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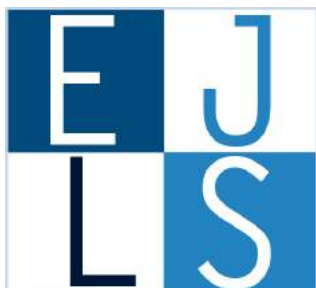
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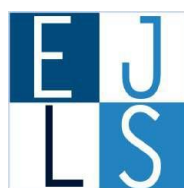
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EDITORIAL

Tiago Andreotti*

CHANGES IN THE EJLS

I start this editorial with good news – after a few years of discussion and planning the EJLS has a new website. This is a project that has been in the making for some time and I am glad that it has now been successfully completed.

As it is becoming practice in the EJLS, in the beginning of every academic year we have a call for new members to our board. I would like to welcome Alastair MacIver, Dienneke de Vos, Mikhel Timmerman and Stavros Pantazopoulos. This addition comes in good time as we had a few members who have already left and some who will be leaving soon, including myself, our Executive Editor Rebecca Schmidt and our Managing Editor Alexis Galan. Emma Linklater and Lucila Almeida will respectively assume the Executive Editor and Managing Editor positions.

Since this is my last editorial as the Editor-in-Chief, I would like to thank all members of the Board for their hard work towards a better EJLS; it has been a pleasure to work with you. Jan Zglinski will be the next one in charge of guiding the Journal's activities as the new Editor-in-Chief.

IN THIS ISSUE

This issue opens with an article by Federico Fabbrini discussing how comparative law can inform the discussion about the constitutionalization of international law. He argues that past experiences of federal governance, legal practice and political thought can provide a framework to understand the developments that are occurring today on a global scale. In the second article, Ulf Linderfalk explains the functionality based theory of meaning and argues that its use in international legal discourse can advance many areas of investigation. Still within the boundaries of international law, Fabienne Quilleré-Majzoub shows that is necessary to distinguish between water streams that are exclusively within a national sovereignty and those that cross more than one sovereign and shows the inadequacy of applying the 'natural resource' concept to international water streams.

Moving to the area of European Law, Donatas Murauskas discusses the arguments for temporality in the context of the Court of Justice of the EU

* European University Institute (Italy). Any errors or omissions are entirely my own.

in the procedure of a preliminary ruling from the perspective of a consequences-based argumentation. In the following article Alberto Vega analyses the legal status of Eurostat documents such as press releases, manuals, recommendations or decisions in particular cases. Jack Wright Nelson follows with an article that aims to clarify the conceptual origins of the Law of Unjustified Enrichment in the *Draft Common Frame of Reference* (Book VII). In the last article in the European Law Section, Corri Longridge makes the case for a comprehensive approach to criminal justice in the EU.

The last three articles are by Svetoslav Salkin, J Alberto del Real Alcalá and Václav Janecek. In his article, Svetoslav Salkin presents a model that can be used as a framework to analyze litigants' outlay decisions in the process of a legal battle. Entering the debate between inconclusive law or the completeness of the law, J Alberto del Real Alcalá argues that Hans Kelsen and Ronald Dworkin converged in denying legal indeterminacy, even though starting from complete opposite positions. Finally, in the last article, Václav Janecek examines the concept of exemplary damages from a comparative approach, analyzing English and Czech law, reinterpreting the concept in a more coherent and acceptable manner that would make them immune to '*ordre public*' objections in private international law.

THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW: A COMPARATIVE FEDERAL PERSPECTIVE

Federico Fabbrini *

During the last two decades, extraordinary legal developments have taken place at the regional and global level, as the world of international law has become inhabited by a growing number of organizations designed to govern phenomena cutting across state borders and affecting the life and wealth of individuals world-wide. This evolving reality has challenged traditional understandings of international law and increasingly scholars have resorted to the language of constitutionalism to describe the variety of regimes that by now exist beyond the states. The purpose of this essay is to discuss how comparative law can inform the discussion about the alleged constitutionalization of international law and provide insights to understand several features of the structure, functioning and finality of global governance institutions. In particular, the essay argues that a comparative analysis, grounded on historical studies, of experiences of federal governance offers a valuable perspective to analyse the phenomena of transnational governance and suggests that steps should be made to re-evaluate a long thread of legal practice and political thought that, from Althusius to the Federalist Papers, has offered original models and ideas to conceptualize constitutional regimes which were neither national nor international, but rather a mixture of both. Comparative federalism can today supply a rewarding framework to explain the developments occurring on a global scale. Indicating the path for future scholarly research in the field, the essay begins exploring the mysteries of global governance through the prism of federalism, identifies three recurrent features of transnational constitutional regimes - pluralism, subsidiarity and liberty - and underlines how these find correspondence in the experiments of federal governance of the past.

* Assistant Professor of European & Comparative Constitutional Law, Tilburg Law School (NL). Earlier versions of this paper were presented at the Junior scholars workshop of the American Society of International Law – American Society of Comparative Law held at Columbia Law School (New York, 29 March 2013), at the workshop of the European Constitutional Law Working Group at the European University Institute (Florence, 17 October 2013) and at the workshop ‘(How) Does Globalization Affect Constitutional Law’ at the 50th Anniversary Celebration of Tilburg Law School (Tilburg, 22 November 2013). I am grateful to Julian Arato, Stephen Coutts, Claudia Haupt, Vicki Jackson, Anna Kocharov, Joris Larik, Anne Meuwese, Vijay Padmanabhan, William Partlet, Dennis Patterson, Sudha Setty, Bart Szewczyk, Bosko Tripkovic, Marijn van der Sluis, and Mila Versteeg, and the anonymous reviewer of EJLS, for their helpful comments and warm encouragements. All errors, of course, remain my own. Further comments are welcome at F.Fabbrini@tilburguniversity.edu

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I. INTRODUCTION

The last two decades have witnessed the rise of new forms of transnational cooperation among sovereign states, both at the regional level and on a global scale. The end of the Cold War and the unprecedented transformations which are generally described under the notion of globalization have created enormous pressures for governments to establish new, or expand existing, systems of governance *beyond the states*. A number of organizations with either a regional or a thematic focus (eg, security, trade, human rights or the environment) have blossomed worldwide: the European Union (EU), the United Nations (UN), the World Trade Organizations (WTO), the Association of Southeast Asian Nations (ASEAN), the European Convention on Human Rights (ECHR) are some among more than hundreds of transnational regimes that today occupy an increasingly populated global legal space. These organizations are certainly not states. Yet, they have complex institutional systems, they exercise a broad array of governmental powers and they directly affect the life and wealth of millions of individuals. As such, this evolving reality has challenged traditional understandings of international law and increasingly scholars have resorted to the language of constitutionalism to describe the variety of regimes that by now exist at the transnational scale.

The purpose of this essay is to discuss how a comparative, historical perspective can inform the discussion about the alleged constitutionalization of international law and provide original insights to understand several features of the structure, functioning and finality of governance regimes at the regional and global level. In particular, the essay argues that a comparative analysis, grounded on historical studies, of experiences of federal governance can enrich our understanding of the dynamics currently taking place in the transnational setting and qualify the

claim that the constitutionalization of international law constitutes an entirely new and unprecedented development. To this end, the essay points to the advantage of re-evaluating a long thread of legal practice and political thought that, from Althusius to the *Federalist Papers*, has offered original models and ideas to conceptualize constitutional regimes which were neither national nor international, but rather a mixture of both, and maintains that comparative federalism can today perhaps supply a rewarding prism through which to look at the developments occurring on a transnational scale.

This essay overviews the rise of constitutional regimes beyond the states and introduces a discussion on the potentials of federalism to make sense of this new legal reality, with the aim to sketch the outline of a more comprehensive research agenda. By analyzing the emergence of forms of constitutional ordering at the transnational level through the prism of the practice and theory of federalism, the essay seeks to flag some recurrent features of the structure, functioning and finality of regional and global governance institutions. The essay argues that pluralism, subsidiarity and the purpose to enhance liberty are characteristics of most contemporary constitutional regimes beyond the states and emphasizes how these correspond, at the same time, to constitutive features of federal arrangements of the past. The essay is structured as follows. Section 2 summarizes the rise of governance regimes beyond the states. Section 3 overviews the scholarly literature on the constitutionalization of international law. Section 4 re-conceptualizes the transformations occurring on the regional and global arena in light of federalism and Section 5 discusses how this approach can help to identify several recurrent features of transnational constitutional regimes, hence outlining possible new avenues for research. By combining the analysis of new forms of international law with the insights of comparative law, the essay seeks to contribute to improve our understanding of systems of global governance in which sovereignty is ever more fragmented and evanescent.

II. THE RISE OF CONSTITUTIONAL REGIMES AT THE GLOBAL LEVEL

During the last two decades, extraordinary legal developments have taken place on the global scale. Since the end of the Cold War, the world of international law has become inhabited by a growing number of organizations designed to govern and manage phenomena that cut across state borders and affect the life and wealth of individuals world-wide.¹

¹ See eg Joel Trachtman, *The Future of International Law: Global Government* (CUP 2013) 1 (defining ‘international government [a]s nothing more than an intensification of international law.’) and Charlotte Ku, *International Law*,

These organizations range in geographical scope, from regional bodies to institutions grouping the (quasi) totality of states world-wide. They have varying thematic focuses, from functional regimes, focused specifically on eg the protection of human rights, the enhancement of trade, or the conservation of the environment, to entities which enjoy broad governmental powers and pursue multiple objectives. They have more or less sophisticated decision-making structures, from simple regulatory bodies to complex machineries for law-making and adjudication. And they differently combine public and private elements, reflecting the interests of a plurality of stakeholders.

Despite their differences, however, all these global governance institutions present several common characteristics. First, they are subject to a high degree of legalization, exercising a broad array of powers through law.² Second, they take legal decisions that directly affect not only states, but also individuals or private entities.³ Third, they entertain with states a complex relation, which defies conventional understandings of international law based on state consent.⁴ States certainly play a crucial role in the establishment of these organizations, mainly resorting to traditional instruments of international law such as treaties. Nevertheless, once they are created, these institutions start living a life of their own, which operates to various degrees outside state control.⁵ ‘International law has expanded its scope, loosened its link to state consent and strengthened compulsory adjudication and enforcement mechanisms.’⁶ As a growing literature has underlined, globalization has profoundly changed the nature of public authority, by reducing the centrality of the state and creating sites of authority beyond it, below it, as well as besides it (in the realm of

International Relations and Global Governance (Routledge 2012).

² See Kenneth Abbot et al, ‘The Concept of Legalization’ (2000) 54 Intl Organization 401 (defining as highly legalized institutions those in which rules are obligatory on parties, are precise and in which authority to interpret and apply these rules has been delegated to third parties acting under the constraint of rules).

³ See Anne-Marie Slaughter and William Burke-White, ‘An International Constitutional Moment’ (2002) 43 Harvard Intl L J 1, 13 (speaking about the ‘individualization of international law’).

⁴ See Louis Henkin, ‘Human Rights and State “Sovereignty”’ (1996) 25 Georgia J Intl & Comparative L 31, 33 (emphasizing how international law, especially in the areas of human rights, now includes important norms to which some states have not consented).

⁵ Gordon Silverstein, ‘Globalization and the Rule of Law: “A Machine that Runs of Itself?”’ (2003) 1 I-Con 427.

⁶ Mattias Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 EJIL 907.

private regulation and enforcement).⁷

A prime example of these phenomena is the EU. In the context of regional integration in Europe, in fact, the EU experienced a progressive development from a (mainly) Economic Community (EEC) into a Union now endowed even with a shared citizenship, a single currency and a Charter of Rights. The EU member states have directly enlarged the constitutional mandate of the EU through subsequent amendments to the founding treaties. At the same time, a key contribution to the development of the EU has been provided by the internal actions of the EU institutions themselves. While the role of the EU Court of Justice (ECJ) in fashioning a constitutional framework for a federal-type structure in Europe has been famously emphasized,⁸ also the EU political branches – the Commission, the Parliament and even the Council, in which the states are represented – have been crucial in expanding the powers of the EU into new policy areas and strengthening the position of natural and legal persons as direct recipients of EU goods and values.

Nevertheless, the developments that have taken place in the EU are in no way *sui generis*. At the global scale, the UN has emerged as the most important institutions in the management of security challenges world-wide, heavily increasing its involvement in activities of peace-making and peace-keeping. In the context of the fight against terrorism, in particular, the UN Security Council (UNSC) has acquired sweeping powers to prevent threats to international security, by directly targeting individuals and entities suspected of financing terrorism and requiring the states world-wide to freeze their funds.⁹ While the confusion of executive, legislative and judicial powers in the hand of the UNSC has been recently at the center of major criticism¹⁰ – as well as of forms of judicial resistance by some domestic courts¹¹ – the recent expansion of the sphere of action of the UNSC attests to the evolution that has taken place under the framework of the UN Charter.

⁷ See Peer Zumbansen, 'Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power' (2012) 76 *Law and Contemporary Problems* 117; Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP 2012).

⁸ Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *AJIL* 1.

⁹ Erika De Wet, *The Chapter VII Powers of the UN Security Council* (Hart 2004).

¹⁰ See eg Enzo Canizzaro, 'The Machiavellian Moment? The UN Security Council and the Rule of Law' (2006) 3 *Intl Organizations L Rev* 89.

¹¹ See Joined Cases C-402/05 P and C-415/05 P *Kadi & Al Barakaat International Foundation v. EU Council and Commission* [2008] ECR I-6351 (striking down a EU regulation implementing UN sanctions on due process grounds).

In addition, similar developments have been witnessed in sector-specific areas such as human rights. In this field, a plurality of transnational institutions specifically charged to adjudicate human rights' claims have blossomed around the world, significantly strengthening the mechanisms of external supervisions over the human right practice of states. Hence, in the European continent, the ECHR has been recently amended to give the European Court of Human Rights (ECtHR) mandatory jurisdiction to hear, after the exhaustion of domestic remedies of recourse, individual applications against any authority of the 47 contracting parties to the ECHR which has allegedly violated a right protected under the ECHR.¹² The ECtHR moreover can condemn a state, compel it to pay damages and require it to redress systematic violations of the ECHR by amending its internal legislation when this is held incompatible with the ECHR. Albeit with different powers, similar regimes of human rights protection currently exist also in America and Africa,¹³ and have been under discussion in Asia as well as on a world scale.¹⁴

Functional organizations have also flourished in the field of economic governance, both at the transnational and regional level.¹⁵ While the WTO – which overhauled the Global Agreement on Trade and Tariffs (GATT) – operates as the main platform to manage and enforce free trade across a large chunk of the world population, specific institutions aimed at integrating regional markets have been established in North America (Nafta) South America (Mercosur and the Andean Community), West Africa (Ecowas), the Asia-Pacific (Apec) and the Caribbean (Caricom). But this list is by no means complete.¹⁶ An intricate web of transnational organizations – usually known by their acronyms – today regulates policies as varied as collective-defense (Nato), finance (IMF, World Bank and the Basel Committee), health (WHO), food (Codex Alimentarius Commission), labor (ILO), sport (WADA) or the protection of cultural heritage (Unesco) – not to mention, of course, the creation of an

¹² See eg Hellen Keller and Alec Stone Sweet (eds), *A Europe of Rights* (OUP 2008).

¹³ See eg Olivier De Schutter, *International Human Rights Law* (CUP 2010).

¹⁴ See eg Tae-Ung Baik, *Emerging Regional Human Rights Systems in Asia* (CUP 2012) and Martin Scheinin, 'Towards a World Court of Human Rights', research report within the framework of the Swiss initiative to commemorate the 60th anniversary of the UDHR (2009).

¹⁵ Ernst-Ulrich Petersmann, 'International Economic Law, "Public Reason" and Multilevel Governance of Interdependent Public Goods' (2011) 14 J Intl Economic L 23.

¹⁶ For a comprehensive taxonomy of institutions operating at the global level, including entities which are more administrative/regulatory than constitutional, see Sabino Cassese, *The Global Polity* (Global Law Press 2012).

International Criminal Court (ICC) empowered to prosecute war crimes, genocide and crimes against humanity (almost) everywhere in the world.¹⁷

The impressive developments that have recently taken place at the global level have called into question traditional conceptions of the nature of law premised on the theory of sovereignty.¹⁸ Under the Westphalian paradigm which emerged in Europe with the formation of territorial states in the 17th century, and was spread by Europe around the world in the ensuing centuries, two separated body of laws governed action by states – constitutional law, regulating the exercise of public power *within* sovereigns; and international law, prescribing rules of conduct *among* sovereigns.¹⁹ The sovereignty-based strict separation between municipal constitutional law and international public law, however, has been increasingly challenged by the emergence of a body of transnational law, blurring the distinction between domestic and foreign affairs.²⁰ As it has been argued, the rise of mechanisms of authority and sources of law in the context of global governance eroded ‘the classical separation model for dealing with international affairs [...which] involved a fairly strict separation between the domestic and the international.’²¹ Although instruments of international law, such as treaties, are still heavily employed in the context of global governance, the blurring of boundaries between internal and external law, and the capacity of supranational institutions to directly affect through law the actions of individuals and firms bypassing state intermediation have challenged the continuing validity of the notion of sovereignty,²² and called for a profound rethinking of the boundary between national constitutional law and international public law.²³

¹⁷ William Schabas, ‘The International Criminal Court at a Crossroads’, in Antonio Cassese (ed), *Realizing Utopia* (OUP 2012).

¹⁸ For the paradigmatic elaboration of the theory of sovereignty at the dawn of the modern age see of course, Jean Bodin, *Les Six Livres de La Républiques* (1576). For a contemporary analysis see Michel Troper, ‘The Survival of Sovereignty’ in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments – The Past, Present and Future of a Contested Concept* (CUP 2010) 132.

¹⁹ See Wilhelm Grewe, *The Epochs of International Law* (De Gruyter 2000) and Neil MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth* (OUP 1999).

²⁰ Rafael Domingo, *The New Global Law* (CUP 2011).

²¹ Nico Krisch, ‘Global Governance as Public Authority: an Introduction’ (2012)10 I-Con 976, 977-978.

²² For a criticism of the viability of the legal concept of sovereignty today see Sabino Cassese, ‘L’erosione dello Stato: Una vicenda irreversibile?’ in Sabino Cassese, *La Crisi dello Stato* (Laterza 2002) 44. For a more popular perspective see then Philip Stephens, ‘Nations Are Chasing the Illusion of Sovereignty’ *Financial Times* (6 June 2013).

²³ This point has been emphasized both from the perspective of constitutional law

III. AN OVERVIEW OF THE LITERATURE

In response to these profound transformations, legal scholarship has advanced a number of perspectives to re-conceptualize the developments occurring beyond the states.²⁴ These perspectives range in scope, taking inspiration from alternative conceptual legal traditions and combining in different ways empirical and normative claims about the *Sein* and the *Sollen* of global governance. Drawing upon the resources of domestic administrative law, for instance, the ‘global administrative law’²⁵ project has examined the phenomena of global regulatory governance mainly from an empirical perspective, albeit attentive to normative principles of due process and accountability.²⁶ The project on ‘public authority in international institutions’, instead, has sought to construct from a normative viewpoint a doctrinal edifice on the exercise of public authority at the international level by exporting principles existing in the national context.²⁷ An increasingly important perspective on the transformation taking place at the transnational scale, finally, is represented by the scholarship on the constitutionalization of international law. As much as ‘constitutionalism has become the dominant currency of the debates on European integration,’²⁸ scholars have increasingly resorted to the idea of constitutionalism also to make sense of the changes taking place in global governance.²⁹

and from that of international law. Compare Ernst Young, ‘The Trouble with Global Constitutionalism’ (2003) *Texas Intl L J* 527, 545 (noticing, albeit grudgingly, that it ‘is just increasingly unrealistic to study constitutional structure without including supranational institutions and constitutional rights without including the corpus of international law’) and Trachtman (n1), 18 (arguing that ‘the central crisis in international law’ is due to the multiplying of the exceptions to the Westphalian paradigm).

²⁴ See eg Neil Walker, ‘Intimations of Global Law’, Montesquieu Lecture delivered at Tilburg Law School, 21 June 2012.

²⁵ See eg Benedict Kingsbury, Nico Krisch and Richard Stuart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15.

²⁶ See Sabino Cassese, ‘A Global Due Process of Law?’, in Gordon Anthony et al (eds), *Values in Global Administrative Law* (Hart 2011) 17; and Giacinto della Cananea, *Al di là dei confine statuali: Principi generali del diritto pubblico globale* (Il Mulino 2009).

²⁷ See eg Armin von Bogdandy et al (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010).

²⁸ Miguel Poiares Maduro, ‘How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union’, Jean Monnet Working Paper No. 5/2004, 3.

²⁹ See eg Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009); Jeffrey Dunoff and Joel Trachtman, ‘A Functional Approach to International Constitutionalization’ in Jeffrey Dunoff and Joel

The scholarship on the constitutionalization of international law is quite diversified. To begin with, as Vicki Jackson explained, this scholarship pursues at least two separate research projects:³⁰ On the one hand, it examines whether, within the field of international law, some norms are becoming constitutional in character vis-à-vis other norms of international law; On the other hand, it considers whether transnational or supranational law, or portions of it, is being constitutionalized vis-à-vis domestic law. A leading example of the first perspective is offered by Joel Trachtman's analysis of how forms of enabling, constraining and supplemental constitutionalization have emerged in the international area in order to respond to the increasing demand for legalization.³¹ The second perspective, instead, is at the center of the manifold analysis that have stressed the growing centrality and the pervasive impact of law generated beyond the states in the legislative, judicial and administrative practices of the states.³²

Secondly, the literature on the constitutionalization of international law includes scholarship which is analytical in nature, and scholarship which, on the contrary, explicitly embraces a normative perspective. Hence, while several studies have empirically underlined how ideas of constitutionality can be helpful to explain international governance frameworks as they exist *de lege lata*,³³ a large component of the literature on global constitutionalism adopts an aspirational approach, aimed at promoting *de jure condendo* the values of constitutionalism at the transnational scale.³⁴ From this point of view the constitutionalization of international law is pursued as a way to tame the fragmentation of international law;³⁵ or alternatively as a tool to compensate for the diminishing importance of

Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP 2009) 3.

³⁰ Vicki Jackson, 'Paradigms of Public Law: Transnational Constitutional Values and Democratic Challenges' (2010) 8 I-Con 517, 519.

³¹ Trachtman (n 1) 253.

³² See eg Stephen Gardbaum, 'Human Rights and International Constitutionalism' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP 2009) 233.

³³ See eg Julian Arato, 'Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations' (2012) I-Con 627.

³⁴ See eg Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (CUP 2007).

³⁵ See eg Lucas Lixinski, 'Taming the Fragmentation Monster through Human Rights? International Constitutionalism, "Pluralism Lite" and the Common Territory of the Two European Legal Orders' in Vicky Costa et al (eds), *The EU Accession to the ECHR* (Hart Publishing 2014).

constitutionalism at the domestic level.³⁶ In this case, as it has been argued, the idea of 'global constitutionalism' grapples with the consequences of globalization as a process that transgresses and perforates national or state borders, undermining familiar roots of legitimacy and calling for new forms of checks and balances as a result.³⁷

Thirdly, scholars employ the language of constitutionalism to make sense of the new reality of transnational governance at different levels of scale. Erika de Wet, for instance, has argued the case for an emerging international constitutional order, consisting of a society, a value system and structures of enforcement.³⁸ Other scholars, on the contrary, have applied constitutional concepts to specific international regimes, rather than to the global order as such. The outburst of the constitutionalist idea is obviously paramount in the European setting. Here, for several decades now, lawyers have conceptualized in constitutional terms the developments occurring beyond the states, in the architecture of the EU.³⁹ And, despite the failure of the project of Constitutional Treaty, the case law of the ECJ has continued to provide support for this reading.⁴⁰ At the same time, also the ECHR has been more and more the object of constitutionalist interpretations, aimed at emphasizing the features of the ECtHR as a constitutional court.⁴¹ Yet, the discourse of international constitutionalism has not stopped at Europe's edges. In the late 1990s, Bardo Fassbender famously characterized the UN Charter as the Constitution of the international community,⁴² and recent events have contributed in strengthening this understanding.⁴³ At the same time,

³⁶ See eg Anne Peters, 'Compensatory Constitutionalism: the Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden J Intl L* 579.

³⁷ Antje Wiener et al., 'Editorial: Global Constitutionalism, Human Rights, Democracy and the Rule of Law' (2012) 1 *Global Constitutionalism* 1, 6.

³⁸ See eg Erika de Wet, 'The International Constitutional Order' (2006) 55 *ICLQ* 51.

³⁹ See eg Joseph HH Weiler, *The Constitution of Europe* (CUP 1999) and Paul Craig, 'Constitutions, Constitutionalism and the European Union' (2001) *ELJ* 125.

⁴⁰ See eg Leonard Bessink, *A Composite European Constitution* (Europa Law Publishing 2007) and Stefan Griller, 'Is this a Constitution? Remarks on a Contested Concept' in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2008), 21.

⁴¹ See eg Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2012) 12 *Human Rights L Rev* 655.

⁴² Bardo Fassbender, 'The UN Charter as the Constitution of the International Community' (1998) 36 *Columbia J Transnational L* 529.

⁴³ See Bardo Fassbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and*

constitutional language is frequently employed in relation to global entities operating in the field of trade or the environment.⁴⁴

Needless to say, the idea that constitutionalism should be the lens through which to analyze global governance meets several criticisms. At one end of the spectrum, scholars anchored in the theory of sovereignty have rejected the idea that constitutionalism and the state can be disarticulated and strongly reaffirmed the centrality of sovereignty as the basis for constitutional government.⁴⁵ Drawing on a bicentennial tradition that conceived of state, people and constitution as the three elements of a magic triangle, those positions have rejected the view that constitutionalism could exist in supranational or transnational settings and, at the same time, sought to limit the impact of these changes.⁴⁶ However, the discourse about global constitutionalism has also been under attack by scholars at the opposite end of the spectrum. Others, in fact, have denied the claim that constitutionalism and global governance can be reconciled, and described the pluralism of global law as an entirely new feature of post-national contemporary legal reality.⁴⁷ From this perspective, therefore, the developments occurring beyond the state constitute a fundamental departure in the organization of public authority from constitutionalism toward pluralism – with the conclusion that the idea of constitutionalism should be put to rest.⁴⁸

Yet, the arguments challenging the constitutionalization of international law have been resisted with strong counter-arguments.⁴⁹ In particular, a

Global Governance (CUP 2009) 133.

⁴⁴ See eg Joel Trachtman, 'The Constitutions of the WTO' (2006) 17 EJIL 623 and Daniel Bodansky, 'Is there an International Environmental Constitution?' (2008) 16 Indiana J Global L Studies 565.

⁴⁵ See eg Jeremy Rabkin, *Law Without Nations? Why Constitutional Government Requires Sovereign States* (Princeton University Press 2005).

⁴⁶ See eg in the context of the debate about EU constitutionalism Paul Kirchhof, 'Der Deutsche Staat im Prozeß der Europäischen Integration' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* VII (Müller Verlag 1992), 855.

⁴⁷ See eg Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010).

⁴⁸ See eg in the context of the debate about EU constitutionalism Matej Avbelj, 'Questioning EU Constitutionalism' (2008) 9 German Law Journal 1.

⁴⁹ See also Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP 2009) 326 (explaining that pluralism is not an alternative to constitutionalism, but rather a component of it, in those systems characterized by structural or institutional heterarchy).

very articulate defense of constitutionalism beyond the state has been offered by Mattias Kumm.⁵⁰ In Kumm's view, the skepticism against the application of constitutional language to international law is the product of a statist paradigm of thought, which conceives of constitutionalism exclusively through the vocabulary of sovereignty.⁵¹ To counter this view, Kumm proposed 'a revolution in legal thinking'⁵² with the introduction of a new paradigm of constitutional thought – what he called a 'cosmopolitan paradigm of constitutionalism.'⁵³ Whereas national scholarship has 'inappropriately narrowed, morally misconstrued, and falsely aggrandized national constitutionalism by analytically connecting it to a statist paradigm of law,'⁵⁴ Kumm encourages scholars to free constitutionalism from the confines of sovereigntist thinking and to re-conceptualize it in cosmopolitan terms as a new 'framework for a general theory of public law that integrates national and international law.'⁵⁵ Reconceived in this manner, constitutionalism provides an accurate account of the structural features of contemporary legal and political practice and can be meaningfully employed to explain the transformations occurring on a global scale.⁵⁶

This essay joins the debate about the constitutionalization of international law by contextualizing the transformations currently taking place at the transnational level in a broader historical and comparative context. In particular, the essay purports to qualify the statement that the conceptual integration of constitutional law and international law requires a 'Copernican turn' in legal thinking.⁵⁷ If at the dawn of the 21st century, constitutionalism is on the verge of leaving the safe port of the nation-state to navigate the transnational seas of global governance, this essay asks whether this represents an unprecedented conceptual change in the organization of political authority. As I shall try to argue, the challenges we are currently experiencing in the context of transnational governance are not entirely new, having been at the heart of the theory and practice of federalism for many centuries before, and after, the rise of the nation states. Seen from this broader historical and comparative perspective, the

⁵⁰ Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009), 258.

⁵¹ *ibid.*, 260.

⁵² *ibid.*, 261.

⁵³ *ibid.*, 263.

⁵⁴ *ibid.*

⁵⁵ *ibid.*, 264 (emphasis omitted).

⁵⁶ *ibid.*, 266.

⁵⁷ *ibid.*, 263.

contemporary debate about the constitutionalization of international law appears as much a 'Copernican turn' as a return to Aristarchus after a few centuries of Ptolemaic doctrine.

IV. A REVIVAL OF FEDERALISM?

This essay claims that a comparative, historical perspective can contribute to the debate about the alleged constitutionalization of international law by suggesting that the transformations currently taking place in the transnational arena constitute a revival of federal ideas. In particular, the argument of this essay is that the rise of global constitutional regimes can be re-conceptualized through the prism of federalism. As a leading contemporary scholar of federalism has explained, the idea of federalism, much like that of democracy or republicanism, is part of the classical terminology of political philosophy, and as such escapes clear-cut definitions.⁵⁸ By federalism, however, I mean here a constitutional theory and a model of institutional design for the governance of a compound system which is *not a state, but rather a union of states*. More specifically, for the purpose of my argument federalism should be understood as a constitutional regime that is created by sovereign states acting through a legal instrument of contractual nature (be it a treaty or a constitution) and that is endowed with an heterarchical system of governance in which the autonomy and continuous existence of the constituting entities is secured and yet combined with the authority and governmental capacity of the constituted union.

Albeit imperfectly, this definition seeks to merge the most distinctive features of federalism as they have been unveiled by the rich scholarship in the field.⁵⁹ First, it reflects the idea of federalism as 'a system of law and structure of power.'⁶⁰ Second, it emphasizes federalism's ability to combine 'self-rule' and 'shared-rule', the promotion of diversity together with the protection of a meaningful form of unity.⁶¹ Third, it clarifies the nature of federalism as a 'half-way house between interstate and intrastate relations,'⁶² underlining how, on the one hand, states remain autonomous

⁵⁸ Daniel Elazar, *Exploring Federalism* (Alabama University Press 1987) 15

⁵⁹ On federalism see also Olivier Beaud, *Théorie de la Fédération* (Presses Universitaires de France 2007). For a comparative analysis of federal systems world-wide see instead Ronald Watts, *Comparing Federal Systems in the 1990s* (Queen's University 1996).

⁶⁰ Samuel Beer, *To Make a Nation: The Rediscovery of American Federalism* (Harvard University Press 1993) 23.

⁶¹ Elazar (n 58) 5.

⁶² Murray Forsyth, *Union of States: The Theory and Practice of Confederation* (Leicester University Press 1981) 16.

entities within the federal union (without dissolving themselves within it) and, on the other, the union itself is endowed with an authority and capacity to act (potentially directly vis-à-vis the citizens of the states) akin to that possessed by the states themselves. Fourth, it stresses the crucial role of law in creating the federal regime as a voluntary process of coming together of pre-existing states,⁶³ and simultaneously underplays the distinction between constitutional law and international law as the source for the creation of the union.⁶⁴ With this conceptual tailoring, I am convinced that federalism can provide an important contribution to the analysis of contemporary forms of constitutional regimes at the transnational level.

The usefulness of resorting to the federal idea to appraise the changes brought about by globalization has already been emphasized by political scientists and political theorists. As the late Daniel Elazar argued, ‘much if not most of what is happening to bring about th[e] constitutionalization [of international law] is what classically has been known as federalism.’⁶⁵ And as Jean Cohen has recently explained, federalism ‘may provide the missing concept needed to theorize a mode of political integration (via extension) that is normatively attractive and analytically necessary to make the discourse of the constitutionalization of international law and regional or global ‘governance institutions’ meaningful.’⁶⁶ Nevertheless, the revival of federalism has not made its way, yet, in the field of public law. Despite the invitation to reconsider the divide between constitutional law and international law in light of the comparable problems (of uncertainty, enforcement and sovereignty) that these two bodies of public law face,⁶⁷ the rise of transnational constitutionalism has not resulted in a reconsideration of the experience of federalism as a possible conceptual benchmark to explain contemporary reality.

The neglect of federalist thinking in the analysis of the constitutionalization of international law is largely due to the progressive

⁶³ Alfred Stepan, *Federalism and Democracy: Beyond the U.S. Model* (1999) 10 J of Democracy 19.

⁶⁴ Bruce Ackerman, ‘The Rise of World Constitutionalism’ (1997) 83 Virginia L Rev 771, 776 (arguing that ‘the (uncertain) transformation of a treaty into a constitution, [which] is at the center of the European Union today [...] was at the center of the American experience between the Revolution and the Civil War.’).

⁶⁵ Daniel Elazar, *Constitutionalizing Globalization: The Postmodern Revival of Confederal Arrangements* (Rowman & Littlefield 1998) 3.

⁶⁶ Jean Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (CUP 2012) 83.

⁶⁷ Jack Goldsmith and Daryl Levinson, ‘Law for States: International Law, Constitutional Law, Public Law’ (2009) 122 Harvard L Rev 1791.

assimilation between *federalism* and the *federal state* that has occurred in Western legal thought over the last two centuries.⁶⁸ Since the 19th century, in fact, public lawyers (especially in Europe) have come to consider federalism simply as a theory for the political organization of a *sovereign state* and as a technical devise to decentralize competences within a single, hierarchical constitutional system. This statist bias has significantly reduced the scope of application of the federal idea, by equating federalism to a purely national phenomenon.⁶⁹ Nevertheless, this *reductio ad unum* of the theory and practice of federalism is by no means justified: in fact, as Kalypso Nicolaïdis has noticed, ‘the ‘federal’ emerged prior to or in contrast with the ‘state’, before the two converged.’⁷⁰ From an historical perspective, federalism constituted a common instrument to organize public authority before the rise of the territorial state.⁷¹ It seems therefore time ‘to recuperate insights from the federal vision while freeing it [...] from the statist paradigm.’⁷²

Before the dawn of the Wesphalian era, federalism was the predominant constitutional theory and instrument of governance for compound systems that were *not* states. As a plurality of examples from modern history reveals – from the United Provinces of the Netherlands to the Swiss Confederation, from the Hanseatic League to the Holy Roman Empire and later the German *Bund* – federalism was a widely used institutional mechanism to organize public authority in ways which was compatible with the self-rule of the federated entities while permitting shared-rule by the confederate body in its collective capacity.⁷³ These experiments – which were supported by the theorization of legal scholars such as Johannes Althusius, Hugo Grotius or Samuel Pufendorf, among others – attempted to consociate pre-existing political units through a *foedus* (in Latin: a pact) for the achievement of specific purposes, such as security, welfare or trade.⁷⁴ As such, federalism was conceived as ‘a species of

⁶⁸ Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009) 22.

⁶⁹ See for a discussion in the EU context, Tim Koopmans, ‘Federalism: the Wrong Debate’ (1992) 29 CMLR 1047.

⁷⁰ Kalypso Nicolaïdis, ‘Conclusion: The Federal Vision Beyond the Federal State’ in Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision* (OUP 2001) 441.

⁷¹ Elazar (n 58) 115.

⁷² Cohen (n 66) 82 (emphasis removed).

⁷³ See Leslie Friedman Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (Johns Hopkins University Press 2001) and Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (CUP 2009).

⁷⁴ See Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave 2005) and Heinz Eulau, ‘Theories of Federalism under the Holy Roman Empire’ (1941) 35 *American Political Science Rev* 643.

international law⁷⁵ – an intermediate form of regulation between the *ius civitatis* (domestic law) and the *ius gentium* (in modern parlance: international law).

The most sophisticated constitutional experiment in federal governance was achieved in America where the Articles of Confederations of 1781 and the Federal Constitution of 1787 designed a regime which – in the celebrated words of James Madison in the *Federalist Papers* No. 39 – was ‘in strictness, neither a national nor a federal Constitution, but a composition of both.’⁷⁶ Although the adoption of the Constitution of the United States (US) is retrospectively identified as the date of birth of the federal state model, and as the conventional watershed between (ancient) confederalism and (modern) federalism, a contextual analysis shows that ‘the principal difference between the Constitution of 1787 and the Article of Confederation was one of means rather than ends.’⁷⁷ As it has been highlighted, because in the English language of the 18th and early 19th century, ‘confederation and federation were used as synonyms,’⁷⁸ the US Constitution continued to partake of the mixed (con)federal nature of its predecessor, as a system laying in between domestic law and international law.⁷⁹ Indeed, ‘[t]he new American republic was in this sense a hybrid system of governance that combined international with national modes of governance.’⁸⁰

As Peter Onuf and Nicholas Onuf have underlined, the founders of the American (con)federation drew on a long tradition of political thought and practice and sought to create in the context of the US a union which would abide simultaneously by republican principles in the domestic affairs of each of the states and by Enlightenment principles of international relations among the states.⁸¹ In doing so, they largely set aside ‘the problem of sovereignty, which so beleaguers the world today.’⁸² As a reading of the *Federalist Papers* confirms,

⁷⁵ Elazar (n 58) 141.

⁷⁶ *The Federalis Papers*, No. 39 (James Madison) (1787) [see Karmis & Norman, *supra* note 74, 129].

⁷⁷ Elazar (n 65) 75.

⁷⁸ Dimitrios Karmis and Wayne Norman, ‘The Revival of Federalism in Normative Political Theory’ in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave 2005) 6.

⁷⁹ Schütze (n 68) 22.

⁸⁰ Daniel Halberstam, ‘Federalism: Theory, Policy, Law’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 576, 578.

⁸¹ Peter Onuf and Nicholas Onuf, *Federal Union, Modern World. The Law of Nations in an Age of Revolutions, 1776-1814* (Madison House 1993).

⁸² *ibid*, 26.

