Israel for its persistent conduct of altering the historical features of Jerusalem and its excavations following its illegal occupation which are regarded contrary to the aims of the UNESCO.[121] The 1978 UNESCO's General Conference resolution 4/7.6/13 condemned the Israeli occupying authorities infringement of both UNESCO and United Nations resolutions and its

[119] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 131, ¶ 292(3) (June 27).
[120] UNESCO General Conference Fifteenth Session Paris, Fr., October 15-November 20, 1968, Sciences, Human Sciences and Culture, Preservation and Presentation of the Cultural Heritage, ¶ 1, U.N. Doc., 15C/RES/3.343 (Nov. 20, 1968).
[121] UNESCO General Conference Eighteenth Session Paris, Fr., October 17-November 23, 1974, Social Sciences, Humanities and Culture, Cultural Heritage, Implementation of the Resolutions of the General Conference and Decisions of the Executive Board Concerning the Protection of Cultural Property in Jerusalem, ¶ 2, U.N. Doc., Res. 3.427 (Nov. 21, 1974).

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measures to change and Judaize the historic and cultural configuration of Jerusalem.[122] By affirming the illegality of the Israeli occupation per se, as well as its illegal measures in Jerusalem, the UNESCO as one of the specialized agencies of the United Nations, is complying with its obligations under international law of not rendering aid or assistance to Israel's colonization and annexation policies. By its resolutions on Jerusalem, the UNESCO is also affirming applicable principles of international law on the illegality of the Israeli occupation and its illegal measures. It is worth pointing out that the Old City of Jerusalem and its Walls has been on the UNESCO's In-Danger List since 1982.[123]

3.9. STATUS OF CONSULATES IN JERUSALEM

Few States have their consulates established in Jerusalem such as the French consulate-general, the Turkish consulate-general, the British consulate-general and Belgium consulate-general. These States' consulates in Jerusalem maintain their embassies in Tel Aviv. The consuls in Jerusalem do not receive accreditation from the President of Israel.[124] Consuls, who were already resident in the city during Mandatory Palestine, did not recognize Israeli or Jordanian rule of the city.[125] The existence of consulates in Jerusalem does not appear to be inconsistent with customary consular international law, as long as the heads of the consular posts exequaturs are not granted by Israel, the occupying power, and as long as the heads of the consular posts do not explicitly or implicitly recognize Israel's occupation, annexation and other illegal measures in Jerusalem including the 1980 Basic law. If/when any

[122] UNESCO General Conference Twentieth Session January 1, 1978, Jerusalem/Cultural Heritage, ¶ 3, U.N. Doc., Res. 4/7.6/13 (Jan. 1, 1978).

[123] ICOMOS World Heritage in Danger, Compendium II- A compendium of key decisions on the conservation of cultural heritage properties on the UNESCO List of World Heritage in Danger, 5 (April 2009), https://whc.unesco.org/document/106357.

[124] United Nations, Prepared for, and under the guidance of, the Committee of the Exercise of the Inalienable Rights of the Palestinian People, *The Status of Jerusalem* (New York: United Nations, 1997), p. 9.

[125] Meron Benvenisti, *Jerusalem the Torn City* (Minneapolis USA: the University of Minnesota Press, 1976), p.15.

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consul-general in Jerusalem exequatur is granted by Israel, it would be a violation of State practice and the element of opinio juris. It would then constitute a violation of customary international consular law as codified in the preambular paragraph six of the Vienna Convention on Consular Relations of 1963. Previously the United States of America consulate had its premises in Jerusalem and the embassy in Tel Aviv. However, on 18 October 2018, in the aftermath of the relocation of the U.S. embassy from Tel Aviv to Jerusalem, the U.S. Secretary of State announced the merging of both the U.S. embassy in Jerusalem and U.S. consulate-general in Jerusalem into a single diplomatic mission and requested the U.S. Ambassador to guide the merger.[126] That's one less consulate in Jerusalem on the 4th of March 2019.

4. COMPARATIVE ANALYSIS OF SOUTHERN RHODESIA (ZIMBABWE), SOUTH WEST AFRICA (NAMIBIA) AND KUWAIT

The legal obligation on States to withdraw existing diplomatic and/or consular missions, or otherwise not to establish diplomatic and/or consular missions in certain territories, has a precedent in Southern Rhodesia (Zimbabwe) and South West Africa (Namibia). The following section will explore Southern Rhodesia (Zimbabwe) and South West Africa (Namibia) case studies and further discuss the status of diplomatic and/or consular missions in Kuwait in the aftermath of the First Gulf War that resulted in the Iraqi occupation and annexation of the territory of Kuwait. The aim of the inclusion of the above-mentioned three specific case studies is to analyze the particularity of each situation and assist in determining the merits of the pending case (*Palestine v. United States of America*).

[126] Press Statement, Michael R. Pompeo, Sec'y of State of Washington, D.C., On the Merging of U.S. Embassy Jerusalem and U.S. Consulate General Jerusalem, U.S. Department of State (Oct. 18, 2018), https://www.state.gov/secretary/remarks/2018/10/286731.htm.

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4.1. SOUTHERN RHODESIA (ZIMBABWE)

As a result of the white minority regime's proclamation of the independence of Southern Rhodesia on the 11th of November 1965, Security Council issued resolution 216 on the 12th of November 1965 in which it condemned the unilateral declaration of independence and further called upon all States not to recognize this racist minority regime.[127] Security Council resolution 217 of 20 November 1965 called upon all States not to entertain diplomatic or other relations with the authorities of this illegal regime.[128] Security Council resolution 253 of 29 May 1968 laid an emphasis on States' obligations to withdraw all consular and trade representation in Southern Rhodesia in addition to the obligation provided under Paragraph 6 of Security Council resolution 217 on not entertaining diplomatic or other relations.[129] Security Council resolution 253 further established a committee to, among other things, examine reports on the implementation of this resolution.[130]

Prior to the illegal declaration of independence by the minority regime, about twenty States maintained some form of consular relations with Southern Rhodesia: while some closed their consulates, others did not.[131] In compliance with the Committee's request contained in paragraph 9 of its first report (S/8954), a note verbale dated on 7 January 1969 was sent by the United Nations Secretary-General to the Governments of Belgium, Denmark, Federal Republic of Germany, France, Greece, Italy, the Netherlands, Norway, Portugal, South Africa, Switzerland and the United States of America as they have maintained a consulate or accredited diplomatic representative in Southern Rhodesia.[132] The Secretary-General drew attention to operative

[127] S.C. Res. 216, *supra* note 102, ¶ 1 and ¶ 2, .
[128] S.C. Res. 217, paras 1, 2, U.N. Doc. S/RES/217 (Nov. 12, 1965).
[129] S.C. Res. 253, para 6, U.N. Doc. S/RES/253 (May 29, 1968).
[130] *Id.* para 20.
[131] C. Rep. No. 4, para 71, Established in Pursuance of S/RES/253 (May 29,1968), Twenty-Sixth Year Special Supplement No. 2, S/10229 and Add. 1 and 2, United Nations New York, p. 17.
[132] C. Rep. No. 2, Established in Pursuance of S/RES/253 (May 29, 1968): Annex VIII, Consular and Trade Representation in Southern Rhodesia, S/9252/Add.1 (13 June, 1969), p.1.

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paragraph 10 of resolution 253 (1968) and operative paragraph 6 of resolution 217 (1965) where he sought the comments of these Governments in light of the provision under resolution 253 (1968). [133] As of 6 June 1969, all States except South Africa had given responses on this matter.[134]

An analysis of the 11 notes verbales that were sent to the Secretary-General in response to his note verbale reveals that all States demonstrated that the presence of their consular posts was essential to render assistance to their respective nationals residing in the territory of Southern Rhodesia.[135] All the notes verbales of the States affirmed either explicitly or implicitly that they had no intention to close their consulates in Southern Rhodesia.[136] In addition, States either explicitly or implicitly claimed that the wording of paragraph 10 of resolution 253 (1968) is seen as a form of recommendation and not binding in nature.[137] The overwhelming majority of the responses of the States affirmed that the presence of their consulates should in no way be interpreted as recognizing the illegal minority regime of Southern Rhodesia.[138] The overwhelming majority of the responses further affirmed that the consuls-general exequaturs were granted by the British sovereign and were not granted by the minority regime.[139]

By way of example, in its note verbale of 1969, Norway stated that it maintained an honorary consulate in Salisbury (in 1982 renamed Harare) where the honorary consul exequatur was granted by the British Sovereign and further stated that since the unilateral declaration of independence in 1965, the honorary consul refrained from any relations or contacts with the illegal regime in Southern Rhodesia.[140] In its note

[133] *Id.*
[134] *Id.*
[135] The texts of the Note verbale are found under Annex VIII, *supra* note 132, Second Report of the Committee Established in Pursuance of S.C. Res. 253 (1968), pp. 2-9.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] Note verbale from the Permanent Representative of Norway (26 March, 1969), Annex VIII, *supra* note 132, p.5.

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verbale of 1969, Switzerland invoked its neutrality to evade subscribing to the compulsory United Nations sanctions and affirmed that a Swiss Consulate was maintained at Salisbury.[141] In its note verbale of 1969, the United States of America decided not to remove its consular staff in Salisbury and affirmed that all staff exequaturs were granted by the British Crown and had no official connexion with the minority regime.[142] Portugal's response was severe as it stated clearly in its note verbale that it did not recognize the invoked United Nations Security Council resolutions as valid where it also complained that it had not received any replies concerning its several requests for clarifications on the invoked Security Council resolutions.[143] Portugal affirmed that it maintains a consulate-general in Salisbury headed by a consul-general.[144] In addition to the diplomatic representation of South Africa, Portugal drew attention to the other existing and functioning consular representations in Southern Rhodesia (which the Secretary-General has already referred to in his note verbale) and further indicated that there exists a German consulate in Bulawayo, Austrian consulate in Salisbury and an official representation of the United Kingdom in Salisbury.[145]

The turning point in Southern Rhodesia was on the 2nd of March 1970 when the minority illegal regime granted it a republican status. The Security Council condemned the proclamation of republican status in its resolution 277 of 18 March 1970,[146] and further decided in accordance with Article 41 of the United Nations Charter that Member States shall "[i]mmediately sever all diplomatic, consular, trade, military and other relations that they may have with the illegal régime in Southern Rhodesia, and terminate any representation that they may maintain in the Territory".[147] In its Fourth Report of 1971, the Committee Established in

[141] Note verbale from the Permanent Observer of Switzerland (21 January, 1969), p.7
[142] Note verbale from the Representative of the United States of America (Feb. 14, 1969), p. 8.
[143] Letter from the Minister for Foreign Affairs of Portugal (Feb. 18, 1969) (S/9026), *Id.* p.6.
[144] *Id.*
[145] *Id* . pp. 6 & 7.
[146] S.C. Res. 277, *supra* note 103, para 3, U.N. Doc., S/RES/277 (18 March, 1970).
[147] *Id.* ¶ 9(a).

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Pursuance of Security Council Resolution 253 (1968) provided that all States with the exception of South Africa and Portugal have closed their consular offices in Southern Rhodesia.[148] On 10 March 1970, the Minister for Foreign Affairs of South Africa announced that the South African representation would not be withdrawn and that the representative of South Africa was accredited to the Rhodesian Minister for Foreign Affairs and not to the Head of State.[149]

On 30 April 1970, Portugal announced that its consul-general in Salisbury would be withdrawn: he in fact departed on 9 May 1970, however the Portuguese consulate was operating with an acting consul-general who was assuming consular functions.[150] The fact that Portugal withdrew its consul-general but kept its consulate operating with an acting consul was a violation of the relevant Security Council resolutions, State practice and opinio juris, which prohibits maintaining or otherwise establishing diplomatic missions or consulates in Southern Rhodesia. In its eighth report of 1976, the committee noted that it received information that in August 1975, the Portuguese consulates in Umtali and Bulawayo had been closed.[151] The Committee has received no further information indicating that any other country than South Africa maintains consular offices in Southern Rhodesia.[152]

After Portugal's closure of its consulates, South Africa remained the only diplomatically represented State in Southern Rhodesia. South Africa among other countries rendered aid and assistance to the illegal and racist regime of Southern Rhodesia including in the diplomatic field. The fall of the Southern Rhodesia regime with which South Africa shared

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[148] Fourth Report of the Committee Established in Pursuance of S.C. Res. 253 (1968), ¶ 72, Twenty-Sixth Year Special Supplement No. 1, S/10229 and Add.1 and 2, United Nations: New York (1971), p.17.

[149] *Id.*

[150] *Id.* ¶ 73.

[151] Eighth Report of the Committee Established in Pursuance of S.C. Res. 253 (1968), ¶ 75, Thirty-First Year Supplement No. 2, S/11927/Rev.1 (Vol. II), United Nations: New York (1976), p.18.

[152] Tenth Report of the Committee Established in Pursuance of S.C. Res. 253 (1968), ¶114, Thirty-Third Year Special Supplement No. 2, Volume I, S/12529/Rev.1, United Nations: New York (1987), p. 36.

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strategic interests and similar practices, would have threatened its own regime, as well as apartheid practices in both South Africa and South West Africa. The fall of the Southern Rhodesia regime led by Ian Smith in 1979 meant that sooner or later there would be a subsequent falling of the South African regime and its occupation of South West Africa (Namibia). The prohibition on establishing or maintaining diplomatic or consular missions in Southern Rhodesia (Zimbabwe) was one of the measures which the Security Council established as a result of the white minority regime's taking of power and its conduct of racial discrimination and segregation against the African people who constituted the majority and whom were for years deprived of their right to self-determination.

4.2. SOUTH WEST AFRICA (NAMIBIA)

After the termination of South Africa Mandate over South West Africa (Namibia) by the General Assembly in its resolution 2145 (XXI) on the 27th of October 1966,[153] South Africa did not withdraw its forces from the territory of South West Africa (Namibia). On the contrary, South Africa kept its military and police presence in South West Africa and practiced apartheid on its territory. The General Assembly and Security Council issued several resolutions addressing the South African occupation of South West Africa. For example, General Assembly resolution 2325 (XXII) declared that the continued presence of South African Authorities in South West Africa is a violation of its territorial integrity and called upon the former to withdraw from the latter's territory unconditionally and without delay.[154] General Assembly 2325 (XXII) further called upon all Member States to take effective economic and other measures to ensure withdrawal of the South African administration from South West Africa.[155]

[153] Gen. Ass. Res. No. 2145 (XXI), ¶ 4 (27 October, 1966).
[154] Gen. Ass. Res. No. 2325 (XXII), ¶ 4 and 5, 1635th Plenary Meeting (16 December, 1967).
[155] *Id.* 6.

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Paragraph 2 of Security Council resolution 276 of 1970 "declare[d] that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts Mandate are illegal and invalid".[156] Security Council resolution 276 further "[c]all[ed] upon all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2 of the present resolution".[157] With resolution 284 adopted on 29 July 1970, the Security Council requested an advisory opinion from the I.C.J. on the following question: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"[158] In the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* advisory opinion of 1971, the I.C.J. provided that

> Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there. They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia. [159]

The aforementioned paragraph adduces three obligations: firstly, abstaining from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia. Secondly, abstaining from sending consular agents to Namibia and withdrawing

[156] S.C. Res. 276, ¶ 2, U.N. Doc., S/RES/273 (Jan. 30, 1970).
[157] *Id.* 5.
[158] S.C. Res. 284, ¶ 1, U.N. Doc, S/RES/284 (July 29, 1970).
[159] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding S.C. Res. (1970), Advisory Opinion, 1971 I.C.J. ¶ 123.

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any such agents already present there. Thirdly, the affirmation that any maintenance of diplomatic or consular relations with South Africa excludes any recognition of the latter's authority over Namibia.