[i]n creating a ‘compound republic’ the founders revived the view that political associations occupy positions in a framework of ascending levels, none of which can claim the ultimate, unlimited sovereign authority. The union obtained powers suiting the needs of a state without eliminating the republics composing it or drastically changing their character. Ignoring the early modern political discourse that Bodin precipitated, the founders invoked Montesquieu to call their creation a federal republic, as if it were conceptually indistinguishable from a mere confederation of sovereign states.⁸³

Despite this origin, the subsequent evolution of the US – especially after the Civil War – has produced a profound redefinition of the US constitutional system of governance,⁸⁴ and today the US is certainly an example of a federal *state* (although important remnants of the federal founding pervade the current regime).⁸⁵ Arguably, an important pressure for the US to overcome its (con)federal organization was produced during the 19th century by the practice of international relations dominated by European states and grounded on the Westphalian theory of international law. As Hendrik Spruyt has explained, the emergence of the sovereign states increasingly undermined the viability of competitive forms of political organization which lacked analogous means of internal hierarchy and enforcement.⁸⁶ As a result, while federal systems consolidated into sovereign federal states, federalism ‘has been relegated to the dustbin of history and deemed an anachronism ever since the system of sovereign states triumphed in Europe.’⁸⁷

Nevertheless, the transformations occurring today at the regional and global scale, have signaled a possible revival of the (con)federal idea. As it has been stated, ‘[t]he world as a whole is in the midst of a paradigm shift from a world of states, modeled after the ideal of the nation-state developed at the beginning of the modern epoch in the [17th] century, to a world of diminished state sovereignty and increased interstate linkages of a

⁸³ *ibid*, 28.

⁸⁴ See Bruce Ackerman, *We the People. Volume 2: Transformations* (Harvard University Press 1998).

⁸⁵ See Ernst Young, ‘Protecting Member States Autonomy in the European Union: Some Cautionary Tales from American Federalism’ (2002) 77 NYU L Rev 1612.

⁸⁶ Hendrik Spruyt, *The Sovereign State and Its Competitors* (Princeton University Press 1994).

⁸⁷ Cohen (n 66) 11.

constitutionalized federal character.’⁸⁸ Hence, the study of the contemporary rise of constitutional regimes beyond the states could benefit from the conceptual instruments offered by the theory and practice of federalism – i.e. of compound constitutional regimes which are different from federal states. A comparative and historical perspective, in other words, can shed new light on the challenges that the international system is currently experiencing, since, as Daniel Halberstam has argued, federalism can ‘lay the foundations for understanding the constitutional significance of arrangements among multiple levels of authority,’ from local institutions all the way up to global governance regimes.⁸⁹

V. THE FEDERAL FEATURES OF CONSTITUTIONAL SYSTEMS BEYOND THE STATES

Re-conceptualizing the rise of constitutional regimes at the regional and global level through the prism of federalism does not only satisfy a desire for definitions.⁹⁰ Adopting a federalist approach to the study of transnational governance may help to navigate the ‘mystery of global governance’⁹¹ and identify a number of recurrent features which characterize the structure, functioning and finality of constitutional systems beyond the states. A number of scholars have attempted to identify several core principles of transnational constitutional regimes, but this endeavor has been carried out from a normative, top-down perspective, aimed also at shaping the development of global governance *de lege ferenda*.⁹² This Section, instead, adopts a bottom-up approach and seeks to identify several recurrent features of transnational constitutional regimes in light of the comparative analysis of historical experience of federal governance undertaken above. The interest here is not to indicate by what principles transnational governance institutions should abide, but rather to emphasize how many of their current features reflect long-standing elements of federalism’s practice and theory. As I shall try to point out, the features of contemporary regional and global governance regimes represent a break with the statist model of constitutional authority. However, when seen from an historical and comparative perspective, they correspond to those of federal experiments and theorization of the past.

⁸⁸ Elazar (n 65) 17.

⁸⁹ Halberstam (n 80) 577-578.

⁹⁰ See Elazar (n 65) 12 (noticing ironically that if something ‘looks like a duck, walks like a duck, and quacks like a duck, it is highly likely to be a duck.’).

⁹¹ See David Kennedy, ‘The Mystery of Global Governance’ in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009) 37.

⁹² See eg Kumm (n 50) 323.

Needless to say, because systems of public authority beyond the states currently come under a variety of forms, the attempt to compare them and to identify several recurrent features is not an easy task. Certainly, it would require much more consideration than what is permitted in the format of a short essay. In what follows, therefore, I will only try to sketch the contours of what are some recurrent features of regional and global governance institutions, in the hope to trace the path for a future research agenda. In my view, in particular, it is possible to recognize in constitutional regimes beyond the states, and to reconnect to the theory of federalism, three features – a structural, a functional and a purposive one. Synthetically, I label these features *pluralism*, *subsidiarity* and *liberty*. I will try to say a few words on each.

1. *Pluralism*

A first feature that permeates the *structure* of transnational constitutional regimes is, in my view, that of pluralism. All the organizations that recently emerged at the regional and world-wide level are characterized by a fragmentation and dispersion of powers. As was explained in Section 2, all global governance institutions are endowed with some powers of decision-making or adjudication. Yet, these powers are not unlimited but rather coexist with, and are counterbalanced by, the powers of the constituting member states, which continue to retain crucial competences. Moreover, within the internal structure of global governance institutions, powers are often distributed between a plurality of bodies and entities, which exercise different functions and tasks, and which enjoy different forms of legitimacy. As a result, the structure of constitutional regimes beyond the states reveals the lack of a single, supreme locus of authority, capable of taking an ultimate decision. Rather, these regimes follow a logic of pluralism, in which power is dispersed along vertical and horizontal axes. Resorting to the terminology developed by Daniel Halberstam, it is possible to say that transnational constitutional regimes are heterarchical systems, rather than hierarchical ones.⁹³

Pluralism is a defining feature of the EU system of governance in which power is divided between the member states and the EU, as well as between a plurality of institutions within the EU itself. In fact, a new scholarly movement which named itself ‘constitutional pluralism’ has recently seen its birth in Europe.⁹⁴ As Miguel Maduro has argued, constitutional pluralism seeks to empirically explain ‘the phenomenon of

⁹³ Halberstam (n 49) 326.

⁹⁴ Julio Baquero Cruz, ‘The Legacy of the *Maastricht-Urteil* and the Pluralist Movement’ (2008) 14 ELJ 389.

plurality of constitutional sources and claims of final authority which create a context for potential constitutional conflicts which are not hierarchically regulated,⁹⁵ and to normatively justify its existence as the best fit for the EU.⁹⁶ At the same time, pluralism also shapes the structure of human rights regimes.⁹⁷ In the context of the ECHR, for instance, pluralism explains the complex dialogue between the ECtHR and the member states that are parties to the ECHR, as well as their supreme and constitutional courts. Moreover strong pluralist features are evident in global and regional trade organizations or in the context of the UN: albeit the hegemonic tendencies of the UNSC have not gone unnoticed, the UN Charter designs a bulk of horizontal separation of powers between multiple bodies, which adds upon the vertical separation of powers between the UN and its member states.⁹⁸

While the pluralism of regional and global constitutional regimes may seem groundbreaking from a statist perspective, this is really nothing new from the point of view of federalism.⁹⁹ Contrary to the Westphalian system – in which authority is hierarchically organized, with a clear sovereign body entitled to speak the last word – in federal systems there is no ultimate power-center, but rather a plurality of institutions sharing power.¹⁰⁰ As has been underlined, indeed, ‘pluralism provides the conceptual background to all modern federal thought’¹⁰¹ and ‘federalism emphasizes constitutionalized pluralism and power sharing as the basis of a truly democratic government.’¹⁰² Pluralism was a distinctive feature of

⁹⁵ Miguel Maduro, ‘Three Claims of Constitutional Pluralism’ in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012), 69–70.

⁹⁶ Mattias Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty’ (2005) 11 ELJ 262.

⁹⁷ Alec Stone Sweet, ‘A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe’ (2012) 1 Global Constitutionalism 53.

⁹⁸ Thomas Frank, ‘Preface: International Institutions: Why Constitutionalize?’ in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009) xi.

⁹⁹ See also Paul Schiff Berman, ‘Federalism and International Law through the Lens of Legal Pluralism’ (2008) 73 Missouri L Rev 1149, 1152 (suggesting the comparability of the US federal system with other pluralist and transnational arrangements characterized by jurisdictional redundancies).

¹⁰⁰ Jeffrey Goldsworthy, ‘The Debate About Sovereignty in the United States: A Historical and Comparative Perspective’ in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 423.

¹⁰¹ Schütze (n 68) 15.

¹⁰² Daniel Elazar, ‘Federalism, Diversity and Rights’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman & Littlefield 1996) 2.

confederal unions in modern Europe.¹⁰³ And famously, James Madison defined the US constitutional system as a pluralist regime when he stated, in *Federalist Papers* No. 51, that '[i]n the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.'¹⁰⁴ This feature, of course, surprised Alexis de Tocqueville, when he described the US as a regime of 'divided sovereignty'¹⁰⁵ – a definition that has made its way up to contemporary jurisprudence of the US Supreme Court.¹⁰⁶ Almost two hundred years after Tocqueville's visit to America, we should be less surprised to see pluralism as a defining principle of constitutional regimes beyond the states.¹⁰⁷

2. *Subsidiarity*

A second, *functional* feature which seems to be germane to constitutional regimes beyond the states is that of subsidiarity. Subsidiarity serves as a criterion for the exercise of competences in pluralist regimes in which there are multiple and overlapping layers of decision-making authorities. Because, as was previously underlined, regional and global governance institutions add upon the states, but do not replace them, all these regimes are characterized by overlapping levels or units of government. As a result, they all face the question of when should powers be exercised by a higher level of government rather than by a lower one, or (to avoid the hierarchical connotations of the terminology of 'levels') when they should be exercised by the authority with the broader jurisdictional reach rather than by one with a narrower scope. Subsidiarity answers this question by requiring that decisions be taken by default at the lower unit of government unless when this unit is unable to achieve the objective for which action is sought and, at the same time, a higher unit is better able to do so. Hence, subsidiarity 'regulates how to allocate or use authority within a political or legal order [...] that disperse[s] authority between a center and various member units [...] holding] that the burden or arguments

¹⁰³ See eg Marlene Wind, 'The European Union as a Polycentric Polity: Returning to a Neo-Medieval Europe?' in Joseph H H Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 103.

¹⁰⁴ *The Federalist Papers*, No. 51 (James Madison) (1787) [see Karmis and Norman (n 74) 131].

¹⁰⁵ Alexis de Tocqueville, *Democracy in America* (Vol 1 1837) [see Karmis and Norman (n 74) 159].

¹⁰⁶ See *US Term Limits, Inc v Thornton*, 514 U.S. 779, 838 (1995) (Kennedy J concurring, defining US federalism as the attempt 'to split the atom of sovereignty').

¹⁰⁷ Robert Schütze, 'Federalism as Constitutional Pluralism. "Letter from America"' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012), 185.

lies with attempts to centralize authority.’¹⁰⁸

In the framework of the EU, subsidiarity has acquired the status of a written principle of constitutional law since the Maastricht Treaty of 1992.¹⁰⁹ In its current version, Article 5 of the EU Treaty proclaims that in areas of shared competences between the EU and the member states, ‘the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’ Subsidiarity is also a crucial facet of human rights regimes world-wide.¹¹⁰ In the ECHR context, for instance, subsidiarity is both reflected in the treaty procedural requirement that plaintiffs exhaust domestic remedies before appealing to the ECtHR, as well as in the jurisprudential doctrine that recognizes a margin of appreciation to the contracting parties in their interpretation of the ECHR whenever a transnational consensus on a given fundamental right is (still) lacking. The principle of complementarity codified in Article 17 of the ICC Statute, then, is consistent with subsidiarity, as prosecutions will only be commenced at the international level if states are unwilling or unable to carry them out at the domestic level. Finally, subsidiarity arguably shapes the function of the UN: pursuant to the UN Charter, in fact, the UNSC is empowered to act only when threats to peace or security reach a critical threshold, which implies that action should be left to other actors when the stability of the international community as a whole is not jeopardized.

Seen in this vein, subsidiarity as it has emerged in regional and global constitutional regimes relates to a long-standing feature of federalism. Despite Daniel Elazar’s criticism of the theological origins of the principle of subsidiarity – with its rooting in Catholic (hierarchical) theology, rather than in the Jewish and Protestant tradition of (heterarchical) covenants between men and God¹¹¹ – Daniel Halberstam has convincingly explained that ‘the key theoretical concept underlying a general theory of federalism is what Europeans call ‘subsidiarity’.’¹¹² Subsidiarity crucially explains how

¹⁰⁸ Andreas Follesdal, ‘The Principle of Subsidiarity as a Constitutional Principle in International Law’ Jean Monnet Working Paper No. 12/2011, 6.

¹⁰⁹ George Berman, ‘Taking Subsidiarity Seriously: Federalism in the European Community and the United States’ (1994) 94 *Columbia L Rev* 332.

¹¹⁰ Paolo Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97 *AJIL* 38.

¹¹¹ Daniel Elazar, ‘The United States and the European Union: Models for their Epochs’ in Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision* (OUP 2001) 31, 42.

¹¹² Halberstam (n 80) 585.

confederal unions first came about in modern Europe: the Swiss Confederation, eg, was established as a subsidiary organization, mainly for self-defense purposes, which left to the cantons all matters that did not require trans-cantonal coordination.¹¹³ Subsidiarity still shape today the architecture of Swiss federalism, as for instance it provides one of the grounds for appeals to the Swiss Federal Tribunal on constitutional matters.¹¹⁴ At the same time, even though the Constitutional Convention that drafted the US Constitution did not codify an explicit principle of subsidiarity,¹¹⁵ the logic of subsidiarity heavily shapes the attribution of legislative competences to the US Congress in Article I, § 8 by assigning ‘power to the smallest unit of government that internalizes the effects of its exercise.’¹¹⁶ Equally, in a global world, problems of externalities and collective action require that functions be assigned to the authorities that are better positioned to handle them, and subsidiarity works as the principle to achieve this result.

3. *Liberty*

Whereas pluralism and subsidiarity represents recurrent structural and functional features of constitutional regimes beyond the states, I would like to suggest that a third, *purposive* feature can be detected in many new transnational arrangements emerging at the regional and world-wide stage. I would submit that this feature is connected to the enhancement of *liberty*. Put bluntly: I am fully aware of the cumbersome connotations that a term such as liberty conveys. So I want to make clear that, in my view, this feature is certainly revealing itself nowadays only in asymmetrical and multifaceted ways in the various regional and global constitutional regimes. Whereas pluralism and subsidiarity seem to be widespread features of transnational constitutional regimes, the enhancement of liberty is a property not visible in all of them. Yet, with these caveats, I would tentatively say that the enhancement of liberty is a recurrent finality accustoming many transnational regimes emerging beyond the states. Crucially, liberty here should be intended as a form of ‘federal liberty’¹¹⁷ –

¹¹³ Max Frenkel, ‘The Communal Basis of Swiss Liberty’ (1993) 23 *Publius* 61.

¹¹⁴ See Art 113, Loi Fédérale sur le Tribunal Fédéral du 17 Juin 2005, RO 2005 p. 3829 (Switz.) (regulating ‘subsidiarity recourse’ to the Federal Tribunal).

¹¹⁵ See Max Farrand (ed), *The Records of the Federal Convention* (Yale University Press 1911) 20-21 (reporting James Randolph’s proposal to empower Congress ‘to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation’) cited in Halberstam (n 80) 586.

¹¹⁶ Robert Cooter and Neil Siegel, ‘Collective Action Federalism: A General Theory of Article I, Section 8’ (2010) 63 *Stanford L Rev* 115, 144 (emphasis removed).

¹¹⁷ Elazar (n 65) 69.

that is as a liberty that individuals, as free and autonomous agents, exercise within the bounds of the constitutional system, and subject to the counter-veiling pressures that are brought about by demands for self-governance.

The trend toward the enhancement of liberty is quite straightforward in human rights regimes, or in the framework of the ICC, whose finality are precisely to protect fundamental rights and the liberty of men and women to decide how to lead a decent life. An analogous phenomenon, at the same time, seems to characterize regional or global economic organizations whose main purpose is to reduce barriers to trade, thus enlarging the space for the exercise of economic rights and free market initiative. While international economic law is not necessarily framed as mechanisms to enhance liberty, certainly its effect is to empower economic actors to exercise their freedom of enterprise through a larger geographical arena. In a more complex way, then, I would posit that also processes of regional political integration such as those epitomized by the EU contribute to strengthen liberty and human agency – not only because of the external constraints that the EU places on human rights restrictions by the states, but also because of the opportunities that the EU offers to its citizens to autonomously decide about their destiny through new forms of supranational representation.¹¹⁸

Yet, as I acknowledged above, relevant counter-examples exist. The most prominent one may be represented by the action of the UNSC which, in the context of the struggle against terrorism, has developed an invasive architecture of sanctions, profoundly challenging the protection of liberties and rights across the globe.¹¹⁹ The global counter-terrorism regime established by the UNSC proved so detrimental to fundamental rights that even courts with a tradition of deference vis-à-vis the UN felt compelled to side-step UN obligations in order to reaffirm the protection of fundamental rights and liberties protected within their (transnational) legal orders.¹²⁰ Nevertheless, protection of liberties and human rights do actually feature as one of the main purposes of the UN – being enshrined in Article 1(3) of the UN Charter, as a cornerstone of the new world order to be built on the ashes of World World II.¹²¹ Increasing calls, therefore,

¹¹⁸ For an assessment of civil, political and social rights in the EU, in comparative perspectives with the US see Federico Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (OUP 2014).

¹¹⁹ Kim Lane Scheppele, 'Global Security Law and the Challenge to Constitutionalism after 9/11' [2011] PL 352.

¹²⁰ See *Nada v Switzerland*, App. No. 10593/08 (ECtHR, 12 September 2012) (ECtHR finding Switzerland in violation of the ECHR for the implementation of UN counter-terrorism sanctions).

¹²¹ See also Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the*

have been made for the UNSC to return to the spirit and the letter of the UN Charter and put aside a regime that has threatened fundamental liberties world-wide.¹²² Although it is too early to say whether these calls for greater due process and procedural justice will contribute to change the practice of the UNSC, the fact remains that the value of liberty under the UN Charter has so far remained under-enforced.

Bearing this important caveat in mind, I would like to emphasize that the finality to enhance liberty that currently emerges in many transnational constitutional arrangements corresponds to a constitutive feature of federal regimes of the past. To make this point, it may be helpful to recall the theoretical justification of federal regimes and to compare it with the justification advanced to legitimize the creation of the sovereign state. The idea that the preservation of liberty is the main finality of federalism as a form of political organization is well reflected in the work of Montesquieu: while, pursuant to the language of his time, Montesquieu couched the liberty purpose of federal systems under the notion of republicanism,¹²³ he clearly emphasized that the creation of a ‘society of societies’ was instrumental to withstand foreign force while avoiding internal despotism – and thus ensuring a space for freedom and self-governance.¹²⁴ This view contrasts with the teleology at the origins of the Westphalian state, at least as epitomized in the paradigmatic work of Thomas Hobbes: As *The Leviathan* made clear,¹²⁵ the creation of the state was not concerned with the preservation of liberty, but rather pursued the end of security, and therefore required the citizenry to renounce every right, except the right to life, for the greater purpose of securing the stability and peace of the *res publica*.¹²⁶

Of course, theoretical disquisitions about the teleological origins of federalism and statism do not necessarily reflect the historical reality of the formation of territorial public authority both in the form of the state

Universal Declaration of Human Rights (Random House 2001) (discussing the values promoted in the aftermath of World War II through the creation of the UN, as epitomized by the drafting of the Universal Declaration of Human Rights).

¹²² See eg Erika de Wet, ‘From *Kadi* to *Nada*: Judicial Techniques Favoring Human Rights over United Nations Security Council Sanctions’ (2013) 12 Chinese J Intl L.

¹²³ See Phillip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997).

¹²⁴ Montesquieu, *The Spirit of the Laws* (1748) book IX, ch 1 [see Karmis and Norman (n 74) 55].

¹²⁵ Thomas Hobbes, *The Leviathan* (1651).

¹²⁶ See for a jurisprudential discussion of the legacy of Hobbes’ work on legal thinking David Dyzenhaus and Thomas Poole (eds), *Hobbes and the Law* (CUP 2012).

and union of states.¹²⁷ Yet, it is noteworthy that the American Founders proclaimed that securing the blessing of liberty was the key finality of the act of union and designed a system in which multiple separations of powers would prevent government overreaching and preserve freedom.¹²⁸ The US federal experience, otherwise, also shows the manifold dimensions of the idea of liberty, with its alternative meanings of both ‘communal liberty’ (the liberty of the communities to govern themselves freely) and ‘individual liberty’ (the liberty of the individuals to act as free agents regardless of community constraints).¹²⁹ Reconciling these two dimensions of liberty has been a hard challenge in any federal regime and, although in the US experience the latter has step by step took over the former, a comparative analysis reveals a more uneven picture.¹³⁰ Whatever the ultimate meaning of liberty, though, the point that I am trying to make here is that the difficult search for a way to maximize liberty is a *fil rouge* that runs from the early experience of federal governance to many modern experiments of global constitutionalism. Whether this pattern will consolidate in the context of global governance remains a fascinating question worth further exploration.

VI. CONCLUSION

The transformations of the global legal arena have increasingly attracted the attention of lawyers, and constitutionalism is now regarded as the *lingua franca* to be spoken in the transnational *agorà*. This essay suggested that comparative law, especially the theory and practice of federalism (as distinct from the federal state), can provide a useful prism through which to enrich our understanding of the phenomena occurring at the global stage. While the debate about the constitutionalization of international law has divided scholarship, this essay explained that the rise of transnational forms of governance is not novel, but rather finds enlightening precedents in experience and theorizations of federalism. Sketching the outline for future research, the essay has attempted to draw insights from a comparative, historical analysis of federalism and to identify three general features that characterize constitutional regimes beyond the states. Tentatively: pluralism, subsidiarity and liberty have

¹²⁷ See eg Gianfranco Poggi, *Lo Stato* (Il Mulino 1992) (discussing the sociological origins of the state).

¹²⁸ Akhil R Amar, *The Bill of Rights: Creation and Reconstruction* (Yale University Press 1998).

¹²⁹ James Gibson, ‘Freedom, Pluralism and Federalism: An Enigmatic Trio?’ in Sarah Baumgartner Thurow (ed), *E Pluribus Unum. Volume 2: Constitutional Principles and the Institutions of Government* (University Press of America 1988) 222.

¹³⁰ See eg Daniel Elazar, ‘Communal Democracy and Liberal Democracy’ (1993) 23 *Publius* 3.

been branded as recurrent features of the structure, functioning and purpose of new transnational regimes (from the EU to the ECHR, the UN and the WTO). While much research remains to be done, federalism seems to offer a new, yet old, perspective to the study of an ever more integrated global legal world.

THE FUNCTIONALITY OF CONCEPTUAL TERMS IN INTERNATIONAL LAW AND INTERNATIONAL LEGAL DISCOURSE

Ulf Linderfalk *

Investigating the meaning of conceptual terms is an important task for legal scholars. Traditionally, the meaning of conceptual terms has been analyzed by reference to what those terms describe, namely a relationship between, on the one hand, the particular properties identifying a particular phenomenon or state of affairs as belonging to the extension of a concept, and on the other hand, the legally relevant inferences ensuing from the categorization. While this theory works reasonably well as long as studies are confined to the meaning of conceptual terms in law, it is ill-suited for any similar study of international legal discourse. In the search for workable alternatives, this essay adopts a different approach. It equates the meaning of a conceptual term with its functionality, ie with what the uttering of a conceptual term potentially does to the beliefs, attitudes, and behaviour of participants in a legal discourse. The essay illustrates the many important further implications of this theory of meaning for the analysis of international legal discourse.

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I. INTRODUCTION

This essay focuses attention on the language used in legal discourse. More specifically, it focuses attention on a particular element of legal language, namely the set of conceptual terms that it entails. For the purposes of the present essay, a *concept* is a mental representation.¹ It is the generalized idea of an empirical or normative phenomenon or state of affairs (eg *the king of Sweden*, *the Quran*, *the colour grey*, *sovereignty*, *the coastal state jurisdiction of Denmark in the Baltic Sea*, or *the diplomatic relations of Syria with Turkey*) or a class of such phenomena or states of affairs (eg *lions*, *BMW motorcars*, *international waters*, *commercial transactions*, *diplomatic immunities*, or *belligerent occupation*).² A *conceptual term* is a term, like any of the examples just provided, used for the verbal representation of a concept.

Scientific disciplines such as cognitive science, psychology, and the philosophy of mind have long emphasized the importance of concepts for cognitive processes such as perception, reasoning, and understanding.³ While potentially, different concepts may often be used to represent a phenomenon or state of affairs, depending on the concept or concepts actually drawn upon in the mental processing of an observation of such a phenomenon or state of affairs, human beings will understand it differently.⁴ Consequently, conceptualizing a phenomenon as a *car* rather than a *leisure car*, typically, people will draw different inferences about the phenomenon. Similarly, people will draw different inferences depending on whether they conceive of a phenomenon or state of affairs as a *dog* or a *pet*, as a *wine* or an *alcoholic beverage*, as *grey* or as *Hex Triplet B2BEB5*, as a *religious practice* or a *cult*, as a *targeted killing* or an *extrajudicial killing of an unlawful combatant*, as *summer* or *the time period from 1 June to 31 August*, as a *reasonable decision* or a *decision based on rational argument*, and so on and so forth.

Granted that perception, reasoning, and understanding are a necessary and important part of the way lawyers think and talk about law, such observations raise attention to the usage of conceptual terms in legal discourse. Obviously, it makes a difference whether a legally relevant phenomenon or state of affairs (eg a *taking of property*, or *the exercise by*

¹ On the ontology of concept, see eg Eric Margolis and Stephen Laurence, 'The Ontology of Concepts: Abstract Objects or Mental Representations?' (2007) 41 *Noûs* 561-593.

² Compare Birger Hjørland, 'Concept Theory', (2009) 60 *J of the American Society for Information Science and Technology* 1519-1536.

³ For an overview of some of the core readings on this topic, see Eric Margolis and Stephen Laurence, *Concepts. Core Readings* (MIT Press 1999).

⁴ cf Hjørland (n 2).

Norway of enforcement jurisdiction in the Barents Sea), or a class of such phenomena or states of affairs (eg *jus cogens*, or *foreign armed occupation*), is referred to by lawyers using the one conceptual term or the other. What then is this difference? Stated in terms of one of the examples, what does the uttering of *jus cogens* help communicate that cannot be communicated by uttering instead a term such as *the international ordre public*?

To address such questions properly, lawyers would have to draw on some particular theory of meaning. A theory of meaning is implied in any study of verbal communication, whether in the context of legal discourse or just any community of people using a language. If *jus cogens* can be used to communicate something that *the international ordre public* cannot, then this difference can be captured only by referring to the different meanings of the two terms.

In the legal literature, commentators have generally analyzed the meaning of conceptual terms by reference to what those terms describe. This was the point of departure of the Danish legal philosopher Alf Ross, whose writing in the 1950's introduced the topic on the agenda of legal scholarship,⁵ and it has permeated much of the thinking of lawyers since. In this essay, I will approach the issue from a different angle. I will adopt the theory of meaning first suggested by philosophers like John L Austin and John Searle,⁶ and later developed by modern pragmatics.⁷ This theory recognizes that utterances do not just describe, but potentially do also a variety of other things. If Jane, in addressing John on his way out, utters 'It's raining!', the meaning of this utterance cannot be fully captured by the interpretation that Jane describes the current weather conditions. Depending on the particular context or situation of utterance, potentially, an utterance like Jane's may also be used to cause John to think that maybe he should bring an umbrella; it may be used to cause John to think that maybe he does not need to water the plants in the garden (as he suggested he would earlier this morning); it may be used to cause John to think that maybe he should offer Jane a lift to work; it may be used to cause John to think that maybe he should help Jane move tables from the garden and lay them inside (while she is planning a garden party later that day); etc.

The point of departure chosen for this essay implies that the usage of conceptual terms in legal discourse can be analyzed in very much the same

⁵ See Alf Ross, 'Tû-tû', (1956-1957) 70 *Harvard L Rev* 812-825.

⁶ See John Langshaw Austin, *How to Do Things With Words* (Clarendon Press 1962); John Searle, *Speech Acts* (CUP1969).

⁷ For an excellent, easy-to-read introduction to the topic, see eg Stephen Levinson, *Pragmatics* (CUP1983); Diane Blakemore, *Understanding Utterances* (Blackwell1992).

way as sentences such as *It's raining!*. Consequently, throughout the essay, I will equate the meaning of legal utterances with their functionality. The *functionality* of a conceptual term in a legal discourse is what the uttering of the term potentially does to the beliefs, attitudes or behaviour of participants of that same discourse.⁸ I will refer to this as *a functionality-based theory of meaning*. The competing theory advocated by Professor Alf Ross and his followers will be referred to as *the descriptive theory of meaning*.

It is the purpose of this essay to illustrate the further implications of a functionality-based theory of meaning for the analysis of legal discourse. Although I see no reason why this theory should not be applicable to legal discourse generally, since international law is my preferred field of expertise, I will confine treatment to *international legal discourse*. The organization of the article will be as follows.

In section 2, by contrasting a descriptive and a functionality-based theory of meaning, I will give a description of some of the basic features of the latter. Having done this, in section 3-8, I will start exploring the further implications of a functionality-based theory of meaning for an analysis of the meaning of conceptual terms in international legal discourse specifically. I will do so relative to particular examples. The examples will give the theory a more concrete shape, and they will provide crucial insights that prepare the ground for the subsequent sections 9 and 10. As sections 3-8 will illustrate, conceptual terms have a number of different functionalities. Functionalities derive from such things as the complexity of law; the inherent nature of concepts; the dependency of international legal language on the language used for the communication of normative propositions in contexts other than international legal discourse; and the systematic organization of conceptual terms. In section 9, I will suggest a methodology that may be used for the determination of the functionality of particular conceptual terms in legal discourse. Throughout this essay, I will refer to this methodology as *functionality analysis*. In sections 10, finally, I will inquire briefly into the usefulness of functionality analysis. As I will argue, if international lawyers can come to realize and accept the functionality dimension of legal meaning, and they also have tools to determine the functionality of particular conceptual terms, this may advance international legal analysis in many areas of investigation. For example, it will help international lawyers explain and critically assess international legal discourse generally. Moreover, and perhaps more importantly, functionality analysis will allow international legal scholars to explain the significance of international legal discourse; thus it will enhance also their understanding of important legal activities, such as for

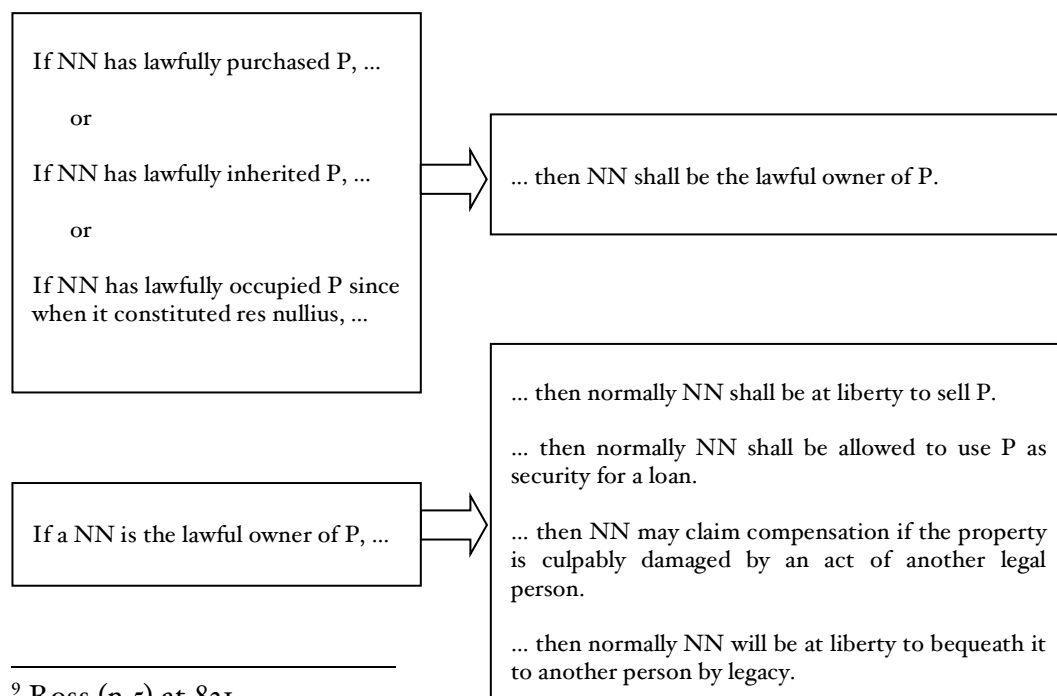
⁸ cf John Lyons, *Semantics* (CUP1977) 725; Blakemore (n 7) at 102-103.

instance the formation of international law.

II. AN INTRODUCTION TO A FUNCTIONALITY-BASED THEORY OF MEANING

Concepts work as ‘intermediate links’ in legal inferences.⁹ In his pioneering article, Professor Ross illustrated this proposition using the concept of *legal ownership*. He noted that in Danish law – like in most domestic legal systems – legal ownership in a piece of property can be accomplished in several different ways: for instance, by purchase, by inheritance, and by the occupation of *res nullius*.¹⁰ Similarly, in Danish law, the acquisition of legal ownership in a piece of property has several different legal consequences. For instance, the lawful owner of a piece of property will normally be at liberty to sell it. The lawful owner of a piece of property will normally be allowed to use it as security for a loan. The lawful owner of a piece of property will be entitled to claim compensation if the property is culpably damaged by acts of other people. He or she will normally be at liberty to bequeath it to another person by legacy.¹¹

According to Professor Ross, if we venture a description of the concept of *legal ownership* in Danish law relative to some particular person (NN) and some particular piece of property (P), consequently, the description would come out something along the following lines:



⁹ Ross (n 5) at 821.

¹⁰ *ibid*, at 817-819.

¹¹ *ibid*, at 817-819.

As can be seen from the scheme, on the one hand, *legal ownership* is a link to the particular properties identifying a particular state of affairs as the legal ownership held by the particular person NN in the particular piece of property P. Henceforth in this article, properties of this kind will be referred to as *identifying criteria*. On the other hand, *legal ownership* is a link to the legally relevant inferences ensuing from the characterization of a particular state of affairs as the legal ownership held by the particular person NN in the particular piece of property P. Henceforth in this essay, such inferences will be referred to as *legal consequences*.

The idea of concepts as intermediate links in legal inferences serves as a necessary background to the theory of descriptive meaning advocated by Professor Ross and many others. According to this theory, conceptual terms *describe* a relationship between identifying criteria and legal consequences.¹² This relationship determines the meaning of conceptual terms in legal discourse. Consequently, any question concerning the meaning of a term like *legal ownership* can be answered by reference to its role in inferences from identifying criteria to legal consequences. When asked to define the meaning of an utterance of a term such as *legal ownership*, if we provide a scheme similar to that given in the previous paragraph, this will be fully sufficient.¹³

It is the main flaw of this suggestion that it totally ignores the importance of a very large portion of legal discourse. As known by every lawyer, people may engage in legal discourse for a variety of different purposes. To illustrate, take again the concept of *legal ownership* expressed as a general relationship held between the identifying criterion 'If a person has lawfully inherited a piece of property' and the legal consequence 'then normally this person shall be at liberty to sell it.' Obviously, participants in legal discourse may assert the existence of this law, but they may also challenge its existence; they may practice and uphold the law; they may approve it, criticize it, construe it, explain it, and suggest its revision. Furthermore, assuming that the law in question does not already exist, participants in legal discourse may either suggest its adoption or they may advise against it. In assuming that conceptual terms have no meaning independently of their role as intermediate links in legal inferences, it would seem proponents of the descriptive theory of meaning are concerned with legal discourse only to a limited extent. Contrary to the pretensions of most

¹² *ibid*, at 822-823.

¹³ *ibid*.

proponents, the theory of descriptive meaning should not be seen as a general thesis about the meaning of conceptual terms in legal discourse. It should be seen as a theory about the meaning of such terms in the limited context of assertions about the *lex lata*.

For this reason it is my suggestion that the meaning of conceptual terms in international legal discourse be analyzed, not in accordance with the theory of descriptive meaning represented by the writing of Alf Ross and others, but in accordance with the theory of meaning advanced by modern pragmatics. As argued by pragmatics, using language is to engage in social inter-action. When a person makes an utterance it is in the expectation that it will influence, in some way or another, the beliefs, attitudes, or behaviour of the addressee or addressees.¹⁴ So defined, pragmatics can certainly accommodate for the limited aspects of language use emphasized by the descriptive theory of meaning. According to the descriptive theory of meaning, by the uttering of a conceptual term, participants in international legal discourse describe a relationship between identifying criteria and legal consequences. The description is presented by the utterer as true. Rephrasing this in a terminology better suited for pragmatic analyses, pragmatics would say that utterances are *assertions*. The usage of conceptual terms potentially helps convince participants in international legal discourse of the existence of some certain relationship between identifying criteria and legal consequences.

Pragmatics being a broader approach to language use than the descriptive theory of meaning, naturally, a functionality-based theory of meaning goes further than this. It recognizes that although utterances may be made for the purpose of the transmission of descriptive information, an utterer may not always be fully committed to the truth of a description.¹⁵ To illustrate, a law student may exclaim after having failed twice the international law exam: 'I'll never get to understand international law.' The student may mean this as an assertion. More likely, however – since the student talks about a future that is partly beyond his control – he will mean his utterance as an assumption or a conjecture. Furthermore, a functionality-based approach recognizes that even though an utterance may be made for the purpose of describing some certain phenomenon or state of affairs, description is rarely (if ever) the sole purpose of an utterance.¹⁶ Take the following utterance made by John addressing Jane over the phone: 'I wish you were here.' In one interpretation of the utterance, it describes a particular state of affairs, namely the fact that John wishes that Jane was

¹⁴ cf Lyons (n 8) at 725.

¹⁵ cf, eg, Blakemore (n 7) at 9.

¹⁶ cf Lyons (n 8) at 725.

with him. However, the utterance is made also with the clear expectation of some certain reaction on the part of Jane. Most likely, the aim of John is to make Jane feel that she is being longed for, desired, or loved. If Jane for some reason fails to capture this part of John's message, she will miss an important aspect of the meaning of the utterance.

It should be noted that there is no one-to-one correspondence between the grammatical structure of an utterance and what the utterance potentially does to the beliefs, attitudes, or behavior of the addressee or addressees.¹⁷ This is illustrated by the earlier example of Jane addressing John on his way out: 'It's raining!'. Grammatically, Jane's utterance is a declarative sentence, but obviously, a sentence like this may be used for other purposes than just describing the prevailing weather conditions. For example, it may be used to warn John that he runs the risk of getting wet. For this same reason, the functionality of an utterance is not dependent on the use of the grammatical verb.¹⁸ The utterance by a person of a piece of language may influence the beliefs, attitudes, or behaviour of an addressee, although the utterance has no verb at all. For example, if one of my colleagues entered my office exclaiming 'What a mess!', I would probably feel embarrassed or even a bit ashamed. I see no reason why the functionality of conceptual terms, which are typically nouns, should not be equally independent of the grammatical verb. This is why I venture the suggestion that there are other aspects of the meaning of a conceptual term in legal discourse than just the description conveyed of a relationship between identifying criteria and legal consequences. In the subsequent sections 3-8 of this essay, I will explore this idea further, providing illustration of some of the many functionalities of conceptual terms in international legal discourse.

III. THE ECONOMIZING FUNCTIONALITY OF CONCEPTUAL TERMS

In his 1957 article, Professor Ross commented on the usefulness or 'function' of conceptual terms. He argued that since concepts work as an intermediate link between identifying criteria and legal consequences, they serve also as 'a technique of presentation'.¹⁹ Professor Ross illustrated this proposition using the example of Danish property law reiterated earlier in this essay.²⁰ If we choose a description of Danish property law relative to some person (NN) and some particular property (P), linking single conditions for the application of the law with the inferences that ensue

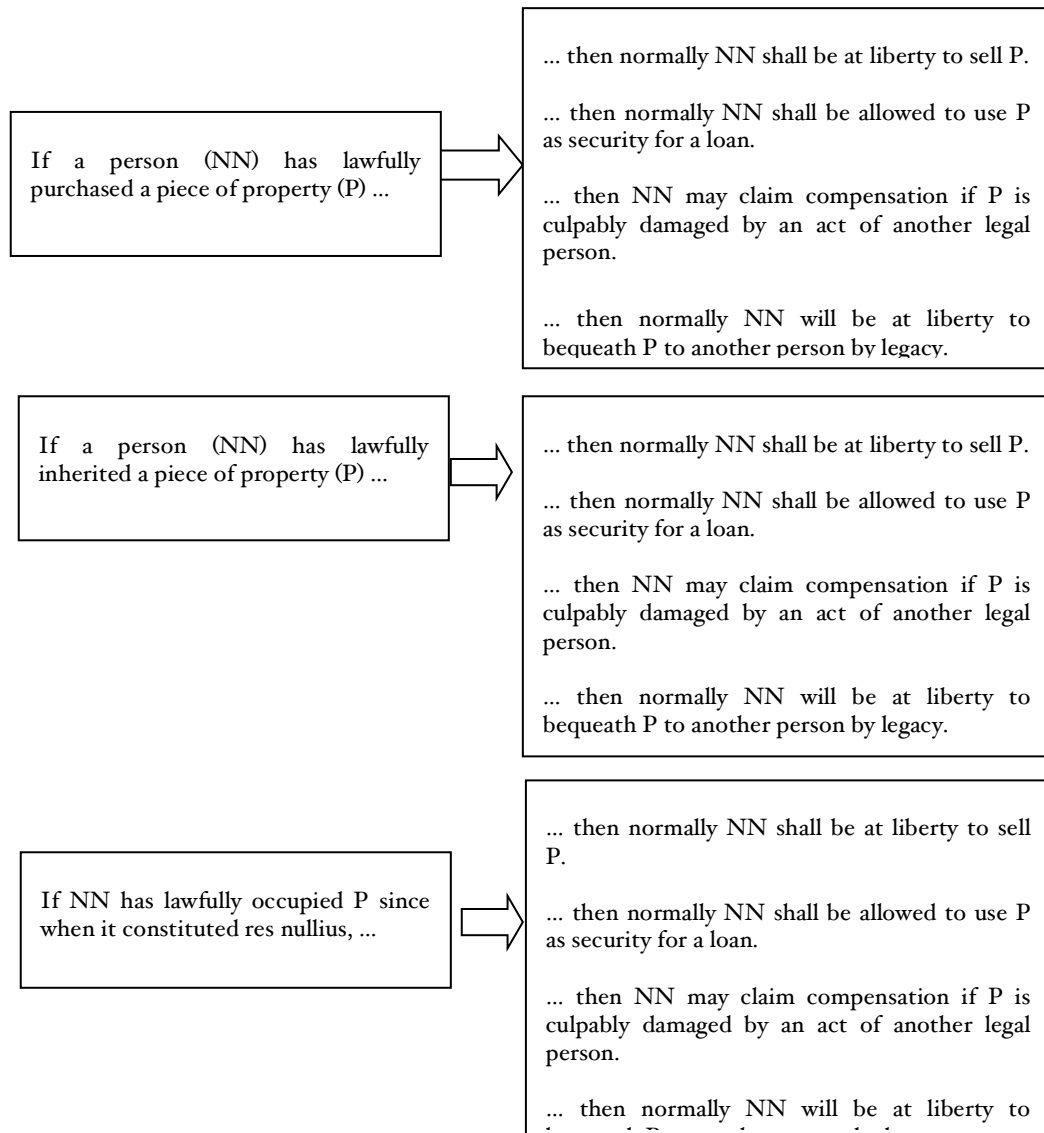
¹⁷ *ibid* at 733.

¹⁸ cf John Lyons *Linguistic Semantics. An Introduction* (CUP 1995), at 250.

¹⁹ Ross (n 5) at 822.

²⁰ *ibid* at 819-824.

from its application, the description will amount to twelve separate rules:



As illustrated by the alternative scheme in section 2, our description will be considerably shortened if instead we decide to express the law using the concept of legal ownership as an intermediate link. The number of rules will now be merely seven. Stated in cold figures, by drawing on the concept of legal ownership, we will have reduced our statement of the law by something like 42 percent.

Surprisingly, by suggesting that conceptual terms not only describe but also economize verbal statements of the law, Professor Ross comes very close to a functionality-based theory of meaning. Certainly, his idea of conceptual terms as techniques of presentation can be accommodated by this theory. It would then have to be slightly modified, however. To say

that conceptual terms serve as a technique of presentation is to say that the uttering of conceptual terms affects the way people think and talk about law. What makes this suggestion slightly problematic is its concern with the *function* of conceptual terms rather than their functionality.

As indicated in section 1, this essay focuses attention on the *meaning potential* of conceptual terms in international legal discourse. In line with modern pragmatics, in this essay the meaning potential of a conceptual term is equated with the functionality of that term, i.e. with what the uttering of the term *potentially* does to the beliefs, attitudes, or behaviour of participants of international discourse. To understand this approach properly, we must be careful not to confuse the *meaning potential* of an utterance with its actual *function* or *effect*.²¹ The meaning potential of an utterance *may* help communicating a certain message, but it will never by itself determine the way the utterance is being understood by an addressee. To illustrate, let us assume that Jane utters to her husband John, who is on his way out: 'It's raining!' Jane wishes to cause John to think that perhaps he should bring an umbrella. Potentially, her utterance may have this effect, but there is no guarantee that John will actually capture the intended message. If, for instance, Jane is throwing a garden party later that day, John may well understand Jane to be suggesting that he help move tables from the garden and lay them inside.

The example illustrates the difference between the functionality of a piece of language like *It's raining!* and the actual function or effect of its utterance. The difference lies in the absence or presence of a particular context. If we talk about the functionality of a particular conceptual term, we may do so without having specific regard to any particular context of utterance. If we talk about the particular function of the utterance of a conceptual term, we may not. In the example of John and Jane, the effect of Jane's utterance cannot be explained without considering the assumption or assumptions that John bring to bear on the process of understanding it,²² in this case the assumption that Jane is throwing a garden party later that day.

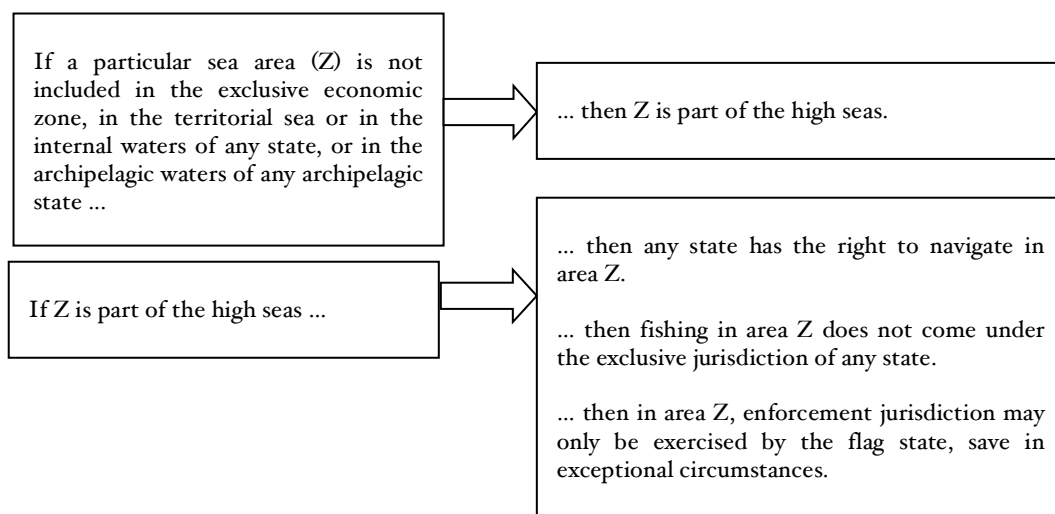
This is the reason for why I have difficulties accepting unreservedly Ross' idea about the economizing *function* of conceptual terms. His suggestion that the uttering of conceptual terms will always affect the way a particular participant in international legal discourse thinks and talks about a law would seem to assume a particular understanding of this law on the part of this same person. It would seem to assume an understanding of the law as

²¹ cf, eg, Blakemore (n 7) at 102-103.

²² *ibid* ch 1.

being fairly complex.²³ If we denote as X and Y the number of identifying criteria and legal consequences tied to the concept represented by a conceptual term, the economizing effect of using a concept like legal ownership can be described as the difference between $(X \cdot Y)$ and $(X + Y)$.²⁴ Consequently, the economizing effect of uttering a conceptual term would seem to require an assumption that $X \geq 2$ and $Y \geq 2$ and that either $X > 2$ or $Y > 2$.

In the example of Danish property law, this requirement is certainly met. The usage of the term *legal ownership* economizes the verbal expression of the relevant law since we assume that according to Danish law, legal ownership in a piece of property can be accomplished in three different ways, each one independently of the others; and because we assume that independently of how a piece of property was acquired, legal ownership will have four different legal consequences. However, if we would have used instead as our example a law that we perceived as less complex, such as for instance the international law of the high seas outlined below,²⁵ the situation would be quite different. Obviously, in this example, the usage of a term such as *the high seas* does not have an economizing effect:



This is why I suggest that conceptual terms have only an economizing

²³ cf Torben Spaak, 'Alf Ross on the Concept of a Legal Right', at 8 <<http://ssrn.com/abstract=923433>> accessed on 11 December 2013 (forthcoming in *Ratio Juris* 2013).

²⁴ cf Lars Lindahl, 'Deduction and Justification in the Law: The Role of Legal Terms and Concepts', (2004) 17 *Ratio Juris* 182, 190.

²⁵ cf Part VIII of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

functionality. Conceptual terms *may* help participants in international legal discourse think and talk about international law in a more economic fashion. Without knowing anything about the particular contexts drawn upon for the purpose of understanding of a conceptual term, we can only say what it *potentially* does.

IV. THE NORMATIVE FUNCTIONALITY OF CONCEPTUAL TERMS

International law is not a self-contained normative system. When international lawyers think about how to verbally represent a concept that they wish to introduce in international legal discourse, rather than inventing an entirely new term, they often find it convenient and appropriate to draw on terminology already used in neighbouring moral or political discourses. Such borrowing may be more or less explicit. Sometimes, concepts are expressed in language imitating exactly a conceptual term used in moral or political discourse. This often has the effect of seriously confusing discussion of the relevant legal issues. For example, when in 2010 the Swedish Parliament recommended that the Swedish Government recognizes the 1915 genocide of Armenian, Assyrian, and Greek populations during Ottoman reign of Turkey,²⁶ the layman had a difficult time understanding whether recognition concerned the commission of genocide in a legal or a political sense. Sometimes, international lawyers explicitly emphasize that although they may have borrowed a term from moral or political discourse, the concept now represented by that term is unique to international law. Such a clarification can be accomplished by adding language that qualifies in some way or another the language normally used in the relevant non-legal discourse. For example, Article 21 of the *Articles on Responsibility of States for Internationally Wrongful Acts* does not refer to self-defence only, but to 'self-defence taken in conformity with the Charter of the United Nations'.²⁷ Clarification can also be accomplished by the adoption of a definition of the concept for legal purposes. For example, in Article 101 of the 1982 UN Convention on the Law of the Sea, the concept of *piracy* is defined as follows:

Piracy consists of any of the following acts:

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

(i) on the high seas, against another ship or aircraft, or against

²⁶ Decision of 11 March 2010, available through the official webpage of the Parliament: <<http://www.riksdagen.se>> search-path 'Debatter och beslut' > '2009/10:UU9' accessed on 11 December 2013.

²⁷ See UNGA Res 56/83 (12 December 2001).

persons or property on board such ship or aircraft;

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

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

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

To the extent that conceptual terms are constructed for the purpose of international law on the basis of concepts used in moral or political discourses, this adds to the functionality of those terms.²⁸ In moral and political discourses, concepts are used in normative inference schemes, too. In political discourse, for instance, the concept of *genocide* is linked to norms that condemn acts of genocide in the strongest possible terms.²⁹ Typically, when international legal language borrows from moral or political discourse, the legal terminology will inhere some of this normativity. The normative significance of the conceptual term used in legal discourse will turn, not on the normativity of law as such, but rather on the normativity associated with the moral or political concept or concepts drawn upon. That being the case, using concepts as intermediate links in legal inferences may work to provoke reactions that international law itself cannot provoke. It may help international lawyers convince their audiences of the correctness of their arguments. For instance, depending on whether the systematic killing of a group of people is categorised as *genocide*, or as a mere breach of an international legal obligation tied to legal consequences like compensation and satisfaction, typically, the commission of the crime will provoke more or less detest. Similarly, the maintenance of a situation or a practice will typically provoke different reactions depending on whether we refer to it as *war* or *armed conflict*, as *targeted killing* or as *the extrajudicial killing of unlawful combatants*, as a *reprisal* or a *counter-measure*, as *expropriation* or *the taking of property*, etc. This is what I refer to as *the normative functionality* of conceptual terms in international law.

The normative functionality of a conceptual term uttered in international legal discourse may be more or less obvious to a legal audience. When concepts are expressed using ‘primarily evaluative language’,³⁰ their

²⁸ See eg Lindahl (n 24) at 195-198; Lorenz Kähler, ‘The Influence of Normative Reasons on the Formation of Legal Concepts’ in Jaap Haage and Dieter von der Pfordten (eds), *Concepts in Law* (Springer 2009) 81-97.

²⁹ cf the Preamble to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

³⁰ Compare Richard Mervyn Hare, *Essays in Ethical Theory* (OUP 1993) 116, 122.

moral/political normativity should be obvious to anyone. Examples include conceptual terms such as *equitable principles*,³¹ *due diligence*,³² *fair and equitable treatment*,³³ a *reasonable period of notice*,³⁴ and *just satisfaction*.³⁵ The moral or political normativity of most conceptual terms uttered in international legal discourse is more subtle, however. To illustrate, let us take once again the concept of *genocide*. The uttering of genocide will not provoke any particular reaction on the behalf of participants in international legal discourse just because they know the lexical meaning of that word. The normative functionality of genocide is dependent on the fact that participants in international legal discourse are acquainted with the underlying political discourse, at least to some extent.

For an even better example where the uttering of a conceptual term very discreetly adds to the normativity of international law, consider *the principle of proportionality*. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.³⁶

If a public authority interferes with the exercise of the right to respect for private and family life, obviously, in order not to be contrary to the

³¹ See eg *North Sea Continental Shelf Cases (Germany v Denmark, Germany v The Netherlands)* (Judgement) [1969] ICJ Rep 3, at 46-47.

³² See, eg, UNCHR, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Companies and Other Business Enterprises, John Ruggie (21 March 2011) UN Doc A/HRC/17/31, at 16.

³³ See eg art 2, para. 2 of the Agreement between the Government of the Kingdom of Sweden and the Government of Ukraine on the Promotion and Reciprocal Protection of Investments, concluded at Kiev, on 15 August 1995, SÖ 1996:38.

³⁴ See eg *Case Concerning Military and Paramilitary Armed Activities In and Against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility, Judgment) [1984] ICJ Rep 392, at 420.

³⁵ cf art 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention for the Protection of Human Rights, as amended) (ECHR).

³⁶ ECHR.

Convention, the interference has to be necessary in a democratic society for the protection of national security, public safety, or any other of the interests specifically stated in paragraph 2. As shown by the practice of the European Court of Human Rights, in order to be able to decide whether a particular act of interference is necessary in the sense of the Convention or not, the Court has to determine the relative weight of the particular interests in conflict. Typically, this act of weighing presupposes some very difficult ethical considerations. Let us say, for instance, that the social authorities of a country decide to transfer the custody of a child from its natural to its foster parents and to impose severe visiting restrictions upon the former.³⁷ In this case, weighing involves, on the one hand, the mutual interest of natural parents and children of developing a family relationship, and the psychological harm risked by the absence of an opportunity of developing such a relationship.³⁸ On the other hand, weighing involves the potential harm caused to a child's personal development if deprived of a stable and harmonious living environment.³⁹ In a case like this, by invoking 'the principle of proportionality', and by referring to the outcome of the consideration as proportionate, the Court would typically have an easier time convincing its audience of the correctness of the weighing result. Arguably, by saying that an interference with the exercise of a right to respect for family life is proportionate, typically, the Court will provoke a more favourable reaction than by just saying that the one conflicting interest overrides the other. It will do so because in political discourse, the concept of proportionality is tied to norms that value the equal respect of the interests of all human beings and the means-end rationality of governmental interference with private life.

V. THE CAMOUFLAGING FUNCTIONALITY OF CONCEPTUAL TERMS

As noted in section 3, conceptual terms have an economizing functionality. If *legal ownership* had not existed, Danish property law would have to be stated and discussed linking individual identifying criteria with individual legal consequences, just like in the twelve-rule example provided in section 3. Speaking about Danish property law generally, lawyers would have to produce at each and every single occasion of utterance a complete list of all the relevant identifying criteria and all the relevant legal consequences. To this extent, obviously, conceptual terms potentially help lawyers think and talk about law in a more economic fashion.

³⁷ cf *Olsson v. Sweden* (No. 2) [1992], Publications of the European Court of Human Rights, Series A no 250.

³⁸ *ibid*, paras 87-91.

³⁹ *ibid*, paras 87-91.

The economizing functionality of conceptual terms comes at a certain price, though. Imagine a situation where the relevant identifying criteria and legal consequences are largely unknown to an utterer. The utterer may not have access to the relevant means for the determination of law. This is typically the case when an international agreement has been drafted in vague and indeterminate language, and there is no earlier or subsequent practice that may assist utterers in the interpretation of the agreement. In the alternative, although the utterer may have access to the relevant means for the determination of law, a scrutiny of those means may show that there is in fact no or very little agreement about the relevant identifying criteria or legal consequences. In all such cases, the uttering of a conceptual term may help to conceal that the utterer is in fact not in possession of the relevant legal knowledge. The conceptual term potentially camouflages the true nature of the inference involved, being in fact consequential more on the personal preferences of the utterer than on the utterer's observation and assessment of the relevant means for the determination of law.⁴⁰ This is what I choose to refer to as *the camouflaging functionality* of conceptual terms.

My pet example is *peremptory international law (jus cogens)*. Article 53 of the 1969 Vienna Convention on the Law of Treaties provides what seems to be currently accepted by international lawyers as the general applicable definition of the *jus cogens* concept.⁴¹ Notably, Article 53 defines *jus cogens* by stating the relevant legal consequences:

[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

It does so for a particular reason. In the process eventually leading up to the adoption of final Article 53, the drafters early decided to abstain from enumerating norms having the character of *jus cogens*; for several reasons.⁴² First, they feared that if particular norms of *jus cogens* were enumerated, this might lead to misunderstandings as to the position of norms not enumerated.⁴³ Secondly, and even more importantly in this context,

⁴⁰ cf Lindahl (n 24) at 190-191.

⁴¹ 1155 UNTS 331.

⁴² See *Report of the International Law Commission on the Work of its Fifteenth Session* (6 May - 12 July 1963) UN Doc. A/CN.4/163, 199. Several members of the ILC suggested that a list of examples be given. See *ibid*.

⁴³ *Report of the International Law Commission on the Work of its Eighteenth Session* (4 May - 19 July 1966) UN Doc. A/CN.4/191, 248.

enumerating norms of *jus cogens* was a near-impossible task since there was no common agreement among international lawyers about the particular criterion or criteria to be used for the identification of such norms.⁴⁴

The situation has hardly changed over the more than 40 years that have passed since the adoption of the Vienna Convention. International lawyers are still in vast disagreement about the particular criterion or criteria to be used for the identification of *jus cogens* norms. Commentators speculate about the particular reason for this disagreement. The relevant explanation seems to lie partly in the simple fact that lawyers have widely different opinions about the ultimate justification of the international *jus cogens* regime.⁴⁵ Depending on who we ask, that person will struggle to convince us that *jus cogens* derives from natural law;⁴⁶ that *jus cogens* is an ‘international constitution’;⁴⁷ that *jus cogens* is the expression of an ‘international *ordre public*’;⁴⁸ that *jus cogens* safeguards ‘the common good of the international community’;⁴⁹ or that *jus cogens* serves to protect some more specific objective such as an ‘open international market’.⁵⁰ Partly, the explanation seems to lie in the fact that the reasons invoked in justification of the international *jus cogens* regime are themselves essentially contested. Even assuming that two lawyers agree that the ultimate justification of the *jus cogens* regime lies in its protection of the international *ordre public*, those two lawyers will typically have very different ideas of what the international *ordre public* actually stands for.

As some philosophers would put it, the *jus cogens* concept remains essentially contested.⁵¹ Still, the *jus cogens* concept exists; it is remarkably present in international legal discourse. If the *jus cogens* concept had not

⁴⁴ See *Report of the International Law Commission on the Work of its Fifteenth Session* (6 May – 12 July 1963) UN Doc. A/CN.4/163, 198.

⁴⁵ See Ulf Linderfalk, ‘What Is so Special About *Jus Cogens*?: On the Distinction between the Ordinary and the Peremptory International Law’, (2012) 14 *Intl Community L Rev* 3, at 9–11.

⁴⁶ See eg Dan Dubois, ‘The Authority of Peremptory Norms in International Law: State Consent or Natural Law?’ (2009) 78 *Nordic J Intl L* 133–175.

⁴⁷ See eg Susan Breau, ‘Review Essay: The Constitutionalization of the International Legal Order’, (2008) 21 *Leiden J of Intl L* 545, at 550.

⁴⁸ See, eg Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 7 ff.

⁴⁹ See eg Alan Brudner, ‘The Domestic Enforcement of the International Covenant on Human Rights’, (1985) 35 *U of Toronto L J* 219, at 249.

⁵⁰ See eg Michael Allen, ‘Globalization and Peremptory Norms in International Law: From Westphalia to Global Constitutionalism’, (2004) 41 *Intl Politics* 341, at 346.

⁵¹ See Walter Bryce Gallie, ‘Essentially Contested Concepts’, (1956) 56 *Proceedings of the Aristotelian Society* 167–198.

existed, the relevant law would have to be stated and discussed linking particular identifying criteria with particular legal consequences. That would have revealed the essentially contested character of the matter, since no or very few such identifying criteria would have mustered agreement. By the introduction of *jus cogens* in the inference from identifying criteria to legal consequences, and because of the particular construction of Article 53, this fact is largely concealed. Obviously, states can be generally agreed that legal consequences like non-derogation and non-modification by ordinary international law should ensue from the application of a particular norm of law, although they may have widely different explanations to why those legal consequences should ensue. This makes *jus cogens* one of the best possible examples of the camouflaging functionality of conceptual terms in international law.

VI. THE DISCLOSING FUNCTIONALITY OF CONCEPTUAL TERMS

For the same reason as a conceptual term may work to camouflage the true nature of the particular legal inference expressed by an utterer in using that term, it may work to disclose and emphasize the nature of such an inference. A good example of this is the concept of *an internationally wrongful act of a state*. The international law of state responsibility distinguishes between *breaches of international legal obligations* and *internationally wrongful acts of a state*. According to Article 1 of the Articles on Responsibility of States for Internationally Wrongful Acts, '[e]very internationally wrongful act of a State entails the international responsibility of that State'. In Article 2, the concept of an internationally wrongful act of a state is defined as an action or omission, which '[i]s attributable to the State under international law', and which '[c]onstitutes a breach of an international legal obligation of the State'. Pursuant to Articles 1 and 2, if an act or omission is attributable to a state and it amounts to a breach of an international obligation of that state, international responsibility ensues. There is an exception to this rule, however. According to Articles 20-25, circumstances may be such as to preclude the wrongfulness of an act or omission, in which case international responsibility *does not* ensue. For example, according to Article 25, necessity will preclude the wrongfulness of an act not in conformity with an international obligation of a state, if the act '[i]s the only way for the State to safeguard an essential interest against a grave and imminent peril'.⁵²

With this legal setting in fresh memory, let us assume a situation where

⁵² For the sake of presentation, I have taken the liberty of using a slightly abbreviated version of art 25.

necessity precludes the wrongfulness of a breach of an international legal obligation owed by one state to another. Let us assume the circumstances of *the Torrey Canyon incident*. In 1967, a Liberian tanker ship carrying large amounts of crude oil ran aground off the coast of the United Kingdom, in the high seas. The accident caused considerable oil spills threatening to severely damage the coastline and the marine environment. UK authorities decided to bomb the ship. That caused the remaining oil to burn, thereby containing the damages considerably. Since Liberia had not consented to the operation, the measures taken by UK authorities were in breach of the principle of exclusive flag state jurisdiction. According to the applicable rule of customary international law, '[s]hips shall sail under the flag of one State only and [...] shall be subject to its exclusive jurisdiction on the high seas'.⁵³ The international wrongfulness of the breach was precluded, however, since bombing was the only way for UK authorities to safeguard an essential interest against a grave and imminent peril. In the words of Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts, bombing was 'necessary'.

The legal reasoning involved can be described in two different ways. First, it can be described by the direct linkage of particular identifying criteria with particular legal consequences, just like in the twelve-rule example given in section 3:

If UK authorities drop a bomb on the Torrey Canyon, this being the only way for the United Kingdom to safeguard an essential interest against a grave and imminent peril, then the operation shall be considered to not entail the international responsibility of the United Kingdom.

Secondly, the reasoning can be described in the way of the international law of state responsibility, by the insertion of the concept of *an internationally wrongful act of a state* as a connective between legal facts and legal consequences:

If UK authorities drop a bomb on the Torrey Canyon, this being the only way for the United Kingdom to safeguard an essential interest against a grave and imminent peril, then the operation shall be seen to not constitute *an internationally wrongful act of a state*.

If the dropping of a bomb by UK authorities on Torrey Cayons does not constitute *an internationally wrongful act of a state*, then the

⁵³ See art 6 of the Geneva Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11.

operation shall be considered to not entail the international responsibility of the United Kingdom.

As it seems, the latter description of international law is more true to reality. Obviously, when Torrey Canyon ran aground, and considerable oil spills threatened to damage the marine environment, UK authorities were forced to make a decision. They had to decide whether to bomb and promote the interest of a clean environment, or whether not to bomb and promote the interest of freedom of navigation. From the perspective of the law of state responsibility, the decision made little difference. Whether UK authorities decided to bomb or not, international responsibility would not ensue. Inevitably, the decision was determined by other considerations than law. It was determined by ethical considerations. This fact is revealed only in the latter of the two descriptions of the relevant law. By the insertion of the concept of *an internationally wrongful act of a state* as a connective between legal facts and legal consequences, a gap will remain between a breach of an international legal obligation and an internationally wrongful act of a state. This gap will make apparent the ethical choices often involved in the application of international law: in our example, the choice between promoting the interest of a clean environment and promoting the interest of freedom of navigation. This is why I find it appropriate to speak about *the disclosing functionality* of the concept of an internationally wrongful act of a state.

VII. THE SYSTEMIZING FUNCTIONALITY OF CONCEPTUAL TERMS

According to the ontology adopted in this essay, a concept is the generalized idea of an empirical or normative phenomenon or state of affairs or a class of such phenomena or states of affairs. As implied by the word 'generalized', concepts are formed through a process of abstraction. They are the result of the ability of the human brain to perceive of particular properties of phenomena as characteristics shared by all entities belonging to the extension of some certain concept.⁵⁴ For example, *footballs* are round or oval in shape; they are made by leather or plastic; they have a weight of something between 410 and 450 gram. Similarly, *the nationality of a ship* is an entitlement granted to a ship-owner by a state.⁵⁵ *High seas* are all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or the internal waters of a state, or in the archipelagic waters of an archipelagic state.⁵⁶ A *jus cogens norm* is a norm accepted and recognized by the international community of states as a

⁵⁴ Compare Laurence and Margolis (n 3) 3-81.

⁵⁵ Compare art 91 of the United Nations Convention on the Law of the Sea (n 25).

⁵⁶ Compare art 86 of the United Nations Convention on the Law of the Sea (n 25).

whole as a norm from which no derogation is permitted and which can be modified only by the creation of a new norm of *jus cogens*.⁵⁷

By its mere nature, obviously, a conceptual term will always express an assumption about the existence of some certain relationship or relationships between particular phenomena or states of affairs.⁵⁸ For instance, if two different norms (N_1 and N_2) are referred to by a particular person as *jus cogens*, then this person commits himself to the assumption that there is a relationship between N_1 and N_2 that does not obtain between any of those two norms and a norm belonging to the ordinary international law. Such an assumption implies systemization. When a person categorizes a particular phenomenon or state of affairs as one that comes within the extension of some particular concept, the phenomenon is fitted into the greater system of assumptions available to that person at the relevant point in time. Relationships are established between the person's observation of the particular phenomenon or state of affairs and the set of assumptions held by that person about the world at large. This explains why conceptual terms may help participants in international legal discourse think and talk more systematically about legally relevant data. I will illustrate this proposition using as my example the concept of an *act of a state*.

Let us assume the facts of the *Case Concerning Military and Paramilitary Armed Activities In and Against Nicaragua*.⁵⁹ According to the rule of the prohibition of the use of force, the laying of mines by one state in the territorial waters of another state is prohibited. A group of private individuals – in the terminology of the CIA, a group of ‘Unilaterally Controlled Latino Assets’ (UCLA’s) – has engaged in the laying of mines in the territorial waters of Nicaragua. In so doing, they have acted on the instructions of a public authority of the United States: the CIA. Even worse, they have acted under the direction and control of that same authority. Since, according to Article 1 of the Articles on Responsibility of States for Internationally Wrongful Acts, ‘[e]very internationally wrongful *act of a State* entails the international responsibility of that State’,⁶⁰ the mine laying operation conducted by the UCLA’s entails the international responsibility of the United States. This conclusion follows from the application of the relevant rules of customary international law reflected in Articles 4-11 of the Articles on Responsibility of States for Internationally Wrongful Acts. Articles 4-11 provide the criteria, by which an action or

⁵⁷ See art 53 of the 1969 Vienna Convention on the Law of Treaties.

⁵⁸ Compare Laurence and Margolis (n 54) 3-81.

⁵⁹ Judgment of 27 June 1986, ICJ Reports, 1986, p. 14.

⁶⁰ Italics are added.

omission shall be identified as an *act of a State*. According to Article 8, '[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.

The relevant law can be described in two different ways. First, it can be described by the direct linkage of particular identifying criteria with particular legal consequences.

If a group of UCLA's engages in the laying of mines in the territorial waters of Nicaragua, and that group of UCLA's in fact acts under the instructions of the CIA, or under its direction or control, then the conduct in question entails the international responsibility of the United States.

Secondly, the relevant law can be described in the way of the Articles on Responsibility of States for Internationally Wrongful Acts, by the insertion of the concept of *an act of a state* as a mediating link between identifying criteria and legal consequences.

If a group of UCLA's engages in the laying of mines in the territorial waters of Nicaragua, and that group of UCLA's in fact acts under the instructions of the CIA, or under its direction or control, then that conduct shall be considered an act of the United States.

If the laying of mines by a group of UCLA's in the territorial waters of Nicaragua is considered an act of the United States, then the conduct in question entails the international responsibility of the United States.

From the point of view of the systemization of international law, the latter description is certainly preferable. The former description has its virtues, of course. Among other things, it communicates openly the systemic character of international law: a legal rule is an ideal construction in the lawyer's model of a legal system. Hence, the full contents of a rule of international law will often have to be reconstructed on the basis of different rule fragments gathered at different locations in international legal discourse.⁶¹ In this case, whereas one fragment of the relevant rule

⁶¹ Compare Ulf Linderfalk, 'The Effect of *Jus Cogens* Norms: Whoever Opened the Pandora's Box, Did You Think About the Consequences?', (2007) 18 EJIL 853-871

originates in the law on the use of force, another originates in the law of state responsibility. If rule fragments, in order to appear meaningful, have to be accumulated and combined, then obviously there must be structures determining how this task shall be accomplished, provided of course that we do not accept just any combination of fragments. Just like the legal rules themselves, these structures form part of the international legal system.

The flaw of the former description lies with its predominant interest with the more concrete dimensions of law. By concretizing law, the description obscures a point of importance, namely that there is a relationship between, on the one hand, Article 8 of the Articles on Responsibility of States for Internationally Wrongful Acts, and on the other hand, the prevailing conceptualization of the state. Due to their mere nature, in much of its international relations states have to rely on real, physical human beings, who act as intermediaries. In the latter description of the relevant international law, this relationship is brought out more clearly. The concept of an act of a state works as a link between the abstract and the more concrete dimensions of law. It makes explicit that legal argumentation is a two-way process. Lest coherence of international law is to be lost entirely, legal reasoning will have to keep zigzagging back and forth between the concrete and the abstract dimensions of law. The development of the concept of an *act of a state* is dependent on the existence and development of the relevant provisions in the law of state responsibility on the attribution of conduct to a state. Similarly, the existence and development of the provisions on the attribution of states is dependent on the existence and development of the concept of an *act of a state*. By clarifying this relationship, the concept of an *act of a state* facilitates constructive discussions concerning the state as legal subject and internationally responsible person. Obviously, in the example provided, with the latter description of the relevant law rather than the former, questions such as the following will come more naturally: To what extent should a state be allowed to act through private intermediaries?

VIII. THE FORMATIVE FUNCTIONALITY OF CONCEPTUAL TERMS

As noted in section 7, by their mere nature, conceptual terms express an assumption about the existence of some certain relationship or relationships between particular phenomena or states of affairs. This is why conceptual terms help participants in international legal discourse think and talk more systematically about legally relevant data. We may now add to this description the following interesting observation: conceptual terms are themselves systematically ordered. As indicated in section 7, the categorization of a particular phenomenon by a particular

person (P) as one that comes within the extension of a particular concept, such as for instance *football*, will inevitably depend on the relationships between P's observation of the phenomenon and the set of assumptions held by P about the world at large. Similarly, the meaning of a conceptual term will always be dependent on its relationship with other conceptual terms belonging to the same language system.⁶² Obviously, the meaning of *football* (in the sense of the ball object) will be dependent on its relationship with the concept of the game known as *football*. The meaning of the colour *cherry red* will be dependent on its relationship with similar colours such as *maroon* or *burgundy*. The meaning of *holiday* will be dependent on its relationship with *workday*. Similar relationships exist between conceptual terms like *daffodil* and *flower*; *arm* and *body*; *minute* and *second*; *big* and *small*; *kick* and *foot*; *raisin* and *grape*; etc.

If relationships exist between different conceptual terms, then this implies the existence of principles that can explain those relationships. Just like there are criteria that can be used to explain the distinction between *footballs* and *non-footballs*, there must be principles that can explain why for instance, according to most people, *grape* is more closely related to *raisin* than to *leisure car*.⁶³ Because of the existence of such principles, the introduction of a new conceptual term in international legal discourse potentially works to facilitate the formation of yet other concepts. This is what I refer to as *the formative functionality* of conceptual terms. Examples are not difficult to find. Referring to an entity meeting some certain criteria as a *sovereign state* obviously helps international lawyers conceive of other particular phenomena and states of affairs, or classes of such phenomena or states of affairs, as for instance *acts of state*, *sovereign immunities*, *flag states*, *state boundaries*, *nationality*, *state recognition*, and *state succession*. Referring to a phenomenon meeting some certain criteria as a norm of *jus cogens* helps international lawyers conceive of other particular phenomena as *ordinary international law*. Similarly, the existence of the concept of a *means of interpretation* owes partly to the practice of referring to a category of activities as *interpretation*. The existence of the concept of a *diplomatic agent* owes partly to the practice of referring to particular groups of people and their assigned tasks as *diplomatic missions*. The existence of the concept of *hot pursuit* owes partly to the practice of referring to particular phenomena as *foreign ships*, which in turn owes partly to the practice of referring to a particular state of affairs as *the nationality* of a ship.

IX. FUNCTIONALITY ANALYSIS

⁶² See Lyons (n 8) ch 8-9.

⁶³ *ibid*.

Given the examples provided in sections 3-8, it would seem to be a truism, first, that single conceptual terms may often (if not always) have more than one functionality, and secondly, that the functionalities of two terms, when randomly chosen, are often not the same. Consequently, when international lawyers wish to determine the functionalities of conceptual terms, this has to be done on a case-by-case basis. Considering this, any suggestion as to what might be the functionality or functionalities of a particular term in international legal discourse is bound to raise methodological questions. In what sense can the functionality of a conceptual term be determined? Stated instead in a context of justification,⁶⁴ how can a person ensure that her suggestion as to what might be the functionality or functionalities of a particular term will be considered by others as sound, and not as the result of mere speculation?

My answer to this question is implicit in the earlier sections of this essay, and more particularly in the set of examples that I provided in section 3-8. In section 3, I warned readers not to confuse the *functionality* of a conceptual term with the *actual function* or *effect* of its utterance. In the terminology of this essay, the functionality of a conceptual term is its meaning potential. So defined, when a conceptual term is being uttered, the functionality of that term *may* help affect the beliefs, attitudes, or behaviour of the addressee in some particular way, but the actual effect will never be guaranteed. As I explained, this is because the actual effect will always be dependent on a particular context. To illustrate this proposition, I used the example of Jane and John. Jane utters to her husband John, who is on his way out: 'It's raining!' Certainly, this sentence *may* be used to cause John to think that perhaps he should help Jane move tables from the garden and lay them inside. However, in order for Jane's utterance to actually have this effect, John has to entertain some certain assumption, such as for instance the assumption that Jane is throwing a garden party later that day.

Now, what sections 3-8 made sufficiently clear is the fact that the functionality of a conceptual term is also context-dependent, although in a different sense. The actual *effect* of an utterance of a conceptual term depends on whether some *particular* assumption was *actually* used by a particular addressee in the process of understanding it. The *functionality* of a conceptual term is dependent on whether some certain *kind* of assumption is *available* to some certain *potential* addressee or addressees, in

⁶⁴ On this terminology, see Karl Popper, *The Logic of Scientific Discovery* (Hutchinson 1959). In the context of law, see Martin Golding, 'A Note on Discovery and Justification in Science and Law' (1986) 27 *Justification* 124-140.

this case, participants in international legal discourse.⁶⁵ To illustrate, as stated in section 4, the normative functionality of *genocide* is dependent on the fact that participants in international legal discourse to some extent can acquaint themselves with the underlying political discourse. This is another way of saying that the normative functionality of *genocide* presupposes the availability of an assumption about the moral or political norms tied to the concept of genocide. If an assumption about those moral or political norms is not available to participants in international legal discourse, then the term *genocide* can never help utterers convince others of the correctness of their legal inferences, not even potentially. To facilitate reference, in referring to the entire set of assumptions available to a participant in international legal discourse, henceforth in this essay, I will use the term *cognitive environment*.⁶⁶

Other functionalities can be similarly analyzed. The camouflaging functionality of *jus cogens* presupposes a cognitive environment that comprises the (possibly false) assumption that the utterer can provide a fairly good description of the identifying criteria and the legal consequences tied to the *jus cogens* concept. The disclosing functionality of *an international wrongful act of a state* presupposes a cognitive environment that *does not* comprise an assumption about the ethical choices often involved in the application of the international law of state responsibility. The systemizing functionality of *an act of a state* presupposes a cognitive environment that comprises an assumption about the relationship between the concept of a state and the relevant law of state responsibility on the attribution of conduct. The formative functionality of *hot pursuit* presupposes a cognitive environment that comprises an assumption about the relationship between the concept of *hot pursuit* and the concept of a *foreign ship*.