4.3. KUWAIT

On the 2nd of August 1990, Iraqi military forces occupied Kuwait and annexed it on the 8th of August 1990. The Emir of Kuwait and members of his cabinet fled to neighboring Saudi Arabia where they acted as a Government in exile. Security Council Resolution 660 of 2 August 1990 condemned the Iraqi invasion and demanded Iraq to withdraw its troops unconditionally and immediately[160] while Security Council resolution 662 of 9 August 1990 decided that the annexation of Kuwait has no legal validity and is null and void.[161] Security Council resolution 662 further "[c]alls upon all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation".[162] On 9 August Iraq ordered the diplomatic and consular missions in Kuwait to close down by 24th August 1990.[163] Security Council resolution 664 of 18 August 1990 "demand[ed] that the Government of Iraq rescind its orders for the closure of diplomatic and consular missions in Kuwait and the withdrawal of the immunity of their personnel".[164]

The Security Council did not call upon States to withdraw their diplomatic and consular missions from Kuwait in the aftermath of the Iraqi occupation and annexation. On the contrary, it was Iraq, whose acts of intimidation against diplomatic agents and the heads of consular posts as well as its forcible measures against the premises of the diplomatic and

[160] S.C. Res. 660, ¶ 1, 2, U.N. Doc, S/RES/660 (Aug. 2, 1990).
[161] S.C. Res. 662, ¶ 1, U.N. Doc., S/RES/662 (Aug. 9, 1990).
[162] *Id.* 2.
[163] Interim Report to the Secretary-General by the United Nations Mission Led by Mr. Aedulrahim a. Farah, Former Under-Secretary-General, Assessing the Losses of Life Incurred During the Iraqi Occupation of Kuwait, as well as Iraqi Practices Against the Civilian Population in Kuwait, 40, S/22536 (April 29, 1991).
[164] S.C. Res. 664, ¶ 3, U.N. Doc., S/RES/664 (Aug. 18, 1990).

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consular missions that made States withdraw their diplomatic agents and heads of consular posts. The expulsion of the diplomatic agents and heads of consular posts who were associated with the Kuwaiti Government purported to cease the legal personality of the State of Kuwait. Security Council resolution 667 of 16 September 1990 demanded Iraq to comply with its obligations under relevant Security Council resolutions, the Vienna Convention on Diplomatic Relations of 18 April 1961, the Vienna Convention on Consular Relations of 24 April 1963 and international law.[165]

Iraq, the occupying power, acted in contravention of the long-standing rules of inviolability and immunity as enshrined under the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations of 24 April 1963 and customary international law. Security Council resolution 674 of 29 October of 1990 demanded Iraq to ensure access to food, water and basic services to, among others, the personnel of diplomatic and consular missions in Kuwait.[166] In addition, Iraq, neither acquired any legal authorization to cut-off diplomatic relations with States diplomatically represented in Kuwait nor acquired any legal authorization to declare diplomatic agents or heads of consular posts as persona non grata. By its forcible measures against the diplomatic agents, heads of consular posts and their premises (which included restrictions on access of food, water and basic services), Iraq succeeded in expelling diplomatic and consular agents which led to the forcible closure of these premises.

Unlike Kuwait which had an institutionalized Government but fled to neighboring Saudi Arabia, the situations in South West Africa and Southern Rhodesia were examples of liberation movements resisting racist regimes and/or occupying powers. Palestine has been an example of liberation movement represented by the Palestine Liberation Organization. However, the Palestine Liberation Organization has

[165] S.C. Res. 667, ¶ 3, U.N. Doc., S/RES/667 (Sept. 16, 1990).
[166] S.C. Res. 674, ¶ 5, U.N. Doc., S/RES/674 (Oct. 29, 1990).

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gradually revived the international legal personality of its de jure statehood even though it still does not have sovereignty over its territory, borders, territorial waters, internal waters or aquifer water, or airspace due to the Israeli colonial occupation.[167] In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America*, the I.C.J. provided that "[t]he basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2. Paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory".[168]

5. THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS-THE MERITS

Preambular paragraph five of the Vienna Convention on Diplomatic Relations affirmed on the applicability of the rules of customary international law on questions not expressly regulated by the present convention: "Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention".[169] The Drafting history of this paragraph illustrates that Switzerland proposed its inclusion in the preamble.[170] Preambular paragraph six of the Vienna Convention on Consular Relations of 1963 is identical to preambular paragraph five of the Vienna Convention on Diplomatic Relations which asserts the applicability of the rules of customary international law on questions not

[167] In 2005, Israel had withdrawn its military forces along with its withdrawal and/or relocation of its civilian settlers population from the Gaza Strip. Although Israel does not hold control over the Rafah crossing between Gaza Strip and Egypt in the aftermath of its withdrawal, the Israeli army of occupation (through its Air Force) has still the effective control over its airspace.

[168] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), ¶ 212 Merits, Judgment, 1986 I.C.J. 111 (June 27).

[169] Vienna Convention on Diplomatic Relations, *supra* note 89, Preamble.

[170] U.N Conference on Diplomatic Intercourse and Immunities, Consideration and Voting Upon the Draft Articles and the Amendments and Proposals Relating Thereto (italic), ¶ 22, U.N Doc. A/CONF.20/L.2 (Vol. II) (Apr. 21, 1961).

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explicitly regulated by the present convention.[171] The second paragraph of Article 31 of the Vienna Convention on the Law of Treaties provides that the context for the purpose of the interpretation of a treaty includes the text, including its preamble and annexes.[172] The fourth paragraph of Article 31 of the Vienna Convention on the Law of Treaties mentions that "[a] special meaning shall be given to a term if it is established that the parties so intended".[173] Article 32 of the Vienna Convention on the Law of Treaties provides that

> supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article .31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.[174]

In the *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, the I.C.J. provided that the principles reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are a codification of existing customary international law.[175] In the *Polish Postal Service in Danzig* Advisory Opinion, the P.C.I.J. provided in 1925 that "[i]t is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd".[176] *In* the *Competence of the General Assembly for the Admission of a State to the United Nations* advisory opinion of 1950, the I.C.J. provided on interpretation and application of the provisions of a treaty that "[i]f . . . . the words in their natural and ordinary meaning are ambiguous or lead to

[171] Vienna Convention on Consular Relations, Preamble, Apr. 22, 1963, 596 U.N.T.S. 261.
[172] Vienna Convention on the Law of Treaties, Art.1,¶ 2, May 23, 1969, 1155 U.N.T.S. 331.
[173] *Id.* Art. 31(4).
[174] *Id.* Art. 32.
[175] Arbitral Award of 31 July 1989 (Guinea- Bissau v. Seneg.), Judgment, 1991 I.C.J. 70, ¶ 48 (November 12).
[176] Polish Postal Service in Danzig (Poland v. Free City of Danzig), Advisory Opinion, 1925 P.C.I.J. ¶ 113 (ser. B) No. 11 (May 16).

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an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words".[177]

The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations regulate the diplomatic and consular relations between the sending State and the receiving State. Article 2 of the Vienna Convention on Diplomatic Relations provides that "The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent".[178] The Draft Articles on Diplomatic Intercourse and Immunities with commentaries 1958 provides that

> [t]he most efficient way of maintaining diplomatic relations between two States is for each to establish a permanent diplomatic mission (i.e., an embassy or a legation) in the territory of the other; but there is nothing to prevent two States from agreeing on other methods of conducting their diplomatic relations, for example, through their missions in a third State.[179]

The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations do not explicitly regulate situations such as the conduct of the sending States in an occupied and/or in sui generis territories. If they are present, should the sending States withdraw or not withdraw their diplomatic missions and/or consular posts? This will be governed by the rules of customary international diplomatic or consular law (if existing), which the preambles of both conventions have asserted on and must be examined on a case-by-case basis. In the occupied territory of Kuwait, there was no rule of customary international law that dictated the sending States to withdraw from

[177] Competence of Assembly regarding Admission to the United Nations, Advisory Opinion, 1950 I.C.J. 8 (March 3).
[178] Vienna Convention on Diplomatic Relations, *supra* note 89, Art. 2.
[179] Draft Articles on Diplomatic Intercourse and Immunities with commentaries, 1958 Yearbook of the International Law Commission, vol. II 90.

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Kuwait during its occupation. In the absence of customary international law and/or Security Council resolutions and/or General Assembly resolutions (that function as customary law), the sending States have the discretion to voluntarily withdraw or not withdraw their diplomatic or consular missions. It was Iraq in its capacity as the occupying power that violated the sending States' discretion where it forcibly made them withdraw their diplomatic and/or consular missions from an occupied territory. One can also draw attention to diplomatic missions or consular missions of the sending States which were already located in a territory before its occupation or were established in the aftermath.

The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations are examples of a treaty law that are reflecting customary international law. In the *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium), the I.C.J. pronounced on the customary international law nature of the Vienna Convention on Diplomatic Relations and Vienna Convention on Consular Relations "[o]n these points, the Vienna Convention on Diplomatic Relations . . . . reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations".[180] In addition, this treaty law is also governed by customary international law in areas that are not explicitly regulated by these conventions.

In the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the I.C.J. provided that the New York Convention on Special Missions of 8 December 1969 and the Vienna Convention on Diplomatic Relations of 18 April 1961 "provide useful guidance on certain aspects . . . . of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that

[180] Arrest Warrant of 11 April (Dem. Rep. of Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶ 52 (Feb. 14).

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the Court must decide the questions relating to the immunities".[181] In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the I.C.J. provided that Croatia

> must show that its dispute with Serbia regarding these events is a dispute relating to the interpretation, application or fulfilment of the Genocide Convention. It is not enough that these events may have involved violations of the customary international law regarding genocide; the dispute must concern obligations under the Convention itself.[182]

Similarly, the Palestine dispute with the United States of America involves violations of customary international diplomatic law (the legal obligation imposed on the Sending State represented in Israel not to establish an embassy in Jerusalem), which relates to the interpretation and application of the Vienna Convention on Diplomatic Relations. The I.C.J. will determine breaches of the Vienna Convention on Diplomatic Relations based on customary international diplomatic law, the Vienna Convention on Diplomatic Relations, customary international law on State responsibility for the internationally wrongful acts and the customary provisions of the Vienna Convention on the Law of Treaties. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro,* the I.C.J. provided that

> [i]n order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international

[181] *Id.*

[182] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (H.R. v. R.S.), Judgment, 2015 I.C.J. 48, ¶ 89 (Feb. 3).

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> law on treaty interpretation and on responsibility of States for internationally wrongful acts.[183]

If there exists State practice evidenced by the element of opinio juris sive necessitatis and/or Security Council resolutions and/or General Assembly resolutions that functions as evidence for establishing the existence of a rule or the emergence of an opinio juris that dictates States to withdraw embassies from or otherwise not to establish embassies in a certain territory (occupied and/or sui generis), the sending States become restricted in their diplomatic action in this fundamental branch of public international law as seen in the examples of Palestine, Southern Rhodesia and South West Africa. Jerusalem is a situation of sui generis territory as the city as it is now, has been unilaterally declared as the capital of Israel which consists of East Jerusalem which international law considers it an occupied and annexed territory, and West Jerusalem which international law does not consider it as an occupied territory. Customary international diplomatic law puts the unilaterally declared boundaries of Jerusalem within the range of prohibition on establishing diplomatic missions by the sending States which are diplomatically represented in Israel.

Article 21 of the Vienna Convention on Diplomatic Relations provides that "[t]he receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way".[184] The 1958 commentary on the Draft Articles on Diplomatic Intercourse and Immunities (Draft Artice19) provides that

> [t]he laws and regulations of a given country may make it impossible for a mission to acquire the premises necessary to it. For that reason the Commission has inserted in the draft an article which makes it obligatory for the receiving State to

[183] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb & Montenegro), Judgment, 2007 I.C.J. 105, ¶ 149.
[184] Vienna Convention on Diplomatic Relations, *supra* note 89, Art. 21.

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> ensure the provision of accommodation for the mission if the latter is not permitted to acquire it.[185]

The operative words are the "receiving State territory" which implicitly indicates that locating a diplomatic mission by the sending State in a territory that does not belong to the receiving State (for example in an annexed and occupied territory) is not permissible, particularly if the ambassadors or nuncio are accredited to the occupying power's executive organ. This, however, should be investigated on a case-by-case basis. In Kuwait, in the aftermath of its occupation and annexation by Iraq, customary international diplomatic or consular law did not dictate the sending States to withdraw their diplomatic or consular missions. The diplomatic agents were accredited to the legitimate Government of Kuwait. In Southern Rhodesia, even though the overwhelming majority of States affirmed that the British Crown and not the rebellious minority régime granted their staff exequaturs, there was a prohibition under customary international diplomatic and consular law on establishing or maintaining diplomatic or consular missions in that territory.

Article 13 of the Vienna Convention on Diplomatic Relations provides that

> [t]he head of the mission is considered as having taken up his functions in the receiving State either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or such other ministry.[186]

Article 14 of the Vienna Convention on Diplomatic Relations mentions inter alia that ambassadors or nuncios are accredited to Heads of State and *chargés d'affaires* are accredited to Ministers for Foreign Affairs.[187] The 1958 commentary on the Draft Articles on Diplomatic Intercourse and Immunities provides that

[185] Draft Articles on Diplomatic Intercourse and Immunities with commentaries, *supra* note 179, vol. II 95.
[186] Vienna Convention on Diplomatic Relations, *supra* note 89, Art. 13.
[187] *Id.* Art. 14.

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> [s]o far as concerns the time at which the head of the mission may take up his functions, the only time of interest from the standpoint of international law is the moment at which he can do so in relation to the receiving State — which must be the time when his status is established. On practical grounds, the Commission proposes that it be deemed sufficient that he has arrived and that a true copy of his credentials has been remitted to the Ministry for Foreign Affairs of the receiving State, there being no need to await the presentation of the letters of credence to the head of State.[188]

Given that the US has moved its embassy from Tel Aviv to Jerusalem, the accreditation of the current American Ambassador to the president of Israel violates customary international diplomatic law concerning Jerusalem. The prohibition on establishing diplomatic missions in Jerusalem is also equated with the prohibition on accreditation to the Israeli executive organ. A new Ambassador of Guatemala took his post a few months after the transfer of Guatemala's embassy to Jerusalem, where he presented his credentials to the president of Israel. Ambassador Mario Bucaro Flores presented his Credentials on the 25th of October 2018.[189] Customary international diplomatic law obliges all States not to relocate their embassies to Jerusalem or otherwise establish embassies in Jerusalem.

[188] Draft Articles on Diplomatic Intercourse and Immunities with commentaries, *supra* note 179, vol. II 93.

[189] Israel Ministry of Foreign Affairs, *Presentation of Credentials of the Ambassador Mario Búcaro Flores (Guatemala)*, Israel MFA (Oct. 25, 2018), https://mfa.gov.il/MFA/AboutTheMinistry/Foreign%20representatives/Pages/Guatemala-.aspx.

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6. OPTIONAL PROTOCOL TO THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS

On the 2nd of April 2014, the State of Palestine acceded to the Vienna Convention on Diplomatic Relations of 1961[190] and on the 22nd of March 2018, it acceded to the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes.[191] The United States of America is a State party to the Vienna Convention on Diplomatic Relations of 1961 and to its Optional Protocol, since 1972.[192] Israel is a State party to the Vienna Convention on Diplomatic Relations but not a State party to its Optional Protocol as it has signed the latter on 18 April 1961 but has neither ratified it nor acceded to it.[193] Similarly, Guatemala is a State party to the Vienna Convention on Diplomatic Relations but is not a State party to its Optional Protocol.[194]

6.1. ACCESSION TO TREATIES

On the first of May 2018, the United States of America submitted a Depositary Notification in which it stated that "[t]he Government of the United States of America does not believe the "State of Palestine" qualifies as a sovereign State and does not recognize it as such".[195] The United States of America Depositary Notification added that: "the Government of the United States of America believes that the "State of Palestine" is not qualified to accede to the Optional Protocol and affirms that it will not consider itself to be in a treaty relationship with the "State

[190] For the status of Ratification, Accession(a), Succession(d) *see* https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iii-3&chapter=3&lang=en.
[191] For the status of Accession(a), Succession(d), Ratification, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-5&chapter=3&clang=_en.
[192] *Supra* note 190, *supra* note 191.
[193] For the status of Accession(a), Succession(d), Ratification, see *Supra* note 190, *supra* note 191.
[194] *Id.*
[195] United States of America: Communication (March 23, 2018), https://treaties.un.org/doc/Publication/CN/2018/CN.228.2018-Eng.pdf.

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of Palestine" under the Optional Protocol".[196] The State of Palestine Communication of 31 May 2018, regretted the United States of America position and recalled General Assembly resolution 67/19 of 29 November 2012 which accorded Palestine the non-member observer State status in the United Nations.[197] It must be noted that instruments of accession are deposited with the depository of the relevant Treaties, Conventions or Statutes or Protocols. In this specific convention, it is the Secretary-General of the United Nations who has the authority to examine instruments of accession and as corollary to accept or reject or otherwise seek guidance from the General Assembly. This is not within the discretion of the United States of America.