Thus, the examples provided in sections 3-8 suggest that the analysis of the functionality of particular conceptual terms in international legal discourse be done according to some certain methodology. Let us assume I wish to inquire whether a given conceptual term, such as for instance *investor*, may help utterers convince participants in international legal discourse of the correctness of their arguments. According to the examples, the relevant way to conduct this inquiry would be by asking the following two questions:

- (1) If the normative functionality of investor presupposes the

⁶⁵ Compare Dan Sperber and Deirdre Wilson, *Relevance, Communication and Cognition* (Basil Blackwell 1986) 81-93.

⁶⁶ *ibid*, 38 ff.

availability of some certain kind of assumption, what is this assumption exactly?

(2) Is it fair to assume about the cognitive environment of participants in international legal discourse that it comprises this particular assumption?

As stated in the introductory section I, throughout this essay, any inquiry following this methodology will be referred to as *functionality analysis*.

X. ON THE USEFULNESS OF FUNCTIONALITY ANALYSIS

Functionality analysis may inform the study of international law in many areas of investigation. To illustrate, take the example of the term *proportionality*. In several areas of international law, proportionality assessments are an integral part of the application of legal norms. Such assessments typically occur in areas of law where significant ethical values are at stake, and where those values do not easily lend themselves to quantification. On the face of it, it would seem that whenever proportionality assessments are made, decision-makers' primary focus is on the achievement of concrete justice rather than on the production of a principled decision based on rational reason. Not surprisingly, therefore, in the camp of international legal scholars, commentators have often been sceptical about the proportionality concept.⁶⁷ Many commentators perceive of the concept as an excuse for decision-makers to impose on the application of law their own subjective values. In the opinion of commentators, if the term proportionality ever works as a description of anything, then what it describes is certainly not the law.⁶⁸ In the face of this criticism, and considering how widely shared proportionality scepticism actually is, one would expect resort to the term *proportionality* in international legal discourse to be on decline. In reality, the trend is going in the exact opposite direction. *Proportionality* is gaining, not losing, popularity.⁶⁹ Two questions arise: (i) How can the increased usage of

⁶⁷ For an excellent summary of the critique, see Jeremy Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 Emory Intl L Rev 465-474.

⁶⁸ *ibid.*

⁶⁹ Symptomatically, proportionality is now used by disciplines such as for instance international environmental law and international investment law, where up to recently proportionality talk would have been considered anomalous. See eg Takeo Horiguchi, 'Proportionality as a Norm of Application for the Precautionary Principle: Its Significance for the Operation of the Precautionary Regime for Land-Based Marine Pollution in the North-West Atlantic' in Teruo Komori and Karel Wellens (eds), *Public Interest Rules of International Law* (Ashgate 2009) 165-188; Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2010) 4 L & Ethics of Human Rights <<http://www.bepress.com/lehr/vol4/iss1/art4>> accessed on 11 December 2013.

proportionality in international legal discourse be explained? And (2) what is the further significance of the proportionality ‘lingo’? As I will now argue, functionality analysis helps providing both questions with an answer.

The first question pertains to the motivating force of utterers. How can we explain that participants in international legal discourse (including proportionality skeptics) continue to use *proportionality* in the communication of legal propositions, if this term does not describe a relationship between identifying criteria and legal consequences? For proponents of the descriptive theory of meaning, this question poses a problem. If there is no law that can be described by the usage of the term *proportionality*, then according to them, this term can only be categorized as non-sensical. Consequently, proponents of the descriptive theory of meaning can only answer by concluding that participants in international legal discourse wrongly believe *proportionality* to describe a law, and that will be the end of the matter. For proponents of a functionality-based theory of meaning, on the other hand, utterers may have many reasons for using a term such as *proportionality*. If it is established that proportionality assessments are in fact *not* done according to standards laid down in international law, proponents of a functionality-based theory of meaning will conclude that an asserting functionality probably cannot be ascribed to *proportionality*; and if it can, then at least the asserting functionality of *proportionality* cannot be the only explanation of the popularity of this term. Proponents of a functionality-based theory of meaning will then proceed to an investigation of the cognitive environment of participants in international legal discourse to see whether other functionalities can be ascribed to *proportionality*.

The second question pertains to the potential effect of legal utterances. International legal discourse being a necessary part of legally relevant activities – such as for instance the making of international law, the interpretation and application of international law, the description of international law, the systemization of international law, the critical assessment of international law, the pleading of a particular interpretation or application of international law, and the appeal for its revision – the question can be rephrased as follows: What is the potential effect of the usage of a conceptual term such as *proportionality* by some given participant in international legal discourse (NN) on some given legal activity or activities (A)? As every international lawyers knows, this question cannot be answered by just referring to the fact that NN belongs to some certain category of agents. Legal discourse is an activity with no uniquely fixed roles. No particular category of agents can be identified with any one particular task. Certainly, most international lawyers would probably agree to the suggestion that it is a primary task of international judiciaries to

interpret and apply the law. The fact is, however, that this task may also entail other law-related actions such as the systemization of the law; and the task does not prevent at least single judiciaries from also pleading a particular interpretation or application of the law, and in exceptional cases perhaps even criticizing the law. To give a few further examples, a legal scholar may describe and assess the law, but he or she may also criticize the law and argue for its revision. An expert collegium may be systemizing the law, but it may also be pleading a particular interpretation or application of the law or arguing its revision. As shown by the examples, the significance of the usage of a conceptual term has to be established by resort to other indicators than the mere fact that the utterer belongs to some certain category of agents. The potential meaning of the term works as such an indicator; and this is where functionality analysis enters the picture.

Functionality analysis helps answering questions concerning the significance of the usage of particular conceptual terms. First of all, functionality analysis helps international lawyers understand the relevance of contextual elements, such as for instance the particular place, time, or situation of utterance, or the particular topic addressed.⁷⁰ As stated in section 9, the functionalities of conceptual terms in international legal discourse are dependent on the cognitive environment of its participants. Now, obviously, the cognitive environment of participants in international legal discourse inevitably varies depending on the particular geographically, temporally, sociologically, or topically defined part of international legal discourse we happen to be investigating. The cognitive environment of participants in international legal discourse on 11 December 2013, for instance, is not necessarily the same as that on 11 September 2001. The cognitive environment of international lawyers based in Germany is not necessarily the same as that of lawyers based in the People's Republic of China. The cognitive environment of a group of law students in a class room situation is not necessarily the same as that of experienced international lawyers and highly qualified academics at an international conference. The cognitive environment of lawyers engaged in a discussion of international human rights law is not necessarily the same as that of lawyers engaged in a discussion of matters concerning maritime delimitation. Functionality analysis acknowledges that differences of this kind may exist. It explains why the significance of the utterance of a conceptual term like *proportionality* sometimes will be one, and sometimes another.

Even more importantly, functionality analysis helps international lawyers

⁷⁰ cf Lyons (n 8) at 573 ff.

understand the relationships that exist between the usage of a particular conceptual term and the effects that it may have on legal activities (referred to in this essay as the *significance* of the term). As appears from sections 3-8, those relationships do not always present themselves very clearly. This is because the uttering of a conceptual term may affect the beliefs, attitudes, or behaviour of an addressee in several ways simultaneously.⁷¹ For instance, *proportionality* has both a systemizing and a formative functionality, while it potentially not only helps international lawyers think and talk more systematically about legally relevant data, but also facilitates the formation of new concepts such as for instance *proportionality assessment* and *proportionality principle*. To complicate things even further, functionalities of conceptual terms may be indirect in the sense that if a cognitive environment comprises an assumption that a conceptual term has some certain functionality, then this may work to confer further functionalities on this same term. For instance, the utterance of *proportionality* may be used to camouflage the fact that in the final analysis, using traditional legal methodology, very little can be said about the identifying criteria and legal consequences tied to this concept. Because it has this functionality, *proportionality* potentially also renders the understanding and assessment of legal inferences more difficult.

Obviously, just as there may be a relationship between the lexical meanings of two words in a language (eg *arm* and *body*), relationships may exist between the different functionalities of a conceptual term. Functionality analysis may help explain those relationships. This may seem particularly important in cases where the internal structures of functionalities assume forms that are more complex than in the example just provided. Consider for instance the example of *jus cogens*. As I would like to believe, *jus cogens* potentially helps international lawyers inflate to importance statements that on closer scrutiny might be rather trivial: 'In my opinion, the prohibition of torture is *jus cogens* (because it is extremely important that torture be prevented).' *Jus cogens* potentially also prevents participants in international legal discourse from questioning the intents of an utterer: 'In my opinion, the prohibition of torture is *jus cogens* (and if by any chance you do not share this opinion, this shows you are pro-torture).' The explanation of those two functionalities lies in the combination of the normative and camouflaging functionalities of *jus cogens*. In other words, *jus cogens* potentially prevents participants in international legal discourse from questioning the intents of an utterer, not because *jus cogens* potentially helps the utterer convince her audience of the correctness of her conclusion, and not because *jus cogens* potentially camouflages that in the final analysis, using traditional legal methodology, very little can be said

⁷¹ *ibid*, at 735-736.

about the identifying criteria and legal consequences tied to this concept, but because *jus cogens* potentially does both.

XI. CONCLUSIONS

What is the way ahead? Obviously, functionality analysis opens new possibilities for the study of legal discourse. Considering this observation, it might seem tempting to initiate empirical investigations with a view to establishing a catalogue of the various functionalities conferred on conceptual terms in particular legal discourses. I would personally warn against all such attempts. By providing examples of the many functionalities of conceptual terms in international legal discourse, as I did in sections 3-8, I do not mean to imply that functionalities can ever be described exhaustively; on the contrary. I work on the assumption that the functionalities of conceptual terms in legal discourses are innumerable. I am convinced that even if I would confine my task to exhaustively enumerating the functionalities of particular terms, I would experience great difficulties. And if by chance I should ever succeed listing the functionalities of some particular conceptual term, considering the context-dependency of functionalities, that list would have a very limited durability, which would make it rather pointless. In my opinion, the main focus of any further inquiries should be on other tasks. Further studies should include the relationships that exist between functionalities of conceptual terms and the effects that the uttering of such a term may have on legal activities, particularly the formation of international law. A clear candidate for further investigation is also the relevance of contextual elements. If my researcher's instinct does not altogether mislead me, understanding the dependency of functionalities on contextual elements like time or topic-matter will prove instrumental to the understanding of the development of international law over time and the explanation of the existence of specialized international legal regimes.

LA QUESTION DE LA NATURE JURIDIQUE DE L'EAU DES COURS D'EAU INTERNATIONAUX – ESSAI D'ÉPISTÉMOLOGIE

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Le grand public considère l'eau comme une ressource naturelle. Le concept de «ressource naturelle» se rapporte d'abord à la ressource vue comme réalité autonome et individualisée. Ce concept reste cohérent avec la préservation de la souveraineté permanente des États sur leurs ressources naturelles. En considérant l'eau du cours d'eau international comme une ressource naturelle, les spécialistes du droit international proposent une vision unique de l'eau, tant nationale qu'internationale. Or, ce point de départ n'est pas pertinent: il est nécessaire de distinguer entre l'eau soumise à l'exclusivité d'une souveraineté nationale et celle du cours d'eau international soumise à plusieurs souverainetés, successives et/ou concomitantes. Il convient donc de discuter de la validité de ce regard sur l'eau du cours d'eau international et de tenter d'esquisser pourquoi le concept de ressource naturelle appliqué à l'eau du cours d'eau international est inadapté à l'aune des réalités du droit des cours d'eau internationaux. Il apparaît alors nécessaire de s'interroger sur la qualification retenue par la Cour internationale de justice, à savoir le caractère de ressource partagée du cours d'eau international. Le rejet de ce dernier pose alors la question des éléments qui justifient le caractère unique de la nature des cours d'eau internationaux. Cette recension est un passage obligé pour prendre la mesure de la difficulté qu'il y a à vouloir définir la nature de l'eau des cours d'eau internationaux. À cet égard, doter l'eau du cours d'eau international d'un statut spécifique qui doit rendre compte de sa réalité suppose de résoudre la tension inhérente à l'objet, territorialisé dans ses usages nationaux et globalisés dans ses répercussions sur les autres États du cours d'eau, et de créer tout à la fois les conditions nécessaires à la préservation du cours d'eau international comme unité hydrologique en prenant dûment en considération l'aspiration à la souveraineté territoriale étatique. Cette étude se place délibérément dans le cadre d'une étude prospective de l'émancipation du droit des cours d'eau internationaux.

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I. INTRODUCTION

Nul n'ignore combien l'acte de nommer est créateur. C'est par le verbe, et par l'acte qui consiste à nommer, qu'une chose ou un être existe¹. L'eau, comme toute chose, est une réalité matérielle incolore et inodore. C'est un composé chimique simple qui réunit à l'état pur une molécule d'oxygène et deux molécules d'hydrogène. Dans la nature, elle se présente sous forme de solution aqueuse plus ou moins minéralisée². À ce titre, qualifier un liquide comme étant de l'eau donne un certain nombre d'indications sur celui-ci. Cependant, n'étant pas une qualification juridique, celle-ci ne nous renseigne pas sur la façon dont le droit appréhende l'élément eau.

Fidèle à une longue tradition, le droit s'attache à classer les réalités matérielles dans des catégories juridiques conçues pour développer des conséquences relativement aux éléments qui les composent. En d'autres termes, le langage du droit constitue une façon juridique d'appréhender la réalité, d'en préciser le statut et d'en inférer les conséquences. Aussi, dire de l'eau qu'elle est une « ressource naturelle » ne saurait être neutre et recouvre plusieurs significations selon le discours dans laquelle s'insère cette qualification.

Elle renvoie tout d'abord à la signification du terme « ressource ». Étymologiquement, ce dernier vient du latin *resurgere*, participe passé

¹ La BIBLE, *Jean* 1.1 et 1.3

² Voir Jean-Louis Chaussade and Maryvonne Pellay, *Les 100 mots de l'eau* (Que sais-je ?, n° 3947, 1st edn, PUF 2012).

substantivé au féminin de « ressourdre » au sens de « rejaillir »³. Directement apparenté au mot « source » au sens d'émergence, ce terme a plusieurs sens. Au sens strict, il signifie ce qui permet de se rétablir, de se relever, « ce qui peut fournir de quoi satisfaire au besoin, améliorer une situation »⁴. Il acquiert un sens dérivé, à caractère économique, à partir du XVI^e siècle : il s'agit des « moyens pécuniaires, moyens matériels d'existence. On emploie généralement le pluriel pour désigner des moyens assez importants tenus en réserve pour les mauvais jours ou constituant des revenus surs »⁵. Au sens large et moderne, depuis le XIX^e siècle, et toujours au pluriel, le terme « ressources » signifie les « moyens matériels (hommes, réserves d'énergie, etc.) dont dispose ou peut disposer une collectivité, [comme par exemple les] ressources d'un pays »⁶.

Si dans l'absolu les ressources ne sont pas aisément définissables, elles ne peuvent l'être que par rapport à des besoins, qui imposent des contraintes de quantité, de qualité et de coût. Les ressources ont le sens d'une offre potentielle à évaluer suivant les critères relatifs aux besoins ou aux demandes⁷. En droit international, les ressources font l'objet de différentes dichotomies courantes par des couples de qualificatifs ou de compléments déterminatifs appliqués au terme « ressources »⁸. Parmi celles-ci, la notion de « ressources naturelles » signifie les « ressources à l'état brut tirées de la nature »⁹ ou du milieu naturel¹⁰.

³ Jean Dubois, Henri Mitterand and Albert Dauzat, *Grand Dictionnaire Étymologique et Historique du français* (2nd edn, Larousse 2005) 861.

⁴ *Dictionnaire Robert* (1st edn, 1973).

⁵ *ibid.*

⁶ *ibid.* De même, Jean Salmon (ed), *Dictionnaire de droit international public* (Bruylant/AUF 2001) 1002.

⁷ John Black considère les ressources comme toute chose qui contribue à une activité économique. Ceci inclus les ressources naturelles (situées sur la terre ainsi que dans et sous la mer), les ressources humaines (incluant le travail de plusieurs compétences et qualifications), et les biens d'équipement ou les moyens de production créés par l'homme (John Black, *A dictionary of economics* (2nd edn, OUP 2003) 403). Les ressources sont aussi les composantes qui assouissent les besoins des individus. Les ressources peuvent être produites par l'homme – travail, compétences, finances, capital, et technologies – ou naturelle – minerais, eau, terre, végétation naturelle, ou même climat -. La perception d'une ressource peut varier dans le temps : le charbon était d'une importance minime pour l'homme néolithique, tandis que le silex était d'une importance capitale. De telles ressources dépendent des technologies adéquates. D'autres ressources, tels les paysages et les écosystèmes, peuvent être valorisés de façon permanente quelle que soit la technologie (Susan Mayhew, *A Dictionary of Geography* (3rd edn, OUP 2004) 425).

⁸ Salmon (n 6) 1002-1004.

⁹ *ibid.* 1003.

¹⁰ Organisation Mondiale du Commerce (WTO) 'Rapport sur le Commerce

La notion de « ressources naturelles » est un exemple type de glissement entre les deux types de discours juridiques que sont le langage du droit et le métalangage¹¹. Issue du métalangage, le langage du droit s'en est emparée et lui a donnée une signification particulière. Plus spécifiquement, le terme « ressource naturelle » renvoie à certains établissements auxquels a été accordée une certaine autorité en matière d'exploitation et de préservation de certaines ressources. En particulier, concernant la propriété sur la ressource naturelle, le propriétaire en est généralement celui qui dispose d'un droit de propriété sur un fonds. La ressource se trouvant sur, au-dessus et au-dessous de ce fonds lui appartiennent, à condition que son exploitation ne cause pas de dommage à autrui¹².

Si l'eau en général est désignée comme une ressource naturelle¹³, l'eau des cours d'eau internationaux peut-elle bénéficier de cette qualification ? Cette interrogation n'est pas seulement de pure forme. Elle se justifie par les caractéristiques spécifiques de l'eau des cours d'eau internationaux : élément mouvant, constamment renouvelé, l'eau coule, se déplace, sans considération de frontières et de souverainetés. Dès lors, la question des droits de chaque État souverain sur l'eau du cours d'eau international se pose de façon aiguë en terme de consommation de la ressource, les États d'amont bénéficiant d'un statut géographique de premier utilisateur. Face à ces éléments factuels, la qualification de ressource naturelle appliquée à l'eau des cours d'eau internationaux ne résiste pas à l'analyse¹⁴, quel que soit le point de vue mis en œuvre, interne¹⁵ ou externe¹⁶, ou issu d'une approche couplée de ces différentes perspectives¹⁷. Ainsi, une perspective descriptive de l'eau du cours d'eau international comme une ressource naturelle dévoile une antinomie discursive (2).

Mondial de 2010 : Le Commerce des Ressources Naturelles' (2010) 46.

¹¹ Voir Hans Kelsen, *Théorie Pure du Droit* (Henri Thévenaz trd, rééd. 1988, Éd de la Baconnière 1953) 153.

¹² *Bouvier Law Dictionary* (Aspen Publishers 2011) 961.

¹³ Voir Jan G. Laitos, *Natural resources law: Cases and materials* (West Publishing Company 1985) 472 ; A. Randall, *Resource economics: An economic approach to natural resource and environmental policy* (Wiley 1987) 34-35.

¹⁴ Voir Tarek Majzoub and Fabienne Quilleré-Majzoub, 'Is Water a "Natural Resource" in International Watercourses?' (2013) 4 ELR News and Analysis 10358.

¹⁵ Voir Herbert Lionel Adolphus Hart, *Le Concept de Droit* (M. Van de Kerchove trd, n° 107, 2nd edn, Publications des Facultés Universitaires Saint-Louis 2005) 123.

¹⁶ *ibid.*

¹⁷ Voir Marc Loisel, 'L'Analyse du Discours de la Doctrine Juridique: L'Articulation des Perspectives Interne et Externe' in *Les Méthodes au Concret* (CURAPP, PUF 2000) 187.

Face à ce constat, une approche critique de la nature de l'eau des cours d'eau internationaux se révèle nécessaire. Elle suppose la recherche tout à la fois de l'existence ou non d'une autre qualification juridique actuellement appliquée, et de la reconnaissance d'un statut spécifique découlant de l'ensemble des règles du droit international déjà applicables à l'eau des cours d'eau internationaux. Cette approche critique se caractérise dès lors par une aporie axiologique (3). En effet, la qualification de ressource partagée retenue par la Cour internationale de justice pour qualifier l'eau du cours d'eau international ne fait pas autorité. Le rejet de ce concept pose alors la question des éléments qui édifient le caractère unique des cours d'eau internationaux dans le droit international. Cet état des lieux permet de prendre la mesure de la difficulté qu'il y a à vouloir définir la nature de l'eau des cours d'eau internationaux.

II. QUELQUES ASPECTS D'ANTINOMIE EPISTEMOLOGIQUE DU CONCEPT DE 'RESSOURCE NATURELLE' APPLIQUÉ À L'EAU DES COURS D'EAU INTERNATIONAUX

Toute définition s'inscrit dans un environnement de données, telles son origine, la référence aux textes qui gouvernent la matière, les exemples qui illustrent la notion, les remarques et les observations, les indications de synonyme ou, au moins, de parenté sémantique¹⁸. Aussi, la définition des « ressources naturelles »¹⁹ présente plusieurs sens. À cet égard, il n'est pas inutile de rappeler que « les rapports de l'économie et du droit sont particulièrement riches et variés ; si l'on s'efforce souvent de garder au concept juridique toute la sève et toute l'efficacité de sa référence économique, il y a aussi des cas, inévitables, où la notion juridique suit un destin différent de la notion économique : le même mot désigne alors des concepts différents, et l'on serait tenté de dire que c'est là le destin final de toute la terminologie juridique, s'il ne fallait pas réserver toujours les inconnues de l'évolution, même dans le monde du droit »²⁰.

L'eau en général, et l'eau des cours d'eau en particulier, n'échappent pas à cette règle²¹. Faute d'être substituable, l'eau est la ressource cardinale pour la vie de l'humanité et le développement socio-économique. À ce titre, elle

¹⁸ Voir Union Académique Internationale, *Dictionnaire de la Terminologie du Droit International* (Sirey 1960) VI.

¹⁹ Voir Fernando Sánchez Albavera, 'Natural Resources: The Current Debate' (December 1993) 51 CEPAL Review 163.

²⁰ Voir Paul Reuter, 'Quelques Réflexions sur le Vocabulaire du Droit International', in *Mélanges Offerts à Monsieur le Doyen Louis Trotabas* (Librairie Générale de Droit et de Jurisprudence (LGDJ) 1970) 429.

²¹ Voir Majzoub and Quilleré-Majzoub (n 14) 10361-10362.

est l'objet de multiples enjeux, tant nationaux qu'internationaux. « De plus en plus fréquemment, des voix autorisées estiment que de graves hypothèses pèsent sur cette ressource naturelle, essentielle à la vie sur la terre, qu'est l'eau douce »²². Aussi, dans les discussions actuelles relatives à la pénurie d'eau, l'eau en tant que « ressource naturelle » occupe une place de premier plan²³.

Cependant, il ressort des textes applicables à l'eau des cours d'eau internationaux qu'elle bénéficie d'un statut exonératoire. Si l'eau en général est considérée comme une ressource naturelle, celle des cours d'eau internationaux ne bénéficie pas aussi systématiquement de cette qualification (2.1). Cette hésitation est justifiée par l'inadéquation du régime de la « ressource naturelle » aux spécificités de l'eau des cours d'eau internationaux (2.2).

I. *La Qualification de l'Eau Comme « Ressource Naturelle » et le Cours d'Eau International: L'Exception à la Règle*

En principe, une « définition caractéristique » est constituée par une « proposition dont le premier membre est le terme à définir, le second étant composé de termes connus qui permettent de déterminer les caractères du premier »²⁴, à savoir « par genre prochain et différence spécifique »²⁵. Elle permet de déterminer, par une formule aussi concise que possible, l'ensemble des caractères qui façonnent l'étendue d'un concept. Selon qu'elle est normative²⁶ ou non²⁷, elle peut avoir une valeur contraignante ou non.

S'agissant de déterminer les termes par « genre prochain » de la définition des ressources naturelles, celles-ci sont les « ressources à l'état brut tirées de la nature »²⁸ ou du milieu naturel²⁹, c'est-à-dire des

²² Voir Daniel Bardonnet, 'Fleuves Internationaux' (décembre 1998) Répertoire de Droit International Dalloz (dernière mise à jour: Septembre 2011) 2 (para 1).

²³ Voir par exemple Pal Tamas, 'Water Resources Scarcity and Conflict: Review of Applicable Indicators and Systems of Reference' (Provisional version, UNESCO et al) 8 ; Laura Fugaro, Maria Pia Picchi and Ilaria Principi, 'Application of Energy Analysis to Sustainable Management of Water Resources', in Naim Afgan et als (eds), *Sustainable Development of Energy, Water, and Environment Systems* (AA Balkema Publishers 2004) 42.

²⁴ Salmon (n 6) XV.

²⁵ *ibid.*

²⁶ Voir Loisel (n 17) 187-190 : en substance, les définitions normatives sont soit légales, soit prétorienne.

²⁷ *ibid.* : ce sont des définitions doctrinales.

²⁸ Salmon (n 6) 1003.

marchandises physiques et naturelles, par opposition à celles issues du travail de l'homme³⁰. Elles sont donc tout élément naturel, tout moyen matériel présentant une valeur économique potentielle ou constituant un élément nécessaire au maintien de la vie, disponible et utile à l'être humain³¹. En ce qui concerne les termes par « différence spécifique », les ressources naturelles regroupent communément sous leur vocable les sols, les minéraux, l'eau - ou les eaux³² -, l'air, la faune, la flore, la lumière, les différentes énergies³³ et les combustibles fossiles³⁴.

Dans le cadre de dichotomies couramment utilisées, les « ressources naturelles » font le plus souvent l'objet d'une qualification³⁵ ou d'une certaine forme de détermination qui les définissent selon divers critères. Ainsi, en vertu de leur origine, elles sont biotiques³⁶ ou abiotiques³⁷. Selon leur état de développement, elles peuvent être potentielles³⁸, actuelles³⁹, de réserve⁴⁰, ou de stock⁴¹. Elles peuvent également être décrites en raison de leur périssabilité comme étant renouvelables⁴² ou non⁴³. De même,

²⁹ WTO (n 10) 46.

³⁰ Guillermo Jorge Cano, *A Legal and Institutional Framework for Natural Resources Management* (FAO Legislative Study n 9, FAO 1975) 30.

³¹ Qu'elles soient issues du soleil, du vent ou de la mer : voir *Bouvier Law Dictionary* (n 12) 961; *Black's Law Dictionary* (9th edn, West 2009) 1127.

³² Convention Africaine sur la Conservation de la Nature et des Ressources Naturelles (adoptée le 15 septembre 1968) 1001 UNTS 3, art III.

³³ Voir *Bouvier Law Dictionary* (n 12) 961; *Black's Law Dictionary* (n 31) 1127.

³⁴ Convention Africaine sur la Conservation de la Nature (n 32).

³⁵ Tels que : agricoles, minérales, minières, etc. On remarquera à cet égard que ces qualificatifs « valorisent » en quelque sorte une activité économique (voir par exemple Jonathan M. Harris, *Environmental and Natural Resource Economics: A Contemporary Approach* (2nd edn, Houghton Mifflin Company 2006) 7, 484).

³⁶ Les ressources biotiques sont celles provenant de la biosphère (forêts, animaux, oiseaux, poissons par exemple) et le matériel qui en provient. Le combustible fossile (charbon et hydrocarbures par exemple) est également compris dans cette catégorie car il est formé de matériel d'origine organique en décomposition.

³⁷ Les ressources abiotiques sont celles provenant de substances inorganiques, non vivantes (les sols, l'eau douce, l'air, les minéraux, etc.).

³⁸ Les ressources potentielles sont celles qui existent dans un espace géographique et peuvent être utilisées à l'avenir (par exemple les hydrocarbures).

³⁹ Les ressources actuelles sont celles qui ont été évaluées ou dont l'inventaire a été dressé, leurs quantités et qualités déterminées, et sont utilisées au temps présent.

⁴⁰ Les ressources de réserve sont celles qui peuvent être évaluées de façon rentable à l'avenir.

⁴¹ Les ressources de stock sont celles qui ont été évaluées mais ne peuvent être utilisées à défaut de technologie adéquate (par exemple l'hydrogène).

⁴² Les ressources renouvelables sont celles qui se renouvellent de façon naturelle. Les ressources ne sont classées comme renouvelables que si le taux de reconstitution dépasse celui d'exploitation ou d'utilisation, c'est-à-dire les sols, les eaux, la flore, la flore, la faune.

relativement à leur appropriation, elles sont considérées comme des ressources nationales ou internationales.

Les traités qui connaissent des ressources naturelles s'inscrivent dans cette approche lorsqu'ils les définissent. Celles-ci y sont « les ressources naturelles abiotiques et biotiques, telles que l'air, l'eau, le sol, la faune, la flore, et l'interaction entre les mêmes facteurs [...] »⁴⁴ ou « les ressources naturelles renouvelables, tangibles et non tangibles, notamment les sols, les eaux, la flore et la faune, ainsi que les ressources non renouvelables »⁴⁵. De même, dans les documents internationaux non contraignants qui les définissent, « [l]es ressources naturelles du globe, y compris l'air, l'eau, la terre, la flore et la faune, et particulièrement les échantillons représentatifs des écosystèmes naturels, doivent être préservés dans l'intérêt des générations présentes et à venir par une planification ou une gestion attentive selon que de besoin »⁴⁶. De la même façon, plusieurs documents internationaux relatifs à l'eau la considère avant tout comme une ressource naturelle⁴⁷. Ainsi, « l'eau fait partie intégrante de l'écosystème et constitue une ressource naturelle et un bien social et économique »⁴⁸. Elle est « une ressource naturelle limitée et un bien public ; elle est essentielle à la vie et à la santé »⁴⁹. Cette appartenance aux ressources naturelles est également

⁴³ Voir Salmon (n 6) 1003. Les ressources non renouvelables ou épuisables sont celles constituées lors de périodes géologiques longues (par exemple les hydrocarbures, le charbon, les aquifères fossiles).

⁴⁴ Convention sur la Responsabilité Civile des Dommages Résultant d'Activités Dangereuses pour l'Environnement (adoptée le 21 juin 1993) ECTS 150 (Convention de Lugano) Article 2 (para 10).

⁴⁵ Convention Africaine sur la Conservation de la Nature et des Ressources Naturelles (version révisée) (adoptée le 11 juillet 2003) Article V.1.

⁴⁶ Conférence des Nations Unies sur l'Environnement Humain, 'Déclaration de Stockholm' (adoptée le 16 juin 1972) 'Rapport de la Conférence des Nations Unies sur l'Environnement (Stockholm, 5-16 juin 1972)' UN Doc. A/CONF.48/Rev.1 (1972) Principe 2.

⁴⁷ Raphaël Romi, '100 Fois sur le Métier Remettez Votre Ouvrage: La Loi n° 92-3 du 3 Janvier 1992 sur l'Eau et le Droit de l'Environnement' [1992] Recueil Dalloz 61.

⁴⁸ Conférence des Nations Unies sur l'Environnement et le Développement, 'Agenda 21' (adopté le 14 juin 1992) UN Doc A/CONF.151/26/Rev.1, para 18.8. À cet égard, l'exploitation durable des ressources en eau, comme celle des autres ressources naturelles, suppose sa protection contre toute forme de pollution (voir en ce sens Accord intérimaire israélo-palestinien (28 octobre 1995) Annexe III portant Protocole relatif aux affaires civiles, Appendice 1, Article 12, A.1 à la lumière de A, et B.4 à la lumière de B.3).

⁴⁹ Comité des Droits Économiques, sociaux et Culturels, 'Observation Générale n° 15: Le Droit à l'Eau (Article 11 et 12 du Pacte International Relatif aux Droits Économiques, Sociaux et Culturels)' (29th session, 2002), UN Doc. E/C.12/2002/11 (20 janvier 2003) para 1.

sous-entendu par un raisonnement *a contrario* lorsqu'il est question de l'eau et « des autres ressources naturelles de valeur »⁵⁰. De façon implicite également, « la gestion de[s] ressources naturelles (autres que l'eau) et d'autres éléments déterminés par l'environnement situés à l'intérieur de leurs propres frontières ne [doit] cause[r] aucun préjudice réel à la condition naturelle des eaux des autres États »⁵¹.

De ce qui précède, il ressort que l'eau est systématiquement citée comme un exemple de « ressource naturelle » à raison d'un certain nombre de caractéristiques. Son caractère de ressource naturelle⁵² constate le fait qu'elle ne dépend pas de l'effort humain mais qu'elle est « donnée » par la nature. En vertu de son cycle, l'eau circule, s'infiltre, s'évapore, se précipite, se reconstitue « naturellement». Elle est tout à la fois immuable et en perpétuel mouvement, encore hors de portée de l'intervention humaine⁵³.

Toutefois, si l'eau apparaît presque invariablement comme un des exemples types de ressources naturelles, les textes et documents relatifs à celle-ci ne reprennent pas systématiquement cette qualification, et le relatif consensus sur la nature de l'eau en général ne s'applique pas *ipso facto* à l'eau du cours d'eau international. En particulier, le traité international dédié aux cours d'eau internationaux et à l'utilisation de leurs eaux, à savoir la Convention des Nations Unies du 21 mai 1997 sur le droit relatif à l'utilisation des cours d'eau internationaux à des fins autres que la navigation (Convention de 1997)⁵⁴, ne les qualifie pas de « ressources naturelles ». À cet égard, parmi la profusion de traités relatifs à certains

⁵⁰ Révision (signé le 22 novembre 1978, et amendé le 16 octobre 1983 et le 18 novembre 1987) de l'Accord entre les États-Unis d'Amérique et le Canada sur la Qualité des Eaux des Grands Lacs (signée le 15 avril 1972) Article (c) *in fine*.

⁵¹ ILA, 'Articles on the Relationship between Water, Other Natural Resources and the Environment [Articles Concernant les Relations entre l'Eau, les Autres Ressources Naturelles et l'Environnement]' (1980) Article 1 (b) (ILA, Committee on International Water Resources Law, 'Conférence de Belgrade' (1980) 17-18). Voir Slavko Bogdanović, *International Law of Water Resources: Contribution of the International Law Association (1954-2000)* 293-311; Patricia Wouters (ed), *International Water Law: Selected writings of Professor Charles B. Bourne* (Kluwer Law International 1997) 262-264, 278.

⁵² Voir John M. Hartwick and Nancy D. Olewiler, *The Economics of Natural Resource Use* (Addison-Wesley 1998) 57.

⁵³ Les hommes ne peuvent pas contrôler l'eau contenu dans l'atmosphère : voy. sur la question Tarek Majzoub et al., "Cloud busters": Reflections on the right to water in clouds and a search for international law rules' (2009) 20 Colo. J. Int'l Envtl. L. & Pol'y 321; Fabienne Quilleré-Majzoub, 'À Qui Appartiennent les Nuages? Essai de Définition d'un Statut des Nuages en Droit International' (2004) 50 AFDI 653.

⁵⁴ Convention des Nations Unies sur l'Utilisation des Cours d'Eau Internationaux à des Fins Autres que la Navigation (adoptée le 21 mai 1997) UN Doc. A/RES/51/229 (Convention de 1997).

cours d'eau internationaux ou de documents internationaux relatifs aux cours d'eau internationaux de façon générale, rares sont ceux qui les qualifient ainsi, que ce soit de façon explicite⁵⁵ ou implicite⁵⁶.

Cette circonspection à affirmer le caractère de ressource naturelle des eaux des cours d'eau internationaux ne manque pas de surprendre. Le terme « ressource naturelle » est une construction intellectuelle répandue s'agissant de la ressource hydraulique ; elle n'apparaît cependant que sporadiquement dans le discours juridique relatif à l'eau du cours d'eau

⁵⁵ En ce sens, voir:

- Traité entre les États-Unis d'Amérique et le Canada relatif aux Utilisations des Eaux de la Rivière Niagara (signé le 27 février 1950, entré en vigueur le 10 octobre 1950) préambule, para 4
- Traité du Bassin du Rio de la Plata entre le Brésil, l'Argentine, la Bolivie, la Paraguay et l'Uruguay (signé le 23 avril 1969, entré en vigueur le 14 août 1970) préambule, para 3
- Convention de Coopération pour la Protection et l'Utilisation Durable du Danube (signé le 29 juin 1994) Article 5 (2) (a) (où il est question de natural water resources)
- Protocole pour le développement durable du Bassin du Lac Victoria (signé le 29 novembre 2003) préambule, para 3 (en relation avec le para 4)
- Accord-Cadre sur la coopération dans le Bassin du Fleuve Nil (signé le 1^{er} août 2009) préambule, para 2, et Article 3, pt 14.

⁵⁶ En ce sens, voir:

Pour les traités:

- Statut du Fleuve Uruguay entre l'Uruguay et l'Argentine (signé le 26 février 1975) Chapitre 9 (intitulé 'Conservation, Utilisation et Développement des Autres Ressources Naturelles')
- Accord de Coopération pour le Développement Durable du Bassin de la Rivière Mékong entre le Cambodge, le Laos, la Thaïlande et le Vietnam (signé le 5 avril 1995) Article 3
- Protocole pour le développement durable du Bassin du Lac Victoria (signé le 29 novembre 2003) Article 6 para 1 (g), Article 7, Article 15 para 2, et Article 24 para 1.

Pour les autres documents :

- Association du Droit International, 'Projet d'Articles sur le Droit des Ressources Hydrauliques (Berlin) (révisant le Projet d'articles d'Helsinki)' (2004) Article 6 (commentaire)
- Association du Droit International, 'Règles sur les Relations entre l'Eau, les Autres Ressources Naturelles et l'Environnement (Belgrade)' (1980) (ILA, Committee on International Water Resources Law, 'Belgrade Conference' (1980) 17-18): ce texte, pris en application des 'Règles d'Helsinki' ('Règles sur les utilisations des eaux des fleuves internationaux' (1966) Article IV (ILA, 'Report of the Fifty-Second Conference (Helsinki, 14-20 August 1966) (1967) 484-532)), sous-entend l'appartenance de l'eau aux ressources naturelles
- Institut de Droit International, 'Résolution sur l'Utilisation des Eaux Internationales Non-Maritimes (Salzbourg)' (11 septembre 1961) préambule, para 1 (à la lumière du para 2).

international et au droit des cours d'eau internationaux⁵⁷. L'explication de ce phénomène, faute de transparaître dans les documents internationaux eux-mêmes ou dans leurs commentaires, doit dès lors être recherchée dans la signification juridique du concept de « ressource naturelle ».

2. *Le Régime de la « Ressource Naturelle » et l'Eau du Cours d'Eau International: Un Syllogisme Paradoxal*

« En principe, la définition d'un concept juridique n'inclut pas la description du régime qui s'y attache »⁵⁸. Elle requiert « une ou plusieurs illustrations d'emploi de chaque sens dans son contexte : c'est-à-dire de phrases comportant le mot à définir. Ces illustrations sont extraites de sources très diverses, [...] »⁵⁹. À cet égard, « [l]es juristes sont [...] amenés non à définir des objets, mais à répertorier des concepts. Or ces derniers ne peuvent le plus souvent être définis que par leur contenu [...]. On glisse dès lors insensiblement de la définition à la description »⁶⁰. Si le régime attaché à un concept n'est généralement pas décrit, il doit l'être lorsqu'il est inextricablement lié à la définition. Force est de constater que tel est le cas pour la notion de « ressource naturelle » : elle ne prend un sens juridique qu'en référence au principe de la « souveraineté permanente des États sur leurs ressources et richesses naturelles »⁶¹.

Ce principe du droit international s'est développé après la Seconde Guerre mondiale en réponse au problème de la propriété étrangère des ressources minérales, spécifiquement du pétrole, dans les nouveaux États indépendants⁶² en voie de développement⁶³. D'origine latino-américaine⁶⁴,

⁵⁷ Voir Luis Antonio Bittar Venturi, *Recurso Natural: A Construção de um Conceito* (2006) 20 GEOUSP – Espaço e Tempo 9.

⁵⁸ Salmon (n 6) XV.

⁵⁹ *ibid.*, XV-XVI: « [...] essentiellement : les traités, les résolutions d'organisations internationales, les décisions juridictionnelles, au premier rang desquelles la C.P.J.I. et la C.I.J., les arbitrages et, dans une moindre mesure la doctrine ».

⁶⁰ Gilbert Guillaume, 'Préface', in Salmon (n 6) X.

⁶¹ Voir Patrick Daillier, Mathias Forteau, et Alain Pellet, *Droit International Public* (8th edn, LGDJ/Lextenso éditions 2009) 1527.

⁶² Pour comprendre l'enjeu de la doctrine de la souveraineté permanente sur les ressources naturelles, il est utile de la replacer dans le contexte de l'époque où il était nécessaire d'assurer son indépendance et sa souveraineté nationale face aux nouvelles formes de « colonialisme » de l'exploitation étrangère et de la dépendance économique. Voir Jean Touscoz, 'La Souveraineté Économique, la Justice Internationale et le Bien Économique', in *Humanité et Droit International - Mélanges René-Jean Dupuis* (Pedone 1991) 316-317.

⁶³ Voir Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment* (Clarendon Press 1994) 112-117.

il a fait l'objet de nombreux débats⁶⁵ et études⁶⁶ qui permettent de mieux cerner le concept de « ressource naturelle ». Il repose sur l'idée que tout pays, dont les ressources et richesses naturelles se trouvent entre des mains étrangères, doit pouvoir recouvrer l'intégralité des droits normalement attachés à sa souveraineté⁶⁷.

La proclamation de la souveraineté permanente des États sur leurs ressources et richesses naturelles a été affirmée pour la première fois en 1952⁶⁸ où il a été notamment question du « droit des peuples d'utiliser et d'exploiter librement leurs richesses et leurs ressources naturelles [qui] est inhérent à leur souveraineté et conforme aux buts et aux principes de la Charte »⁶⁹. Puis, la Résolution de l'Assemblée générale des Nations Unies 1803 (XVII) de 1962⁷⁰ a proclamé le droit des peuples et des nations à leur souveraineté permanente sur leurs ressources et richesses naturelles⁷¹. Ce principe a été par la suite sanctionné par des traités et de très nombreux documents internationaux⁷². Pour la grande majorité des États, le principe

⁶⁴ C'est le Chili qui, en 1952, a introduit la notion dans le débat sur les Pactes relatifs aux droits de l'homme : voir P.J. O'Keefe, 'The United Nations and Permanent Sovereignty over Natural Resources' (1974) *J of World Trade L* 239; James N. Hyde, 'Economic Development Agreements' (1962) 105 *Recueil des Cours de l'Académie de Droit International* 335.

⁶⁵ Voir James N. Hyde, 'Permanent Sovereignty over Natural Wealth and Resources' (1956) 50/4 *AJIL* 854, 855.

⁶⁶ *ibid* 854.

⁶⁷ Autrement dit, un pays souverain ne peut être contraint de céder contre son gré à des étrangers les droits qu'il détient normalement sur les richesses situées sur son territoire.

⁶⁸ UNGA, Résolution 523 (VI) (12 janvier 1952) 'Développement économique intégré et accords internationaux', et Résolution 626 (VI) (21 décembre 1952) 'Le droit d'exploiter librement les richesses et ressources naturelles'.

⁶⁹ *ibid*. Parmi les ressources en question figurent en bonne place les ressources hydrauliques.

⁷⁰ UNGA, Résolution 1803 (XVII) (14 décembre 1962) 'Souveraineté Permanente sur les Ressources Naturelles'.

⁷¹ Son préambule recommande que le droit souverain de chaque État de disposer de ses richesses et ressources naturelles doit être respecté en accord avec ses intérêts nationaux.

⁷² Pour une liste des traités et documents internationaux évoquant cette théorie, voir tout particulièrement ILC, 'Rapport de la CDI à l'Assemblée Générale (63^e session)' (5 mai-6 juin et 7 juillet-8 août 2008), UN Doc. A/63/10 (2008) 44, fn 24. À cette liste non exhaustive, on peut ajouter également plusieurs autres documents : UNGA, Résolution 2158 (XXI) (25 novembre 1966) 'Souveraineté Permanente sur les Ressources Naturelles', Résolution 2692 (XXV) (11 décembre 1970) 'Souveraineté permanente sur les ressources naturelles des pays en voie de Développement et l'Expansion des Sources Intérieures d'Accumulation pour le Développement Économique', Résolution 3016 (XXVII) (18 décembre 1972) 'Souveraineté Permanente sur les Ressources Naturelles des Pays en Voie de

de la souveraineté sur les ressources naturelles a la force d'un véritable dogme. Ce principe implique la pleine maîtrise par chaque État de son développement et, par conséquent, le pouvoir de contrôler la manière dont sont utilisées ou exploitées les ressources et richesses naturelles situées sur son territoire.

En vertu de ce principe fondé sur le droit des peuples à disposer d'eux-mêmes, un droit souverain et exclusif sur ses ressources naturelles est reconnu à l'État. Autorité juridiquement constituée pour gérer les intérêts de sa population en toute indépendance, l'État est apte à exercer toute action tendant à la conquête ou à la récupération du contrôle sur les richesses situées sur son territoire. Déclarer la souveraineté permanente et inaliénable sur les ressources naturelles a une double signification. D'une part, aucune aliénation ou concession n'est valable sans le consentement de l'État sur le territoire duquel se trouvent ces ressources. D'autre part, cet État a, à tout instant, le droit de prendre ou de reprendre le contrôle des richesses aliénées. Avec le principe de la souveraineté permanente, il ne peut y avoir d'aliénation qu'à titre précaire, c'est-à-dire toujours révocable dès lors que le gouvernement considère qu'elle ne répond plus aux intérêts du pays, intérêts dont il est seul le juge et le gérant. Autrement dit, l'aliénation est toujours possible, mais elle ne saurait en aucune manière échapper à la volonté de l'État. La règle est que l'État peut exercer sa souveraineté sur tous les biens situés dans les limites de sa compétence territoriale. Il s'agit donc, comme l'ont précisé certaines résolutions, des ressources et richesses situées à l'intérieur des frontières internationales terrestres, et de celles que l'on trouve dans les espaces maritimes soumis à la juridiction nationale. Les ressources naturelles se trouvant sur, au-dessus et au-dessous de ces espaces lui appartiennent, à condition que leur exploitation ne cause pas de dommage à autrui⁷³.

À cet égard, il faut distinguer entre souveraineté et propriété, entre

Développement', et Résolution 3171 (XXVIII) (17 décembre 1973) 'Souveraineté Permanente sur les Ressources Naturelles'; ONUDI, 2^e Conférence, 'Déclaration de Lima' (adoptée le 26 mars 1975); CNUCED, Résolution 46 (III) (18 mai 1972) 'Mesures à Prendre pour Réaliser une Plus Large Entente sur les Principes devant Régir les Relations Commerciales Internationales et les Politiques Commerciales Propres à Favoriser le Développement'; Conseil du Commerce et du Développement, Résolution 88 (XII) (19 octobre 1972): elle réaffirme le droit souverain de tous les pays à disposer librement de leurs ressources naturelles; NUGA, Résolution 3201 (S-VI) (1^{er} mai 1974) 'Déclaration sur l'Établissement d'un Nouvel Ordre Économique International'; Conseil de Sécurité, Résolution 330 (XXVIII) (21 mars 1973) ; et les nombreuses Résolutions du Conseil économique et social.

⁷³ *Bouvier Law Dictionary* (n 12) 961.

*imperium*⁷⁴ et *dominium*⁷⁵. La souveraineté signifie que l'État veille à l'intérêt général et contrôle dans ce but l'exercice du droit de propriété. En d'autres termes, la souveraineté sur les ressources naturelles est une notion politique qui n'est pas incompatible avec le fait que la propriété des ressources ou le droit de les exploiter appartienne à des étrangers. Cependant, cette distinction reflète les conceptions du libéralisme économique et semble peu compatible avec les réalités du monde actuel au sein duquel la séparation de l'économique et du politique s'avère illusoire. Les États, souverains sur leurs ressources naturelles, peuvent arriver légitimement à la conclusion que la souveraineté effective et le droit de propriété, même règlementé, sont deux notions contradictoires, et quelque fois incompatibles⁷⁶.

« Dans le droit international classique, les ressources naturelles n'avaient pas de place. L'arrangement des ressources était supposé suivre la délimitation de la souveraineté en terme spatial entre les États »⁷⁷. Si la question de la nature de l'eau des cours d'eau internationaux se pose sous la forme d'une controverse, c'est en raison de la revendication de souveraineté sur cette ressource naturelle qui oppose la plupart du temps les États d'amont et d'aval. En effet, parce qu'elle est une nécessité universelle, l'eau est, par nature, une ressource objet de conflit : dans les cours d'eau internationaux, elle coule d'une souveraineté à l'autre et défie toute appropriation nationale. L'eau du cours d'eau international met donc en jeu plusieurs souverainetés et relève simultanément tant du domaine national qu'international⁷⁸.

Or, ni le droit international ni le droit national ne distingue entre les ressources naturelles. Qu'elles soient soumises à la juridiction exclusive d'un seul État ou à plusieurs juridictions, la ressource naturelle forme un tout. À ce titre, elle est soumise à une seule doctrine juridique, celle de

⁷⁴ Le pouvoir de commandement (Henri Roland et Laurent Boyer, *Locutions latines du droit français* (4th edn, Litec 1998) 175-176).

⁷⁵ Le domaine (ibid., 121-122).

⁷⁶ Voir en ce sens : UNGA, Résolution 56/204, 'Souveraineté Permanente du Peuple Palestinien sur les Terres Palestiniennes Occupées, y Compris Jérusalem Est, et les Habitants Arabes du Golan Syrien Occupé sur Leur Ressources Naturelles' (21 décembre 2001).

⁷⁷ « In classical international law, natural resources had no place. The disposition of resources was assumed to follow the delimitation of sovereignty in spatial terms between the States » (Ian Brownlie, 'Legal Status of Natural Resources in International Law (Some Aspects)' (1979) 162 *Recueil des Cours de l'Académie de Droit International* 253).

⁷⁸ Robert H. Abrams, 'Natural Resources Law', *Encyclopædia Britannica Online*, <<http://www.britannica.com/EBchecked/topic/1341009/natural-resources-law>> (visité le 10 octobre 2013).

l'appropriation dans les frontières de l'État⁷⁹. En effet, la qualification de « ressource naturelle » utilisée pour définir les cours d'eau les soumet tous au même traitement, sans considération de leur caractère international ou national. Or, le principe de souveraineté sur les ressources naturelles appliqué à un cours d'eau s'impose à l'eau située totalement à l'intérieur des frontières nationales. L'absence de chevauchement ou de ramifications transnationales de ses eaux évite ainsi tout problème d'ordre international. Le terme « ressource naturelle » permet donc de décrire sans difficulté l'eau soumise à la juridiction nationale d'un seul État, à savoir l'eau d'un cours d'eau national.

Par contre, qualifier l'eau des cours d'eau internationaux de « ressource naturelle » devient discutable, les conséquences d'une telle qualification n'étant pas neutres pour la souveraineté des États sur la ressource. Les diverses utilisations dont sont susceptibles les eaux des cours d'eau internationaux soulèvent de fait de nombreux problèmes⁸⁰, notamment concernant l'exercice de la souveraineté des États riverains. Ces divers usages par un État peuvent entraîner des « conséquences nuisibles » sur le territoire d'un autre État riverain. Il s'agit donc de concilier les intérêts souvent opposés au regard de la multiplicité des usages⁸¹ et la souveraineté de chaque État riverain intéressé. Il est particulièrement important à cet égard de ne pas sous-estimer l'attraction territoriale qui s'exerce sur les cours d'eau internationaux, au point de se demander s'ils ne sont pas des éléments du territoire comme les autres. En effet, ils font partie du territoire des États qu'ils traversent, ou séparent, et sont par conséquent placés sous leur souveraineté.

La question qui se pose dès lors concerne la qualité de la compétence territoriale de l'État riverain. Y a-t-il plénitude de compétence comme l'exige la qualification de « ressource naturelle » ? Les conséquences d'ordre pratique impliquées par cette question sont considérables dans la mesure où il s'agit de rendre compatible l'exercice simultané des souverainetés des États riverains sur un élément qui traverse leur territoire, et ce fait difficilement susceptible d'une appropriation définitive⁸² et, en

⁷⁹ Pour un exemple d'accord relatif à l'exploitation de ressources naturelles dans une zone frontalière controversée : 'Mining Integration and Complementation Treaty Between Chile and Argentina' (adopted on December 29, 1997).

⁸⁰ Pour s'en convaincre, voir la littérature abondante concernant les crises de l'eau autour de cours d'eau internationaux tels que le Nil, l'Euphrate et le Tigre ou encore le Jourdain (Tarek Majzoub, *Les Fleuves du Moyen-Orient – Situation et Prospective Juridico-Politiques* – (L'Harmattan 1994)).

⁸¹ Qu'il s'agisse de l'irrigation, de la production d'énergie hydroélectrique, etc.

⁸² Les plus grands barrages sont submergés par les eaux des cours d'eau qui s'écoulent sans discontinuer. Même si l'eau détournée pour l'irrigation est

tout état de cause, « partagé »⁸³. En droit international, l'exercice de la souveraineté des États ne s'arrête pas à la rive des cours d'eau, mais à celle de leurs frontières. Les cours d'eau internationaux sont à cet égard un des éléments du territoire. À cet égard, la notion de cours d'eau international est une notion purement juridique. Elle ne soustrait pas le cours d'eau qui traverse, ou sépare, le territoire de plusieurs États à la souveraineté de ceux-ci. Cependant, l'exercice de la souveraineté des États riverains sur l'eau du cours d'eau international ne saurait être pleine du fait même de leur pluralité et de leur instantanéité. La Convention de 1997 ne dit rien d'autre quand elle définit les limites à la souveraineté des États⁸⁴ qu'entraîne le caractère international d'un cours d'eau et de ses divers éléments⁸⁵ à travers les principes de l'utilisation équitable et raisonnable⁸⁶

totale, une dérivation totale – et un assèchement complet – d'un cours d'eau pour cette raison est difficilement concevable, bien que possible (par exemple : cas de l'Amou Daria et du Sir Daria et ses conséquences sur la mer d'Aral : 'Mer d'Aral: une Catastrophe Écologique' (1^{er} septembre 2007) La Documentation française

<<http://www.ladocumentationfrancaise.fr/dossiers/heritage-sovietique/mer-aral.shtml> (visité le 10 octobre 2013); cas du Huang He et du Yangtsé-kiang en Chine ['Un avenir noir pour le fleuve Bleu' (29 mars 2012) Courrier International <<http://www.courrierinternational.com/article/2012/03/29/un-avenir-noir-pour-le-fleuve-bleu>> (visité le 10 octobre 2013); ou encore cas du fleuve Murray en Australie ou du Colorado aux États Unis). Les détournements effectués pour des ouvrages comme les canaux de communication ne constituent pas non plus des dérivations totales des cours d'eau.

⁸³ Voir Fabienne Quilleré-Majzoub et Tarek Majzoub, 'Le Cours d'Eau International Est-Il une "Ressource Partagée"?' [2009] Revue Belge de Droit International 499.

⁸⁴ Stephen C. McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (OUP 2007) ; Laurence Boisson de Chazourne et Salman M. A. Salman (eds), *Les Ressources en Eau et le Droit International* (Nijhoff 2005).

⁸⁵ Convention de 1997 (n 54) Article 2.

⁸⁶ *ibid.*, Article 5 et 6, et tout spécialement Article 5 para 1. Ce principe s'inscrit dans la logique du droit international, car il existe dès 1929 un principe selon lequel « la communauté d'intérêts sur un fleuve navigable devient la base d'une communauté de droit, dont les traits essentiels sont la parfaite égalité de tous les États riverains dans l'usage de tout le parcours du fleuve et l'exclusion de tout privilège d'un riverain quelconque par rapport aux autres » (*Affaire Juridiction territoriale de la Commission internationale de l'Oder*, Rep CPJI Série A No 23 (Avis Consultatif) 27). De plus, si en 1929, la navigation était prioritaire, la coopération internationale a depuis investi d'autres secteurs (Lucius Caflisch, 'Règles Générales du Droit des Cours d'Eau Internationaux' (1989) 219 Recueil des Cours de l'Académie de Droit International 42; Patricia Buirette, 'Génèse d'un Droit Fluvial International Général – Utilisation à des Fins Autres que la Navigation' [1991] RGDIP 5) et concernent aujourd'hui les utilisations autres que la navigation (Alexandre Kiss, 'Legal Procedures Applicable to Interstate Conflicts on Water Scarcity: The *Gabčíkovo* Case', in Edward H. P. Brans, Esther J de Haan, Andre Nollkaemper and Jan Rinzema (eds) *Water Scarcity and*

et de l'utilisation non dommageable du territoire⁸⁷. Dès lors, « toute tentative de plier, en droit des gens, au même traitement des choses foncièrement dissemblables, est vouée à l'insuccès certain »⁸⁸. La notion de « ressource naturelle » trouve ici ses limites.

III. QUELQUES ELEMENTS DE CRITIQUE AXIOLOGIQUE DANS L'APPRÉHENSION DE L'EAU DES COURTS D'EAU INTERNATIONAUX EN DROIT INTERNATIONAL PUBLIC

L'eau des cours d'eau internationaux doit être préservée et ne peut pas faire l'objet de pratiques jugées normalement acceptables à l'encontre de toute autre ressource naturelle de type classique, c'est-à-dire consommable et financièrement profitable. Irremplaçable, l'eau apparaît comme la vie qu'elle fait naître par sa présence : hors de prix et gratuite tout à la fois, paradoxale par définition⁸⁹. Elle concentre sur elle tout à la fois la volonté des États du cours d'eau international d'en accaparer les richesses, et l'impossibilité patente de toute tentative d'appropriation au profit d'un seul État. Sans propriétaire incontesté, les eaux du cours d'eau international se trouvent dès lors propulsées hors du monde mercantile de l'offre et de la demande et représentent par nature l'image de la solidarité, même si elle est difficile, voire parfois impossible, à atteindre.

L'eau du cours d'eau international présente à cet égard des caractéristiques spécifiques qui la distinguent des autres ressources naturelles⁹⁰ et ne permet pas l'exercice du principe de la pleine souveraineté des États sur leurs ressources naturelles. Juridiquement, elle ne peut pas être considérée comme une « ressource naturelle » et, dans leur pratique, les États ne la considèrent pas comme une « ressource naturelle » comme les autres⁹¹. « [U]ne centaine d'États au moins ont donc reconnu [...] que le principe

International Law (Kluwer Law International 1997) 59, 62).

⁸⁷ En vertu de l'adage romain *sic utere tuo ut alienum non laedas*, soit l'obligation pour un État de ne pas laisser utiliser son territoire aux fins d'actes contraires aux droits d'autres États. Voir *Affaire du Déroit de Corfou* [1949] Rec CIJ 22 ; *Affaire Gabčíkovo-Nagymaros (Hongrie c. Slovaquie)* [1997] Rec CIJ para 78 (1).

⁸⁸ Cette affirmation de Bohdan Winiarski reste toujours d'actualité (Bohdan Winiarski, 'Principes généraux du droit fluvial international' (1933) 45 Recueil des Cours de l'Académie de Droit International 160).

⁸⁹ Voir en ce sens le paradoxe économique de l'eau et du diamant (voir Éric Fries, 'Le Paradoxe de la Valeur chez Adam Smith' (1978) 29 (4) *Revue Économique* 713).

⁹⁰ Il s'agit ici des richesses minérales, c'est-à-dire de ressources naturelles « statiques » au sens où elles ne se déplacent pas. Pour les ressources en eau, il s'agit des ressources dites « nationales », c'est-à-dire non-internationales au sens de la Convention de 1997 (n 54) Article 2.

⁹¹ Voir II, B, les développements sur la protection de l'eau dans les conflits.

de la souveraineté permanente sur les ressources naturelles ne s'applique pas aux ressources naturelles partagées et, par conséquent, qu'il ne s'applique pas à l'eau des voies d'eau internationales »⁹².

Cette singularité est tout entière exprimée dans la qualité de « ressource partagée » de l'eau⁹³. Pour autant, cette qualification n'est pas acceptée par une majorité d'États. S'ils considèrent l'eau du cours d'eau international comme la composante essentielle de la communauté des États riverains⁹⁴ et reconnaissent la nécessité de l'utiliser de manière équitable et raisonnable, cette vision n'a pas débouché sur un consensus envers son caractère partagé, et ce malgré la position adoptée par la Cour internationale de justice (3.1). Face à cette forme d'impasse, et avant même de prétendre à s'essayer à une quelconque tentative de qualification de l'eau des cours d'eau internationaux, il est nécessaire de se pencher sur les éléments caractéristiques que le droit international lui reconnaît et qui lui donne toute sa spécificité (3.2).

1. *La Qualification de « Ressource Partagée » Appliquée à l'Eau du Cours d'Eau International: Un Obstacle Sémantique Majeur*

Le droit international conventionnel à vocation universelle, dans la Convention de 1997⁹⁵, n'a pas retenue l'expression « ressource partagée » pour qualifier l'eau du cours d'eau international et son utilisation. Par contre, au moment où celle-ci était proposée à la ratification des États, la Cour internationale de Justice (CIJ), dans son arrêt *Gabčíkovo-Nagymaros* du 25 septembre 1997, devait expressément utiliser cette expression. En effet, la CIJ « considère que la Tchécoslovaquie, en prenant unilatéralement le contrôle d'une ressource partagée, et en privant ainsi la Hongrie de son droit à une part équitable et raisonnable des ressources naturelles du Danube – avec les effets continus que le détournement de ses eaux déploie sur l'écologie de la région riveraine [...] – n'a pas respecté la

⁹² Affirmation de Stephen M. Schwebel, rapporteur de la CDI, fondée sur l'article 3 de la 'Charte des droits et devoirs économiques des États' (CDI, 'Annuaire de la CDI (vol. II, 1^{re} partie)' (1980) UN Doc. A/SER/1980/9/Add.1 (Part.1) 177-178, para 148). Voir également Daillier, Forteau et Pellet (n 61) 1158-1159, n° 609.

⁹³ Voir Quilleré-Majzoub et Majzoub, 'Le Cours d'Eau International Est-Il une "Ressource Partagée"?' (n 83).

⁹⁴ Claude-Albert Colliard, 'Droit Fluvial International: Les Problèmes Actuels des Ressources en Eau' (1988) XXII Revue Roumaine d'Études Internationales 165.

⁹⁵ Rappelons que la Convention de 1997 n'est toujours pas entrée en vigueur : elle compte actuellement (au 1^{er} août 2013) 30 ratifications (et 16 signatures) sur les 35 nécessaires à son entrée en vigueur en vertu de l'article 36.

proportionnalité exigée par le droit international »⁹⁶. Cet *obiter dictum* marque la consécration sans équivoque par la Cour du caractère de « ressource partagée » du cours d'eau international.

Cette qualification n'est pas accidentelle. La CIJ l'utilise à plusieurs reprises dans son arrêt en qualifiant le Danube de « cours d'eau international partagé »⁹⁷, et en confirmant qu'il s'agit d'une « ressources en eau partagées »⁹⁸. La répétition des termes est ici essentielle et consacre la notion de « ressource partagée » du cours d'eau international. De plus, cette consécration intervient dans le respect du droit des cours d'eau internationaux et associe cette notion avec le principe de l'utilisation équitable et raisonnable⁹⁹ inscrit dans la Convention de 1997 comme élément juridique impliqué par cette expression à défaut de l'expression elle-même. Par ailleurs, cette qualification n'est pas isolée puisqu'elle a fait l'objet d'une utilisation renouvelée dans l'arrêt de la CIJ dans l'affaire des *Usines de pâte à papier sur le fleuve Uruguay* du 20 avril 2010 : « [les parties] sont tenues de garantir l'utilisation rationnelle et optimale du fleuve Uruguay en se conformant aux obligations prescrites par le statut aux fins de la protection de l'environnement et de la gestion conjointe de cette ressource partagée »¹⁰⁰. Plus encore que dans son arrêt de 1997, cette qualification traverse l'arrêt de la Cour¹⁰¹ et confirme la juridicité de la notion de « ressource partagée ».

À cet égard, cette expression n'est pas nouvelle. Apparue officiellement en 1973¹⁰², elle a été utilisée en 1974 pour désigner les ressources exploitées par

⁹⁶ *Affaire Gabčíkovo-Nagymaros* (n 87) para 85 (4), souligné par l'auteur.

⁹⁷ *ibid* para 78 (1).

⁹⁸ *ibid* paras 147, 150 et 152 (4).

⁹⁹ Cette association est, elle aussi, remarquable, car elle avait dans le passé suscité des réserves de la part de certains États en voie de développement ; voir Pierre-Marie Dupuy, 'Où en Est le Droit International de l'Environnement à la Fin du Siècle?' [1997] RGDIP 882.

¹⁰⁰ *Affaire Usines de Pâte à Papier sur le Fleuve Uruguay (Argentine c. Uruguay)* [2010] Rec CIJ para 173, souligné par l'auteur.

¹⁰¹ *ibid*, paras 81 *in fine*, 86, 103, 138, 176-177, et 203-204.

¹⁰² UNGA, Résolution 3129 (XXVIII) (13 décembre 1973) 'Coopération dans le domaine de l'environnement en matière de ressources naturelles partagées par deux ou plusieurs États'. Cette résolution rappelle la Déclaration de la Conférence des Nations Unies sur l'environnement ('Déclaration de Stockholm' (n 46)) et la 'Déclaration économique de la quatrième Conférence des chefs d'État ou de gouvernement des pays non alignés' (4^e Conférence des chefs d'État et de gouvernement des pays non alignés, 'Déclaration économique' (Alger, 5-9 septembre 1973) UN Doc. A/9330, 94 (Section XII)) dans lesquelles il était fait référence aux « ressources naturelles communes à deux ou plusieurs États ».

deux ou plusieurs États¹⁰³. Le Plan d'action de Mar del Plata¹⁰⁴ a, quant à lui, utilisé l'expression « ressources en eau partagées »¹⁰⁵. En 1978, cette expression a été consacrée par le « Projet de principes de conduite dans le domaine de l'environnement pour l'orientation des États en matière de conservation et d'utilisation harmonieuse des ressources naturelles partagées par deux ou plusieurs États »¹⁰⁶. Si aucun instrument ne définit les « ressources partagées »¹⁰⁷, cette expression a été utilisée à de

¹⁰³ AGNU, Résolution 3281 (XXIX) (12 décembre 1974) 'Charte des droits et devoirs économiques des États', Article 3 (sur la coopération entre États grâce à un système d'informations et de consultations préalables en vue d'assurer l'exploitation optimale des « ressources communes », autres expression utilisée pour désigner les ressources qui s'étendent sur les territoires de plusieurs États).

¹⁰⁴ 'Rapport de la Conférence des Nations Unies sur l'Eau (Mar del Plata, 14-25 mars 1977), publication des Nations Unies, numéro de vente F.77,II.A.12.

¹⁰⁵ 'Plan d'Action de Mar del Plata sur la Mise en Valeur et la Gestion des Ressources en Eau', *ibid*, en particulier, voir les recommandations G (Coopération Régionale, paras 84-87) et H (Coopération Internationale, paras 90-93) sur la 'Mise en Valeur des Ressources en Eau Partagées'. Voir Également la 'Conférence des Nations Unies sur la Désertification', où était soulignée la nécessité d'une gestion « sage et efficace des ressources hydrauliques partagées afin d'en assurer une utilisation rationnelle » ('Rapport de la Conférence des Nations Unies sur la désertification (Nairobi, 29 août-9 septembre 1977)' UN Doc. A/CONF.74/36 (1977) para 33).

¹⁰⁶ UNEP, Conseil d'Administration, Décision 6/14 (19 mars 1978), 'Coopération dans le Domaine de l'Environnement Concernant les Ressources Naturelles Partagées par Deux ou Plusieurs États', in 'Rapport Officiel de l'Assemblée Générale (33^e Session, Supplément No. 25)' UN Doc. A/33/25, Annexe I. Pour le texte intégral, voir Laurence Boisson de Chazournes, Richard Desgagne et Cesare Romano (eds), *Protection Internationale de l'Environnement* (Pedone 1998) 30-34. Après sa révision par la Deuxième Commission, l'Assemblée adoptait sans vote ce 'Projet de principes' le 18 décembre 1979 (UNGA, Résolution 34/186 (18 décembre 1979) 'Coopération dans le Domaine de l'Environnement en Matière de Ressources Naturelles Partagées par Plusieurs États'). Par la suite, et contrairement à ce qui avait été prévu, ce projet n'a pas servi à l'élaboration d'une convention internationale sur les questions relatives aux ressources naturelles partagées (UNGA, Résolution 33/87 (15 décembre 1978) 'Coopération dans le Domaine de l'Environnement en Matière de Ressources Naturelles Partagées par Deux ou Plusieurs États', et Résolution 34/186, *ibid*). En effet, la plupart des gouvernements ayant fait part de leurs observations ont estimé que les principes devaient être considérés « comme des principes directeurs et non comme constituant un code international de conduite qui aurait force obligatoire pour les États. [...] [Ils] ont souhaité que ceux-ci servent de base de négociation lorsque les États élaboreraient des traités bilatéraux ou multilatéraux concernant les ressources naturelles qu'ils partagent » ('Rapport du Secrétaire Général sur la Coopération dans le Domaine de l'Environnement en Matière de Ressources Naturelles Partagées par Deux ou Plusieurs États' UN Doc. A/34/557 et Corr.1, para 6).

¹⁰⁷ En particulier, le *Projet de principes* du PNUE de 1978 ne les définit pas. Selon le

nombreuses reprises dans la décennie suivante¹⁰⁸, spécialement dans le cadre de la codification des règles du droit international relatives aux voies d'eau internationales de la CDI¹⁰⁹ pour définir leur caractère atypique¹¹⁰. Quoique critiquée¹¹¹, l'utilisation de cette expression semblait recevoir un accueil plutôt positif¹¹². Par la suite cependant, ce terme ne devait plus être

Directeur Exécutif du PNUE, « Le groupe de travail, faute de temps, n'était pas à même de procéder à une discussion approfondie de la question de la définition des ressources naturelles partagées et par conséquent n'est pas parvenu à des conclusions » ('Note du Directeur Exécutif du PNUE' UN Doc. UNEP/GC.6/17 (10 mars 1978) 7).

¹⁰⁸ Voir en particulier : les conclusions de la réunion interrégionale qui renvoyaient à l'idée de « ressources en eau partagées » (ONU, 'Expériences de Mise en Valeur et de Gestion des Bassins de Fleuves et de Lacs Internationaux (Actes de la Réunion interrégionale des organisations fluviales internationales, Dakar, 5-14 mai 1981)' (Ressources Naturelles/Série Eau n° 10, UN, 1981) 16 (1^{re} partie, 'Rapport de la Réunion', para 49); la communication du Ministère Égyptien de l'Irrigation Intitulée 'Étude des Ressources en Eaux Souterraines Partagées dans l'Afrique du Nord-Est' (ibid, 328 (II^o partie 'Sélection de Communications Présentées par des Organisations Fluviales Internationales, des Gouvernements et des Organisations Intergouvernementales'); le rapport du professeur Robert D. Hayton sur les 'Progrès Réalisés dans le Cadre des Accords de Coopération' (ibid, 76 (II^o partie, 'Documentation de base'); les 'Règles de Montréal relatives à la pollution des eaux d'un bassin de drainage international' (ILA, 'Report of the Sixtieth Conference (Montréal, 1982)' (1983) 1, Résolution 2/1982, para 4).

¹⁰⁹ La CDI a entamé l'examen du sujet dès 1971, et l'a poursuivi jusqu'en 1994.

¹¹⁰ Stephen M. Schwebel (rapporteur spécial), 'Premier Rapport sur le Droit Relatif aux Utilisations des Voies d'Eau Internationales à des Fins Autres que la Navigation' (21 mai 1979) UN Doc. A/CN.4/320 and Corr.1; 'Deuxième Rapport sur le Droit Relatif aux Utilisations des Voies d'Eau Internationales à des Fins Autres que la Navigation' (24 avril et 22 mai 1980) UN Doc. A/CN.4/332 and Corr.1 and Add.1, Chapitre III Intitulé 'Principes Généraux: l'Eau, Ressource Naturelle Partagée' 176.

¹¹¹ Les « ressources partagées » constituaient une notion trop récente dans la pratique internationale pour que la CDI s'y réfère : voir Quilleré-Majzoub et Majzoub, 'Le Cours d'Eau International Est-Il une "Ressource Partagée"?' (n 83) fn 81.

¹¹² Plusieurs organismes, onusiens ou non, l'avaient déjà utilisée (Schwebel, Deuxième Rapport... (n 108) 176). Voir également les déclarations des représentants de la Thaïlande (UNGA, Sixième Commission (35^e session) 'Documents Officiels de l'Assemblée Générale' UN Doc. A/C.6/35/SR56 (1980) para 51), de l'Égypte (ibid, para 72), de l'Algérie (UN Doc. A/C.6/35/SR55 (1980) para 36), de l'Argentine (UN Doc. A/C.6/35/SR57 (1980) paras 18-20), des États-Unis d'Amérique (UN Doc. A/C.6/35/SR56 (1980) para 21) et des Pays Bas (UN Doc. A/C.6/35/SR44 (1980) paras 38-39). Le troisième rapporteur spécial de la CDI, Jens Evensen, a également utilisé cette expression (CDI, 'Annuaire de la CDI' (vol. II, 2^e partie) (1983) UN Doc. A/CN.4/SER.A/1983/Add.1 (Part 2) 75, fn 248): « chaque État du système a un droit de participation raisonnable et équitable (à l'intérieur de son territoire) à cette ressource partagée » (CDI, 'Annuaire de la CDI' (vol. II, 1^{re} partie) (1983) UN Doc.

utilisée dans des documents internationaux¹¹³, seul celui de « ressources communes » étant utilisé dans de rares dispositions¹¹⁴.

Ce n'est que récemment que cette expression a été de nouveau mise en lumière dans le cadre des travaux de la CDI relatifs au « statut des

A/CN.4/SER.A/1983/Add.1 (Part 1) 176-177, para 80). Plusieurs membres de la CDI ont défendu son utilisation (CDI, 'Annuaire de la CDI (vol. I)' (1983) UN Doc. A/CN.4/SER.A/1983: déclarations de M Stavropoulos (ibid, 187, para 38); de M Pirzada (ibid, 194, para 30); de M Sucharitkul (ibid, 195, para 3); de M Diaz González (ibid, 205, para 2); de M Barboza (ibid, 207-208, paras 9-11); de M Balanda (ibid, 209-210, paras 20 et 24); et de M Mahiou (ibid, 232, para 9)).

¹¹³ Jorge Thierry Calasans, *Le Concept de « Ressource Naturelle Partagée » – Application aux Ressources en Eau: L'Exemple de l'Amérique du Sud* (thèse, Université Paris I – Panthéon-Sorbonne 1992) 55: ce terme n'apparaît ni dans les documents adoptés lors de la 'Conférence de Rio sur l'environnement et le développement de 1992' ('Rapport de la Conférence des Nations Unies sur l'environnement et le développement (Rio de Janeiro, 3-14 juin 1992)' UN Doc. A/CONF.151/26 (Vol. I à IV)), ni dans ceux des cinq Forums Mondiaux de l'Eau ('1^{er} Forum Mondial de l'Eau' (FME) (Marrakech, mars 1997); '2^e FME' (La Haye, mars 2000); '3^e FME' (Kyoto, Osaka et Shiga, 16-23 mars 2003); '4^e FME' (Mexico, 14-22 mars 2006); '5^e FME' (Istanbul, 16-22 mars 2009); '6^e FME' (Marseille, 12-17 mars 2012); '7^e FME' (Daegu-Gyeongbuk, 14-15 mai 2013), ni dans les textes européens (que ce soit dans le cadre du Conseil de l'Europe et ses textes relatifs à l'environnement, ou dans celui de l'Union européenne et ses textes relatifs à la politique de l'eau), ni dans ceux des diverses Conférences relatives à l'eau, de façon spécifique (par exemple: 'Conférence Internationale sur l'Eau Douce (Bonn)' (décembre 2001); 'Plan d'action sur l'eau (29^e Sommet du G-8 (Évian)' (juin 2003); 'Décennie Internationale 2005-2015 d'action "L'Eau, Source de Vie" organisée par les Nations Unies; '2008, Année Internationale de l'Assainissement' organisée par les Nations Unies; '1^{er} Forum ministériel du G-77 sur l'Eau (Mascate)' (février 2009); 'La Paix avec l'Eau (Parlement européen, Bruxelles)' (février 2009) à l'initiative de l'ancien dirigeant soviétique M Gorbatchev, organisée par le Forum politique mondial, les Groupes parlementaires européens et l'Institut européen de recherche sur la politique de l'eau. Cette conférence a en particulier demandé que les questions relatives à l'eau soient incluses dans tout accord qui succédera au Protocole de Kyoto sur le changement climatique) ou traitant du problème de l'eau de façon incidente (cas des réunions relatives à l'environnement, au développement durable, etc. Voir par exemple : Sommet du Millénaire des Nations Unies, 'Déclaration du Millénaire' (septembre 2000); Sommet Mondial sur le Développement Durable (SMDD), 'Plan d'application de Johannesburg' (août-septembre 2002); '12^e et 13^e sessions de la Commission des Nations Unies sur le Développement Durable (CSD-12 et CSD-13)' (avril 2004 et avril 2005); '16^e session de la CSD' (juin 2008) ; '34^e Sommet Annuel du G-8 (Hokkaido)' (juillet 2008); '1^{re} Réunion Conjointe du Réseau des Femmes Ministres et Chefs de File de l'Environnement (NWMLE) (Nairobi)' (février 2009), réunion conjointe entre le NWMLE et le Programme des Nations Unies pour l'Environnement (PNUE)).