By its Statement on the 1st of May 2018, the United States of America interfered with the functions of the depository under customary international law. Article 76 provides that "[t]he functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance". [198] The fourth paragraph of Article 77 of the Vienna Convention on the Law of Treaties mentions that one of the functions of depositaries entails "[e]xamining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question".[199] The fact that the United States of America - or any other State - does not recognize the State of Palestine does not mean that Palestine is not a State or does not qualify to accede to among others the Vienna Convention on Diplomatic Relations and its Optional Protocol. The Summary of practice of the Secretary-General as Depositary of Multilateral treaties provided that:

[196] *Id.*
[197] State of Palestine: Communication (May 31, 2018), https://treaties.un.org/doc/Publication/CN/2018/CN.272.2018-Eng.pdf.
[198] Vienna Convention on the Law of Treaties, *supra* note 172, Art. 76.
[199] *Id.* Art. 77(4).

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> The question of whether the Cook Islands was an "independent" entity, i.e. a State, was also raised. For a period of time. . . . it followed that the status of the Cook Islands was not one of sovereign independence in the juridical sense . . . . However, in 1984, an application by the Cook Islands for membership in the World Health Organization[200] was approved by the World Health Assembly . . . . In the circumstances, the Secretary- General felt that the question of the status, as a State, of the Cook Islands, had been duly decided in the affirmative by the World Health Assembly, whose membership was fully representative of the international community. The guidance the Secretary-General might have obtained from the General Assembly, had he requested it, would evidently have been substantially identical to the decision of the World Health Assembly.[201]

Likewise, the membership of the Cook Islands in one of the specialized agencies of the United Nations, Palestine membership in the UNESCO in 2011 as one of the United Nations specialized agencies made it easier - and eligible - to accede to the overwhelming majority of treaties under international law. [202] Had Palestine not been a member in any of the specialized Agencies of the United Nations, it can still guarantee accession to the Vienna Convention on Diplomatic Relations and its Optional Protocol through the invitation of the General Assembly. Article 48 of the Vienna Convention on Diplomatic Relations provides that

> [t]he present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies Parties to the Statute of the International

[200] *See* Constitution of the World Health Organization, U.N.T. S. Vol. 15, 185. Quoted in U.N. Office of Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (New York, United Nations 1999), 24.
[201] U.N. Office of Legal Affairs, *supra* note 200.
[202] Basheer AlZoughbi, "*The de jure State of Palestine under Belligerent Occupation: Application for Admission to the United Nations*," in Palestine Membership in the United Nations, ed. Mutaz Qafisheh (Cambridge Scholars Publishing, 2013), p. 174.

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> Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention.[203]

Article 50 of the Vienna Convention on Diplomatic Relations provides that "[t]he present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in article 48. The instruments of accession shall be deposited with the Secretary-General of the United Nations".[204] The Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties asserted that:

> Since that difficulty did not arise with regard to membership in the specialized agencies, where there is no "veto" procedure, a number of those States became members of specialized agencies, and as such were in essence recognized as States by the international community. Accordingly, and in order to allow for as wide a participation as possible, a number of conventions then provided that they were also open for participation to States members of specialized agencies. This type of entry-into-force clause was called the "Vienna formula". Thus, whenever a treaty specified, under the Vienna formula or otherwise, which entities could become parties thereto, the Secretary-General had no difficulty in complying with the participation provision of the treaty concerned.[205]

6.2. TREATY RELATIONSHIP

The question that arises is whether the United States' communication that establishes it, is not in a treaty relationship with the State of Palestine is legally valid under existing principles of international law or a violation of it. Article 78 of the Vienna Convention on the Law of Treaties

[203] Vienna Convention on Diplomatic Relations, *supra* note 89, Art. 48.
[204] *Id.* Art. 50.
[205] U.N. Office of Legal Affairs, *supra* note 201, at 22.

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governs the notifications and communications process by State parties, while Article 77 of the Vienna Convention on the Law of Treaties provides with one of the functions of the depository to include examining notifications.[206] The commentaries on the Draft Articles on the Law of Treaties of 1966 provides that, "unless the treaty otherwise states, "notification" is not, as such, an integral part of the process of establishing the legal nexus between the depositing State and the other contracting States".[207] In the *Case concerning right of passage over Indian territory (Preliminary Objections)*, the I.C.J. ruled that "[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it".[208]

Should a State have the right to deprive another State - which is equally a party to Compulsory Settlement of Disputes Treaty - of the right to initiate proceedings through a refusal of the former to acknowledge the multilateral treaty relationship with the latter, then it would be incompatible with the object and purpose of the Compulsory Settlement of Disputes mechanism. If the communication of the United States of America is legally valid then this would be one of the grounds to exclude the I.C.J. jurisdiction in the pending case (*Palestine v. United States of America*). If, on the other hand, it is not legally valid then it is one of the grounds why the I.C.J. has jurisdiction over the pending case. In the *Nottebohm case Preliminary Objection*, the I.C.J. provided that "[i]t makes use, as do the declarations relating to it, of the words "compulsory" and "jurisdiction", and the structure of the text is sufficient to show that of these two words the first is the more important".[209] Commenting on the third condition of the Declaration of Portugal, the I.C.J. provided in the

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[206] *See* Vienna Convention on the Law of Treaties, *supra* note 172, Art. 77, 78.
[207] Draft Articles on the Law of Treaties with commentaries, 1966 Yearbook of the International Law Commission, vol. II 271.
[208] Right of Passage over Indian territory (Portug. v. India), Preliminary Objections, 1957 I.C.J. 142 (Nov. 26).
[209] Nottebohm case (Liech. v. Guat.), Preliminary Objections, 1953 I.C.J 122 (Nov. 18).

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case concerning right of passage over Indian territory (Preliminary Objections) that

> [i]t is a rule of law generally accepted, as well as one acted upon in the in the past by Court, that, once the court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction.[210]

It is noteworthy to mention that several ratifying States made declarations or reservations under several conventions such as the Vienna Convention on Diplomatic Relations, stating that the mere ratification of such convention does not imply a recognition of Israel nor does it amount to entering into relations with it.[211]

6.3. INITIATION OF LEGAL PROCEEDINGS (PALESTINE V. UNITED STATES OF AMERICA)

On the 28th of September 2018, the State of Palestine initiated legal proceedings against the United States of America before the I.C.J. in relation to violations of the Vienna Convention on Diplomatic Relations of 18 April 1961. Article 1 of the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol".[212] In its application Instituting Proceedings in the International Court of Justice, the State of Palestine provided that

[210] Right of Passage over Indian territory (Portug. v. India), 1957 I.C.J 142 (Nov. 26).
[211] On this matter, see the reservations or declarations made by Bahrain, Kuwait, Libya, Qatar Saudi Arabia, Sudan, Syrian Arab Republic, United Arab Emirates, Yemen, Oman and formerly Egypt available at https://treaties.un.org/Pages/ViewDetails.aspx?src=Treaty&mtdsg_no=III-3&chapter=3&lang=en.
[212] Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes art. 1, Apr. 18, 1961, 241 U.N.T.S. 500.

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> [b]y the present Application, the State of Palestine requests the Court to settle the dispute it has with the United States of America over the relocation of the embassy of the United States of America in Israel to the Holy City of Jerusalem. In so doing, it places its faith in the Court to resolve the dispute in accordance with its Statute and jurisprudence, based on the Vienna Convention on Diplomatic Relations (V.C.D.R.) read in appropriate context.[213]

The phrase "read in appropriate context" is redundant but not necessarily wrong. The sentence could be legally restructured to read as follows: "In so doing, it places its faith in the Court to resolve the dispute in accordance with its Statute and jurisprudence, based on the Vienna Convention on Diplomatic Relations . . . ". in line with its applicable customary provisions of international diplomatic law. Earlier on the 14th of May 2018, the State of Palestine sent a note verbale, whereby it informed the State Department of the United States of America, of its position: that any steps taken to relocate the embassy constitute a violation of the Vienna Convention on Diplomatic Relations, read in conjunction with the relevant Security Council resolutions.[214] The 14 May 2018 note verbale of the State of Palestine further requested that the United States of America inform it of "any steps the United States is considering to ensure that its actions are in line with the Vienna Convention on Diplomatic Relations" which the latter did not provide.[215] On 4 July 2018 the Palestinian Ministry of Foreign Affairs and Expatriates notified the State Department of the United States of America of the existence of a dispute between the two Parties, pursuant to Articles I and II of the Optional Protocol concerning the Compulsory Settlement of

[213] Application Instituting Proceedings in the International Court of Justice (Ps. v. U.S.), ¶ 2 (Sep. 28, 2018).
[214] Annex III. Note Verbale of the Ministry of Foreign Affairs of the State of Palestine addressed to the Department of State of the United States of America, 14 May 2018, Ref.: MA-201805-MO002 available at https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-01-EN.pdf.
[215] *Id.*

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Disputes, arising out of the interpretation or application of the Vienna Convention on Diplomatic Relations, read in conjunction with relevant Security Council resolutions on the alteration of the status of Jerusalem.[216]

Article 2 of the Optional Protocol concerning the Compulsory Settlement of Disputes of the Vienna Convention on Diplomatic Relations provides that:

> [t]he parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application.[217]

The lack of a response from the Government of the United States of America had not allowed the parties to use the option of agreeing on resorting to other mechanisms of pacific dispute settlement which are provided under the Optional Protocol to the Vienna Convention on Diplomatic Relations under article II (arbitral tribunal) or article III (resorting to conciliation procedure).

6.4. WITHDRAWAL FROM TREATIES

On 12 October 2018, the Secretary-General received from the US Government a communication notifying its withdrawal from the Optional Protocol. Earlier, on 7 March 2005, the Secretary-General received from the Government of the United States of America, a communication notifying its withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement

[216] Annex IV. Note Verbale of the Ministry of Foreign Affairs of the State of Palestine addressed to the Department of State of the United States of America, 4 July 2018, Ref.: MA-201807-M0006 available at https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-01-EN.pdf.

[217] Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, *supra* note 212.

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of Disputes.[218] The communication of 12 October 2018 of the Government of the United States of America reads as follows:

> [T]he Government of the United States of America [refers] to the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, done at Vienna on April 18, 1961. This letter constitutes notification by the United States of America that it hereby withdraws from the aforesaid Protocol. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.[219]

The United States of America's notification of a purported withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes occurred in the aftermath of two litigations brought before the I.C.J. against it: *LaGrand case (Germany v. United States of America)* and the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*. In both cases, the I.C.J. found the United States of America in breach of its obligations under the Vienna Convention on Consular Relations.[220] The United States of America's notification of a purported withdrawal took place soon after the State of Palestineinitiated proceedings against the former, while pending a decision of the I.C.J. on its jurisdiction and admissibility of the case law. The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations and their optional protocols concerning the Compulsory Settlement of Disputes are silent as to the termination or withdrawal of these treaty instruments. Article 56 of the Vienna Convention on the Law of Treaties (1969) provides that

[218] The text of the U.S. Communication is available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-8&chapter=3&clang=_en#1.

[219] The text of the U.S. Communication is available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-5&chapter=3&clang=_en#10.

[220] *See* LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. 514-516, ¶ 128 (June 21) & Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 70-73 , ¶ 153 (Mar. 31).

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> 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. 2. A party shall give not less than twelve months notice of its intention to denounce or withdraw from a treaty under paragraph 1.[221]

The commentaries on the Draft Articles on the Law of Treaties mention that no clause of denunciation or withdrawal was inserted during the Vienna Conferences on Diplomatic and Consular Relations and that the omission of the clause from the conventions was accepted without discussion.[222] In the *Case Concerning the Gabčíkovo-Nagymaros Project Hungary/Slovakia*, the I.C.J. ruled in 1997 that "[t]he 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal . . . . the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention".[223]

On 25 August 1997, the Secretary-General received from the Government of the Democratic People's Republic of Korea (hereinafter D.P.R.K.) a notification of withdrawal (dated on the 23rd August 1997) from the International Covenant on Civil and Political Rights (hereinafter I.C.C.P.R.). [224] The I.C.C.P.R. does not contain a withdrawal provision. On 23 September 1997 the Secretariat of the United Nations issued an *aide-memoire* asserting that the D.P.R.K. could only withdraw from the I.C.C.P.R. with the consent of all the parties as provided under Article 54 of

[221] Vienna Convention on the Law of Treaties, *supra* note 172, art. 56.
[222] *See generally* Draft Articles on the Law of Treaties with commentaries, *supra* note 207, vol. II 251.
[223] Gabčíkovo-Nagymaros Project (Hung. v. Slovak.), Judgment, 1997 I.C.J. 62-63 ¶ 100 (Sep. 25).
[224] *See* Denunciation of the International Covenant on Civil and Political Rights by the D.P.R.K., C. N. 4 6 7 .1997. Treaties -10 (Sep. 23).

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Vienna Convention on the Law of Treaties. In its General Comment number 26, the Human Rights Committee stated clearly that: "The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it".[225] Article 54 of the Vienna Convention on the Law of Treaties provides that "[t]he termination of a treaty or the withdrawal of a party may take place: (a) In conformity with the provisions of the treaty; or (6) At any time by consent of all the parties after consultation with the other contracting States".[226]

Similarly, the Secretary-General received, on 9 June 1971, a communication from the Government of Senegal denouncing the Convention on the Territorial Sea and the Contiguous Zone as well as the Convention on the Living Resources of the High Seas, and specifying that the denunciation would take effect on the thirtieth day from its receipt.[227] Neither convention contained provisions on withdrawal or denunciation. A communication from the UK Government was sent to the Secretary-General on the 2nd of January 1973, concerning the aforementioned notification by the Senegalese Government. The UK Government did not consider those Conventions as susceptible to unilateral denunciation by a State party (Senegal).[228]

6.5. THE PRINCIPLE OF GOOD FAITH

The United States of America failed to act in good faith under international law in at least five different aspects. First, when it relocated its embassy from Tel Aviv to Jerusalem. Second, when it challenged the

[225] General Comments Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, ¶ 5, C.C.P.R./C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997).

[226] Vienna Convention on the Law of Treaties, *supra* note 172, art. 54.

[227] *See also* The text of the communication of Senegal is available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXI-1&chapter=21&clang=_en#8.

[228] *See* For a text of the communication of the United Kingdom see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXI-1&chapter=21&clang=_en#8.

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qualification of the State of Palestine to accede to the Optional Protocol against the authority of the depository (the Secretary-General of the United Nations). Third, when it decided to withdraw from the Optional Protocol soon after the State of Palestine instituted legal proceedings before the I.C.J., at a time when a case was pending against it. Fourth, when it did not consider itself in a treaty relationship with the State of Palestine. Fifth, when it did not respond to the 14 May 2018 note verbale of the State of Palestine and as corollary violated the principle of peaceful settlement of international disputes. Article 26 of the V.C.LT. entitled "*pacta sunt servanda*" provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".[229] Referring to "pacta sunt servanda", which is the rule according to which treaties are binding on the parties and must be performed in good faith, the Commentaries on the Draft Articles on the Law of Treaties of 1966 provided that is "the fundamental principle of the law of treaties".[230] In the *Nuclear Tests Case (Australia v. France)*, the I.C.J. held that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith".[231] The I.C.J. went on to say in the *Nuclear Tests Case* that "[j]ust as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration".[232]

Conversely, the State of Palestine is acting in good faith and in accordance with the pacific mechanisms of international disputes, as codified under the conventions and declarations relative to pacific mechanisms of international disputes in general and under Article 33 of the United Nations Charter in particular. The State of Palestine is seeking a judicial settlement as one of the means to a friendly settlement of its disagreement with the United States of America in relation to its act of

[229] Vienna Convention on the Law of Treaties, *supra* note 172, art. 26.
[230] Draft Articles on the Law of Treaties with commentaries, *supra* note 207, vol. II 251, p. 211.
[231] Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 268 ¶ 46 (Dec. 20).
[232] *Id.*

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relocating its embassy from Tel Aviv to Jerusalem. In the *Mavrommatis Palestine Concessions case*, the P.C.I.J. defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[233]

The State of Palestine asserts that the United States of America must not establish its embassy in Jerusalem under the applicable provisions of the Vienna Convention on Diplomatic Relations while the United States of America has relocated its embassy to Jerusalem and ipso facto opposes the State of Palestine argumentation. Palestine should lay emphasis on the provisions of customary international diplomatic law that are not explicitly governed under the Vienna Convention on Diplomatic Relations. In the *Case of the Free Zones of Upper Savoy and the District of Gex (Order of Aug. 19)*, the P.C.I.J. stated, that "[w]hereas the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties".[234] In *South West Africa Cases (Ethiopia V. South Africa; Liberia V. South Africa) Preliminary Objections*, the I.C.J. ruled that:

> It must be shown that the claim of one party is positively opposed by the other. Tested by this criterion there can be no doubt about the existence of a dispute between the Parties before the Court, since it is clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate".[235]

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[233] Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30).
[234] Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1929 P.C.I.J. (ser. A) No. 22 (Order of Aug. 19).
[235] South West Africa (Eth. v. S.Afr. ; Liber. v. S. Afr.), Preliminary Objections, 1962 I.C.J. 328 (Dec. 21).