¹¹⁴ Voir par exemple : 'Accord de l'Association des Nations de l'Asie du Sud-Est (ASEAN) sur la Conservation de la Nature et des Ressources Naturelles (Kuala Lumpur)' (adopté le 9 juillet 1985) Article 19 (1).

ressources partagées »¹¹⁵.

Si l'expression « ressource partagée » n'est pas définie¹¹⁶, il y a unanimité sur son régime. Sur son territoire, tout État a incontestablement le droit d'utiliser l'eau d'un cours d'eau international, mais n'a pas une souveraineté illimitée sur elle¹¹⁷ du fait de l'exercice de plusieurs souverainetés concomitantes et/ou successives. En vertu du principe fondamental de l'« égalité des droits »¹¹⁸, cette pluralité de souverainetés empêche l'exercice d'une souveraineté absolue d'un des États du cours d'eau international. Cette limitation de l'exercice de la souveraineté¹¹⁹ justifie le

¹¹⁵ Voir sur le site de la CDI, ses travaux relatifs aux ressources partagées: <http://untreaty.un.org/ilc/guide/8_5.htm> (eaux souterraines transfrontières) et <http://untreaty.un.org/ilc/guide/8_6.htm> (pétrole et gaz) (visités le 10 octobre 2013).

¹¹⁶ Plusieurs définitions ont été proposées dont une où il est fait référence à « un élément de l'environnement naturel utilisé par l'homme qui constitue une unité biogéophysique, et est localisé sur le territoire de deux ou plusieurs États » (UN Doc. UNEP/IG/12/2 (1978), para 16 ; voir aussi Calasans (n 113) 53, 137-138). Dans un souci d'éclaircissement, le Directeur exécutif du PNUE a indiqué les cinq « exemples les plus évidents » de « ressources partagées ». Outre les mers fermées ou semi-fermées, les 'bassins atmosphériques' (*Air sheds*), les chaînes de montagnes, les forêts, les espaces protégés (*Conservation areas*) et les espèces migratoires, il considère que « le premier » exemple, parce que le plus évident, est tout système hydrologique international (y compris les eaux de surface et les eaux souterraines : PNUE, 'Coopération dans le Domaine de l'Environnement en Matière de Ressources Naturelles Partagées par Deux ou Plusieurs États : Rapport du Directeur Exécutif (1975) UN Doc. UNEP/CG/44 et Ass.1, para 86).

¹¹⁷ Voir Brownlie (n 77) 289; Birnie and Boyle (n 63) 115.

¹¹⁸ Salmon (n 6) 205; ainsi, en ce qui concerne la navigation sur les cours d'eau internationaux, les États riverains forment « une communauté d'intérêts » (*Juridiction territoriale de la Commission internationale de l'Oder* (n 86)) et donc de droits qui exclut toute idée d'inégalité entre ces États, sauf accord contraire.

¹¹⁹ Autrement dit, il y a rejet des doctrines absolutistes, que ce soit la doctrine Harmon ou celle de l'intégrité territoriale absolue. Selon la doctrine Harmon, « l'État exerce une autorité illimitée sur les parties d'un cours d'eau international situées en son territoire » (Salmon (n 6) 353). La jurisprudence, à travers la sentence arbitrale du 16 novembre 1957 dans l'*Affaire du Lac Lanoux* qui opposait la France à l'Espagne, a condamné cette théorie (*Sentence du Tribunal arbitral constitué en vertu du compromis d'arbitrage entre les gouvernements français et espagnol sur l'interprétation du Traité de Bayonne du 26 mai 1866 et de l'acte additionnel de la même date concernant l'utilisation des eaux du lac Lanoux* (Paris, 16 novembre 1957) (1958) RGDIP 103). Par ailleurs, cette doctrine n'a jamais reçu l'approbation de l'ensemble des États, pas même celle des États-Unis (voir Coleen C. Higgins, *From «Harmon» to Harmony and Equitable Utilization and the US-Mexico River Regime* (UHEI 1987); Joseph W. Dellapenna, 'Treaties as Instruments for Managing Internationally Shared water Resources' (1994) 26 Case Western Reserve J of Intl L 35). Quelques rares États ont défendu cette doctrine, sans succès. Ce fut le cas de l'Inde lors de son différend sur le Gange avec le Pakistan oriental, devenu en

recours aux principes¹²⁰ de l'utilisation équitable¹²¹ et raisonnable¹²², de

1971 l'actuel Bangladesh. Mais le gouvernement indien devait renoncer à sa position lors d'une déclaration devant l'AGNU en 1976 (UNGA, Commission politique spéciale, 'Documents officiels de l'Assemblée générale (31^e session)' 21^e séance, paras 8-9). Cette doctrine a également été reprise par la Turquie dans son différend avec la Syrie et l'Iraq s'agissant des eaux de l'Euphrate. Néanmoins, elle est unanimement réfutée, que ce soit par les textes, la jurisprudence ou la pratique.

Il en va de même pour la défense constante de la théorie de l'intégrité territoriale en ce qui concerne Israël, et de façon plus souple, l'Égypte (Majzoub, *Les fleuves du Moyen-Orient* (n 80) 174-177 et 194-236). Cette théorie est défendue par Marc Wolfrom, *L'Utilisation à des Fins Autres que la Navigation des Eaux des Fleuves, Lacs et Canaux Internationaux* (Pedone 1964) 33-35. Parmi ceux qui l'ont soutenue, certains considèrent qu'« en principe, chaque État dispose librement de son territoire et exerce son autorité exclusivement sur celui-ci, il n'a ni le droit d'agir sur un territoire étranger ni l'obligation de subir de tels agissements. Ne peuvent être considérés comme agissements illicites par-delà les frontières de l'État que ceux qui exercent une influence sur l'état naturel ou artificiellement constitué des choses et de ce fait sur les droits de l'autre État » (Max Huber, 'Ein Beitrag zur Lehre von der Gebietshoheit an Grenzflüssen' [1907] *Zeitschrift für Völkerrecht und Bundesstaatsrecht* 159 (ibid (Wolfrom trd) 33)). De ce fait, on peut parler de la consécration de la théorie de la souveraineté limitée (Majzoub, *Les fleuves du Moyen-Orient* (n 80) 177-178).

¹²⁰ Voir généralement McCaffrey (n 84).

¹²¹ Voir en ce sens Stephen M SCHWEBEL, 'Troisième Rapport sur le Droit Relatif aux Utilisations des Cours d'Eau Internationaux à des Fins Autres que la Navigation', UN Doc. A/CN.4/348, paras 41-84; Jens Evensen (rapporteur spécial), 'Premier Rapport sur le Droit Relatif aux Utilisations des Cours d'Eau Internationaux à des Fins Autres que la Navigation', UN Doc. A/CN.4/367 and Corr.1, paras 80-93, et 'Deuxième Rapport sur le Droit Relatif aux Utilisations des Cours d'Eau Internationaux à des Fins Autres que la Navigation', UN Doc. A/CN.4/381 and Corr.1 and Corr.2, paras 45-53 ; Stephen C McCaffrey (rapporteur spécial), 'Deuxième Rapport sur le Droit Relatif aux Utilisations des Cours d'Eau Internationaux à des Fins Autres que la Navigation', UN Doc. A/CN.4/399, paras 76-168.

¹²² L'équité est la recherche de la justice ; en tant que notion juridique, elle « procède directement de l'idée de justice » (voir *Affaire du Plateau Continental Tunisie/Jamahiriyah Arabe Libyenne* [1982] Rec CIJ 59 para 70). Cependant le raisonnable s'oppose à celui d'équité, notamment par sa relativité et sa subjectivité. Premièrement, le raisonnable est sujet à des variations temporelles; ce qui a pu et a été considéré comme raisonnable autrefois, peut ne plus l'être de nos jours (l'esclavage par exemple). Deuxièmement, le raisonnable peut être sujet à des transformations spatiales (les inégalités sociales et économiques jadis admises en Grande-Bretagne et en France, étaient condamnées par les théoriciens allemands et russes). Troisièmement, le raisonnable peut également subir l'influence de la culture, de la religion (c'est « la diversité des façons d'une nation à l'autre » selon Montaigne). Ainsi le raisonnable, tel qu'il est conçu dans le temps comme dans l'espace, revêt un caractère de subjectivité, voire de relativité qui tranche avec le caractère objectif de l'équitable.

l'utilisation non dommageable du territoire¹²³ et de la coopération des États qui exercent leur souveraineté sur une partie de la ressource¹²⁴. Les deux premières obligations sont substantielles tandis que la dernière est procédurale¹²⁵.

Plus précisément, le premier principe signifie que chaque État du cours d'eau international a droit à bénéficier des avantages qu'il offre. En vertu du principe d'égalité entre les États du cours¹²⁶, ils sont tenus de respecter les droits équivalents des autres riverains. Ce n'est donc pas tant la ressource qui doit être partagée que son utilisation par les États qui exercent leur souveraineté sur une partie de la ressource. L'essence de ce principe est de procurer à chaque État du cours un bénéfice maximum dans les utilisations de l'eau, avec un inconvénient minimum pour chacun des États¹²⁷. Le deuxième principe signifie qu'aucun État n'a le droit

Les représentants de certains États, notamment la France, au sein de la Sixième Commission (lors de la 42^e session de la UNGA) ont énoncé de fortes réserves à l'égard de la mise en œuvre de ces critères en matière d'utilisation de l'eau. Le représentant de la France estime qu'en plus de l'imprécision de la notion de l'utilisation équitable et raisonnable, elle se réfère indirectement au concept de « ressource naturelle partagée », récusé par la plupart des États occidentaux (SR/45, para 2).

¹²³ En vertu de l'adage romain *sic utere tuo ut alienum non laedas*, soit l'obligation pour un État de ne pas laisser utiliser son territoire aux fins d'actes contraires aux droits d'autres États ; voir *Affaire du Détroit de Corfou* (n 87) 22. Voir Stephen C McCaffrey, *The Law of International Watercourses (Non-Navigational Uses)* (OUP 2003) 346-380.

¹²⁴ Voir 'Projet de principes du PNUE' in Boisson de Chazournes et al (n 106) 30 (principe 1): « Il est nécessaire que les États coopèrent dans le domaine de l'environnement en matière de conservation et d'utilisation harmonieuse des ressources naturelles partagées par deux ou plusieurs États. Par conséquent, eu égard à la notion d'utilisation équitable des ressources naturelles partagées, il est nécessaire que les États coopèrent afin de contrôler, prévenir, atténuer ou supprimer les effets néfastes sur l'environnement qui pourraient résulter de l'utilisation de ces ressources. Cette coopération s'exercera sur un pied d'égalité et compte dûment tenu de la souveraineté, des droits et intérêts des États concernés ».

¹²⁵ On pourrait ajouter à ces trois obligations deux autres qui n'ont focalisés l'attention que récemment. La première est l'obligation substantielle de protéger les cours d'eau internationaux et leur écosystème des dégradations non raisonnables. La deuxième est une obligation procédurale relative à la coopération des États du cours dans leurs relations vis-à-vis des ressources en eau partagée.

¹²⁶ *Affaire Juridiction Territoriale de la Commission Internationale de l'Oder* (n 86) : « la communauté d'intérêts sur un fleuve navigable devient la base d'une communauté de droit, dont les traits essentiels sont la parfaite égalité de tous les États riverains dans l'usage de tout le parcours du fleuve et l'exclusion de tout privilège d'un riverain quelconque par rapport aux autres ».

¹²⁷ Voir CDI, 'Annuaire de la CDI (vol. 1)' (1979) UN Doc. A/CN.4/SER.A/19, 103-

d'utiliser ou d'exploiter la ressource si cette utilisation occasionne des « dommages significatifs »¹²⁸ aux autres États. Ainsi, il ne peut modifier les conditions naturelles de son propre territoire aux dépens des conditions naturelles des territoires des autres États. Un État n'est donc pas autorisé, en droit, à entraver ou à détourner un cours d'eau international s'il en résulte un préjudice pour les autres États¹²⁹. Le troisième principe résulte des deux précédents : les États du cours sont appelés à coopérer par des échanges d'informations et des consultations sur la base du principe de la bonne foi et dans un esprit de bon voisinage¹³⁰. C'est la raison pour laquelle les États sont dans l'obligation d'informer les autres États, susceptibles d'être affectés, de toute situation d'urgence ou de tout événement naturel grave¹³¹.

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¹²⁸ Il s'agit de l'application du principe *sic utere tuo ut alienum non laedas* qui engage la responsabilité de l'État qui a laissé l'utilisation de son territoire engendrer un préjudice non négligeable.

¹²⁹ Voir en ce sens l'*Affaire du Lac Lanoux* (n 119) para 8. Voir également Majzoub, *Les fleuves du Moyen-Orient* (n 80) 157-169 ; Lassa F Oppenheim, *International Law* (8th edn, 1955) vol. I, 475 (Wolfrom trd (n119) 33, fn 118) : « [C]'est une règle reconnue en droit international qu'aucun État n'a le droit de modifier les conditions naturelles de son territoire au détriment des conditions naturelles d'un État voisin. Pour cette raison, il est interdit à tout État d'arrêter ou de dériver le débit d'une rivière qui coule sur son territoire et traverse un État voisin (...) ».

¹³⁰ Voir 'Projet de Principes du PNUE' (n 124) 32 (principe 7): « Les échanges d'information, la notification, les consultations et les autres formes de coopération applicables aux ressources naturelles partagées sont entrepris sur la base du principe de bonne foi et dans un esprit de bon voisinage et de manière à éviter tout retard injustifié dans les formes de coopération ou dans l'exécution des projets de développement ou de conservation ».

¹³¹ *ibid* 32-33 (principe 9):

« 1. Les États ont le devoir d'informer d'urgence les autres États susceptibles d'être affectés :

a) de toute situation d'urgence résultant de l'utilisation d'une ressource naturelle partagée pouvant causer soudainement des effets nuisibles à leur environnement ;

b) de tout événement naturel grave et soudain en rapport avec une ressource naturelle partagée susceptible d'affecter l'environnement de ces États.

2. Les États devraient aussi, lorsque cela apparaît approprié, informer de toute situation ou de tout événement de cette nature les organisations internationales compétentes.

3. Les États intéressés devraient coopérer, notamment en convenant le cas échéant des plans pour circonstances imprévues et en se prêtant mutuellement assistance afin de prévenir des situations graves et d'éliminer, d'atténuer ou de corriger dans la mesure du possible les effets de telles situations ou de tels événements ».

Toutefois, la qualification de « ressource partagée » n'a pas été retenue par le droit international conventionnel relatif à l'utilisation des cours d'eau internationaux¹³². En effet, depuis l'apparition de cette expression, il existe un véritable rejet de celle-ci par de nombreux États dès qu'il s'agit de lui donner force contraignante¹³³. Ce refus s'est exprimé explicitement lors des travaux de la CDI qui devaient déboucher sur l'adoption de la Convention de 1997¹³⁴, et s'est focalisé sur l'utilisation des termes « partagé » ou « partage », les États les considérant comme attentatoires au principe de souveraineté permanente sur leurs ressources naturelles. Ils considéraient que cette reconnaissance constituait une sujétion non seulement quantitative en obligeant un État à abandonner ses utilisations pour permettre aux autres États de pouvoir exercer les leurs, mais également qualitative, les États riverains n'étant plus en droit d'utiliser leur part d'eau comme ils le veulent. L'absence de souveraineté permanente marquait la disparition de toute souveraineté sur l'eau du cours¹³⁵. Aussi, refusaient-ils l'idée même de partage de la ressource, sous quelque forme que ce soit¹³⁶, soutenu par le fait que les documents qui font référence aux ressources partagées ne sont pas juridiquement obligatoires¹³⁷. Or, le régime des ressources partagées ne correspond pas à

¹³² Voir le 2^e Rapport de Jens Evensen: CDI, 'Annuaire de la CDI (vol. II, 1^{re} partie)' (1984) UN Doc. A/CN.4/SER.A/1984/Add.1 (Part 1) 105.

¹³³ Selon le commentaire de la Commission, la notion de ressource partagée pouvait en fait entraîner certaines obligations juridiques : « la notion de ressources naturelles partagées est peut-être, à certains égards, aussi ancienne que celle de coopération internationale, mais ce n'est que depuis peu qu'elle a été énoncée, et encore de façon incomplète. Elle n'a pas été acceptée en tant que telle, ni en ces termes, comme un principe du droit international, bien que l'existence de ressources partagées soit depuis longtemps considérée, dans la pratique des États, comme engendrant l'obligation de traiter ces ressources dans un esprit de coopération. (...) » (CDI, 'Annuaire de la CDI (vol. II, 2^e partie)' (1980) UN Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) 117, para 2).

¹³⁴ La CDI en a abandonné l'utilisation en 1984 (voir MA Fitzmaurice, 'International Protection of the Environment' (2001) 293 Recueil des Cours de l'Académie de Droit International 440). Sur les raisons de cet abandon : ibid 441; Buirette (n 86) 32-33. Quant à l'inutilité de l'expression, voir Andre Nollkaemper, *The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint* (Kluwer Academic Publishers 1993) 26. Quant à son utilité, voir par exemple Nico Schrijver, *Sovereignty Over Natural Resources, Balancing Rights and Duties* (CUP 1997) 336-337.

¹³⁵ CDI, 'Annuaire de la CDI (vol. I)' (1980) UN Doc. A/CN.4/SER.A/1980, 134, para 30.

¹³⁶ Stephen C. McCaffrey (rapporteur spécial), 'Rapport Préliminaire sur le Droit Relatif aux Utilisations des Cours d'Eau Internationaux à des Fins Autres que la Navigation', UN Doc. A/CN.4/393, para 39.

¹³⁷ C'est le cas des recommandations du 'Plan d'action de Mar del Plata sur la mise en valeur et la gestion des ressources en eau' (n 104): « ce terme n'est utilisé que pour l'uniformité du texte, et son emploi ne préjuge pas la position des pays qui

cette appréciation¹³⁸.

En fait, ces craintes étatiques sont essentiellement d'ordre sémantique. En effet, un cours d'eau international n'est pas une « ressource partagée » au sens littéral¹³⁹ : en effet, l'utilisation de l'adjectif « partagée » laisse entendre que les eaux du cours font, ou ont fait, l'objet d'un partage déterminé¹⁴⁰. Si l'on s'en tient au sens factuel de « résultat d'un partage »

sont en faveur de l'expression « eaux transfrontières » ou « eau internationales » sur aucun des problèmes en cause ». Le Secrétaire général de la Conférence, M. Abdel Mageed, devait d'ailleurs souligner, dans sa déclaration d'ouverture à Mar del Plata le 14 mars 1977, que « [...] c'est un fait qu'il existe actuellement des divergences de vues notables entre de nombreux pays au sujet de ce problème [celui des ressources en eau partagées] » (Evensen, 'Premier Rapport' (n 121) para 49). Or, le second rapporteur spécial, M Schwebel, affirmait que les « recommandations du *Plan d'action de Mar del Plata* et les résolutions par lesquelles le Conseil économique et social et l'Assemblée générale les ont approuvées [...] indiquent que la communauté mondiale dans son ensemble reconnaît, d'une part, que l'eau des voies d'eau internationales est une ressource naturelle partagée... » (Schwebel, 'Deuxième Rapport' (n 108) para 152). Certes, elles « n'établissent pas l'existence d'obligations de droit international, pas plus qu'elles ne donnent naissance à de telles obligations », mais elles ne sont pas négligeables « parce qu'elles indiquent [...] qu'il existe des « principes de droit international généralement admis » qui s'appliquent, même en l'absence d'accords bilatéraux ou multilatéraux » à leur utilisation, leur mise en valeur et leur gestion.

¹³⁸ Il ressort de ce qui précède que cette notion n'élimine pas la souveraineté de l'État sur sa ressource, quand celle-ci se trouve sur son territoire. Certes, la souveraineté ne saurait être permanente, au sens d'exclusif, sur les eaux d'un cours d'eau international. Cependant, la non reconnaissance d'une souveraineté absolue d'un État sur une ressource ne signifie pas *ipso facto* la disparition de cette souveraineté : tout au plus, elle en limite les effets et en aménage les conséquences. À cet égard, les cas de souveraineté limitée ne sont pas rares en droit international. Le droit de la mer en est le meilleur exemple avec ses différents espaces maritimes (mer territoriale, plateau continental, zone économique exclusive, détroits internationaux,...) sur lesquels la souveraineté étatique s'exerce de façon différenciée. Voir en ce sens Fabienne Quilleré-Majzoub, 'À qui Appartiennent les Icebergs? (Discussion autour d'un statut des icebergs en droit international public)' (2007) 20/1 Revue Québécoise de Droit International 203.

¹³⁹ Voir les remarques en ce sens de Paul Reuter (CDI, 'Annuaire de la CDI (vol. I)' (1980) (n 135) 118, para 23). Julio Barboza utilise lui aussi le terme « ressource commune » (CDI, 'Annuaire de la CDI (vol. I)' (1979) UN Doc. A/CN.4/SER.A/1979, 228, para 10). Quant à Robert Pinto, il utilise indistinctement les termes ressource partagée ou commune comme deux synonymes (CDI, 'Annuaire de la CDI (vol. I)' (1980) (n 135) 130, para 44).

¹⁴⁰ Jean Margat, 'Contribution à la Réunion Consultative d'Experts sur les Eaux Souterraines Transfrontières (Notes et Commentaires sur le 'Deuxième Rapport sur les Ressources Naturelles Partagées : Les Eaux Souterraines Transfrontières'

de cet adjectif, il ne peut s'appliquer, en toute logique, qu'aux ressources ayant fait l'objet d'un accord ou d'un traité. Faute de partage, l'utilisation de cet adjectif est alors impropre et équivoque, et ce sont plus sûrement des expressions comme « en partition » ou « à partager » qui permettent de qualifier correctement l'eau des cours d'eau internationaux.

Par ailleurs, et il ne s'agit sûrement pas d'un élément négligeable, l'utilisation du terme « partagé » renvoie à l'idée d'égalité dans le partage, de parts égales¹⁴¹. Cette signification implicite ne peut être écartée qu'à condition de préciser le caractère du partage par l'ajout d'un substantif tel que équitablement et/ou raisonnablement.

Les raisons qui ont poussé de nombreux États à refuser cette qualification apparaissent dès lors avec clarté : les termes destinés à qualifier l'eau du cours d'eau international et à en permettre l'utilisation optimale pour tous les États riverains se doivent d'être précis et exempts de toute équivoque ou sous-entendu. Dans un premier temps d'ailleurs, les travaux de la CDI ont laissé penser que le concept de ressources partagées semblait devoir être cantonné aux eaux souterraines transfrontières¹⁴². Il n'en fut rien. Par la suite, les États ont encore refuser le maintien de l'utilisation du terme de « ressource partagée »¹⁴³ s'agissant du « Projet d'articles relatifs aux aquifères transfrontières »¹⁴⁴, en soulevant les mêmes objections que dans le cadre des travaux de la CDI sur l'utilisation des cours d'eau internationaux¹⁴⁵. Chacun reste donc sur ses positions.

(présenté par M. Chusei Yamada à la CDI, Genève, mai-juin et juillet-août 2004)' (UNESCO, 17-18 juin 2004).

¹⁴¹ On peut remarquer à cet égard que les traités prévoyant le partage des eaux d'un cours d'eau international prévoient fréquemment un partage égalitaire, les partages non égalitaires constituant plutôt l'exception; voir Schwebel, 'Deuxième Rapport' (n 108) 191-194.

¹⁴² Voir Raphaële Rivier, 'Travaux de la Commission du Droit International et la Sixième Commission' (2008) AFDI 398: « Cette réduction des ressources partagées aux eaux souterraines transfrontières s'inscrit dans une logique difficilement contestable ».

¹⁴³ Alors même que ce projet intervient dans le cadre de l'étude des « Ressources naturelles partagées » par la CDI (CDI, 'Rapport de la CDI (60^e session)' UN Doc. A/63/10 (5 mai-6 juin et 7 juillet-8 août 2008) 13-14, paras 34-35).

¹⁴⁴ *ibid* 19-30, para 53.

¹⁴⁵ M. Chusei Yamada (rapporteur special), 'Cinquième Rapport' UN Doc. A/CN.4/591 (21 février 2008) para 11: après avoir pris acte du refus des États relativement aux termes partagé et international, le rapporteur a retenu celui de transfrontière, pour des raisons essentiellement techniques. Par ailleurs, les États ont fait inscrire dans le « Projet d'articles relatifs aux aquifères transfrontières » le principe de la souveraineté permanente des États sur leurs ressources naturelles (CDI, 'Rapport (60^e session)' (n 143) 20, préambule, para 3).

La difficulté majeure qui subsiste quant à cette qualification, tient au fait que la notion de « ressource partagée » n'est toujours pas globalement admise¹⁴⁶, ni acceptée comme « un principe de droit international »¹⁴⁷. Malgré l'insistance de la Cour internationale de justice, la notion de « ressource partagée » subit toujours le rejet des États, même si « The above considerations show that in the future it will be very difficult to discard this concept [shared resource] as not applicable to international watercourses. However, it must be observed that the Court [International Court of Justice] did not substantiate why it included international watercourses in this group »¹⁴⁸. Ainsi, le problème reste en suspens.

2. *Les Réalités Juridiques du Statut Spécifique de l'Eau des Cours d'Eau Internationaux en Droit International: Le Défi d'une Nature et d'un Régime Uniques*

S'il semble si difficile de définir juridiquement la nature de l'eau des cours d'eau internationaux, la cause en incombe à l'objet considéré – l'eau courante¹⁴⁹ – ainsi que les implications juridiques afférentes. Même concernant les éléments de son statut, si les principes coutumiers codifiés par la Convention de 1997 ne paraissent pas devoir être remis en cause, les réticences que cette question fait naître chez les États sont à la hauteur de leur incapacité à ratifier la Convention¹⁵⁰. Celle-ci, inspirant la jurisprudence de la Cour, interdit à un État de prendre le contrôle unilatéral de la ressource¹⁵¹, et de priver ainsi un autre État riverain de son

¹⁴⁶ « Les projets d'articles 6 à 9 (Chapitre II « Principes généraux, droits et devoirs des États du cours d'eau ») ne reposent plus, comme dans la version primitive, sur la notion de « ressource naturelle partagée ». Certains membres de la Commission [du Droit International] ont vu là un progrès appréciable. D'autres ont estimé regrettable l'abandon d'une notion qu'ils considéraient comme étant à la base des travaux de la Commission depuis sept années, et qui figure dans le Plan d'action de Mar del Plata et dans la Déclaration adoptée par la Conférence des Nations Unies sur l'environnement (Stockholm, 5 au 16 juin 1972) » (voir Jacques Dehaussy, 'La Commission du Droit International des Nations Unies' [1984] AFDI 623).

¹⁴⁷ Voir Yves Daudet, 'La Commission du Droit International des Nations Unies' (1980) AFDI 479.

¹⁴⁸ Fitzmaurice (n 134) 442.

¹⁴⁹ Voir notamment Jamie Linton, *What is Water? The History of a Modern Abstraction* (UBC Press 2010).

¹⁵⁰ Voir fn 95.

¹⁵¹ Dean Acheson, lorsqu'il était Secrétaire d'État adjoint aux États-Unis, a déclaré que « [...] La conclusion logique de l'argumentation juridique avancée par les adversaires du Traité est, semble-t-il, qu'un pays d'amont peut, par un acte unilatéral accompli sur son propre territoire, empiéter sur les droits d'un pays d'aval ; c'est là une doctrine juridique qui ne peut guère se défendre à notre

droit à une part équitable et raisonnable des eaux du cours d'eau international¹⁵². L'État qui agit ainsi ne respecte pas la proportionnalité exigée par le droit international¹⁵³. La qualification retenue par la CIJ constitue un critère qui lui permet de déclarer la légalité ou non des contre-mesures, le liant de ce fait à la responsabilité de l'État¹⁵⁴. Sans aucun doute, cette qualification signifie que le cours d'eau international ne peut dépendre du pouvoir arbitraire d'un des États du cours. Chaque État est libre d'en disposer à sa convenance, au mieux de ses intérêts, nonobstant le respect du droit à une part équitable des autres États du cours. Cette pluralité de droits interdit l'exclusivité d'utilisation et l'appropriation unilatérale des eaux, de même qu'elle interdit de leur causer des dommages significatifs¹⁵⁵. L'eau du cours d'eau international est partagée au sens où les États riverains en partagent les bénéfices. La qualification par la Cour de « ressource partagée » appliquée au cours d'eau international renvoie donc à une catégorie de ressource fractionnée politiquement, mais qui ne peut l'être physiquement en raison de sa nature mouvante et indivise¹⁵⁶.

Il appartiendra en premier lieu aux États qui refusent l'utilisation de ce terme d'en proposer un autre, afin de faire correspondre la qualification de l'eau des cours d'eau avec les principes qui en gouvernent le régime en conformité avec leur appréhension tant sémantique que juridique. S'il ne saurait être question ici de proposer un nouveau concept en ce sens, il est néanmoins nécessaire de recenser les éléments juridiques que le droit international reconnaît à l'eau du cours d'eau international et qui constituent des particularismes, aussi bien factuels que juridiques, autres

époque» (voir Stephen M McCaffrey, 'Deuxième Rapport' UN Doc. A/CN.4/399 et Add.1 et 2 (1986) 110, para 85).

¹⁵² Charles Rousseau insistait sur le principe juridique selon lequel « Le droit international contemporain considère l'ensemble des riverains de la voie d'eau comme une entité régionale soumise au principe de l'utilisation commune du fleuve et de ses affluents. La conséquence directe de ce principe est l'« interdiction de toute utilisation exclusive » par l'un des États riverains en vertu de sa souveraineté territoriale et particulièrement la prohibition de toute action unilatérale par l'État d'amont dont le résultat serait, par des détournements opérés d'une manière discrétionnaire, de priver d'eau l'État ou les États d'aval » (Charles Rousseau, *Droit International Public, Tome IV – Les Relations Internationales* (Sirey 1980) 499-500, n° 428).

¹⁵³ *Affaire Gabčíkovo-Nagymaros* (n 87) para 85 *in fine*.

¹⁵⁴ Voir Quilleré-Majzoub et Majzoub, 'Le Cours d'Eau International Est-Il une "Ressource Partagée"?' (n 83); Fitzmaurice (n 134) 442.

¹⁵⁵ Fitzmaurice (n 134) para 152 *in fine*.

¹⁵⁶ Julio A Barberis, *Los Recursos Naturales Compartidos entre Estados y el Derecho Internacional* (Tecnos 1979) 148 ; MJ Magorinos De Mello, 'Les Ressources Naturelles et Leurs Rapports avec le Droit de l'Environnement et le Droit International' (1977) 3 *Environmental Policy and Law* 134.

que ceux déjà énoncés.

Toute analyse doit partir des faits, c'est-à-dire des attributs physiques de l'eau d'un cours d'eau international¹⁵⁷. Aussi convient-il de les rappeler en les développant. L'eau est un élément qui se renouvelle constamment dans le cadre du cycle hydrologique, ce qui lui confère un caractère de permanence et de continuité, mais également de fluctuation. Mobile dans l'espace par ses variations en quantité et en qualité, elle est généralement stable dans le temps, grâce au phénomène de jaillissement continu de la source. Elle participe alors aux caractères des biens immeubles sur lesquels elle s'écoule ; elle s'y incorpore et constitue à cet égard l'élément essentiel de la propriété, puisqu'en son absence la terre est frappée d'une stérilité pouvant aller jusqu'à l'absolu. Ensuite, l'eau du cours d'eau international a un pouvoir auto-épurateur : elle se nettoie naturellement¹⁵⁸, soit en éliminant les déchets sous l'effet du courant, soit par réaction chimique entre les déchets et l'oxygène¹⁵⁹. Enfin, animée d'un mouvement de la source vers l'embouchure, l'eau du cours d'eau international est donc un bien meuble, qu'il est impossible d'arrêter de couler de façon permanente¹⁶⁰. Sa mobilité en fait un élément capital de richesse et d'énergie : elle peut être transportée sur de longues distances pour aller fertiliser des territoires désertiques ; elle peut constituer une source indéfiniment renouvelable d'énergie. En conséquence de quoi, toute utilisation de l'eau du cours d'eau international doit être pensée comme un tout, en prenant en considération l'ensemble du cours dans son environnement. En termes techniques, il s'agit d'une ressource unitaire dans le cadre de son bassin hydrographique, ce qui impose une gestion et un développement coordonnés de celui-ci si les États désirent en tirer durablement les meilleurs avantages. Cette approche transectorielle de la ressource nécessite la mise en place d'une gestion intégrée de la ressource

¹⁵⁷ L'application de ces divers critères physiques conduit à rappeler les trois phénomènes répertoriés par M. Schwebel, rapporteur de la CDI, et qui caractérisent l'eau : le cycle hydrologique, l'auto-épuration et les variations de quantité et de débit. La CDI a repris ces trois caractères sans son rapport, 'Annuaire de la CDI (vol. II, 2^e partie)' (1979) UN Doc. A/CN.4/SER.A/1979/Add.1 (Part2) 184, paras 113-118. Voir également Schwebel, 'Premier Rapport' (n 110) 153-158.

¹⁵⁸ Si le débit du cours d'eau n'est pas suffisant, ou si la réserve d'oxygène fournie au cours d'eau par l'air et les plantes est épuisée, le cours d'eau ne peut plus s'auto-épurer.

¹⁵⁹ Des pollutions sont plus pernicieuses : les vases au fond du cours, en raison de leur non disparition et de leur écoulement vers l'embouchure participe à la pollution des mers, etc.

¹⁶⁰ À plus ou moins long terme, les plus majestueux obstacles sont dépassés par l'eau du cours d'eau international, sauf à la détourner ou à la consommer totalement (irrigation).

en eau¹⁶¹ prônée par l'ensemble des acteurs internationaux¹⁶².

L'eau n'est donc pas une ressource comme les autres : elle impose une prise en compte globale des toutes les ressources et de tous les acteurs. Le respect du principe de l'utilisation non dommageable n'est pas suffisant à en permettre l'utilisation qui, de par sa nature, est conflictuelle dès lors qu'elle est consommée. Indispensable, irremplaçable, vitale¹⁶³, elle est au cœur de la création et de toute forme d'existence. Elle représente un enjeu tel que le droit humanitaire issu des Conventions de Genève de 1949 et de leurs Protocoles de 1977 n'a pu l'ignorer et faire l'économie de lui octroyer un statut dérogatoire spécifique¹⁶⁴. Son statut privilégié s'articule autour de deux approches complémentaires. Il s'agit d'une part de l'interdiction de détruire les biens indispensables à la survie de la population civile¹⁶⁵ dans tous les conflits armés, internationaux ou non, et d'autre part, de l'interdiction d'attaquer les installations hydrauliques¹⁶⁶.

Selon la première approche, l'eau y est appréhendée comme une cible à protéger et non comme une arme. Le lien privilégié entre l'eau et l'être humain est le fondement de cette protection et interdit de provoquer délibérément une famine par la destruction des systèmes d'approvisionnement en eau¹⁶⁷. Si cette interdiction n'est ni absolue, ni générale, et peut être levée¹⁶⁸, seule la logique de la prise en compte des nécessités militaires en gouverne les limites. De plus, le critère de l'« appui direct » ne diminue pas notablement la portée de la protection

¹⁶¹ Communément appelée GIRE.

¹⁶² Voir la définition de la GIRE telle que proposée par le Partenariat Mondial de l'Eau (Partenariat Mondial de l'Eau/Comité Technique consultatif, *La gestion intégrée des ressources en eau* (TAC Background Papers No. 4, 2000) 24).

¹⁶³ Chusei Yamada, 'Quatrième Rapport' UN Doc. A/CN.4/580 (6 mars 2007) para 14.

¹⁶⁴ Théo Boutruche, 'Le Statut de l'Eau en Droit International Humanitaire' (décembre 2000) 82 (No 840) *Revue Internationale de la Croix-Rouge* 887; Ameer Zemmali, 'La Protection de l'Eau en Période de Conflit Armé' (septembre-octobre 1995) 815 *Revue Internationale de la Croix-Rouge* 601.

¹⁶⁵ Consacrée par les articles 54 du Protocole I (Yves Sandoz, Christophe Swinarski et Bruno Zimmermann, *Commentaire des Protocoles Additionnels aux Conventions de Genève de 1949* (Martinus Nijhoff Publishers 1986) 669-677) et 14 du Protocole II (ibid 1477-1482).

¹⁶⁶ En vertu des articles 56 du Protocole I et 15 du Protocole II.

¹⁶⁷ Selon l'article 54 § 2 du Protocole I, « il est interdit d'attaquer, de détruire, d'enlever ou de mettre hors d'usage des biens indispensables à la survie de la population civile, tels que (...) les installations et réserves d'eau potable et les ouvrages d'irrigation (...) ». L'article 14 du Protocole II reprend en substance les mêmes termes et constitue une version simplifiée de l'article 54.

¹⁶⁸ Article 54 § 3 du Protocole I.

accordée¹⁶⁹. Au contraire, comme la nécessité militaire doit être écartée si son action aboutit à réduire la population civile à la famine ou à la forcer à se déplacer¹⁷⁰, la protection de l'eau est renforcée.

Selon la seconde, l'eau est considérée comme une arme et la protection dont elle bénéficie revêt un caractère générique, et non plus spécifique, à travers le principe de l'interdiction d'attaquer des ouvrages et installations contenant des forces dangereuses¹⁷¹. La destruction des ouvrages hydrauliques¹⁷² entraînant des effets qui dépassent de loin les objectifs militaires légitimes, toute attaque les visant l'empêche d'être licite¹⁷³. Certes, si ces ouvrages sont utilisés comme « appui régulier, important et direct d'opérations militaires et si [les] attaques sont le seul moyen pratique de faire cesser cet appui »¹⁷⁴, il ne peuvent plus bénéficier de cette protection, à condition que « dans tous les cas, la population civile et les personnes civiles continuent de bénéficier de toutes les protections qui leur sont conférées par le droit international [...] »¹⁷⁵. De même, sont interdites les représailles contre ces ouvrages¹⁷⁶ qui bénéficient ainsi d'une immunité « même s'ils constituent des objectifs militaires »¹⁷⁷ ou s'il existe « [d']autres objectifs militaires situés sur ces ouvrages ou installations ou à proximité »¹⁷⁸. Cette immunité est donc accordée dès lors que l'attaque est susceptible de provoquer la libération de ces forces dangereuses « et, en conséquence, causer des pertes sévères dans la population civile ». Est donc interdite la destruction des services d'eau

¹⁶⁹ En effet, « on ne voit pas bien comment les denrées alimentaires, les récoltes, le bétail et les réserves d'eau potable pourraient être utilisés comme appui direct d'une action militaire »: Sandoz et al (n 165) 674.