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7. QUESTIONS OF JURISDICTION AND ADMISSIBILITY

The sixth paragraph of Article 36 of the I.C.J. Statute provides that "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court".[236] The distinction between the two kinds of objections, objection to jurisdiction and objection to admissibility, is well recognized in the practice of the I.C.J.[237] In the *Nottebohm case (Preliminary Objection)*, the I.C.J. provided that

> [s]ince the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.[238]

As a general rule, the international courts and tribunals decide on their own jurisdiction should any doubt arises, where they exclusively have the *Kompetenz–Kompetenz*.[239] The first paragraph of Article 79 of the Rules of the I.C.J. provides that "[a]ny objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible".[240] The second paragraph of Article 79 of the Rules of the I.C.J. provides that "[n]otwithstanding paragraph 1 above, following the submission of the application and after the President has met and

[236] Statute of the International Court of Justice art. 36(6).

[237] *See generally* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Preliminary Objections, 2008 I.C.J. 465, ¶ 120 (Nov. 18).

[238] Nottebohm (Liech. v. Guat.), Preliminary Objection, 1953 I.C.J. Rep. 119 (Nov. 18).

[239] *See* Eds Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, Christian J. Tams, Assistant eds Maral Kashgar, David Diehl, *The Statute of the International Court of Justice (2nd Edition): A Commentary*, Oxford: Oxford University Press 2012, p. 694.

[240] Para (1), Article 79, Rules of Court (1978) adopted on 14 April 1978 and entered into force on 1 July 1978.

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consulted with the parties, the Court may decide that any questions of jurisdiction and admissibility shall be determined separately".[241]

In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *Preliminary Objections*, the I.C.J. provided that

> [i]f the objection is a jurisdictional objection, then since the jurisdiction of the Court derives from the consent of the parties, this will most usually be because it has been shown that no such consent has been given by the objecting State to the settlement by the Court of the particular dispute.[242]

The consent of the United States of America and Palestine has been ipso jure given, as both States are parties to the Optional Protocol to the Vienna Convention on Diplomatic Relations.

The United States of America may, however, argue that it is no longer a State party to the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes. As this concerns the Compulsory Settlement of Disputes, the United States of America thus claims that the I.C.J. has no jurisdiction in the pending case (Palestine v. United States of America). It is the I.C.J. which will ultimately decide if it has jurisdiction and thus if the U.S. purported withdrawal is valid, or otherwise, when its withdrawal will be valid or how could its withdrawal be validated in line with the customary international law of treaties. Similarly, if a State party to the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes initiates proceedings against the United States of America for violations of provisions of the Vienna Convention on Consular Relations, the I.C.J. will decide on its jurisdiction and the matter of the United States of America withdrawal. [243]

[241] *Id.* art. 79 para 2.
[242] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Preliminary Objections, 2008 I.C.J. 465, ¶ 120 (Nov. 18).
[243] *See* John Quigley, The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences, 19 Duke Journal of Comparative & International Law, 2009, 290.

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On admissibility, the I.C.J. mentioned in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *Preliminary Objections* that "[a] preliminary objection to admissibility covers a more disparate range of possibilities" such as "a failure to comply with the rules as to nationality of claims; failure to exhaust local remedies; the agreement of the parties to use another method of pacific settlement; or mootness of the claim".[244] Other grounds of inadmissibility may include delay in bringing a claim, abuse of process and infringement of good faith, lack of power of representation, waiver of the right to have recourse to judicial settlement and the lack of locus standi.[245] The United States of America's allegation that Palestine is not qualified to accede to the Vienna Convention on Diplomatic Relations and its Optional Protocol implies that the United States of America is of the opinion that Palestine lacks a locus standi as a State and thus has no right or capacity to initiate legal proceedings. This allegation addresses issues of admissibility of the application of the State of Palestine before the I.C.J. and, if brought up, will be rebutted in one stroke. In the *Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections*, the I.C.J. did not

> find it necessary to consider all the objections, nor to determine whether all of them are objections to jurisdiction or to admissibility or based on other grounds. During the course of the oral hearing little distinction if any was made by the Parties themselves between "jurisdiction" and "admissibility".[246]

On 15 November 2018 the I.C.J. issued an order in relation to the pending case of *Relocation of The United States Embassy To Jerusalem (Palestine v. United States Of America)* where it stated that

> [I]n view of the fact that, according to the United States, the Court manifestly lacks jurisdiction to entertain Palestine's

[244] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Preliminary Objections, 2008 I.C.J. 465, ¶ 120 (Nov. 18).
[245] *See also* Eds Zimmermann, Oellers-Frahm, Tomuschat & Tams, op.cit., pp. 703 to 705.
[246] Northern Cameroons (Cameroon v. U.K.), Preliminary Objections, 1963 I.C.J. 27 (Dec. 2).

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> Application, it is necessary to resolve first of all the question of the Court's jurisdiction and that of the admissibility of the Application, and that these matters should accordingly be separately determined before any proceedings on the merits.[247]

The I.C.J. "[d]ecide[d] that the written pleadings shall first be addressed to the question of the jurisdiction of the Court and that of the admissibility of the Application".[248] In addition, the I.C.J. in its order of 15 November 2018 fixed the following time-limits for the filing of the pleadings: 15 May 2019 for the Memorial of the State of Palestine and 15 November 2019 for the Counter-Memorial of the United States of America.[249]

7.1. THE MONETARY GOLD PRINCIPLE

Article 62 of the I.C.J. Statute provides that "(l) [s]hould a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. (2) It shall be for the Court to decide upon this request".[250] In the *case of Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, the I.C.J. ruled that "[t]o adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent".[251] The I.C.J. went on to say that

> Albania has not submitted a request to the Court to be permitted to intervene . . . . Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of

[247] I.C.J., 15 November General List No. 176 15 November 2018 Relocation Of The United States Embassy To Jerusalem (Palestine v. United States Of America) Order, p. 3, available at https://www.icj-cij.org/files/case-related/176/176-20181115-ORD-01-00-EN.pdf.
[248] *Id.*
[249] *Id.*
[250] Statute of the International Court of Justice art. 62.
[251] Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K. and U.S.), Preliminary Objection, 1954 I.C.J. 32 (June 15).

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> the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania.[252]

In the *case of Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, the I.C.J. recalled the arbitrator's opinion of 20th of February 1953 that the gold belonged in 1943 to Albania.[253] Since the expression of Monetary Gold principle, which relies on Article 62 of the I.C.J. Statute, several States have invoked it either to bar the I.C.J. from exercising jurisdiction or to request for an intervention in the proceedings. In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America,* the I.C.J. provided that

> [t]he circumstances of the Monetary Gold case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings.[254]

In the *Case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia*), *preliminary objections* of 26 June 1992, the I.C.J. considered that "the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application and the situation".[255] The I.C.J. added that "[i]n the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim".[256] The I.C.J. further stated that

[252] *Id.*
[253] *Id.* p. 26.
[254] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 431, ¶ 88.
[255] Certain Phosphate Lands in Naru (Naru v. Au.), Preliminary Objections, 1992 I.C.J. 261, ¶ 55.
[256] *Id.*

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> a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia.[257]

In the *Case concerning East Timor (Portugal v. Australia)*, Portugal advanced several arguments before the I.C.J. to exclude the applicability of the Monetary Gold principle. The first argument was to make a separation of Australia's behavior from that of Indonesia.[258] However, the I.C.J. did not accept this argument in this specific case and provided that "the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor".[259]

Portugal's second argument underlined the inapplicability of the Monetary Gold principle as it maintained that the rights which Australia allegedly breached were erga omnes.[260] The I.C.J. expressly stated in the *Case concerning East Timor (Portugal v. Australia)* that "[w]hatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case".[261] The I.C.J. further provided that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things".[262]

The third argument advanced by Portugal cores at that "the status of East Timor as a non-self-governing territory and its own capacity as the administering Power of the Territory, have already been decided by

[257] *Id.* pp. 261 & 262.
[258] East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. 102, ¶ 28.
[259] *Id.*
[260] *Id.* para 29.
[261] *Id.*
[262] *Id.*

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the General Assembly and the Security Council".[263] Portugal added that "the Court might well need to interpret those decisions but would not have to decide *de novo* on their content and must accordingly take them as "givens"".[264] Portugal further added that: "the Court is not required in this case to pronounce on the question of the use of force by Indonesia in East Timor or upon the lawfulness of its presence in the Territory".[265]

The I.C.J. noted that the third argument advanced by Portugal:

> rests on the premise that the United Nations resolutions . . . . can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded, however, that the relevant resolutions went so far.[266]

The I.C.J. ruled that:

> In this case, the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful . . . . Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent. [267]

The I.C.J. provided that "[w]ithout prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as "givens" which constitute a sufficient basis for determining the dispute between the Parties".[268]

[263] *Id.* para 30, p. 103.
[264] *Id.*
[265] *Id.*
[266] *Id.* para 31.
[267] *Id.* para 34, p. 105.
[268] *Id.* para 32, p. 104.

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7.2. ASSESSING THE APPLICABILITY CRITERIA OF THE MONETARY GOLD PRINCIPLE

One can deduce from the jurisprudence of the I.C.J. *case of Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)* the application of two major criteria for the determination of the applicability or inapplicability of Monetary Gold principle in relation to the pending case *Palestine v. United States of America*: does Israel have an interest of a legal nature which may be affected by the decision of the I.C.J.? And would Israel be the very subject-matter of the decision on the transfer of the United States of America embassy from Tel-Aviv to Jerusalem?

Following from the jurisprudence of the I.C.J., several sub questions can also be raised so as to provide assistance on the determination of the applicability or inapplicability of the Monetary Gold principle. Is the determination of the responsibility of Israel a prerequisite to determine U.S. responsibility? Does the existence or the content of responsibility attributed to the United States of America by Palestine have or may have implications for the legal situation of Israel, and if so, will this be used as a basis for the I.C.J. decision on Palestine argument against the United States of America? Would the I.C.J. need to rule on the lawfulness of the conduct of the United States of America when its judgment would imply an evaluation of the lawfulness of the conduct of Israel, which is not party to the proceedings? Has not the evaluation of the lawfulness of the conducts of Israel in relation to jus ad bellum and jus in bello already been determined by themain organs of the United Nations (General Assembly, Security Council, the United Nations Economic and Social Council and the I.C.J), the United Nations specialized agencies e.g. the U.N.E.S.C.O. and additionally customary international law?

Would the I.C.J. need not to decide de novo on the content of the voluminous of the United Nations resolutions and accordingly take them as “givens”? Have not the voluminous content of the United Nations resolutions gone further than the relevant United Nations resolutions on

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East Timor? The counter-argument that Palestine's claim invokes the applicability of the Monetary Gold principle[269] does not hold water as the I.C.J. will consider that it shall have jurisdiction to entertain Palestine's Application based on at least one of the following arguments.

7.3. THE INAPPLICABILITY OF THE MONETARY GOLD PRINCIPLE (PALESTINE V. UNITED STATES OF AMERICA)

7.3.1. A SENDING STATE'S PRACTICE

The first argument that must be advanced on the inapplicability of the Monetary Gold principle underlines that the issue in question concerns only the sending State's practice combined with the element of opinio juris without the need to look into the conduct of the de facto receiving State (Israel), albeit illegal under international law. In this respect, Israel would not be the very subject-matter of the decision of the I.C.J.

Security Council resolution 478 of 1980 mainly distinguishes between on the one hand, those obligations imposed on Israel and, on the other, those imposed on other States. Security Council resolution 478 called upon States other than Israel (obviously the Sending States) that have established diplomatic missions in Jerusalem to withdraw such missions from the Holy City.[270] Security Council resolution 478 called upon Israel to rescind its legislative and administrative measures and actions which have altered or purport to alter the character and status of the Holy City of Jerusalem particularly the 1980 "Basic Law" on Jerusalem. [271] Security Council resolution 478 called on all Member States to accept this decision[272] (which includes Israel).

[269] Marko Milanovic, *Palestine Sues the United States in the I.C.J. re Jerusalem Embassy*, E.J.I.L.: Talk! Blog of the European Journal of International Law (Sept. 30, 2018), https://www.ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-embassy/.
[270] S.C. Res. 478, *supra* note 28, ¶ 5.
[271] *Id.* para 3.
[272] *Id.* para 5(a).

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In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the I.C.J. invoked United Nations resolutions relative to the question of Palestine including Security Council resolution 478 (1980). The I.C.J. recalled the second, third and fifth provisions of the Security Council resolution 478 i.e. affirming that the enactment of the 1980 "Basic Law" constitutes a violation of international law, that "all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem . . . . are null and void" and deciding on "not to recognize the "Basic Law" and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem".[273]

In the wider sense, a distinction could be drawn between at least five categorical obligations of States as a result of the United Nations resolutions and/or customary international law. Firstly, Israel's obligations e.g. to rescind its legislative and administrative measures and actions which are illegal international law including the 1980 "Basic Law" on Jerusalem. Secondly, obligations of the sending States, which are diplomatically represented in Israel, not to establish embassies in Jerusalem. Thirdly, all States' (other than Israel) obligations e.g. not to recognize any changes carried out by Israel in the occupied territory of Palestine including East Jerusalem and not to render aid or assistance to the Israeli occupation, annexation and colonization policies. Fourthly, obligations of all Member States of the United Nations to accept and carry out the decisions of the Security Council in line with Article 25 of the United Nations Charter, which may also be extended to non-member States of the United Nations. For example, one of the conditions on which Switzerland could become a Party to the I.C.J. at a time when it was not a member of the United Nations was its "Acceptance of all the obligations of a Member of the United Nations under Article 94 of the Charter".[274]

[273] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 167, ¶ 75.
[274] G.A. Res. 91, U.N. Doc. A/RES/91 (Dec. 11, 1946).

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Fifthly, obligations of all States to abide by customary international law that emerged or existed as a result of General Assembly resolutions and/or Security Council resolutions. By a way of example on the second, third, fourth and fifth categorical obligations, the Holy See is not a member in the United Nations however its apostolic nunciature is in Tel Aviv and not Jerusalem.

Israel has of course committed internationally wrongful acts by among others its annexation of East Jerusalem and its legislative organ enactment of the 1980 Basic Law. However, the object of the litigation in the pending case is to adjudge and declare that the conduct of the United States of America (the sending State) in relocating its embassy from Tel Aviv to Jerusalem violated its international legal obligations as provided in preambular paragraph five of the Vienna Convention on Diplomatic Relations. Indeed, the purpose and objective of adjudication is to rule on the illegality of the conduct of the United States of America (the Sending State) and not on Israel's acts and/or omissions of breaches of its international obligations (the de facto receiving State). Therefore, the judgment will be binding on the sending State and not on the de facto receiving State. The very subject-matter of the decision of the I.C.J. would be the United States of America and not Israel.

The I.C.J. would be requested to rule on the illegality of the United States of America conduct of relocating its embassy from Tel Aviv to Jerusalem and to further request reparation from the United States of America in the form of restitution and satisfaction. For the purpose of this specific case, the I.C.J. would not need to request Israel to make restitution and give satisfaction for the internationally wrongful act of the United States conduct of relocating of its embassy. Article 59 of the I.C.J. statute provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case".[275] In the *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene*, the I.C.J. provided that "[t]he future judgment will not merely be limited

[275] Statute of the International Court of Justice art. 59.

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in its effects by Article 59 of the Statute: it will be expressed, upon its face, to be without prejudice to the rights and titles of third States".[276]

7.3.2. A MATTER RELATIVE TO THE QUESTION OF PALESTINE VIS-À-VIS THE RESPONSIBILITY OF THE UNITED NATIONS

The second supplement or alternative argument that must be advanced on the inapplicability of the Monetary Gold principle in the present pending case rests on the premise that the issue in question is concerned with a matter relative to the question of Palestine vis-à-vis the responsibility of the United Nations and/or vis-à-vis the responsibility of merely third States. The very subject-matter of the decision of the I.C.J. would be the United States of America in its capacity as a third State. The I.C.J. as the principal judicial organ of the United Nations has the responsibility to invalidate the Monetary Gold principle in the present pending case in conformity with its statute, rules of procedure and the rules of consent to jurisdiction. Several General Assembly resolutions "[r]eaffirm[ed] the permanent responsibility of the United Nations with regard to the question of Palestine until the question is resolved in all its aspects in accordance with international law".[277] In its advisory opinion of 2004, the I.C.J. recalled the preamble of resolution 57/107 of 3 December 2002 and further provided that

> [w]ithin the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.[278]

[276] Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1984 I.C.J. 26-27, ¶ 43.
[277] G.A. Res. 49/62, Preamble (Dec 14, 1994). Other General Assembly resolutions used the term "international legitimacy" instead of international law for example, G.A. Res. 57/107, Preamble (Dec. 3, 2002).
[278] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 159, ¶49.

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7.3.3. A DISPOSITIVE DETERMINATION OF ISRAEL'S OBLIGATIONS UNDER JUS AD BELLUM AND JUS IN BELLO

The third alternative argument that must be advanced on the inapplicability of the Monetary Gold principle in the present pending case rests on the premise that Israel's rights or rather title and obligations under jus ad bellum and jus in bello have been dispositively or authoritatively determined under international law. The content of the voluminous resolutions of the main organs of the United Nations (General Assembly, Security Council, the Economic and Social Council as well as the I.C.J. advisory opinion of 2004), the resolutions of the U.N.E.S.C.O. as one of the specialized agencies have authoritatively determined the scope of Israel's obligations. These intermingled with the existence of several provisions of customary international law in relation to the question of Palestine. The occupying power conduct under jus in bello (to name but a few, annexation of East Jerusalem, construction of a wall and its associated regime and extensive transfer of parts of the occupant's civilian population into settlements in the occupied territory of Palestine) and jus ad bellum (the Israeli occupying armed forces entry into and presence in the occupied territory of Palestine) have been determined as unlawful. In *the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* advisory opinion of 1971, the I.C.J. provided that "it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design".[279]

Several General Assembly and Security Council resolutions emphasized Israel's own obligations in its capacity as the occupying power. For example General Assembly resolution 58/292 of 6 May 2004

[279] Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Sec. Council Res. 276/1970, Advisory Opinion, 1971 I.C.J. 50, ¶105.

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provided that "Israel, the occupying Power, has only the duties and obligations of an occupying Power under the Fourth Geneva Convention and the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War of 1907".[280] General Assembly resolution 69/92 of 5 December 2014 "[c]alls upon Israel to . . . . comply with all of its obligations under international law and cease immediately all actions causing the alteration of the character, status and demographic composition of the Occupied Palestinian Territory, including East Jerusalem".[281] Security Council resolution 672 "[c]alls upon Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention, which is applicable to all the territories occupied by Israel since 1967".[282] Security Council resolution 2334 of 2016 "[r]eaffirm[ed] the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention . . . . and recalling the advisory opinion rendered on 9 July 2004 by the International Court of Justice".[283]

The Security Council and General Assembly called upon Israel, the occupying power to withdraw from the occupied territory of Palestine and terminate its occupation. For example, Security Council resolution 242 of 1967 called for the "(i) [w]ithdrawal of Israeli armed forces from territories occupied in the recent conflict";[284] Security Council resolution 471 of 1980 "[r]eaffirm[ed] the overriding necessity to end the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem";[285] General Assembly resolution ES-7/2 of 29 July 1980 called upon Israel for complete and unconditional withdrawal from all Arab territories occupied since June 1967 including Jerusalem and urged that

[280] G.A. Res. 58/292, ¶1 (May 6, 2004).
[281] G.A. Res. 69/92, ¶2 (Dec. 5, 2014).
[282] U.N. Sec. Council Res. 672, ¶3 (Oct. 12, 1990).
[283] U.N. Sec. Council Res. 2334, Preamble (Dec. 23, 2016).
[284] U.N. Sec. Council Res. 242, ¶1 (Nov. 22, 1967).
[285] U.N. Sec. Council Res. 471, ¶6 (Jun. 5, 1980).

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the withdrawal should start before 15 November 1980.[286] The General Assembly has repetitively and explicitly labeled the Israeli occupation as illegal. General Assembly resolution 36/147 of 1981 recalled its previous resolutions in particular resolution 3414 (XXX), 31/61, 32/20, 33/28, 33/29, 34/70 and 35/122 E, "in which it, inter alia, called upon Israel to put an end to its illegal occupation of the Arab territories and to withdraw from all those territories",[287] General Assembly resolution A/73/L.49 of 2018 reiterated its call to end the Israeli occupation that began in 1967, including East Jerusalem.[288] Labeling the Israeli occupation as illegal by the General Assembly is not a recommendation but is of a dispositive force and effect. The I.C.J. provided in *certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)* advisory opinion that

> the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with "decisions" of the General Assembly "on important questions". These "decisions" do indeed include certain recommendations, but others have dispositive force and effect.[289]

The content of the relevant voluminous resolutions on the question of Palestine went much further than the ones in East Timor, have made authoritative determinations in relation to Israel's obligations under jus ad bellum and jus in bello, have dispositive force and effect, have formulated a legal situation, apply a fortiori and in many instances established the existence of a rule or the emergence of an opinio juris. Commenting on the termination of South Africa's mandate over South West Africa by the General Assembly, the I.C.J. provided in *Legal*

[286] G.A. Res. ES-7/2, U.N. Doc. A/RES/ES-7/2, ¶7 (Jul. 29, 1980).
[287] G.A. Res. 36/147/E, Preamble (Dec. 16, 1981).
[288] *See* U.N. Doc. A/73/L.49 (Dec. 6, 2018).
[289] Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 163 (Jul. 20).

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Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), advisory opinion that "[t]his is not a finding on facts, but the formulation of a legal situation".[290]

7.4. TECHNICAL ANALYSIS OF PORTUGAL V. AUSTRALIA AND PALESTINE V. UNITED STATES OF AMERICA

Two judges wrote dissenting opinions regarding the reasons why the I.C.J. should have exercised jurisdiction to entertain the *case concerning East Timor (Portugal v. Australia)*.[291] The I.C.J. found a grey area in the East Timor situation where in the absence of Indonesia, it could not exercise jurisdiction over the case initiated by Portugal. Eventually, the I.C.J., which formulated the Monetary Gold Principle, has the greater leeway in making decisions on which cases falls within this principle. The I.C.J. seemed to have evaded exercising jurisdiction in that particular case concerning East Timor where it was caught between a rock and a hard case. The I.C.J. found itself in an undesirable situation of a complex formula. Firstly, there is an applicant State (Portugal) which the Security Council and General Assembly resolutions have called upon all States to refrain from rendering its Government any assistance that would enable it to repress the peoples of the Territories under its administration or would enable it to pursue the colonial war in the Territories under its domination. Secondly, there is a respondent State (Australia) which concluded the Timor Gap Treaty with Indonesia (which was not party to the case) and the Security Council[292] and General Assembly[293] had

[290] Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276/1970, Advisory Opinion, 1971 I.C.J. 50, ¶ 105.

[291] *See* Portugal v. Australia, (Weeramantry, J., dissenting) available at https://www.icj-cij.org/files/case-related/84/084-19950630-JUD-01-05-EN.pdf *see also* (Skubiszewski, J., dissenting) available at https://www.icj-cij.org/files/case-related/84/084-19950630-JUD-01-06-EN.pdf.

[292] *See e.g.* U.N. Sec. Council Res. 384, ¶2 (Dec. 2, 1975).

[293] *See e.g.* G.A. Res. 3485 (XXX), ¶5 (Dec. 12, 1975).

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requested the Indonesian armed forces to withdraw from East Timor. In either case, in the event of a potential judgment of ruling in favour of one of the parties (Portugal or Australia), the I.C.J. would have contributed in one way or another to one of the two repressive States i.e. Indonesia or Portugal and it would have not contributed to the realization of the right of self-determination of the people of East Timor. General Assembly resolution 2507(XXIV) of 1969

> [c]all[ed] upon all States, the specialized agencies and all the international organizations concerned to increase, in cooperation with the Organization of African Unity, their moral and material assistance to the peoples of the Territories under Portuguese domination who are struggling for their freedom and independence.[294]

In *Palestine v. the United States of America*, the I.C.J. is faced with a completely different formula. Firstly, there is an applicant State (Palestine) which is the injured State and is under military occupation and colonization where the General Assembly called upon all States, international organizations and specialized agencies to render assistance to its people to realize the right to self–determination. Secondly, a respondent State (the United States of America) where by its conduct of relocating its embassy from Tel Aviv to Jerusalem has not only violated existing customary international diplomatic law but also have rendered aid or assistance to Israel, the occupying power in pursuing of its policies of, inter alia, annexation and colonization, on the other.

In the *case of Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, the gold belonged to Albania which was not party to the case. In *case concerning East Timor (Portugal v. Australia),* East Timor was a non-self-governing territory torn between Portugal which had repressed the East Timorese people, and Indonesia, whose armed forces occupied it

[294] G.A. Res. 2507 (XXIV), *supra* note 101, ¶11.

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since December 1975. The people of East Timor territory were entitled to the right to self-determination and independence, as has been affirmed by the United Nations resolutions. However, the exact mode of self-determination was only decided with the 1999 referendum, with the majority of the East Timorese people willing for a transition to independence and for a refusal of a special autonomy within Indonesia. The Palestinian people have the right of self-determination although the mode of self-determination has been determined under customary international law in a form of an independent State. The international legal personality of the statehood of Palestine exists under international law, albeit it has no sovereignty and is under military occupation and colonization where parts of is territory has been annexed.

8. CONCLUSION

The prohibitive rule on establishing or maintaining diplomatic missions in Jerusalem established by the Security Council in its resolution 478 of 1980 was maintained by the General Assembly resolutions. This prohibitive rule established by Security Council resolution 478 has been intermingled with the emergence and existence of State practice with the element of opinio juris. The fact that certain States (currently the United States of America and Guatemala) and formerly Costa Rica, El Salvador and Paraguay violated this customary international diplomatic law does not by any means indicate an emergence of new rule. On the contrary, it is a violation of this existing customary international diplomatic law which incurred the responsibility of these States under international law and requires adequate reparation in the form of restitution and satisfaction.

The prohibitive rule on establishing or maintaining diplomatic missions in Jerusalem was seen a necessary measure under customary international diplomatic law so as not to recognize Israel's

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internationally wrongful acts towards Jerusalem, by among others, its occupation, annexation, acquisition of territory by force, and declaration of the Holy City "complete and united" as the capital of its State under the Basic Law of 1980. Jerusalem is a situation of sui generis territory as the city has been unilaterally declared as the capital of Israel and is a combination of an annexed occupied territory (East Jerusalem) and a territory that international law does not consider it as occupied (West Jerusalem). However, the prohibitive rule imposed on the sending States to not establish embassies in Jerusalem include all the unilaterally declared boundaries of the municipality of Jerusalem.

The prohibition on establishing or maintaining diplomatic or consular missions in Southern Rhodesia (Zimbabwe) was seen as one of the necessary measures to denounce any legitimacy of the minority regime's rule in Southern Rhodesia, to avoid recognizing its practices of racial discrimination and segregation and to support the Southern Rhodesian people right to self-determination. Similarly, the legal obligations to not maintain consulates in South West Africa (Namibia) and to abstain from sending diplomatic or special missions to South Africa, including in the occupied territory of Namibia were seen as necessary actions in order to refuse and not recognize South African practices of occupation and apartheid and support the people's right to self-determination. In Kuwait, following Iraq's occupation and annexation in 1990, the Security Council did not deem it necessary to call upon States to close diplomatic or consular missions or withdraw their diplomatic or consular agents, who were accredited to the Government of Kuwait (which went into exile). On the contrary, it was Iraq unilateral and illegal measures which have done so which purported to dissolve the legal personality of the State of Kuwait.

The relocation of the United States of America and the Republic of Guatemala of their embassies from Tel Aviv to Jerusalem is considered an act of aid and/or assistance, which will be used by the occupant (Israel) in its persisting colonial and annexation policies in the occupied territory of

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Palestine including East Jerusalem. The internationally wrongful acts of the United States of America and the Republic of Guatemala runs contrary to their legal interests and obligations to protect the erga omnes right of self-determination of the Palestinian people. In its resolutions, the General Assembly did not only call upon all States but also international organizations and specialized agencies to not render any aid or assistance to Israeli annexation and colonization policies, on the one hand and assist and support the Palestinian people right to self -determination, on the other.

It stands to reason that the merits of the pending case are not the United Nations resolutions but the Vienna Convention on Diplomatic Relations and the applicable provision of customary international diplomatic law underpinning the prohibition on the sending States represented in Israel to not establish embassies in Jerusalem. The analysis of the violations of the Vienna Convention on the Diplomatic Relations lies within its preambular paragraph five whereby the rules of customary international law govern any questions that the present convention does not explicitly regulate. In addition to the Vienna Convention on Diplomatic Relations and customary international diplomatic law (the prohibitive rule of customary international diplomatic law on the sending States which are diplomatically represented in Israel to not locate their embassies in Jerusalem), the I.C.J. will have to recourse to the customary international law on State responsibility and the customary international law of treaties to determine the responsibility of the United States of America.

The United States of America's arguments relating to jurisdiction of the I.C.J. and admissibility of the Palestine Application may be based on inter alia four possible claims. Firstly, Palestine is a not a State under international law and hence it is not qualified to accede to the Vienna Convention on Diplomatic Relations and its Optional Protocol and accordingly lacks a locus standi. Secondly, the United States of America is not in a treaty relationship with Palestine. Thirdly, the United States of

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America has submitted a (purported) withdrawal from the Optional Protocol of the Vienna Convention on Diplomatic Relations. Fourthly, the invocation of the applicability of the Monetary Gold principle. The aforementioned are not legally compelling arguments and neither hold water nor stand their ground under international law in relation to the pending case. The I.C.J. has jurisdiction to entertain the present pending case under the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes and that the Application filed by Palestine is admissible. The State of Palestine should advance at least three major arguments before the I.C.J. in order to exclude the applicability of the Monetary Gold principle.

The first argument that must be presented is that Israel would not be the very subject-matter of the decision of the I.C.J. as the issue in question concerns only the sending State's practice combined with the element of opinio juris without the need to look into the de facto receiving State conduct (Israel). The very subject -matter of the decision of the I.C.J. would be the United States of America in its capacity as the sending State and not Israel, the de facto receiving State. The second supplement or alternative argument that must be advanced on the inapplicability of the Monetary Gold principle in the present pending case rests on the premise that the issue in question is concerned with a matter relevant to the question of Palestine vis-à-vis the responsibility of the United Nations and/or vis-à-vis the responsibility of merely third States. The third alternative argument that must be advanced on the inapplicability of the Monetary Gold principle in the present pending case is that Israel's obligations under both jus ad bellum and jus in bello have been dispositively or authoritatively determined under international law. The content of the voluminous resolutions of the Security Council, the General Assembly, the United Nations Economic and Social Council, the specialized agencies such as U.N.E.S.C.O. as well as the I.C.J. advisory opinion of 2004 and customary international law, have determined Israel, to be the occupying power, and to hold obligations under that title. The

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occupying power conduct under jus ad bellum and jus in bello have been determined as unlawful. The aforesaid arguments attest, in whole or in part, to the grist for the mill of the inapplicability of the Monetary Gold principle.

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ANNEXES: MAPS

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Annex I

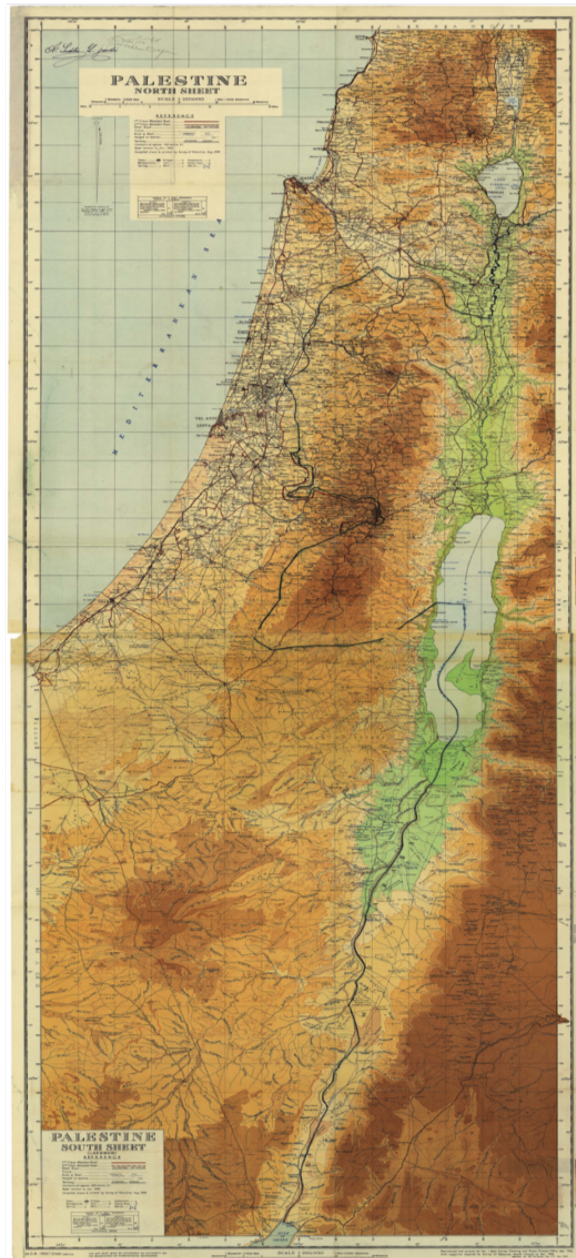

Figure 1: Map Delineating Armistice Demarcation Lines Palestine (North & South sheets), Jerusalem, Latrun. Document Sources: Hashemite Jordan Kingdom - Israel: General Armistice Agreement - Document sources: United Nations.