¹⁷⁰ Article 53 § 3, al. b) du Protocole I.

¹⁷¹ Articles 56 du Protocole I et 15 du Protocole II.

¹⁷² Tels que les barrages, les digues, etc.

¹⁷³ Article 49 du Protocole I.

¹⁷⁴ Article 56 § 2 du Protocole I. Ces critères paraissent plus sévères que ceux de l'article 54.

¹⁷⁵ Article 56 § 3 du Protocole I.

¹⁷⁶ Article 56 § 4 du Protocole I. Sur le plan répressif, le fait de « lancer une attaque contre des ouvrages ou installations contenant des forces dangereuses (...) » est considéré comme crime de guerre (Protocole I, art. 85, § 3, c)). Notons que le droit pénal international a étendu la liste des crimes de guerre et les a appliqués aussi aux conflits armés non internationaux. Voir également l'interdiction d'utiliser la famine comme méthode de guerre, qui n'est pas une infraction grave au sens de l'article 85 du Protocole I, mais qui est un crime de guerre selon le Statut de la Cour pénale internationale (Statut, Article 8, § 2, b) (XXV)).

¹⁷⁷ Article 56 § 1 du Protocole I. Il s'agit en fait d'une atténuation du principe de la licéité des attaques contre les objectifs militaires de l'article 48 du Protocole I.

¹⁷⁸ *ibid.*

potable et de leurs installations, des ouvrages d'irrigation¹⁷⁹, des barrages et des digues¹⁸⁰.

Dans la pratique, les États respectent généralement cette protection. Les exemples sont nombreux, mais certains sont plus significatifs que d'autres. Ainsi, durant les multiples guerres indo-pakistanaïses, alors même que l'eau était au cœur du conflit, les ouvrages hydrauliques des deux États n'ont pas subi de destruction¹⁸¹. De même, durant la guerre de 1967 entre les États arabes et Israël, dont l'eau était l'une des causes¹⁸², les hostilités de toutes les parties en conflit, qui se sont étalées sur de nombreuses années, ont révélé l'existence d'un consensus tacite et implicite qui a laissé les ouvrages hydrauliques intacts¹⁸³. Durant la guerre du Vietnam, les États Unis n'ont pas attaqué non plus les barrages¹⁸⁴, malgré la férocité des actes de guerre lors de ce conflit et le recours à l'ensemencement des nuages pour nuire aux opérations militaires des forces d'Ho Chi Minh grâce aux pluies diluviennes ainsi provoquées. Plus récemment encore, le principe de l'interdiction de s'attaquer à l'eau et aux infrastructures hydrauliques a été réaffirmé par les deux parties au conflit israélo-palestinien dans une déclaration officielle où elles réitèrent leur engagement à garder ces infrastructures en dehors du cycle des violences qui les opposent¹⁸⁵. Certes, il existe des exceptions¹⁸⁶ à ces pratiques ; néanmoins, elles restent marginales et ont été désapprouvées par la majorité des États et par l'opinion publique mondiale¹⁸⁷.

¹⁷⁹ Globalement, l'article 15 du Protocole II contient les mêmes dispositions.

¹⁸⁰ Ceux d'entre eux qui présentent un caractère mixte, parce qu'ils servent tout à la fois à l'irrigation et à la production de courant électrique, bénéficient en même temps de la protection offerte par les articles 54 et 56. Cette situation témoigne de la possible utilisation cumulative des dispositions relatives à l'eau, permettant d'aboutir à une qualité de protection satisfaisante.

¹⁸¹ Voir Joseph W Dellapenna, 'Water in the Jordan Valley : The Potential and Limit of Law' [1989] *The Palestinian Yearbook of International Law* 4.

¹⁸² Voir John Cooley, 'The Hydraulic Imperative' (22 July 1983) *Middle East International* 10-11.

¹⁸³ Voir Joseph W Dellapenna, 'Treaties as Instruments' (n 119) 31.

¹⁸⁴ *ibid* 32.

¹⁸⁵ Israel-Palestinian Joint Water Committee, 'Joint Declaration for Keeping the Water Infrastructure out of the Cycle of Violence' (January 31, 2001).

¹⁸⁶ Voir Peter H Gleick, 'Water and Conflict: Fresh Water Resources and International Security' (Summer 1993) 18/1 *International Security* 87-88; Conseil des Droits de l'homme, 'La Situation des Droits de l'Homme en Palestine et dans les Autres Territoires Arabes Occupés: Rapport de la Mission d'Établissement des Faits de l'Organisation des Nations Unies sur le Conflit de Gaza (Résumé)' UN Doc. A/HRC/12/48 (ADVANCE 1) (23 septembre 2009) 11-12, paras 50 et 52.

¹⁸⁷ Conseil des Droits de l'Homme, *ibid*.

Ainsi, les caractéristiques physiques de l'eau du cours d'eau international sont particulièrement mises en lumière, de même que dans les travaux de la CDI et les réflexions relatives à la souveraineté de l'État sur elle¹⁸⁸. Les travaux de ses différents rapporteurs partent de cette considération élémentaire que l'autorité de l'État s'exerce différemment sur la terre ou sur l'eau, celle-ci n'étant pas affectée dans sa signification mais dans son étendue face aux phénomènes physiques¹⁸⁹. En effet, l'eau du cours d'eau international faisant fi des frontières politiques, et assurant la transmission de tout ce qui peut l'affecter en n'importe quel point de son cours aux États riverains, ce phénomène est générateur de difficultés d'ordre juridique. Par la force des choses, l'utilisation des cours d'eau internationaux nécessite des limitations, et par conséquent une limitation de la souveraineté de l'État sur la ressource. « [D]ans le cas d'un système fluvial s'étendant sur deux ou plusieurs États, le principe pouvait s'appliquer, non pas sous la forme d'une souveraineté permanente sur une quantité d'eau déterminée traversant le territoire national, mais sous la forme d'une souveraineté permanente sur une partie de la ressource renouvelable et unitaire contenue dans le bassin fluvial qui relevait de la juridiction territoriale de l'État »¹⁹⁰.

L'analyse montre avec évidence que l'eau du cours d'eau international est une ressource qui échappe aux critères traditionnels¹⁹¹, qu'elle est unique, *sui generis*. Néanmoins, c'est sur ce terreau que le sens juridique de la nature de l'eau du cours d'eau international doit naître. Ses caractères contradictoires et atypiques en font un casse-tête juridique¹⁹², à moins que

¹⁸⁸ Richard D Kearney, 'Premier Rapport' UN Doc. A/CN.4/295 (1976) 9.

¹⁸⁹ *ibid* 9-10. Ainsi, des particularités physiques de l'eau découlent plusieurs conséquences juridiques qui seront détaillées dans ce qui suit.

¹⁹⁰ Voir 'Annuaire de la CDI (vol. II, 2^e partie)' (1976) UN Doc. A/SER/1976/Add.1 (Part.2) 147, para 151.

¹⁹¹ Voir également le statut des cours d'eau internationaux dans le cadre de la succession d'État : Fabienne Quilleré-Majzoub, 'La Succession d'États en Matière de Traités Relatifs à l'Utilisation des Cours d'Eau Internationaux à des Fins Autres que la Navigation - Essai de Réactualisation' (2005) 2 *Revue Hellénique de Droit International* 331.

¹⁹² Voir les travaux des rapporteurs de la CDI pour la Convention de 1997. Pour les juristes occidentaux, le droit de l'eau a de tout temps constitué un véritable casse-tête, qu'ils ont à grand peine tenté de résoudre en s'appuyant sur la persistance d'une double confusion : ainsi le droit de l'eau a longtemps été assimilé à celui de la terre, de même qu'étaient souvent confondues les notions de « propriété » et d'« usage ». Aujourd'hui, en dépit de quelques avancées récentes, le droit de l'eau demeure confus, extrêmement complexe (voir en ce sens, au niveau national, Géraldine Chavier, 'La Qualification Juridique de l'Eau des Cours d'Eau Domaniaux' [2004] *Revue Française de Droit Administratif* 928). Comme le rappelle le Coran, l'eau est Source de Vie; elle est quelque chose de complexe, sinon de mystérieux, qui résiste à l'analyse.

ce soit nos classifications habituelles qui ne soient pas adaptées à une ressource d'un genre aussi particulier. Comme l'a relevée la CDI, la tâche la plus utile qu'elle pouvait accomplir consistait à formuler des principes généraux relatifs à l'utilisation de l'eau du cours d'eau international, sans se laisser retarder par des « querelles de définition »¹⁹³. Ce travail fut accompli avec la Convention de 1997, dont la valeur codificatrice des coutumes internationales en vigueur en ce domaine a été reconnue par la CIJ.

IV. CONCLUSION

De tout temps, l'eau des cours d'eau internationaux a été le témoin de la vie des peuples et la source de vie, de richesses agricoles et énergétiques, d'échanges économiques et culturels. Elle est à la fois sève nourricière et axe de développement et de civilisations¹⁹⁴. En reconnaître la nature spécifique est donc nécessaire à la reconnaissance de son caractère vital, et sa qualification juridique est révélatrice de cette reconnaissance. Certes, « [...] le langage est œuvre humaine et souffre des imperfections de l'humanité. Dans la langue courante, il arrive souvent qu'un même mot ait plusieurs sens et qu'il faille par voie de conséquence en donner diverses définitions. Il en est de même en droit »¹⁹⁵.

À cet égard, l'eau du cours d'eau international est l'objet de nombreux discours qui s'ignorent. Les philosophes, sociologues, économistes, juristes s'intéressent à l'eau, mais la traitent de manière séparée ; philosophie de l'eau, sociologie de l'eau, économie de l'eau, droit de l'eau ne se rencontrent guère. Cette diversité des discours ne contribue pas à éclairer les débats dont l'eau est l'objet, et cette eau de « spécialistes savants » est encore différente de l'eau dont les médias parlent à l'homme de la rue. Pourtant, c'est toujours de la même eau dont il est question, de l'eau qui circule depuis des millénaires sur notre planète. Là où règne aujourd'hui un fort particularisme disciplinaire, il faut donc établir des passerelles entre tous ces savoirs, tous ces discours, toutes ces pratiques aussi, dont l'eau et la définition qui lui donne forme sont l'objet et l'enjeu. Ainsi que le relevait Paul Reuter, « [e]n premier lieu, comme les autres branches du droit, le droit international emprunte son vocabulaire à un langage étranger au droit, mais il opère ensuite une transformation plus ou moins profonde du sens des mots. En second lieu, un facteur propre au droit international,

¹⁹³ Kearney, 'Premier Rapport' (n 188) para 13.

¹⁹⁴ Voir sur l'hydraulique et la naissance des civilisations : Pierre-Louis Viollet, *L'Hydraulique dans les Civilisations Anciennes: 5000 Ans d'Histoire* (Presses de l'École Nationale des Ponts et Chaussées 2004) 15-32.

¹⁹⁵ Voir Guillaume (n 60) X.

l'absence de langue proprement internationale, vient accélérer la formation d'un vocabulaire particulier. En troisième lieu, les contradictions profondes qui dominent les structures de la société internationale actuelle conduisent, surtout dans le vocabulaire le plus récent, à une ambiguïté et à une incertitude dont les raisons ne sont pas accidentelles »¹⁹⁶.

Pour autant, la question de la nature juridiques de l'eau reste entière et le débat est sans fin pour qui veut s'y tenir. Affirmer que « [l]'eau n'a pas de frontières. C'est une ressource commune qui nécessite une coopération internationale »¹⁹⁷ avait en son temps donné jour à une proposition d'article, que la Convention de 1997 n'a pas retenu, selon lequel « Waters are equal in value to land, and any person who exceeds the equitable and reasonable share of utilization of an international watercourse agreed upon between the watercourse States shall incur the appropriate penalties provided for in the Charter of the United Nations in the same manner as a person who encroaches on another's land by force »¹⁹⁸. De même, affirmer que « [l]'eau n'est pas un bien marchand comme les autres mais un patrimoine qu'il faut protéger, défendre et traiter comme tel »¹⁹⁹ nécessite de lui trouver un statut juridique à la hauteur des enjeux qu'elle représente.

Les termes utilisés pour qualifier l'eau du cours d'eau international ne sont jamais neutres. Ils permettent de prendre la mesure de l'adéquation de son régime à la réalité des enjeux dont elle est l'objet et de confronter les éléments reconnus comme tels de son régime ainsi ébauché aux concepts du droit déjà définis. Leur inadéquation interpelle et appelle à trouver d'autres termes, de nouveau concept. À cet égard, toute tentative pour qualifier l'eau du cours d'eau international devra, pour être acceptée, ne pas aller à l'encontre de la souveraineté nationale, mais présenter une solution

¹⁹⁶ Voir Reuter, 'Quelques Réflexions' (n 20) 424.

¹⁹⁷ Comité des ministres du Conseil de l'Europe, Résolution 67 (10) 'Charte Européenne de l'Eau' (adoptée le 26 mai 1967 et proclamée le 6 mai 1968) douzième et dernier principe. De même, en vertu de la mobilité de l'élément « eau », l'actuelle 'Charte européenne des ressources en eau de 2001' (Comité des Ministres du Conseil de l'Europe, Recommandation aux Pays Membres sur la Charte Européenne des Ressources en Eau, Rec (2001) 14 (adoptée par le Comité des Ministres du Conseil de l'Europe le 17 octobre 2001)) réaffirme cette réalité dans son para 2 et en développe les éléments constitutifs dans son para 15.

¹⁹⁸ ILC, 'Report of the International Law Commission on the Work of its Forty-Fifth Session (1993): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its Forty-Eighth Session prepared by the Secretariat' UN Doc. A/CN.4/457 (15 February 1994) para 431.

¹⁹⁹ Voir Directive 2000/60/CE du Parlement Européen et du Conseil du 23 Octobre 2000 Établissant un Cadre pour une Politique Communautaire dans le Domaine de l'Eau, JOCE (FR) 2000 (L) 60.

d'ordre consensuel. Aussi, faut-il espérer un outil juridique fort et ambitieux pour assurer, à l'aube du vingt-et-unième siècle, une gestion solidaire et une meilleure protection de la ressource en eau du cours d'eau international.

TEMPORAL LIMITATION BY THE COURT OF JUSTICE OF THE EU: DEALING WITH THE CONSEQUENCES

Donatas Murauskas*

Temporality is one of the tools enabling courts to deal with the consequences of a judgment. The present paper focuses on the special case of temporality in judicial review type judgments, ie the doctrine of temporal limitation of a judgment by the Court of Justice of the EU in the procedure of a preliminary ruling. Although the primary goal of the doctrine was to avoid harsh consequences in cases determined by the conventional retroactive application of a judgment, the doctrine has created its own costs. The paper is an attempt to discuss the arguments of the Court from the perspective of a consequences-based argumentation regarding the temporal effects of a preliminary ruling. The analysis provided is merely the positive type of insights regarding the current argumentation of the Court which aims to extend the view on the social impact driven argumentation of the Court.

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I. INTRODUCTION

The Court of Justice of the European Union (referred to below as ‘the Court’ or ‘the Court of Justice’) was created to be an enforcer of European law as well as to be the constitutional and administrative authority on European Community legal issues.¹ As every other court it employs various methods of legal reasoning including both rights-based and goal-based types of arguments.² Today the Court is the object of discussions throughout Europe on such important questions as judicial activism, political autonomy and influential authority. The debate often includes matters of the reasoning of the Court as well as the consequences of its judgments. The Court of Justice applies rules in particular types of procedures. Most of the procedures end up with judgments having a conventional rule of *ex nunc* (meaning ‘from now on’) with regards to its temporality. However, three of the procedures³ have the temporal effects of *ex tunc* (meaning from ‘the outset’). Therefore, the specific element of temporality has a potential effect on the social consequences of a judgment, especially if the judgment is to be applied retroactively as in the case of the *ex tunc* effect.

The preliminary ruling is the most frequently used instrument (accounting for over 50 per cent of all cases heard by the Court) and it plays a key role in the development and enforcement of EU law.⁴ Although the preliminary ruling is one of three types of procedures with a retroactive temporal effect of judgment, the temporal aspect of the preliminary ruling was

¹ Karen J Alter, *The European Court’s Political Power: Selected Essays* (OUP 2009) 288.

² The distinctive criteria of a judgment could also be identified as ‘absolutistic’ and ‘relativistic or in other terms, depending on the perspective and the context of the analysis’.

³ Actions for failure to fulfil an obligation (Article 258 of the Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (referred below as ‘TFEU’), Action for annulment (Article 263 of the TFEU and References for a preliminary ruling (Article 267 of the TFEU).

⁴ Josephine Steiner, Lorna Woods, Chistian Twigg-Flesner, *EU Law* (9th edn, OUP 2006) 193.

among the areas which were shattered by the need for intervention into the conventional rules of the founding Treaties in 1976.⁵ Therefore, it might be useful to analyse the reason the Court has created an exception from the retroactive application of the preliminary ruling in terms of its consequences from the perspective of the consequences for the whole of society.⁶

The present paper aims to analyse the application of the retroactivity principle by the Court in the procedure of a preliminary ruling from the perspective of consequences-based arguments. For this reason, the argumentation of the Court regarding the temporal effect of a preliminary ruling is ascertained in the light of the framework of an analysis of the consequences of a judgment. The background framework is influenced by the analysis of consequence-based arguments proposed by Peter Cserne.⁷ The setting consists of a system of an economic analysis hypothetically conducted by a judge. It also reflects the conceptual framework of Jürgen G. Backhaus⁸. The structure of the framework is based on the three-step procedure of the optimisation of a judgment under uncertainty⁹: (i) the identification of the social consequences which matter for a court; (ii) the measuring of the impact of the alternative consequences; and (iii) the evaluating of which type of judgment creates less costs. The analysis of the paper mostly focuses on the third element by assessing the actual arguments of the Court in the light of the costs imposed on various agents and behavioural incentives created. It helps to ascertain the actual arguments of the Court in the light of the social impact they pose.

It is worth noting that the framework operated in the paper does not intend to evaluate arguments of the Court in the light of particular conceptual economic criteria such as their allocative efficiency. It simply

⁵ From the case *Defrenne v SABENA II* (referred to below as ‘*Defrenne*’) in 1976 when the conventional rule was not applied due to social consequences anticipated by the Court, Case 43/75 *Defrenne v SABENA II* [1976] ECR 455.

⁶ More conceptually ‘macro-level real consequences’ in comparison to ‘micro-level real consequences’ as the consequences merely for interested parties. See Klaus Mathis, ‘Consequentialism in Law’ (2010) LawEcon Workshop, University of Bonn, 3-4 <<http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/paper-mathis>> accessed 25 April 2013.

⁷ Peter Cserne, ‘Consequence-Based Arguments in Legal Reasoning: A Jurisprudential Preface to Law and Economics’ in Klaus Mathis (ed), *Efficiency, Sustainability, and Justice to Future Generations* (Springer 2011), 45 <<http://ssrn.com/abstract=1684043>> accessed 12 March 2013.

⁸ Jürgen G Backhaus, ‘Towards an Ideal Economic Analysis of a Legal Problem’ in Jürgen G Backhaus (ed), *The Elgar Companion to Law and Economics* (2nd edn, Edward Elgar Publishing 2005) 465-472.

⁹ Cserne (n 7) 45.

tries to ascertain a variety of legal arguments in the light of the ratio between benefits and costs created by alternative legal regimes (the retroactivity rule and the doctrine of the temporal limitation of a judgment)¹⁰ as well as incentives provided for particular agents. The analysis is of a positive character, ie it does not identify the way the Court needs to rule in a particular situation. The paper asks the costs and incentives for the particular agents observed by the arguments of the Court of Justice which determine whether the rule of retroactivity is or is not applied. Therefore, the analysis provided is based on the primary systemisation of the actual argumentation of the Court and a derivative evaluation of the argumentation in terms of its direct costs and incentives, not oppositely.

The structure of the paper is determined by the focus of the analysis. First of all, the debate regarding the legitimacy of the consequences-based argumentation is briefly outlined. Secondly, the legal insights and costs related concerns of the temporality of the judicial review type of judgments¹¹ are presented. Thirdly, the arguments of the Court regarding the application of the doctrine of the temporal limitation of a judgment are provided. Finally, a concise framework of the consequences-based arguments of the Court regarding the temporality of preliminary rulings is highlighted.

II. CONSEQUENTIALISM AS A 'METHOD' OF ARGUMENTATION

There is a continuous debate regarding the content of legitimate arguments in courts. Therefore, one could reasonably ask whether the reasoning of a court based on social consequences is permissible at all. The orthodox view on legal interpretation lies in the idea that it is the text-based and text-bound finding of the correct meaning of a legal norm.¹² Thus, the applicable rule is derived from the internal system of law. The

¹⁰ This would appear to be the criterion of the Kaldor-Hicks efficiency at a first glance. However, the criterion of Kaldor-Hicks tends to narrow the analysis to the homogenous agents which are to be affected by a particular legal change as conceptually a legal change (the change for an alternative legal regime) seems to be Kaldor-Hicks efficient if it maximises net aggregate social welfare, ie the sum of the individuals' welfare regardless of whether each individual is better off (see Richard A Posner, *The Economic Analysis of Law* (3rd edn, Aspen Law & Business 1986) 11-13. Notwithstanding, the analysis of the paper evaluates the argumentation of the Court comprehensively by highlighting the effects on costs or the net benefit of a legal change for all the relevant agents: individuals, Member States, the European Commission.

¹¹ In particular, the preliminary ruling procedure.

¹² Stefan Mayr, 'Putting a Leash on the Court of Justice? Preconceptions in National Methodology v Effet Utile as a Meta-Rule' (2012/13) 5 EJLS 8, 12.

argument could be derived from the works of Niklas Luhmann, who argued that legal adjudication is conditionally programmed by the legislator. To be precise, if certain conditions are fulfilled then a certain judgment has to be reached.¹³ Moreover, the argumentation is a special mode of operation of the system, specialised in the self-observation which is focused on the distinction and denotation of arguments on the basis of texts.¹⁴ The arguments addressed by Luhmann against consequentialism are ‘the argument of legal certainty’, ‘the argument of legal equality’, ‘the argument of overburdening the courts’ and ‘the statement that consequentialism jeopardises the independence of the courts’.¹⁵ However, the importance of consequences arises due to the critique regarding the logically-based reasoning of courts as a relatively vulnerable and too pretentious method in the practice of courts. For instance, formal syllogising is a tool pretending to a certainty and regularity which do not exist in fact. The effect of such pretension is increasing uncertainty and social instability. It is for this reason that either logic must be abandoned or it must be relative to consequences rather than antecedents.¹⁶

The founder of the theory of law as integrity, Ronald Dworkin, has noted the principles as integral elements of the law.¹⁷ He insisted that judges need to restrict arguments based on principles rather than policies, which need to be left to the legislator.¹⁸ However, as Neil MacCormick has argued:

[T]he spheres of principle and of policy are not distinct and mutually opposed, but irretrievably interlocking [...]. To articulate the desirability of some general policy-goal is to state a principle. To state a principle is to frame a possible policy-goal.¹⁹

Furthermore, MacCormick has stated the necessity of arguments based on consequences stating that decisions need to be based on various criteria

¹³ Niklas Luhmann, *Rechtssoziologie 2, Reinbek bei Hamburg* in Klaus Mathis, ‘Consequentialism in Law’ (2010) LawEcon Workshop, University of Bonn, 3-4 <<http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/paper-mathis>> accessed 25 April 2013.

¹⁴ Niklas Luhmann, ‘Legal Argumentation: An Analysis of Its Form’ (1995) 58 MLR 285, 287.

¹⁵ Klaus Mathis, ‘Consequentialism in Law’ (2010), LawEcon Workshop, University of Bonn, 3-4 <<http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/paper-mathis>> accessed 25 April 2013.

¹⁶ John Dewey, ‘Logical Method and Law’ (1925) 10 Cornell LQ 17, 26.

¹⁷ Nigel E Simmonds, *Central Issues in Jurisprudence* (Sweet & Maxwell 2008) 204-205.

¹⁸ Ronald Dworkin, *Taking Rights Seriously* (Gerald Duckworth & Co 1977) 85-86.

¹⁹ Neil MacCormick, *Legal Reasoning and Legal Theory* (OUP 1978) 263.

such as justice, common sense, public policy, and legal expediency.²⁰ Thus, shifting the focus on the consequences of a judgment helps to improve the deficiencies of formal reasoning as consequence-based reasoning can be identified as being instrumental, forward-looking and often policy-oriented.²¹

One of the early proponents of consequentialism in law, Oliver W Holmes, has noted the importance of consequences in the process of adjudication:

[C]ertainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form [...] [But] [i]t is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.²²

Holmes' critique of legal formalism and the exclusion from social reality by some opponents of a consequentialist approach in adjudication has been followed by other scholars. The later approaches of the legal realist Karl Llewellyn²³, points made by pragmatists such as John Dewey²⁴, together with legal scholars such as MacCormick support the statement that consequence is the element which helps to properly frame the decision making process.²⁵ It could be argued that consequentialism escapes the boundaries created by the internal logic of an artificial system of law as it aims to achieve a factual change by a decision in the real world rather than the formal legitimisation of a decision with no conceptual links to the factual change that it determines.

Moreover, the philosophic, economic and social ideas of the XVIII-XIX centuries have changed a lot in regards to attitudes to legal adjudication. One such change is the shift to consequentialism as a concept which requires applying arguments from a broader context (ie external

²⁰ Mathis (n 15) 3-4.

²¹ Cserne (n 7) 45.

²² Oliver W Holmes, 'The Path of the Law' (1886/87) 10 HLR 457, 466.

²³ See Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Wolter Kluwer Law & Business 1960).

²⁴ See John Dewey, 'Logical Method and Law' (1925) 10 Cornell LQ

²⁵ Mathis (n 15) 17-18.

arguments). Nowadays, it is widely accepted that consequentialism is an essential feature of law.²⁶ Even more relevant to the practical implementation of the consequentialist approach by the courts is the concept of instrumentalism. The founder of this theory is the pragmatist John Dewey²⁷. Instrumentalism is an approach which holds that reflective thought is always involved in transforming a practical situation.²⁸ It is the theory according to which the aim (*end*) of the decision presupposes the method (*mean*). Therefore, we do not need to think about internal reasons if the purpose of the reasoning is stated as finding the best means to the end. It is worth noting that the framework of Cserne, which is employed in this paper, is based on instrumental theory. It is aimed at the optimisation of a judgment²⁹ from the perspective of social consequences, thus it aims to achieve a particular end (reduce the costs) by using a particular methodology (ie the means).

The approach of the Court of Justice regarding temporality might be placed into the theory of instrumentalism. The assumption which needs to be established is that the Court struggles to achieve the least costly approach to the question of temporality in the procedure for preliminary rulings. This assumption enables the argumentation of the Court to be analysed in the light of the conceptual frameworks of reasoning which are based on consequentialist (or instrumentalist) theories. Although the terms ‘consequentialism’ and ‘instrumentalism’ are not the same, they are both derived from the same theoretical background and share similar qualities. Thus, for the analysis of the argumentation of the Court provided in the paper, the term ‘consequentialism’ is used and encompasses both the concepts of instrumentalism and consequentialism unless it is stated otherwise.

To sum up, consequentialism provides a proper justification for arguments based on external sources, ie social consequences. This is important as the framework of consequences-based judgments is focused exceptionally on these types of factors. However, before the analysis based on the framework takes place, the temporality effect of judgments and preliminary procedure in particular needs to be discussed briefly.

III. JUDGMENTS AND TEMPORALITY

²⁶ See Neil MacCormick, ‘On Legal Decisions and Their Consequences’ (1983) 58 NYULR 241.

²⁷ See ‘John Dewey (1859-1952)’, Internet Encyclopedia of Philosophy, <<http://www.iep.utm.edu/dewey/>> accessed 14 December 2013.

²⁸ Samuel E Stumpf, *Philosophy: History & Problems* (McGraw-Hill 1989) 424.

²⁹ Cserne (n 7) 45.

1. *The Temporal Effects of Judgments*

To begin with, the question of temporal effects presupposes an explanation of how sources of law vary regarding temporal effects. The most general distinction is among statutory law and case law. Traditionally, there is not so much controversy in the case of statutory law: The statutory rule has a prospective effect except in certain particular situations.³⁰ Notwithstanding this, the judgments of courts follow a different approach. Historically, the default rule was opposite to statutory law, ie a judgment used to consider an explanation of existing law *a priori*.³¹ Thus, the retroactive effect used to be a good and justifiable option at least in common law countries.³² However, concerns over the harsh consequences of such retroactive effects arose as it became obvious that the conventional rule is not the most reasonable solution in all situations.³³ For the sake of clarity, the mixture between the possible temporal effects of a judgment should be analysed taking into account the functional features of not only common law but continental courts as well.

This paper deals with a specific type of judgments - judicial review. The concept of judicial review type judgments in courts began to develop in Europe after WWII and was influenced by the proposals of the prominent Hans Kelsen.³⁴ The idea of judicial review type judgments lies in the jurisdiction of the special court (which usually has the term 'Constitutional' in the title) to annul statutes enacted by legislators. This analogous approach has been consequently adopted by the administrative courts regarding the sub-statutory law.

The judicial review type judgment deals with statutory law and may annul

³⁰ The conventional rule of the temporality of statutory law is 'ex nunc'. This is related to the notion that persons should be entitled to know what the law governing their conduct is at the moment of their actions. However, the feature of such predictability could be sometimes reversed and could need a specific justification (see Stephen R Munzer, 'Retroactive Law' (1977) 6 J of L Studies 373).

³¹ The idea is that an ordinary court is an institution which deals with a situation which happened in the past at the time the legal regime existed. Thus, a court should understand and deal with a law which existed at the moment legally important facts occurred. Special remarks should be made regarding the exclusion of non-ordinary courts such as constitutional courts which directly deal with statutory law. In addition, the analogous function of specialised courts such as administrative courts regarding statutory law should also be taken into account.

³² Thomas S Currier, 'Time and Change in Judge-Made Law: Prospective Overruling' (1965) 51 VLR 201.

³³ eg *Harper v Virginia Dept. of Taxation*. U.S. Supreme Court Judgment of 18 June 1993, Case No. 91-794, 509 U.S. 86.

³⁴ Allan R Brewer-Carias, *Constitutional Courts as Positive Legislators: A Comparative Legal Study* (CUP 2011) 13.

it. Various legal frameworks establish different rules regarding the temporality of a judgment which annuls the statutory rule. In case of constitutional judicial reviews there could be at least three most common approaches: (i) The court determines when an annulled legislation will cease to have effect at some point in the future; (ii) the courts assign the retroactive or non-retroactive effects of a decision, determine the date on which the legislation ceases to have effects; (ii) the court decides to bring back previously repealed legislation when declaring the present one null.³⁵

The situation in case of the jurisdiction of administrative courts to exercise a judicial review is not uniform. The temporal effect of the judgments of administrative courts in Europe was traditionally retroactive as it is still the conventional rule.³⁶ However, retroactivity has always been disputed as a blind application which could determine devastating consequences. Thus, the relatively new practice of the French *Conseil d'Etat*³⁷, the highest administrative tribunal in France, which was also a precursor of the Court of Justice, was inspired by a similar approach of the Court in its application of the doctrine of the limitation of the temporal effects of a judgment³⁸ (referred to below as 'the Doctrine' or 'the doctrine of temporal limitation') as well as by comparable approaches in Germany, Austria and Italy.³⁹

2. *The Preliminary Ruling Procedure and Temporality*

The jurisdiction of the Court of Justice under the procedure for a preliminary ruling looks towards two fundamental goals: The interpretation and the validity of EU law⁴⁰. The validity of its jurisdiction is confined to the acts of institutions. It is worth noting that the grounds for the invalidity of acts are the same as in actions for annulment procedures under Article 263 of the TFEU⁴¹. The interpretative function of the Court is wide and it encompasses the jurisdiction to interpret the

³⁵ *ibid* 94.

³⁶ See the website of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union <<http://www.aca-europe.eu/index.php/en/tour-d-europe-en>> accessed 7 March 2013.

³⁷ From 2004, see Judgment of Conseil d'État, Case 114: 865 *Association AC et autres* [2004].

³⁸ To be precise, 'the doctrine of limitation of temporal effects of a judgment in the preliminary ruling procedure'; Consolidated Version of the Treaty on the Functioning of the EU (TFEU) [2010] OJ L83/47.

³⁹ Jean Massot, 'The Powers and Duties of the French Administrative Judge' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2010) 424.

⁴⁰ Steiner, Woods and Twigg-Flesner (n 4) 193.

⁴¹ TFEU (n 38).

founding Treaties of the EU, acts of institutions (even including non-binding acts) and statutes of bodies established by an act of the European Council.⁴²

Although the Court is prohibited from the interference in matters regarding the reference source (ie the national law in particular)⁴³ it provides an interpretation of EU law in the context of the points of law stated by the referring institution.⁴⁴ Thus, the framework of the preliminary ruling procedure might be seen as a clarification of EU law in the light of a national law by *de facto* establishing whether the national rule conforms to EU law. In cases where a national rule does not satisfy the EU law, the clarification of the Court of EU law might look like a shaping of the proper national rule without even interfering in national jurisdictions. The reason the clarification of the Court shapes national rule is the obligation of Member States to take any appropriate measure, either general or particular, to ensure the fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.⁴⁵

Therefore, if the Court rules that a national rule does not correspond with EU law, it is for the national rule to be interpreted retroactively for the time the particular EU rule has been operating. This means that domestic courts are obliged to deal with a 'new' national rule after the preliminary ruling has been published. It also means that the various agents of national law (natural, legal persons, institutions etc.) might have a right to claim for damages against Member States⁴⁶ or individuals who relied on the 'old' national rule. In terms of the costs of the issue, which is determined by the retroactive temporal effect, although Member States are monitored by the European Commission (referred to below as 'the Commission') regarding the application of EU law and interested parties, the creative approach of the Court⁴⁷ might be underestimated by persons and Member States. Such underestimation might be influenced by the following factors: the political power of the Court, its creativity and the specific situations in which the boundary of whether a national rule conforms to EU law is not yet clear until the Court states so.

As a reliance on a national rule might be risky for some agents, there seems

⁴² Steiner, Woods, Twigg-Flesner (n 4) 195.

⁴³ Case 13/61 *De Geus en Uitdenboger v. Robert Bosch GmbH* [1962] ECR 00089.

⁴⁴ Case 6/64 *Costa v. ENEL* [1964] ECR 01141

⁴⁵ TFEU (n 38), Article 4.

⁴⁶ Based on the arguments for member state liability in the *Francovich* case. See Case C-479/93 *Andrea Francovich v Italian Republic* [1995] ECR I-03843.

⁴⁷ The political impact of the Court is widely recognised and discussed, eg Alter (n 1).

to be space for the exceptional framework which enables the Court to escape the harsh consequences of the retroactive temporal regime of a preliminary ruling. This framework has been adopted in the aforementioned *Defrenne* case in 1976 and has been applied several times. Exceptions to the conventional rule have an impact on the content of the legal certainty by weakening the reliance on the conventional rule – retroactivity. Hence, there seems to be a trade-off regarding the costs of two alternative rules: the cost of the reliance on a conventional rule by some agents, and the cost of retroactivity for some agents, which will need to compensate for the defection of a national rule (primarily, the Member States). Furthermore, it seems that the reasoning of the Court regarding the doctrine of temporal limitation deals with particular factors and it might be useful to depict those.

The rationale of the positive analysis of the reasoning lies in the idea of the feasible consequences-based argumentation of courts. Although the temporality regime of the preliminary ruling procedure is not clear enough⁴⁸ the Court has depicted particular elements of the argumentation which might be evaluated from the perspective of the social consequences. Therefore, the costs determined by those arguments need to be revealed as well as the legal background of the doctrine of temporal limitation.

IV. THE CONSEQUENTIALISM OF TEMPORAL LIMITATION

1. *Legal Insights into the Doctrine*

As has already been stated, the doctrine of the temporal limitation of a preliminary ruling has been introduced by the Court of Justice in the *Defrenne* case in 1976⁴⁹. The purpose of this move by the Court was the circumvention of serious economic repercussions on those parties (ie employers) who would otherwise have had to pay compensation due to a breach of the equal pay principle.⁵⁰ The problem arose due to the fact that national courts must apply the conventional rule of retroactivity to situations which occurred before the Court of Justice provided a preliminary ruling.⁵¹ In general, the question of temporal limitation needs to be considered by the Court in cases in which a retroactive application may give rise to serious repercussions as regards the past.⁵² The doctrine of temporal limitation which is a focus of the paper is actual in interpretative judgments of the preliminary ruling procedure. The preliminary rulings on

⁴⁸ Steiner, Woods and Twigg-Flesner (n 4) 217.

⁴⁹ Case 43/75 *Defrenne v SABENA II* [1976] ECR 455.

⁵⁰ Steiner, Woods, Twigg-Flesner (n 4) 217.

⁵¹ Paul Craig, *EU Administrative Law* (2nd edn, OUP 2012) 707.

⁵² Steiner, Woods and Twigg-Flesner (n 4) 218.

validity are assimilated to those of a successful annulment action regarding the temporal effect of a judgment.⁵³ In this type of procedure the Court of Justice has limited the temporal effects in number of cases such as the *Roquette Frères*.⁵⁴

For a more rigorous view over the factual application of the doctrine of temporal limitation and tendencies, particular empirical data is provided in Table 1. Apparently, during the period from 1 April 1976 to 1 May 2012 there were 35 requests to apply the Doctrine. The Court only applied the Doctrine in seven cases. The results provided are based on an analysis in the online search tool of the judgments of EU courts.⁵⁵ The search was carried out by analysing the preliminary rulings with the key phrases ‘temporal limitations’, ‘doctrine of temporal limitation’, ‘temporal effect’ and ‘ratione temporis’ explicitly mentioned.

Number of Court cases from April, 1976 to May, 2012 (only preliminary rulings ⁵⁶)	Number of cases in which a Member state or a national court requested / asked for a temporal limitation	Number of cases in which the Court applied the doctrine of temporal limitation
4 486	35	7 ⁵⁷

Table 1 Factual application of the doctrine of temporal limitation

According to the data provided in Table 1, the Doctrine is not a widespread phenomenon. Therefore, the Doctrine cannot be identified as the new conventional rule regarding the temporal effects of a judgment.

⁵³ *ibid* 220.

⁵⁴ Case 145/79 *SA Roquette Frères v French State* [1980] ECR 02917.

⁵⁵ InfoCuria (Case law of the Court of Justice) <<http://curia.europa.eu/juris/recherche.jsf?language=en&jur=C,T,F&td=ALL>> accessed 9 December 2012.

⁵⁶ ‘Reference for a preliminary ruling’ and relatively recently adopted ‘Preliminary reference - urgent procedure’.

⁵⁷ Those seven are Case 43/75 *Defrenne v SABENA II* [1976] ECR 455; Case 24/86 *Blaizot v Université de Liège and Others* [1988] ECR 00379; Case 262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-01889; Case C-163/90 *Administration des douanes and droits indirects v Legros and Others* [1992] ECR I-04625; Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* [1995] ECR I-04921; Case C-308/93 *Bestuur van de Sociale Verzekeringsbank v Cabanis-Issarte* [1996] ECR I-02097; Case C-437/97 *EKW and Wein & Co* [2000] ECR I-01157.