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Annex II

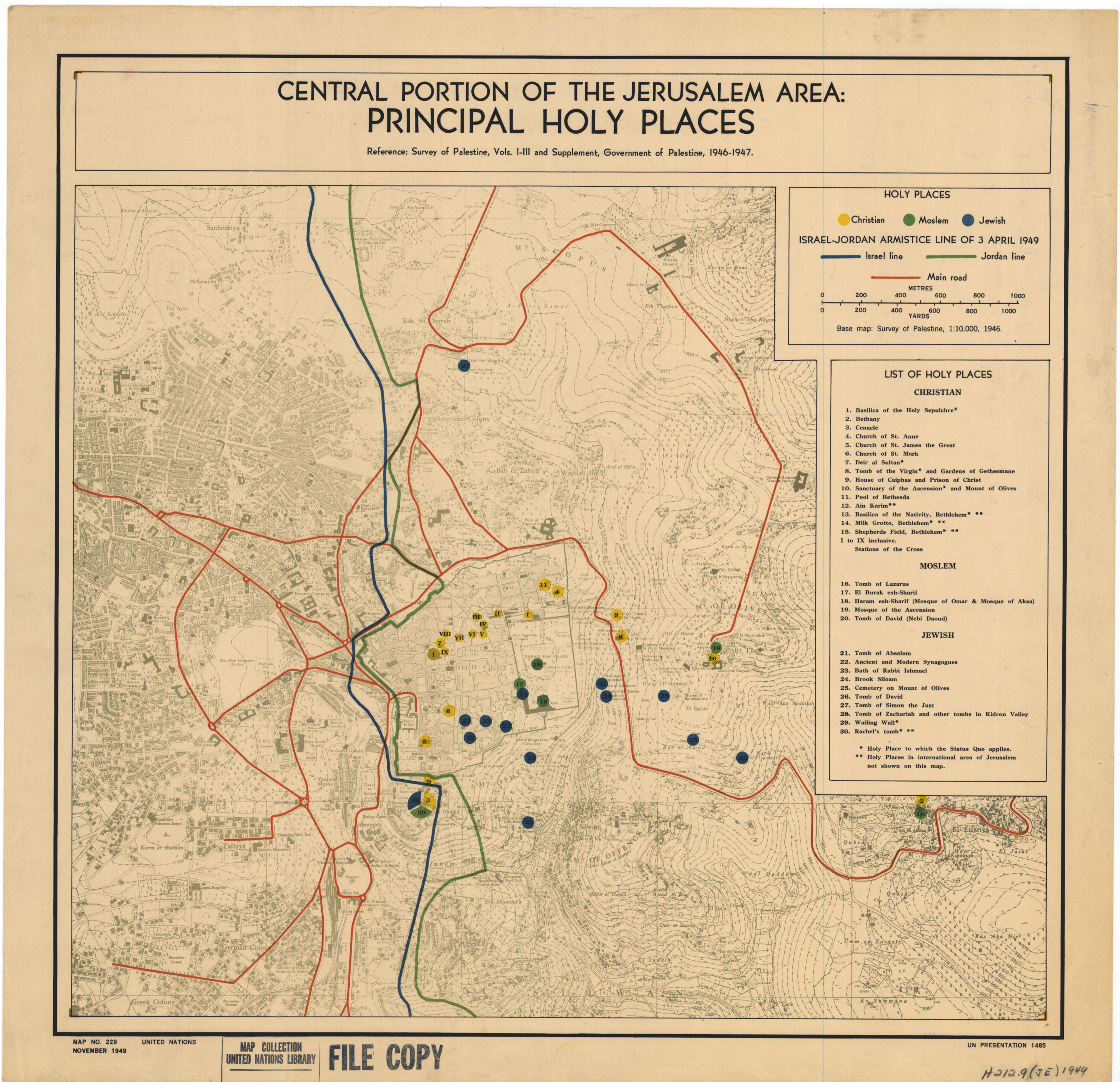

Figure 2: Jerusalem – Principal Holy Sites – Armistice line – Map No. 229 November 1949 - Document sources: United Nations.

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Annex III

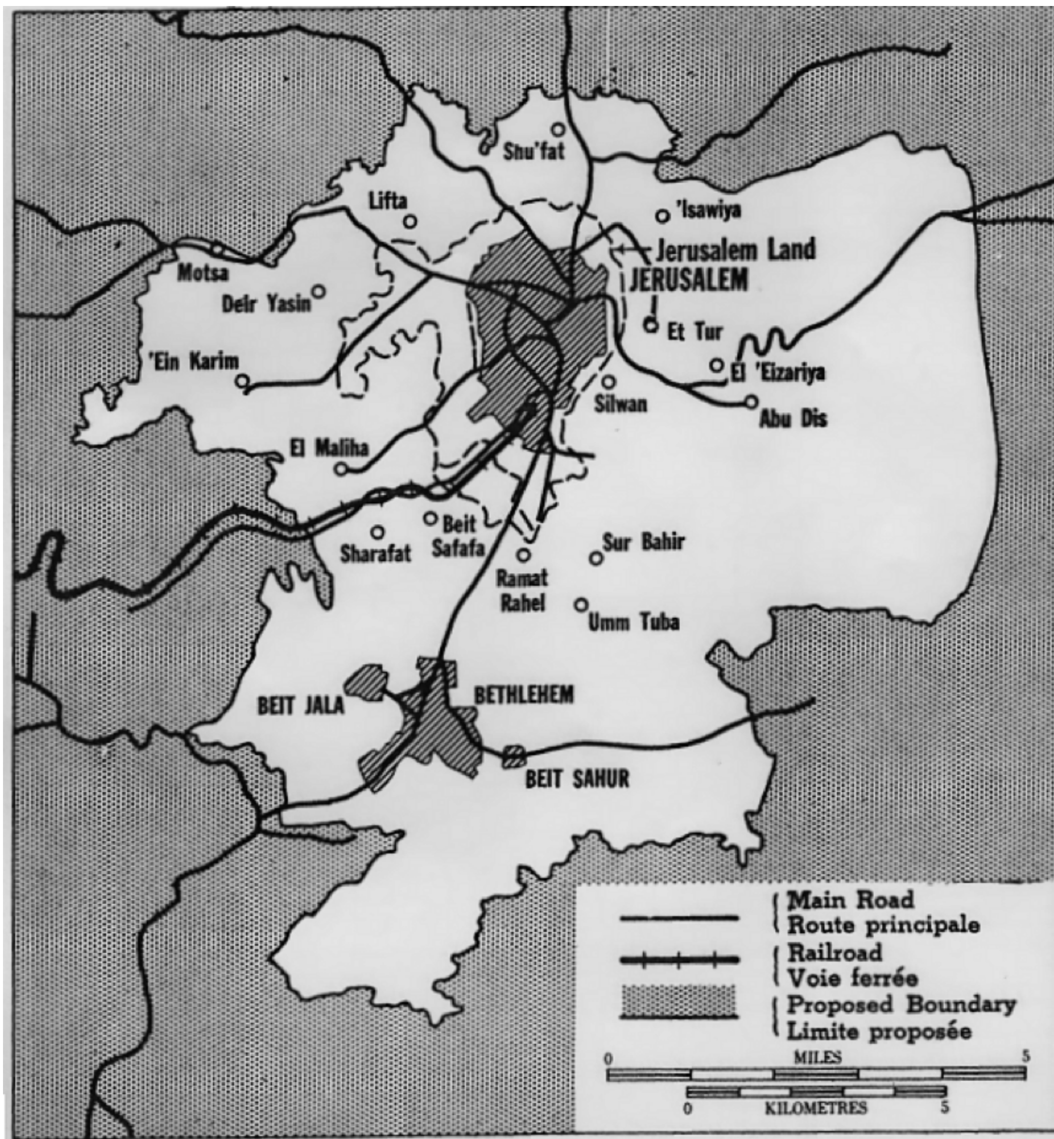

Figure 3: Map No. 104 (b), City Of Jerusalem Boundaries Proposed: [Annex B to resolution 181 (II) of the General Assembly, dated 29 November 1947] - Document sources: United Nations.

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Annex IV

Figure 4: East Jerusalem Access and Closure Oct. 2017 – Document sources: Office for the Coordination of Humanitarian Affairs map.

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Annex V

Figure 5: West Bank Access Restrictions Oct. 2017 – Document sources: Office for the Coordination of Humanitarian Affairs map.

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Annex VI

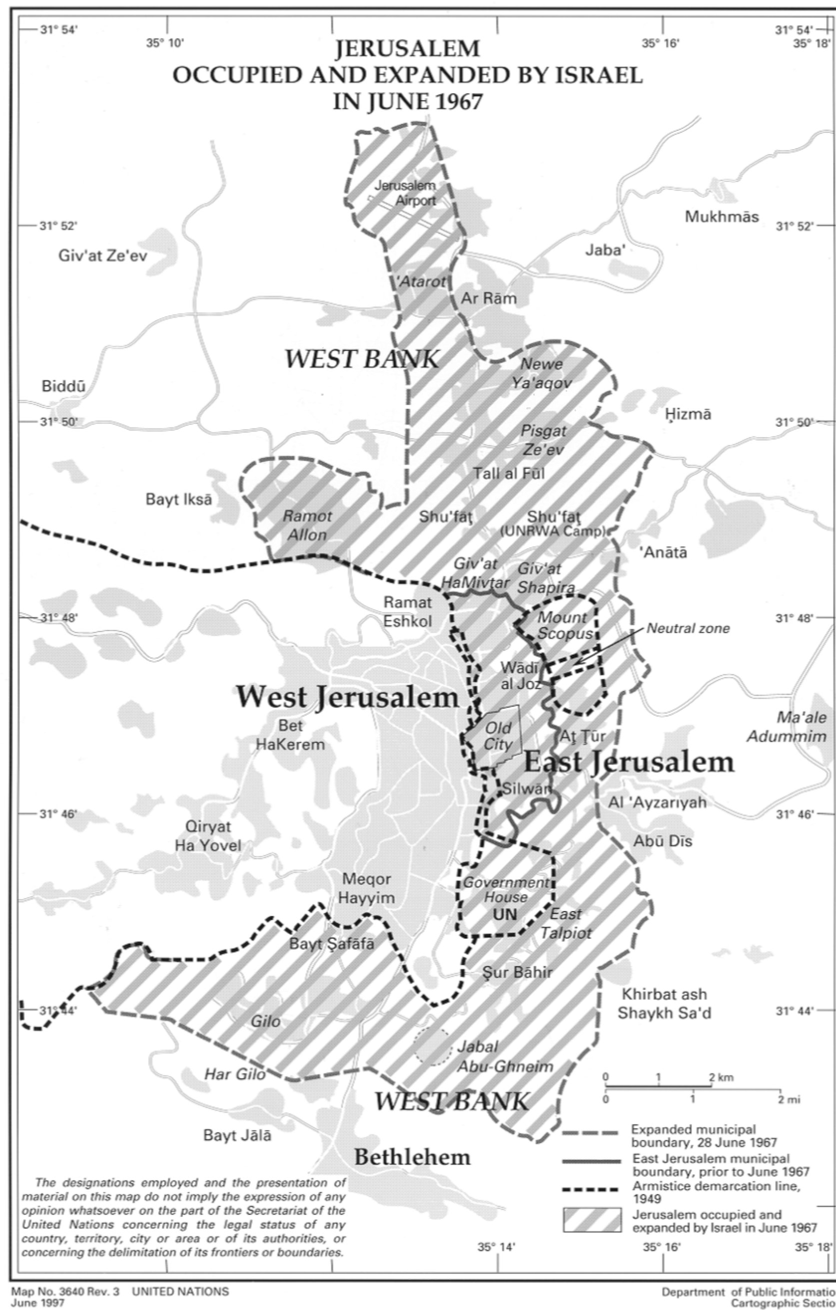

Figure 6: 'Jerusalem occupied and expanded by Israel in June 1967, Map No. 3640, Rev. 3, June 1997 - Document sources: United Nations, Department of Public Information Cartographic Section 1997.

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For an Effective Training of Magistrates

JOÃO BATISTA LAZZARI †

TABLE OF CONTENTS: 1. Introduction; 2. The importance of Judicial Training in the Constitutional Plan of Modern Democracies; 3. Fundamental Principles of Judicial Training; 4. Pedagogical Guidelines to Inspire Effective Training of Magistrates; 5. Final Considerations.

ABSTRACT: This article assumes that proper training of magistrates is essential for society to have a democratic, independent judiciary and to provide a fair process, as judges ultimately pronounce on life, freedoms, rights, duties and assets of citizens. From this perspective, the present study aims to identify the pedagogical principles and guidelines to be observed for effective training of magistrates. In order to obtain a satisfactory answer to the presented problem the inductive method was used, concluding that the training of magistrates must be of a practical and multidisciplinary form, aiming at transmitting professional values and techniques that complement the legal formation and must seek the development of capacities and competences capable of providing efficiency and legitimacy in the judicial proceedings. Judicial training, therefore, is paramount in order for magistrates to be able to perform their tasks properly and to understand the human and social realities with which the justice system interacts.

KEYWORDS: *Magistrates; Formation; Principles; Guidelines; Skills*

JEL CODES: *A1, K11, Y19*

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1. INTRODUCTION

In recent decades there has been an intensification in the access to justice in contemporary democracies unleashing a great challenge to the Judiciary, namely to provide society with an efficient and fair jurisdictional provision, with reasonable duration of proceedings.

In this scenario, it is up to magistrates to decide ultimately on the lives, freedoms, rights, duties and assets of citizens. It is therefore essential that the domestic legal systems of each country promote the independence and impartiality of judges so that they can conduct judicial proceedings in an appropriate manner, while respecting the fundamental rights and guarantees of the parties.

As the Italian scholars Guarnieri and Pederzoli rightly point out in the work "Il Sistema Giudiziario", in a constitutional state, defined by its concern to adequately protect the rights of its citizens, the role of the judge is to resolve disputes, especially between the state and the citizen, and its independence has guaranteeing impartiality as its main objective.[1]

To ensure that the performance of forensic activities occurs with efficiency, legitimacy, and independence, it is essential that training be provided for this purpose, which must occur from the investiture of the position and continue in a gradual and permanent manner throughout the judicial career.

Thus, in order to provide training in line with the human and social realities experienced in democratic and open societies, Judicial Schools should promote educational programs focused not only on the

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† Post-Doc in Law and Constitutional Justice by Alma Mater Studiorum - Università di Bologna (Italy), Doctor in Public Law from the University of Perugia (Italy), Doctor and Master in Legal Science from the University of Vale do Itajaí (Brazil), Federal Judge in Florianópolis (Brazil). Scientific production related to Postdoctoral research in Law and Constitutional Justice, focusing on the Judiciary and Judges Training, at Alma Mater Studiorum - Università di Bologna (Italy), under the guidance of Professor Dr. Luca Mezzetti.

[1] Carlo Guarnieri & Patrizia Pederzoli, Il sistema giudiziario: l'espansione del potere giudiziario nelle democrazie contemporanee [The judicial system: the expansion of the judiciary in contemporary democracies], 129–130 (2017).

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transmission of legal concepts but, above all, on the development of skills,[2] ethics and humanism.

Based on this perspective, it is fundamental to identify the pedagogical principles and guidelines to be observed for the effective training of magistrates (judges)[3], as well as the formative actions that can be performed by the Judicial Schools. Faced with this reality, the question is: what are the pedagogical principles and guidelines to be observed in order to obtain an effective training of magistrates?

To reach a satisfactory answer to this question, the research was structured into three topics. The first was to demonstrate the importance of judicial training in the constitutional plan of modern democracies in view of the fundamental role that judges play. The second, aimed at recognizing the fundamental principles of judicial training with a focus on those adopted in the Member States of the European Union (hereinafter E.U.). The third, reserved to identify pedagogical guidelines that could inspire effective formative actions of magistrates.

In this way, it has sought to obtain elements that can help Judicial Schools develop training programs that address the need to provide efficiency and legitimacy in the jurisdictional practice.

The investigation, data processing and the elaboration of the report of this research were carried out based on the inductive method, using the techniques of the referent, the registration of works and consultations in the worldwide computer network.

[2] *See* Enfam, Pedagogical guidelines, 10 (2017) ("It's the ability to act in Expected and unexpected situations quickly and efficiently, articulating tacit and scientific knowledge, social and work experiences, behaviors and values, desires and motivations developed over the life trajectories in increasingly complex contexts. Competence, therefore, is linked to the capacity to solve problems, mobilizing, in an inter- and transdisciplinary way, - specific, complex cognitive and behavioral - knowledge, capacities and skills, transferred to new situations, i.e. implies to act mobilizing knowledge and resources.").

[3] Judicial training is important and necessary for all legal practitioners, so that they can acquire the skills necessary for the performance of their duties. In many countries, especially members of the E.J.T.N., the term "magistrates" is adopted for judges and members of the prosecution service. However, for the purpose of this research, the reference to magistrates focuses on the judges.

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2. THE IMPORTANCE OF JUDICIAL TRAINING IN THE CONSTITUTIONAL PLAN OF MODERN DEMOCRACIES

The need for training of magistrates lies in the constitutional framework of modern democracies in view of the fundamental role that judges play, namely of resolving conflicts and enforcing the law, functions that must be carried out with complete independence and impartiality in order to ensure the effectiveness of judicial systems.

These guarantees are essential for a fair trial and, therefore, for a balanced protection of rights.

According to professor Luca Mezzetti the complexity of the jurisdictional function, means that it requires multiple guarantees, especially when privileging citizens' freedoms. This is why constitutional norms must provide for an organizational system inspired by the principles of the rule of law, especially the principles of legality, independence and impartiality of judges. [4]

Moreover, according to professor Boaventura de Sousa Santos, the courts require more efficiency, more speed, more quality and more social proximity. These challenges are gigantic for a routinized system in a bureaucratic and socially distant operation. Thus, the judicial system does not overcome the challenges that the new social context poses if it does not transform its model of recruitment and training of magistrates.[5]

As for the growing importance of judiciary training in Europe, Carlo Guarnieri argues that it is linked to the need to enrich the professional skills of the magistrate with new and different contents considered essential for

[4] Luca Mezzetti, Manuale Breve Diritto Costituzionale [Brief Constitutional Law Manual] 395 (2017). *See* Zagreblesky Gustavo Zagrebelsky, Valeria Marcenò, Francesco Pallante, Lineamenti di Diritto Costituzionale [Outlines of Constitutional Law] 400 (2014) (according to Zagrebelsky, "the subjection of judges only to the law results in their independence").

[5] Boaventura de Sousa Santos (Coord), *O Sistema Judicial E Os Desafios Da Complexidade Social: novos caminhos para o recrutamento e formação de magistrados [The Judicial System and the Challenges of Social Complexity: new paths for the recruitment and training of magistrates]* 453-454 (2011), http://www.smmp.pt/wp-content/relatorio_formacao_16jun_final.pdf.

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the proper functioning of the judicial system which faces the challenge of continuous growth of new cases addressed to it.[6]

It should be noted that the United Nations (hereinafter U.N.) provided for the adoption of the Bangalore Principles of Judicial Conduct, which is a project of the Judicial Code in global scope, based on other national, regional and international codes and statutes, among them the Universal Declaration of Human Rights of U.N..

This Code recognizes that in addition to the basic knowledge that every judge needs to acquire early in his career, a judge is committed, from nomination, to perpetually study and learn and that such training is indispensable, given the constant changes in law, technology and the possibility that in many countries a judge will take on new responsibilities when he takes up the new post. In this context, the Judiciary should play the leading role, or be responsible for organizing and supervising the training of judges, so that its members are kept informed of relevant developments in legislation, including international conventions and human rights standards.[7]

For Luca Mezzetti, the internationalization-universalization of human rights has matured as a consequence of the evident inability of nation-states to adequately protect fundamental human rights. The globalization of human rights implies a close synergy between international law and national laws to protect the same rights and, before

[6] Carlo Guarnieri Et Al., Anatomia Del Potere Giudiziario: Nuove Concezioni, Nuove Sfide [Anatomy Of The Judiciary: New Concepts, New Challenges] 67 (2016). In the same vein is the approach taken by the Superior Council Of The Judiciary of Italy, which defines training as a set of activities designed to ensure that magistrates are given the up-to-date knowledge and in-depth scientific and professional studies necessary to perform the judicial functions with the utmost competence and preparation. For this reason, the training has always been considered one of the main guarantees of autonomy and independence of the judicial function. *See also* Magistratura: Il Percorso Professionale, Consiglio Superiore Della Magistratura [Judiciary: The Professional Path, Superior Council of the Judiciary], https://www.csm.it/web/csm-internet/magistratura/ordinaria/percorso-professionale.

[7] *See* United Nations Office on Drugs and Crime (hereinafter U.N.O.D.C.), Comentários aos Princípios de Bangalore de Conduta Judicial *[Comments on the Bangalore Principles of Judicial Conduct. Translation by Marlon da Silva Malha, Ariane Emílio Kloth].* Brasília: Conselho da Justiça Federal [Brasìlia: the Council of Federal Justice], 129-141, N 118 (May, 2008).

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that, to create prerequisites (peace, well-being, equality, solidarity) that make the degree of effectiveness acceptable everywhere. [8]

Then, professor Carlos Gómez Ligüerre in drawing up a study based on the constitutions of several European countries and analyzing the functioning of their legal systems, concluded that: a) all legal cultures seem to be aware of the relationship between the preparation of judges and the correctness of decisions which resolve the conflicts that are presented to them; b) it is wise to allocate resources (and do so efficiently) to the preparation and training of those who will judge; c) the better the training and preparation of the magistrates, the greater the quality of their work.[9]

In that sense, the E.U. believes that the training of legal practitioners, both materially and procedurally, is important for the development of transnational cooperation. In view of this, the Treaty on the Functioning of the E.U. establishes officials and servants of justice in civil and criminal matters as fundamental support for the training of judges (Article 81, paragraph 2 and subparagraph "h"; Article 82, paragraph 1and subparagraph "c").

It should also be mentioned that training in law is part of the Charter of Fundamental Rights of the E.U. for initial and continuing training at the national level, in view of the need for the proper exercise of judicial or professional functions. In addition, the diversity of courts and positions held by magistrates has led to the creation of international study groups with a dual purpose, namely to facilitate judicial cooperation and to promote more successful measures in the organization of the judiciary. Among the various initiatives in force, the one that undoubtedly stands out is the European Commission for the Effectiveness of Justice.[10]

[8] Luca Mezzetti, Teoria costituzionale: Principi Costituzionali – Giustizia Costituzionale – Diritti Umani – Tradizioni Giuridiche e Fonti del Diritto [Constitutional theory] 372 (2015).
[9] Carlos Gómez Ligüerre, Juízes na Europa: Formação, selecção, promoção e avaliação [Judges in Europe: Training, selection, promotion and evaluation], 32 (2014).
[10] *Id.* at 25.

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In order to facilitate the European training of the national judges of the Member States, the European Judicial Training Network (hereinafter E.J.T.N.) was created, representing the interests of more than 120,000 European judges, prosecutors and judicial trainers from all over Europe.

In its work, E.J.T.N. seeks to identify training needs and develops training standards and curricula, coordinates exchanges and programs of judicial training, disseminates specialization in training and knowledge and promotes cooperation between judicial training institutions in the E.U..

This complexity of performance is related to: - the set of rules of law that countries have to apply; - social relations established that increasingly require the intervention of justice; - the multiple and often incompatible rights and expectations which must be recognized and guaranteed; - the growing public influence of individuals and social groups; - the need for social order and security; - the expectations of non-discrimination and reduction of inequalities - social equity and redistribution; and - the limits of available resources that may create tensions and make it more difficult and delicate to ensure, in practice, the necessary balance. Ligüere also emphasizes that the specialization of jurisdictions, proper to contemporary judicial systems, has a reflection on the training and selection of judges.[11]

Similarly, the 2010 Magna Carta of European Judges of the Council of Europe (hereinafter C.C.J.E.) emphasizes that initial and continuing training is a right and a duty of judges and that training in general is an important element in safeguarding the independence of judges and the quality and efficiency of the judicial system. For the Advisory Council, the magistrates that will integrate the legal systems belonging to the Common Law or Civil Law must undergo a necessary initial training.

Following this legislation, for example, the Superior Council of the Judiciary of Italy, in approving the guidelines related to the training of magistrates, adopted as presuppositions: (a) that the formative moment,

[11] *Id.* at 37.

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as a legitimating basis for the magistrate's function, is an objective of collective, shared and general interest, of paramount importance; (b) for each magistrate the formation is one of the conditions for the legitimacy of his work and his independence; (c) in conjunction with the system of professional assessments, disciplinary procedures and criteria for the organization of work, training helps to improve the level of professionalism and become an essential objective in consideration of the new political-institutional position of the judiciary.

In addition, in Report No. 4 (2003), the C.C.J.E. presents a series of recommendations, among them the need to take into account the peculiarities of designation methods for directing and adapting training programs in an appropriate way and indication of the need for compulsory initial training with programs adapted to the professional experience of the selected candidates.[12]

Given this context, there is a need to identify who should take the responsibility for training of magistrates.

Following what the Italian Judge Giacomo Oberto argues, the independence of the judiciary and freedom of education are the two pillars of the training of magistrates. If there is acceptance of these two principles, the answer to the question concerning the identification of the person responsible for training can only be as follows: a body that trains judges should not only be independent of other branches of government, but also must be equipped with a considerable degree of autonomy in the institution responsible for the self-government of the judiciary. But the real problem today is not so much the "labeling" of the formal institution in question (academy, school, institution, center, etc.) but the relationship between this body and the authorities responsible for "administering the judicial system."[13]

[12] *Id.* at 35-36.

[13] Giacomo Oberto, *La Formazione Professionale dei Magistrati Italiani nell'Ottica della Formazione del Giurista Europeo* [*The Professional Training of Italian Judges in the Perspective of the Training of European Jurist*], 8 Riv. Dir. Priv., 2003, at 173.

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As a result of the recognized need for judicial training, it has become essential for democratic nations to create Judicial Schools to account for this assignment. And, as a rule, the Judicial Schools were structured with organizational, didactic, functional and managerial autonomy to carry out their functions.[14]

Likewise, the E.J.T.N. has been distinguished by the creation of a European area of justice and by promoting knowledge of the E.U. legal systems, thus increasing the understanding, trust and cooperation between judges and members of the prosecution service within the Member States of the E.U.. Still, among the results already achieved, it is the extension of the scope of actions for training - adding new fields of law, as well as non-legal training.

In addition, according to professor Boaventura de Sousa Santos, "training should give equal importance to technical-juridical preparation, to the understanding of social phenomena and renewing of the legal culture."[15]

Judicial training faces challenges in the face of a globalized context and the growing need for an environment of cooperation and international dialogue among magistrates, especially for the application of criminal law, the fight against organized crime and corruption affecting modern democracies. Thus, the training of magistrates needs to add new insights into the social context of law and judicial processes and develop skills to interact with the public and the media in order to preserve the independence of judges and the quality and efficiency of the judicial system.

[14] "La scuola è una struttura didattica autonoma, con personalità giuridica di diritto pubblico, piena capacità di diritto privato e autonomia organizzativa, funzionale e gestionale, secondo disposizioni del proprio statuto e dei regolamenti interni e nel rispetto della legge." ["The school is an autonomous didactics structure and a legal person under the public law, with a full legal capacity under common law and organisational, functional and management autonomy, according to its statute and rules of procedures and in compliance with the law."] *See* GIULIANO SCARSELLI, ORDINAMENTO GIUDIZIARIO E FORENSE [JUDICIAL AND FORENSIC SYSTEM], 123 (2013).

[15] SANTOS, *supra* note 5, at 504.

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3. FUNDAMENTAL PRINCIPLES OF JUDICIAL TRAINING

The Brazilian jurist, Miguel Reale works the "principles" category from the logical point of view, in the perspective of statements admitted as conditions or bases of validity of the other assertions that make up the field of knowledge, founding truths of a knowledge system.[16]

Based on this concept, it is assumed that "principle" is a more generalized idea that inspires other ideas in order to deal specifically with each institute. The principle can be considered as the foundation of the legal norms of a country or a community of nations, that is, the foundation of the phased construction of the legal-positive order.

In line with this guideline, the U.N. has endorsed the Basic Principles formulated for Member States to ensure and promote the independence of the judiciary. One of the most important is number one (1), which establishes that the independence of the judiciary must be guaranteed by the State and incorporated into the Constitution and laws of the country and that it is the duty of all governments and other institutions to respect and observe the independence of the Judiciary.[17]

Another principle of the U.N., which is fundamental to the selection and training of magistrates, is number (10), which establishes that persons selected for judicial activity should be individuals of integrity and ability with appropriate training or legal qualifications. This stipulates that any method of judicial selection shall prevent nominations made for incorrect reasons and that in the selection of judges there shall be no discrimination against the person on the basis of race, color, sex, religion, political opinion or other opinion, national or social origin, possession, birth or status.

Further, according to the Bangalore Judicial Conduct Principles, judgments must be equitable, fair and public, conducted by an independent and impartial court. From this conception the connection between independence and the education of magistrates is clearly seen, as

[16] MIGUEL REALE, LIÇÕES PRELIMINARES DE DIREITO [Preliminary Law Lessons] 303 (2003).
[17] U.N.O.D.C., *supra* note 7, at 45.

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evidenced in Principle no. 6, named "value 6: competence and diligence.".

This principle points out that competence in the performance of judicial duties requires legal knowledge, skill, thoroughness and preparation. "The professional competence of the judge should be evident in the performance of his duties." Also, the "judge must take reasonable measures to maintain and increase his knowledge, skills and personal qualities necessary for the proper execution of judicial duties, taking advantage, for this purpose,of training and other resources that may be available under judicial control for judges."[18]

On October 6th, 2016, the E.J.T.N. held an important assembly bringing together the institutions responsible for training judges and prosecutors from 28 Member States of the E.U., in which nine fundamental principles on judicial training were adopted, which were also adopted by the European Network of Councils of Justice, bringing together the Superior Councils of the Judiciary of twenty-eight Member States of the E.U.. These principles recognize the importance and specificity of training for magistrates, who work in democratic societies and, at the same time, serve as a guarantee of competence and professionalism.[19]

For the development of this research, the principles of judicial training were chosen, as they properly reflect the foundations to be followed by the magistrates of democratic countries to carry out their functions with efficiency and legitimacy.

The use of these founding elements is also justified by the fact that "the nine principles of judicial training constitute both the common ground and the horizon which unites all the judicial schools of the E.U., in addition to the diversity of legal systems and training models of magistrates in Europe."[20]

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[18] U.N.O.D.C., *supra* note 7, at 129-141.
[19] *See* European Judicial Training Network (E.J.T.N.), *Judicial Training Principles*, (June 10, 2016).
[20] *Id.*

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On the basis of these considerations, each of the principles considered to be fundamental to judicial training is listed, which is intended to guide and inspire the training of individual magistrates in the E.U., as well as in judicial training institutions outside the E.U. that wish to adopt the standards.

The first establishes that judicial training should be a practical and multidisciplinary approach which seeks, essentially, to transmit values and professional techniques that complement the legal training.

In a similar way and in line with this principle, the National School of Judicial Training of Brazil adopts the principle of interdisciplinarity that "requires the trainer to plan and organize pedagogical practices to develop the competencies that constitute the objective of training, in order to integrate knowledge and diverse knowledge, methods and resources that allow greater integration and contextualization of knowledge and actions through the protagonism of the training subjects."[21]

The second determines that each magistrate must receive initial training before or at the time of his appointment, an essential condition for the exercise of the position.

The third provides that all magistrates have the right to receive regular training after their appointment and throughout their careers and are responsible for carrying out this training and that each Member State should put into operation a system to ensure that magistrates exercise this right and responsibility.

The fourth stipulates that the training is part of the normal professional life of a magistrate. Thus, all magistrates must have sufficient time to attend training within their normal working hours, except in exceptional circumstances when this would undermine the proper administration of justice.

The fifth indicates that in accordance with the principles of judicial independence, the design, the content and method of transmission of

[21] ENFAM, *supra* note 2, at 9.

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judicial training are determined exclusively by the appropriate national institutions.

The sixth designates that the training should be given, mainly, by magistrates with previous training for this purpose, valuing the formation of the trainers.

The seventh prescribes that in training, priority should be given to active and modern teaching techniques. Observance of active methodologies is essential to teaching them how to do.

The eighth sets out that the Member States must make available to the national institutions responsible for judicial training sufficient financial and other resources to enable them to meet their priorities and objectives.

The new and final set of principles calls on the highest judicial authorities to support judicial training.

In line with these principles is the E.J.T.N. Manual, which also draws the principles that judicial trainers should observe when they teach magistrates, such as:

> a) adults need to know why they should learn something;
>
> b) adults have to learn using their own experiences;
>
> c) adults approach learning as a resolution of problems;
>
> d) adults learn best when they see the immediate value of the theme;
>
> e) education of adults is an active process of reflection and discussion.[22]

Once the fundamental principles of judicial training have been defined, the analysis of the pedagogical guidelines that can be considered adequate to give effect to the desire for effective training of magistrates is carried out.

[22] E.J.T.N., HANDBOOK ON JUDICIAL TRAINING METHODOLOGY IN EUROPE 32 (2016).

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4. PEDAGOGICAL GUIDELINES TO INSPIRE EFFECTIVE TRAINING OF MAGISTRATES

This topic intends to address the pedagogical guidelines that Judicial Schools must observe in order to succeed in the difficult task of effectively conducting initial and continuing training of magistrates.

Pedagogical guidelines include guidelines aimed at assisting judicial schools in curriculum planning, in the way these institutions should work, in the didactics to be used, in the monitoring and evaluation of educational actions, as well as in the achievement of training goals of magistrates. It involves the training nature, the process of knowledge production, the principles and pedagogical processes, skills development and evaluation system.

For the definition of an effective process of learning, we rely on David A. Kolb's teachings, educational theorist focused on experiential learning. For him, "learning is the process by which knowledge is created through the transformation of experience" and occurs when a person progresses following a cycle of four phases, namely: "(1) to have concrete experience followed by (2) observation and reflection on this experience, which leads to (3) the formation of abstract concepts (analysis) and generalizations (conclusions) which are, then, (4) used to test hypotheses in future situations, resulting in new experiences."[23]

Yet, according to Kolb, learning is an integrated process, that is to say, "each phase mutually supports and feeds the next phase." He believes that it is even possible to enter the cycle in any one of the phases and follow it according to the logical sequence. However, the effective learning occurs only when a learner is capable of performing the four phases of the model. "Therefore, none of the phases of the cycle is effective in itself as a learning process."

In terms of judicial training, the guidelines contained in Report No. 4 (2004) of the Consultative Council of European Judges on Judicial

[23] David A. Kolb, Experiential Learning: Experience as the Source of Learning and Development (1984).

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Schools are paramount. In view of the diversity of the systems applicable to the initial training of judges, this document sets out key recommendations, including the following:

> i. that, prior to their taking office, all candidates selected for judicial functions acquire extensive legal knowledge in the field of material and procedural law, at national and international level;
> ii. that more specific training programs for the exercise of the profession of judge should be determined by the training center, the trainers and the judges themselves;
> iii. that such theoretical and practical programs should not be limited to purely legal techniques, but rather should also include ethical training, as well as openness to other areas relevant to judicial activities, such as management of issues and administration of courts, information technology, foreign languages, social sciences and alternative modes of conflict resolution;
> iv. that training is pluralistic in order to ensure and strengthen the open-mindedness of the judge;
> v. that, depending on the existence and duration of a previous professional experience, the training has a significant duration with the purpose of preventing its purely formal character.[24]

Regarding continuing education that seeks to meet the need for constant updating of magistrates, "should be seen as a right/duty closely linked to their ethical attitude, in which an obligation of permanent actualization is implicit, determined by an imperative of intellectual honesty."[25]

[24] LIGÜERRE, *supra* note 9, at 42.
[25] Mário Tavares Mendes, *A formação inicial e continua de magistrados: uma perspectiva do Centro de Estudos Judiciários de Portugal* [The initial and continuing training of magistrates: a perspective from the Center for Judicial Studies of Portugal], REVISTA DO CENTRO DE ESTUDOS JUDICIÁRIOS [R. CEJ], Jan.-Mar. 2004, at 23, 23-29.

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The C.C.J.E. Report provides important recommendations/guidelines to be observed by the Judicial Schools regarding continuing education, namely:

> i. that the continuous training should, in principle, be based on the judges' will;
> ii. that, exceptionally, ongoing training may be imposed in certain circumstances, for example (if the judiciary or other body responsible has decided) when a judge accepts a new position or a job type or different function or private functions or on fundamental changes to legislation;
> iii. that training programs are defined by the authority of a judicial body, or other responsible for initial and continuing training, as well as the trainers and judges;
> iv. that these programs, put into practice by the same body, revolve around legal issues and around other questions concerning the functions of judges and respond to their needs;
> v. that the jurisdictions encourage their members to follow courses of continuing training;
> vi. that programs are in charge of promoting an environment in which members of different sectors and levels of jurisdictions can meet and share their experience and materialize common ideas;
> vii. that, although training is for the judge a deontological duty, Member States should also make available to the judges the financial resources, time and other resources necessary for continuing training.[26]

In line with the recommendations outlined by the C.C.J.E., the E.J.T.N. Manual on Judicial Training in Europe is based on the assumption that the main idea is that adults learn best when they participate fully in training. That is, a conception of participatory training means that all people must be involved and active.

[26] LIGÜERRE, *supra* note 9, at 42-43.

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Based on the discussion above, it can be said that among the guidelines to inspire effective training of magistrates is the use of methodologies aimed at learning, not only legal and judicial knowledge, but also multidisciplinary knowledge, skills and competences that a good judge needs to properly perform his tasks and have an understanding of the human and social realities with which the justice system interacts.

For example, the School of National Training and Improvement of Magistrates (hereinafter E.N.F.A.M.) has made a political-educational option focused on humanism and ethics as an ideal for training Brazilian judges, understanding "that the man-judge must be fully developed with knowledge that aim at competencies that go beyond technical rationality and that lead to the critical and creative awakening of the human being in the praxis of work." [27]

Similarly, professor Livingston Armytage argues that judicial education programs should be focused on skills development and should be designed to meet the specific learning characteristics of judges.[28]

This understanding is also part of the Councils for the training bodies, published by the E.U., in the sense that "judicial training programs for professionals of justice should focus not only on the knowledge about law, but also include the development of competences and a wide range of non-legal skills, thus ensuring a greater openness to a modern society."[29]

Also, in accordance with these guidelines, the Superior Council of the Judiciary of Italy, in drawing the programmatic lines on the training and professional updating of magistrates, has chosen the most important questions to be explored in training activities, namely: a) the theme of ethics and professional ethics; b) ordinary themes and the organization

[27] ENFAM, *supra* note 2, at 8.

[28] LIVINGSTON ARMYTAGE, EDUCATING JUDGES: TOWARDS A NEW MODEL OF CONTINUING JUDICIAL LEARNING (1996). (*apud* ENFAM, *supra* note 2, at 9).

[29] European Commission, Directorate-General for Justice and Consumers, *Conselhos para os Organismos de Formação - Formação Judiciária Europeia*, at 5 (2016), *available at* https://e-justice.europa.eu/fileDownload.do?id=fe5753d6-8434-4689-bd06-f6d6a8808dab 5 (2016).

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culture in a theoretical-practical perspective; c) the use of new technologies on the performance of judicial functions; d) procedural issues, not as a place of exasperated technicalities, but as a moment of loyal dialectical confrontation between the opposing positions of the parties; e) interdisciplinary themes, the so-called unification of knowledge to develop the capacity to reflect on yourself and on the main challenges; f) immigration, foreign minors and others that derive from them or that connect to them (prostitution, slavery, organ trafficking, trafficking human beings, small crimes, etc.), and also international terrorism. [30]

In short, training in interpersonal skills should occupy a relevant place in Judicial Schools programs in all educational initiatives. Based on this premise, formative actions should be planned and executed following methodologies that provide the development of capacities and skills that go beyond the acquisition of new legal knowledge. Therefore, a modern judge must be connected with the reality that surrounds him and attentive to the innovations coming from a globalized and interconnected way and to be able to understand the social phenomena for a correct and complete legal evaluation of the concrete case.

Another fundamental guideline to generate an effective training and provide the necessary institutional confidence is the understanding and appreciation of the role and competences of the trainer in the use of modern methodologies for the development of training actions.

In view of this, participatory methodologies should be used. The main features of these methodologies are that trainee-centered training should be based on experience and often open to fit the group's needs for which it was designed.

E.J.T.N. recognizes that Judicial Training Methods (J.T.M.) represent a "thread" with all the actions that are implemented, since its purpose is

[30] *See* Consiglio Superiore della Magistratura [Superior Council of Judiciary], Linee programmatiche sulla formazione e l'aggiornamento professionale dei magistrati per l'anno 2018 (Jul. 27, 2017) [Outlines on training and continuing education of judges of 2018] (It.) [Resolution of 27th July 2017].

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to propose the most efficient and concrete training methodologies, as well as strengthen the spread of best practices, essential requirements for any action of judicial training.

For this, the J.T.Ms. were organized according to three topics and three main fields of action: assessment/appreciation, ability and leadership. They aim to meet the following needs: a) sharing good judicial training practices among E.U. judicial practitioners, while defining new approaches towards knowledge and training; b) combining judicial training with quality of justice.[31]

It is up to trainers to identify the needs of training magistrates in order to sustainably improve their skills, competences and professional knowledge.

E.J.T.N. Manual states that "instead of confronting, or even overloading, merely passive and reactive participants with a substantial amount of theoretical content, the trainer should promote the professional development of (future) judges and (future) prosecutors in a practical way, demonstrating the importance of the topics addressed."[32]

This guideline adopts the concept of "lifelong learning" by requiring judges to constantly question their knowledge, skills and professional behavior. This is because we live in a constantly evolving and transforming scenario, and the role of the trainers is to make the participants see the need to "unlearn and learn" again.

Further, from E.J.T.N. Manual it is possible to extract a chronology guided by the "life cycle of training", as specified:

a) planning of a curriculum based on needs assessment;

b) modern conception of actions and individual sessions of training;

c) organizational management of the training action;

[31] *See E.J.T.N.*, EUROPEAN E-JUSTICE, https://e-justice.europa.eu/content_european_training_networks_and_structures-122 (last visited Feb. 03, 2018).

[32] The evaluation questionnaires and a guide for the evaluation of training to promote the exchange of best practices among national training institutions are also highlighted as an important tool in the Manual of Methodology for Judicial Training in Europe of the E.J.T.N., *supra* note 22, at 9.

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d) accurate assessment, which should also give ideas for future training actions.

Since the planning process in a modern training institution must follow three principles:

1) Any training program must be oriented toward the needs;

2) Any training program must use a variety of training formats. And, the approach must be "by measure", i.e., that the content and method are chosen according to the group profile of trainees;

3) Planning must be oriented towards the needs and be integrated into a general conceptual framework.

In this sense, it can be said that the modern conception of judicial training can be carried out through methods involving lectures, group work, seminars, trial simulations, jurisprudence analysis, interviews, e-learning, courses, orientation, among others.

E.J.T.N. Manual highlights: a) the methodology to be applied shall use appropriate trainers; b) the methodology must respect and correspond to the chosen training format (conference, symposium, seminar, workshop, webinar, etc.); (c) training content should be practical (issues related to law, ethics, judges and prosecutors in society, methodological and behavioral skills and competences, etc.), (d) the expectations and capacities of the target group concerned should be taken into account.

It is thus evidenced that the Judicial Schools must invest in the development of electronic tools with the purpose of expanding the scope of training opportunities, making the universalization of the courses offered and the reduction of operational costs possible.

The extension of distance learning courses is an imposition so that the Judicial Schools can improve the administrative efficiency of the management of judicial programs, especially in the continuous training of magistrates. Distance learning courses format can also be adopted for the development of learning in mixed mode, that is, part with face-to-face meetings and part by online platforms.

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For the improvement and evolution of these new training models with a view to an adequate use of potential of the training judges, it becomes pertinent that the Judicial Schools observe the recommendations contained in the C.C.J.E. Report No. 4 (2004), namely:

> i. that training programs and methods are regularly monitored by the bodies responsible for judicial training;
> ii. that the use of the potential of judges in relation to training is not, in principle, subject to a qualitative assessment, although it may be taken into account in the professional assessment;
> iii. the results of participants in training programs are, however, assessed in systems in which the initial training is an integral part of the nomination process.[33]

In turn, the assessment model should be centered on the participant. The Kirkpatrick evaluation model is based on four levels:[34] a) reaction; b) learning; c) behavior; d) results. From the analysis of each of these four levels, one can understand how effective training was, that is, whether the objectives and defined goals were achieved and how they could be improved in the future.

It can be said in summary that the evaluation of a training action should cover three essential aspects, namely: a) the satisfaction of the participants; b) the increase of the capacities and competences of the participants; and c) the impact on the participants' jurisdictional practice.

Based on the pedagogical guidelines presented in this topic, it is believed that the effective implementation of programs aimed at the training of magistrates within the scope of the Judicial Schools is fully possible and that such educational actions are capable of providing the knowledge, skills and competencies that the judges need to fulfill the tasks assigned to them.

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[33] LIGÜERRE, *supra* note 9, at 43.
[34] The model was first published in a series of articles in 1959 in the *Journal of American Society of Training Directors*. In 1994, a full publication of Kirkpatrick's decades-long studies was published for the first time under the title Evaluating training programs: *see* DONALD L KIRKPATRICK, EVALUATING TRAINING PROGRAMS: THE FOUR LEVELS (1994).

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5. FINAL CONSIDERATIONS

This study has identified that the training of magistrates is characterized as an indispensable element to ensure the independence and autonomy of the judicial function and should include, in addition to the legal and technical preparation, the understanding of social phenomena and the renewal of the legal culture.

Based on the deliberations of international bodies, including the Council of Europe, it was concluded that training should be conceived not only as a faculty of the magistrate, but as an expression of a deontological duty to update and grow professionally. Therefore, it is the responsibility of the Judiciary, through the Judicial Schools, to create the necessary conditions to guarantee to all the magistrates an adequate and independent formation.

Therefore, by identifying the fundamental principles of judicial training, it was perceived that they should be used as a foundation and source of inspiration to guide the activities of the Judicial Schools.

Among the principles enumerated, it is important to point out that judicial training should be a practical and multidisciplinary training, which essentially aims to transmit professional values and techniques that complement legal training. That is, the training courses should target a deontologically conscious judge, who identifies himself in his institutional role and therefore is more independent and impartial.

Regarding the pedagogical guidelines for effective training of magistrates, one may conclude that there are several methods, all of which must prevail for the development of formative actions oriented to the practice, that is, by the transmission of theoretical knowledge combined with active methods that allow an understanding of the material effects of the contents studied, enabling the development of abilities and skills that a modern judge needs to adequately perform his tasks.

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Therefore, as a response to the research problem, which is based on the references mentioned in this study, it can be said that effective training of magistrates requires the observance of principles and guidelines aimed at learning, not only legal and judicial knowledge, but also of multidisciplinary knowledge, through the development of professional skills and competences as well as values for the performance of the activity in a critical perspective of application of law and social assessment of concrete cases.

To undertake a virtuous journey into the contemporary era, in order to "understand the updated awareness of the judge's role", it will be necessary to follow the path of organization and formation, combined with the management of processes, in the spirit of speed, but with respect to the fundamental rights of peoples, thus improving the judicial system without ever colliding with the noble values of democracy. [35]

Finally, in order to stimulate the continuity of new research on this subject, we refer to to the Portuguese jurist Boaventura de Sousa Santos, who warns:

> [T]he formation must also pay special attention to the future, to which it does not reach the courts, to new rights . . . . to which in society is not likely to have the legal guarantees that the judicial system allows in democratic societies and to new dynamics of change in the management and governance of the justice system.[36]

[35] *See* Mirella Delia, *La modernità del giudice e la B.D.D.C.: viaggio virtuoso fra le vie dell'organizzazione e della formazione.* [The modernity of judges and the Conciliative Database: an excursus among organisation and training] 1-2 LA MAGISTRATURA 192, 192-202 (2017) (It.), http://www.associazionemagistrati.it/rivista/numeri/nm_5.pdf.

[36] SANTOS, *supra* note 5, at 505.

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