The question which arises is whether the importance attributed to the Doctrine is not an error in personal judgment? To be precise, the error in personal judgment could occur if persons with limited information exaggerate an issue with a higher than factual probability just because the level of reliance increases inadequately after a prominent case involving the Court.⁵⁸ The reliance costs could be various here. They can mostly be related to the decreasing belief in the legal certainty (ie the conventional retroactive rule) by interested persons who become too cautious in regard of national laws implementing EU law. This shift might lead to a situation in which interested persons contest national law in cases where it is not really sufficient, ie by investing more than is reasonably needed in their assets under the present legal regime just because of the lack of certainty. It may lead to needless private litigation costs. Therefore, there needs to be some clear explanations related to the exceptionality of the doctrine of temporal limitation and the specificity of the Doctrine. Some observations might be highlighted.

Firstly, the Doctrine is applied in very different cases. Thus, the probability of its application cannot be based merely on the existing experience as it is not clear what the next field of EU law in which the Doctrine will be applied will be. Secondly, the essence of the Doctrine precludes all preliminary rulings to be included in the estimation as the Doctrine is applied only in exceptional circumstances in important cases⁵⁹ when the retroactive effects can be sufficiently detrimental, as usually this is not an issue. Lastly, although the Doctrine was introduced in 1976, its application has not been equally distributed in time. As can be seen in Figure 1, the Doctrine has not been intensively applied throughout all the period from 1976. It is noteworthy that during some periods the Doctrine was not even considered (ie it was not requested by Member States). Thus, this creates even more uncertainty as it is not clear what could contribute to a new wave of application of the Doctrine. This factual situation raises the reliance costs as the uncertainty induces risk-reducing investments in private assets by owners in order to prevent an uncertain outcome.

⁵⁸ Christine Jolls, Cass R Sunstein and Richard H Thaler, 'A Behavioral Approach to Law and Economics' in Cass R Sunstein et al. (eds.) *Behavioral Law and Economics* (CUP 2000) 37.

⁵⁹ eg Case 43/75 *Defrenne v SABENA II* [1976] ECR 455, Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others*, [1995] ECR I-04921 and others.

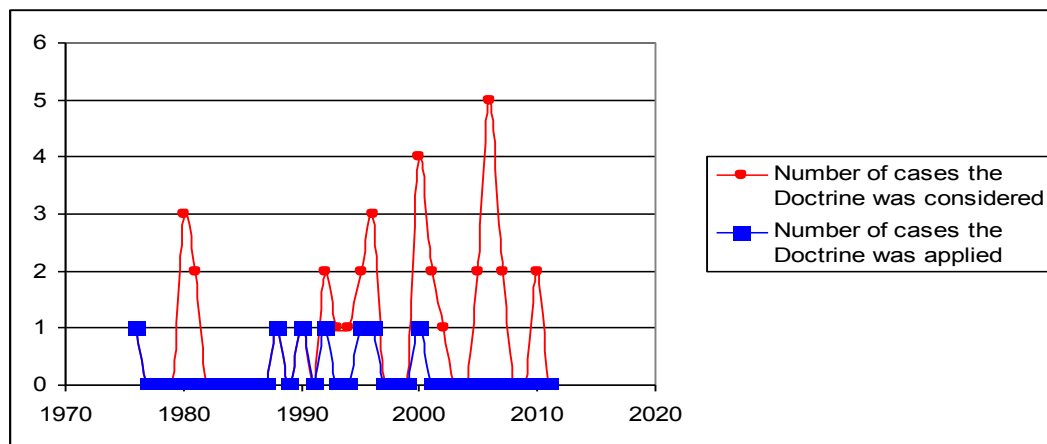


Figure 1 Factual application of the doctrine of temporal limitation by the Court of Justice.

2. *Analysis of Consequences-based Argumentation of the Court*

The positive analysis of the actual consequences-based reasoning of the Court consists of the representation and identification of relevant arguments employed by the Court to justify one of two following alternative rules: (i) the conventional retroactive effect rule or (ii) the doctrine of temporal limitation. The process of tackling cases is identified assuming the framework of Cserne⁶⁰ is applied. Therefore, first of all, the Court starts to deal with a case without having any knowledge of the relevant facts. It analyses each case and identifies the factual elements which matter. Subsequently, the Court analyses the impact of possible decisions and, finally, evaluates which of the alternatives poses the least costs to the macro-lever real consequences.

The Court does not explicitly depict the dimension of costs while reasoning. However, the legal arguments which are employed by the Court might be ascertained. The judgments of the Court have a normative character due to their power. Therefore, they create various costs and have a particular impact on the behaviour of different agents by creating incentives. The doctrine of temporal limitation was introduced mainly due to the prospective costs for the agents of the member state (ie the employers in the *Defrenne* case⁶¹). This means that the basic rationale of the Doctrine is based on particular consequences-based evaluations. Accordingly, a more comprehensive costs-focused approach of the main important factors determining the application of the Doctrine may be depicted.

⁶⁰ Cserne (n 7) 45.

⁶¹ *Defrenne v SABENA II* Case 43/75 [1976] ECR 455.

a. Exceptionality

Probably the most pervasive notion regarding the Doctrine is its **exceptionality**. The Court has stated that in determining whether or not to limit the temporal effect of a judgment it is necessary to bear in mind that although the practical consequences of any judicial decision must be weighed carefully, the Court cannot go so far as to diminish the objectivity of the law and compromise its future application on the grounds of the possible repercussions which might result.⁶²

The notion of the objectivity of the law reflects the value of the legal certainty regarding the conventional procedural rules. It is necessary to reiterate that in case of the temporal limitation, the Doctrine is not prescribed in statutory law. Hence, it arises from the consequentialist idea that there might be exceptional situations when the net benefit of the stable regime under the conventional rule is less than the net benefit after the saved costs which might appear due to, for instance, harsh financial obligations. Thus, the conventional retroactive rule creates legal certainty. The Court indirectly acknowledges that the general trade-off is between the costs of the legal certainty of the conventional rule and the direct costs of the judgment due to retroactivity. According to the Court, legal certainty should, in general, prevail as the feature which ensures the expectations of individuals.

b. The Commissions' Contribution

Furthermore, the arguments of the Court touch upon the notion of windfall losses for those Member States and individuals who relied on the 'old' national rule. These windfall losses lie in an idea directly related to legal certainty and reliance investments of relevant agents. The possibility of windfall losses means that the current situation of agents is such so that there might be a surprising and unexpected loss which was not predicted in advance. This effect is created by the Doctrine and the Court tries to mitigate this. The context of the argument might be seen in the light of the factual situation of the following *Defrenne*⁶³ case. The applicant was working as a cabin steward for an airline. Her employment contract prescribed her and other female cabin stewards a different salary in comparison to what was paid to male cabin stewards. She brought a claim to a national court, which referred to the Court for a preliminary ruling. The Court declared that the national rule contradicted the principle of equality entrenched in EU law. The government raised the question of

⁶² Case 24/86 *Blaizot v Université de Liège and Others* [1988] ECR 00379.

⁶³ Case 43/75 *Defrenne v SABENA II* [1976] ECR 455.

retroactivity. In addition, the Commission has never initiated proceedings against a member state due to the improper application of EU law.

It is worth noting that one of the core arguments used by the Court in the *Defrenne* case was the fact that the **Commission had not initiated proceedings** against Member States concerned on the grounds of a failure to fulfil an obligation. This argument could be identified as a tool which helps to prevent windfall losses for persons who were following the 'old' national rule. According to the Court, the contribution of the Commission, which was in a position to notice the situation but did not act in order to change it, should be such so as to reasonably lead the authority of a member state to uncertainty.⁶⁴ The criterion of 'reasonableness' is not clear in itself, but it does give at least a general idea of the boundaries of a reasonable person. In addition, the argument provides incentives for the Commission to monitor the compliance of national law to EU law more actively.

c. Good Faith

Furthermore, the Court has adapted the notion of **good faith**, which is probably a way to fill in the gap of vagueness of the concept of reasonableness. Accordingly, only a member state which behaves in good faith may successfully request to apply the Doctrine. The following situation in the *Stradasfalti*⁶⁵ case highlights the rationale of this argument. The authorities of Italy knew that the tax measure they apply did not comply with EU law. However, the measure was justified by the wording of 'cyclical economic reasons' embedded in an EU directive, which provided a possibility to derogate from the existing regulation. Even though it was supposed to be temporary at the time of the adopting of the measure, the Italian government continued to apply it 20 years later.

Therefore, a member state should be an active and positive participant in the EU institutional framework, trying to comply with EU law in good faith according to the reasoning of the Court of Justice. Such an implication by the Court serves as a constraint on Member States which try to exploit features of the Doctrine. In terms of consequences-based arguments, the Court creates particular restraint for the possible opportunism of Member States. For instance, a member state might be interested in the application of the Doctrine as it finds that all relevant criteria are met. Therefore, the criterion of the good faith enables the Court to test the factual behaviour of the institutions of a member state and reject the request even if other criteria are met.

⁶⁴ Case C-437/97 *EKW and Wein & Co* [2000] ECR I-01157.

⁶⁵ Case C-228/05 *Stradasfalti* [2006] ECR I-08391.

d. Economic Repercussions

The first application of the Doctrine was related to the general trade-off between the net loss created by the exception from the conventional rule and the net loss consisting of the financial burden for relevant agents (ie employers). Thus, the existence of possible **economic repercussions** was the criterion applied from the first application of the Doctrine.⁶⁶ In the *Defrenne* case the Court explicitly concluded that given the large number of persons concerned claims might seriously affect the financial situation of respective undertakings and even drive some of them to the bankruptcy.⁶⁷ In its later judgments the Court extended the application of the economic repercussions criterion from private employers to branches of governments or municipalities of Member States⁶⁸ and the financial stability of Member States in a more general sense.⁶⁹ However, at the same time the Court created a clear boundary to Member States which perceive a possibility to justify the application of the Doctrine due to the presumable financial repercussions. In the *Société Bautiaa*⁷⁰ case the Court stated that the financial consequences which might ensue for a government owing to the unlawfulness of a tax or its imposition never in themselves justify limiting the effects of a judgment of the Court. Such an argument explicitly shows the rigorous position of the Court towards an exclusive proposition of financial difficulties. Therefore, it might be an argument which impedes the opportunism of Member States as restricting them to abuse the current financial situation by worsening it even more in order to escape the retroactive application of the preliminary ruling.

It is worth noting that the Court does not rely on the accurate estimations of losses provided by a Member State while dealing with the question of the temporal limitation of retroactivity rule. The *Nádasdi*⁷¹ case is one of the rare examples in which the exact amount of the loss in the case of the retroactive rule is presented. In this case the government has provided a detailed estimation of the losses (116 million Euros) which would occur if

⁶⁶ Michael Lang, 'Limitation of the temporal effect of a judgment of the Court' (2007), 35 Intertax 230, 233 <<http://www.eatlp.org/uploads/public/Lang%20%20Temporal%20effects%20of%20ECJ.pdf>> accessed 19 February 2013.

⁶⁷ Case 43/75 *Defrenne v SABENA II* [1976] ECR 455.

⁶⁸ Case C-163/90 *Administration des douanes and droits indirects v Legros and Others* [1992] ECR I-04625, Case C-437/97 *EKW and Wein & Co* [2000] ECR I-01157.

⁶⁹ Through the possible influence on the financing mechanism of social insurance. See Case C-262/96 *Sürül* [1999] ECR I-02685.

⁷⁰ Case C-197/94 *Bautiaa and Société française maritime v Directeurs des services fiscaux des Landes and du Finistère* [1996] ECR I-00505.

⁷¹ Case C-290/05 *Nádasdi* [2006] ECR I-10115.

the Court decided that the national rule contradicts EU law. However, the Court has not been convinced by the proposition of the Member State. It again puts forward the restriction on the opportunism of Member States, meaning that despite the accurateness of the estimated costs, there still needs to be other important elements to grant a relief from the retroactive effect of the preliminary ruling procedure.

e. Intricate Legal Relationships

A variety of cases have enabled the expansion of the concept of direct losses from pure economic repercussions to other comparable concepts as well. The seminal case was the *Bosman*⁷² case in 1995. The situation was as follows. The applicant was a football player playing for *RFC Liège* in the Belgian First Division in Belgium. After the termination of his contract, he decided to sign a contract and moved to *Dunkerque*, a French team. However, according to the rules of the Royal Belgian Football Association at the time a professional footballer who is a national of one Member State could not be employed by a team of another Member State upon the expiry of his contract with a team unless the latter team had paid a transfer fee or a training and development fee to his former team. The legal relationships between football players and teams, as well as among teams, regarding football players are governed by a very complex system of rules of their respective national associations and by UEFA (at the European level) as well as FIFA (at the international level). The player appealed to a national court which then referred to the Court for a preliminary ruling.

The Court provided a different test of direct costs indicating that the specific features of the rules laid down by sporting associations for the transfers of players between teams of different Member States, together with the fact that the same or similar rules applied to transfers between teams belonging to the same national association and between teams belonging to different national associations within the same member state, may have caused uncertainty as to whether those rules were compatible with EU law. Thus, the Court extended the potential financial loss as direct costs to the more sophisticated concept of the **uncertainty of a situation in the context of intricate legal relationships**.

f. Actions of Litigants before the Judgment

The Doctrine is an instrument that does not only help to evade harsh direct losses as it creates costs as well. Among these are incentives for

⁷² Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* [1995] ECR I-04921.

individuals to address national courts and seek damages due to the improper application of EU law. The loss in this situation is that in the light of a temporal limitation, persons understand that a ‘new’ national rule might be applied to them retroactively. Thus, they might be hindered from addressing the improper application of EU law if an ‘old’ rule is beneficial to them. Such a situation creates costs as it deters persons from a reasonable investment in their assets in those fields which are debatable as regards their compatibility with EU law if we assume that EU law promotes efficiency by reducing entry barriers to markets or stimulating the capabilities of the EU single market.

However, the actual application of the Doctrine takes into account such incentives. In the *Legros* case⁷³ the Court concluded that neither the provisions of EEC Treaty in relation to charges related to customs duties on imports nor Article 6 of the Agreement between the Community and Sweden may be relied upon in support of claims for the refunding of charges such as dock dues paid before the date of this judgment, except by claimants who had initiated legal proceedings before that date or who had raised an equivalent claim. Thus, while applying the Doctrine the Court **excludes those persons who did not address the ‘old’ rule of national law actively before a judgment by the Court.** In addition to the proposition of the Court to overcome fear to invest in some ‘risky’ assets, it also induces individuals to monitor and appeal possible improper applications of EU law in national courts.

g. Interconnection of Cases

The application of the Doctrine creates dubious effects on negatively affected persons if they (including Member States) were able to assess the risks in advance and internalise them. Thus, there might be a tool that would prevent those persons from compensating their losses if they were able to assess that a rule does not correspond EU law. It is worth noting that the Court had distinguished this argument by stating that **the limitation of the temporal effects of a judgment could be carried out only if an actual judgment upon the interpretation was sought.**⁷⁴ This means that it is not possible to circumvent a retroactive application of the changed interpretation of EU law if there is another judgment similar to the present case. This criterion of ‘interconnection’ can be illustrated in the field of tax law, as it is this field that the factor has been mostly applied. The criterion is supposed to help to avoid a situation

⁷³ Case C-163/90 *Administration des douanes and droits indirects v Legros and Others* [1992] ECR I-04625.

⁷⁴ Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* [1995] ECR I-04921.

in which taxpayers in one member state are still able to exercise their rights, whereas the taxpayers in another member state cannot do so due to a non-retroactive judgment, even though the same fiscal periods are concerned.⁷⁵

h. Existence of the Request

The procedural element that is considered by the Court is the existence of a **request of a Member State** or a national court⁷⁶. It is an obligatory condition to apply the Doctrine in the majority of the Court cases in which the question regarding the Doctrine was analysed. The Court has never limited the temporal effect of a judgment *ex officio*. This factor could be even called the first precondition for the Doctrine within the reasoning of the Court. It seems that this precondition of the Doctrine does not have any explicit effect on social consequences merely being a formal requirement.

To sum up, the factors that are highlighted by the Court of Justice regarding the effect of the Doctrine on various agents in terms of costs and incentives, it is difficult to summarise the structure of the argumentation of the Court and the effect this has on costs and incentives. For this reason insights into the relevant factors of the Courts' reasoning are put into the proposed framework of the consequences-based reasoning.

V. THE CONCISE FRAMEWORK OF THE APPLICATION OF THE DOCTRINE

Cserne⁷⁷ focuses on so-called 'behavioural consequences' framework as the criterion with which to consider the least achievable costs and the effects on incentives of various agents in a particular case. This is quite distinct from the perspective of 'judicial consequences' which involves the analysis of a judgment as a bundle of consequences-as-implications as general rules for future cases.⁷⁸ Behavioural consequences refer to 'what human

⁷⁵ Ariane Wiedmann, 'Non-Retroactive or Prospective Ruling by the Court of Justice of the European Communities in Preliminary Rulings According to Article 234 EC' (2006), (E) 5/6-2006 The European Legal Forum 197, 199 < <http://www.simons-law.com/library/pdf/e/682.pdf> > accessed 12 February 2013.

⁷⁶ Case C-423/04 *Richards* [2006] ECR I-03585, Case C-57/93 *Vroege v NCIV* [1994] ECR I-04541, Case C-367/93 *Roders and Others v Inspecteur der Invoerrechten en Accijnzen* [1995] ECR I-02229.

⁷⁷ See Table 2. Evaluation of behavioural consequences of a judgment. More: Cserne (n 7) 45.

⁷⁸ To lead as a person of prudence and forethought any judge across *the range of possible situations which will have to be covered by this ruling in point of right*. See MacCormick, 'On Legal Decisions and Their Consequences' (n 26) 251.

behaviour the rule will induce or discourage’ while judicial consequences refer to ‘what sorts of conduct the rule would authorise or proscribe’⁷⁹. It is worth noting that the doctrine of temporal limitation is not merely a way to reason the unacceptable consequences regarding the social situation after the judgment (**direct costs**). The Doctrine also affects the behaviour of parties in other cases since it signals the expected manner of behaviour (**providing incentives**). Therefore, both facets of the consequentialism of the Court need to be addressed.

Step	Question to be answered by the Court	Difficulties
1. Identification	Which consequences matter?	Operationalisation
2. Measurement	What is the impact (costs and benefits) of the decision in these dimensions?	Information
3. Evaluation	Which of the possible decisions has the best consequences (the least costs)?	Trade-offs

Table 2 Evaluation of the behavioural consequences of a judgment.

Following the framework proposed, the **first** step of the analysis (exposing all the relevant factors which affect consequences according to the Court) is provided in the previous part of the paper in which those factors of the Courts’ reasoning regarding the subject-matter are introduced. **Secondly**, it is important to distinguish the possible consequences of a case in the relation to all factors provided by the Court. The judge is obliged to measure the prospective costs and benefits of possible different outcomes having in mind the different factors of reasoning regarding the temporal effect of a judgment and deciding in which case the consequences would lead to the situation with the least overall costs in terms of direct costs and behavioural incentives. The **third** step enables the particular trade-offs of divergent outcomes which are faced by the judge to be seen.

Therefore, the analysis of the actual application of the Doctrine in the

⁷⁹ Backhaus (n 8) 15.

practice of the Court might pose various concerns about the way judges approach the different possible outcomes of a case. The issue of the evaluation of every consequence and the comparison of them still need more comprehensive analysis. For the purposes of the positive analysis the identification of the current systemic approach of the Court is the most relevant concern. However, the vagueness of many of elements which are included in the framework of the Court might encourage discussion on their values and possible hierarchy.

The actual presentation of the consequences-based argumentation of the Court consists of: (i) the actual arguments provided by the Court; (ii) costs related to particular arguments depending on whether the Doctrine is applied or not; and (iii) incentives related to the effects which a particular argument generates *regardless* of whether the Doctrine is applied or not. Hence, sections (ii) and (iii) are revealed in the paper after the analysis of the actual argumentation (i) of the Court.

Factors (arguments) related to costs if the conventional rule of retroactivity is applied (conceivable incentives of the argument in general)	Factors (arguments) related to costs if the doctrine of temporal limitation is applied (conceivable incentives of the argument in general)
Argument: the Commissions' contribution to uncertainty. Costs related to windfall losses by individuals who were not able to estimate risks objectively (incentives: Commission is induced to monitor the compliance of national law to EU law actively).	Argument: Exceptionality of the Doctrine. Costs created by the uncertainty of the temporal regime rule (incentives: mitigating the improper perception of risks which are either under-investment or over-investment in precautionary measures (the reliance costs) due to the uncertainty created by the Doctrine).
Argument: Good faith of a member state. Costs related to worthless endeavours on the part of the Member State by seeking compliance (incentives: the Member State is induced to seek a compliance of national law to EU law, Member States are discouraged from the opportunistic behaviour).	Argument: Excluding persons who did not address the 'old' rule before the judgment of the Court. Costs related to investments by those persons who argued the improper national rule in court (incentives: persons are induced to address national courts

	and to search for more efficient rules other than the 'old' national rule).
Argument: Intricate legal relationships regarding the subject-matter of a case. Costs related to the revaluation and restructuring of intricate legal relationships, the adjudication of costs in complex cases (incentives: creating complex legal relationships in order to escape retroactive application for those individuals who benefited from the improper 'old' rule).	Argument: Actual judgment upon the interpretation sought. Costs related to the inefficient internalisation of risks by those persons who were able to perceive them (incentives: persons are induced to seek information on existing EU law and appeal improper national rules).
Argument: Economic repercussions. Costs related to the direct financial losses of a Member State or other persons (incentives: creating large potential financial losses for agents who will benefit from the Doctrine (mostly Member States)).	

Table 3. The concise framework of the legal arguments regarding the doctrine of temporal limitation by the Court of Justice.

To sum up, the concise framework of the Court regarding the Doctrine provided in Table 3 enables the different issues touched upon by the Court in order to prevent costly outcomes from happening and diverse social impact of the argumentation to be seen. In general, two arguments (the intricate legal relationships regarding the subject-matter of a case and its economic repercussions) seem to create some negative incentives for the parties and Member States. However, other arguments seem to work as a tool for the mitigating of such unfavourable outcomes by seeking to get the perception determined by the introduction of the Doctrine to the equilibrium. Nevertheless, the analysis conducted proposes an outlook on the subject-matter and further deeper research needs to be fulfilled in the future.

VI. CONCLUSION

Dealing with the consequences of judgments is a matter of economic analysis of law which may be harnessed by judges in order to achieve more grounded outcomes of their decisions. One of the dimensions which might determine the social consequences of a judgment is its temporal effect. The doctrine of temporal limitation of a judgment is a tool which enables

the Court of Justice to prevent harsh social consequences of the retroactive effect of a preliminary ruling procedure. However, the introduction of such a doctrine creates particular concerns regarding the costs and behavioural incentives for various agents from individuals to Member States and the European Commission.

The doctrine of temporal limitation of a judgment of the Court of Justice is an attempt to balance the benefits of conventional retroactivity and costs which might be imposed on the parties. In the arguments concerning the doctrine of temporal limitation, the Court includes propositions related to costs if the conventional rule of retroactivity is applied (such as the Commissions' contribution to uncertainty etc.) and propositions related to costs if the doctrine of temporal limitation is applied (such as an actual judgment upon the interpretation sought etc.). While reasoning judgments, the Court creates incentives which offset some of the costly effects of the doctrine of temporal limitation (primarily, the devaluation of legal certainty). Therefore, the Court searches for the proper approach by minimising the costs of the retroactivity of a judgment and for the reasonable behavioural incentives for various agents at the same time.

EUROSTAT, SOFT LAW AND THE MEASUREMENT OF PUBLIC DEBT: THE CASE OF PUBLIC-PRIVATE PARTNERSHIPS

Alberto Vega *

Budget stability seems to be mainly regulated through hard law, but in order to measure public debt, Eurostat has had to complement many aspects with informal instruments such as decisions in press releases, manuals, recommendations or decisions on particular cases contained in letters to the national statistical authorities. The aim of this paper is to analyse the legal status of these instruments and to comment on their main limitations. In order to do this, we will focus on the case of public-private partnerships, which have frequently been criticised for being used to hide public debt and whose accounting treatment on or off the government's balance sheet depends mainly on the criteria published by Eurostat.

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I. INTRODUCTION

Soft law, understood as those instruments which are legally non-binding but which have the purpose of influencing the conduct of Member States without formally containing rights and obligations,¹ plays a very important role in the activities of the European Union. Until now, the use of soft law has been analysed mainly in fields such as competition policy,² state aid control,³ employment,⁴ social policies,⁵ taxation⁶ or general economic policy coordination.⁷

In the area of economic governance and, in particular, in the framework of the Economic and Monetary Union and the Stability and Growth Pact, it is also possible to observe the use of soft law as a complement of hard law. In this sense, Hodson and Maher consider that soft law, such as non-binding recommendations enforced through peer pressure, was an adequate complement to achieve the objectives established in hard law provisions.⁸ Moreover, after the reform of the Pact in 2005, Schelkle noted that even though some of its elements seemed to have softened, for instance through the introduction of escape clauses, the increasing role of soft law in fiscal surveillance by the Commission may render hard law more

¹ This is the conception of soft law of Karel C Wellens and Gustaaf M Borchardt, 'Soft Law in European Community Law' (1989) 14(5) Eur L Rev 267, 285. A similar approach is followed by Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 112-113.

² See eg Håkon A Cosma and Richard Whish, 'Soft Law in the Field of EU Competition Policy' (2003) 14(1) Eur Business L Rev 25.

³ See eg Michael Blauburger, 'From Negative to Positive Integration? European State Aid Control through Soft and Hard Law' (2008) MPIfG Discussion Paper 08/4 <http://www.mpifg.de/pu/mpifg_dp/dp08-4.pdf> accessed 18 October 2013; and Michelle Cini, 'The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime' (2001) 8(2) J of Eur Public Policy 192.

⁴ See eg David M Trubek and Louise G Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination' (2005) 11(3) ELJ 343.

⁵ See eg Gerda Falkner *et al.*, *Complying with Europe – EU Harmonisation and Soft Law in the Member States* (CUP 2005).

⁶ See eg Hans Gribnau, 'Soft Law and Taxation: EU and International Aspects' (2008) 11(2) Legisprudence 67.

⁷ See eg Dermot Hodson and Imelda Maher, 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination' (2001) 39(4) J of Common Market Studies 735, who see the open method of coordination as a type of soft governance of economic policies.

⁸ See Dermot Hodson and Imelda Maher, 'Soft Law and Sanctions: Economic Policy Co-ordination and Reform of the Stability and Growth Pact' (2004) 11(4) J of Eur Public Policy 799.

effective.⁹

The main purpose of this article is to focus on an aspect which has not received enough attention in the literature despite its practical relevance: the use of soft law by Eurostat in the context of the elaboration of the statistics on public deficit and debt. Thus, this paper does not try to present or reinterpret the broad existing literature on soft law,¹⁰ something which has already been made by other authors.¹¹ Instead, this article considers the generally accepted views on the notion of soft law and on the main advantages and risks of this type of instrument, and tries to apply them to the particular area of the work of Eurostat on public finance statistics.

The mere concept of 'soft law' has been controversial in the literature and it has been used to refer not only to those non-binding instruments which are published with the aim of influencing the behaviour of States, but also to refer to legally binding instruments which are vague or which lack the mechanisms to ensure their effective enforcement.¹² In fact, some authors even consider that the mere notion of 'soft law' is redundant and undesirable.¹³ However, in this paper, we will follow the most common view in the literature, which identifies soft law with certain non-binding instruments (such as guidelines and recommendations) and which considers that it has become a relevant instrument for the regulation of international affairs, even though it may also entail several risks.¹⁴

In general, the interaction of soft and hard law in the context of European integration has been frequently welcomed given that it may facilitate the

⁹ See Waltraud Schelkle, 'EU Fiscal Governance: Hard Law in the Shadow of Soft Law?' (2007) 13 *Columbia J of Eur L* 705.

¹⁰ For more details on the issue of soft law, see eg Richard R Baxter, 'International Law in "Her Infinite Variety"' (1980) 29(4) *Intl and Comparative LJ* 549; Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) *ICLQ* 850; Michel Virally, 'La valeur juridique des recommandations des organisations internationales' (1956) 2 *Annuaire Français de Droit International* 66; and Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77(3) *AJIL* 413.

¹¹ See eg Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2(1) *J of L Analysis* 171; and Hartmut Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10(3) *EJIL* 499.

¹² See eg Kenneth W Abbott *et al.*, 'The Concept of Legalization' (2000) 54(3) *Intl Organization* 401.

¹³ See eg Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67(4) *Nordic J of Intl L* 381.

¹⁴ See eg Christine Chinkin, 'Normative Development in the International Legal System' in Dinah Shelton (ed), *Commitment and Compliance* (OUP 2000) 21.

achievement of the objectives of the European Union.¹⁵ However, the use of non-binding instruments also involves risks from the perspective of democratic legitimacy, the rule of law, the division of powers and transparency.¹⁶

With respect to the role of soft law in the area of European budget stability, even though it may seem that this field is dominated by hard law, in practice there are many aspects which have had to be complemented by Eurostat, mainly with soft law. In order to assess the importance of the role of Eurostat we will analyse the issue of public-private partnerships (PPPs) for the provision of public services or the construction of infrastructures. As we will see later in more detail, in this type of project it is fundamental to determine whether the assets and the associated liabilities should be recorded by the public party (increasing public debt) or by the private partner. In this context, the opinions of Eurostat are decisive, but their legal nature is frequently controversial and have even given rise to some processes before the Court of Justice.

Thus, the aim of this paper is to clarify their legal status and to comment on some of the main limitations of the decisions of Eurostat on PPPs, both from the perspective of their form and their content, since they are a controversial instrument which could be used as a mechanism to hide public debt. In this sense, we will begin with a general presentation of the hard law framework dealing with budget stability and after that we will concentrate on the different instruments which have been used by Eurostat, such as general decisions published in news releases, the *Manual on Government Deficit and Debt*, the recommendations expressed during dialogue visits and the decisions on particular cases contained in letters to the national statistical authorities.

II. THE EUROPEAN HARD LAW FRAMEWORK OF PUBLIC DEBT

The objectives of budget stability seem to be an example of governance through hard law, such as treaties, protocols and regulations. Moreover, public accounting rules have also been given a legally binding character. This section will briefly present the hard law dealing with this subject, which is necessary to perceive later why Eurostat had to draw upon soft law to interpret or complement many aspects.

¹⁵ See Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (5th edn, OUP 2011) 107-108.

¹⁶ See eg Senden (n 1) 477-498.

1. *General Framework of Budget Stability*

The Treaty of Maastricht introduced several convergence criteria for the Economic and Monetary Union and, among other requirements, the following conditions have to be respected: the ratio of the annual government deficit to gross domestic product (GDP) must not exceed 3% and the ratio of gross government debt to GDP, 60%. In order to check the fulfilment of these criteria, Eurostat has played a central role.¹⁷

Currently, Article 121 TFEU (ex Article 99 TEC) foresees the multilateral surveillance of the economic policies of the Member States, which will be carried out by the Council on the basis of reports submitted by the Commission. More specifically, Article 126 TFEU (ex Article 104 TEC) states that Member States shall avoid excessive government deficits and requires the Commission to monitor the budgetary situation and debt levels of the Member States, focusing on the ratios of government deficit and debt to GDP. These ratios should not exceed the reference values included in Protocol No 12 on the excessive deficit procedure,¹⁸ which establishes that the reference values are 3% for the ratio of the planned or actual government deficits to GDP at market prices; and 60% for the ratio of government debt to GDP at market prices. Moreover, the Protocol establishes that the previous statistical data will be provided by the Commission and defines some basic concepts such as ‘deficit’, ‘debt’ or ‘government’ by reference to the European System of Integrated Economic Accounts (ESA95).

The application of the Protocol on the Excessive deficit procedure has been developed by Council Regulation (EC) 479/2009,¹⁹ which also defines certain basic concepts (such as ‘government deficit’ and ‘government debt’) by reference to the accounts of ESA95. Moreover, it details the obligation of the Member States to periodically report information to Eurostat on their planned and actual government deficits and levels of government debt, as well as information on other economic variables such as their gross domestic product (Articles 1 – 7). The quality of this information is assessed by Eurostat, which verifies compliance with the rules of ESA95, paying particular attention to problematic aspects such as the delimitation of the government sector, the classification of government transactions

¹⁷ Art 104 c of the Treaty of Maastricht did not specify the reference values, which were detailed in the Protocol on the Excessive Deficit Procedure.

¹⁸ Protocol (No 12) on the Excessive Deficit Procedure [2008] OJ C115/279.

¹⁹ Council Regulation (EC) 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community [2009] OJ L145/1. This regulation was amended one year later by Council Regulation (EU) 679/2010 of 26 July 2010 [2010] OJ L198/1.

and liabilities, and the time of recording (Article 8). In this sense, it should be noted that Eurostat can express reservations or amend the data (Article 15), which can be seen as a tool to exert political pressure and promote compliance.²⁰

If, according to the assessment of Eurostat, the levels of public deficit and debt do not respect the limits of Protocol No 12, Article 126 TFEU foresees a series of steps that can end up with the imposition of sanctions. To begin with, the Commission will prepare a report on which the Economic and Financial Committee will formulate an opinion. After that, the Commission will address an opinion to the affected Member State and will also inform the Council. If the Council, taking into account the proposal of the Commission and the observations of the Member State, considers that an excessive deficit exists, it will make recommendations to correct the situation. Finally, if the Member State fails to implement the recommendations, the Council can decide to impose more serious measures, including fines.²¹

Other related aspects have been regulated by Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; and Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, both of which have been recently amended in the process of reform of the Stability and Growth Pact. Moreover Council Regulation (EC) 1222/2004 of 28 June 2004 deals with the compilation and transmission of data on the quarterly government debt; and Council Directive 2011/85/EU of 8 November 2011 regulates the requirements for budgetary frameworks of the Member States. Finally, in this review of the hard law on budget stability it is also important to mention the recent Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed on 2 March 2012, which strengthens budget discipline and reinforces the monitoring function of the European Commission and, thus, the central role of the statistics provided by Eurostat.

²⁰ See Annika Östergen Pofantis, 'Eurostat – Watchdog of European Public Finances' (2008) 3 *Sigma – The Bulletin of European Statistics* 11. Reservations usually take the form of a footnote in the press release in which the data is reported (see Lena Frej Ohlsson, 'Statistical Implications of the Stability and Growth Pact: Creative Accounting and the Role of Eurostat' (2007) Göteborg University School of Business, Economics and Law Working Paper in Economics 268, 32 <<http://hdl.handle.net/2077/7374>> accessed 18 October 2013).

²¹ This aspect has been developed by European Parliament and Council Regulation (EU) 1173/2011 of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1.

2. *The European System of National and Regional Accounts (ESA95)*

The European System of National and Regional Accounts (ESA95) was approved by Council Regulation (EC) 2223/96,²² following to a great extent the System of National Accounts adopted by the United Nations in 1993 (SNA93). Since then, ESA95 has been modified by several Regulations, such as Council Regulation 500/2000 on general government expenditure and revenue, or Commission Regulation 113/2002 on revised classifications of expenditure according to purpose. From September 2014 onwards, ESA95 will be substituted by ESA2010, which was approved by European Parliament and Council Regulation (EU) 549/2013.²³ Thus, this paper will focus on ESA95, which is still applicable, but reference will also be made to the main changes introduced by ESA2010.

ESA95 is an accounting system which includes a series of definitions, nomenclatures and rules of accounting methodology which are applied by the Member States when drawing up their national accounts and economic statistics. Moreover, its importance is also due to the fact that it is also followed for the application of the excessive deficit procedure.

The issue of PPPs is not directly addressed by ESA95, that is to say, it does not give any particular criteria to determine whether the assets involved in those operations should be classified as government assets or as assets of the private partner. In fact, ESA95 does not even mention the expression ‘public-private partnership’.²⁴ It only deals with classifications and accounts which may be affected by PPP operations, such as those on general government sector, intermediate consumption, gross fixed capital formation, consumption of fixed capital, saving, net borrowing/net lending or fixed assets; or with certain types of operations, such as leases or concessions, which are related to PPP projects. However, in order to record an operation, it is first necessary to determine whether the PPP assets should be on or off the government’s balance sheet following the interpretation of Eurostat.

This interpretative assistance of Eurostat is necessary because, as Jones has

²² Council Regulation (EC) 2223/96 of 25 June 1996 on the European system of national and regional accounts in the Community [1996] OJ L310/1.

²³ European Parliament and Council Regulation (EU) 549/2013 of 21 May 2013 on the European System of National and Regional Accounts in the European Union [2013] OJ L174/1.

²⁴ This is not the case of ESA2010, which has set out the principles for the treatment of public-private partnerships, an issue which is presented in ch 20 (government accounts).

pointed out, national accounting definitions both of SNA93 and ESA95 of what is public and what is private are so vague that in practice they are empty, namely, the classification of an entity within or outside the general government sector is based on expressions, such as ‘control’, ‘ownership’ or ‘prices that are economically significant’, which are not further defined.²⁵ As a result, it would be relatively easy for public authorities to intervene in the sphere of production through institutional units which are not part of the general government sector and which are not normally identified with the public sector, such as corporations or non-profit institutions which fulfil certain requirements.²⁶ Thus, in a borderline field such as that of PPPs, Eurostat’s guidance is particularly relevant because in practice it does not only interpret the vague or controversial concepts of the regulation establishing ESA95, but also fills its gaps.

3. *Normative Framework of Eurostat*

The basic legal framework of Eurostat can be found in Regulation (EC) 223/2009 of the European Parliament and the Council of the European Union of 11 March 2009 on European statistics, which defines in its Article 4 the European Statistical System as a partnership between the Community statistical authority, which is the Commission (Eurostat), and the national statistical institutes and other national authorities responsible in each Member State for the development, production and dissemination of European Statistics. For instance, in Germany these include not only federal institutions, but also the statistical offices of the *Länder*. With respect to the role of Eurostat, it ensures the production of European statistics and is the solely responsible for deciding on processes, statistical methods, standards and procedures, and on the content and timing of statistical releases (Article 6).

Eurostat is a Directorate-General of the European Commission and its main characteristics are regulated by Commission Decision 2012/504/EU,²⁷ which deals with aspects such as the independence of the Director-General of Eurostat when carrying out statistical tasks. After the revision

²⁵ See Rowan Jones, ‘Public versus Private: The Empty Definitions of National Accounting’ (2000) 16(2) *Financial Accountability & Management* 177-178, who acknowledges that in some cases the definitions of ESA95 are more precise than those of SNA93. Moreover, it is important to mention that the notion of ‘government assets’ in this field is not equivalent to the concept of ‘State resources’ which is of relevance for the assessment of the existence of State aid also with regards to PPP projects (see eg *London Underground Public Partnership* (Case N 264/2002) Commission Decision C(2002)3578fin [2002] OJ C309/15).

²⁶ See Jones (n 25) 176.

²⁷ Commission Decision 2012/504/EU of 17 September 2012 on Eurostat [2012] OJ L251/49.

of the Stability and Growth Pact in 2005, the role of Eurostat in the supervision of the quality of statistical figures reported by the different States was reinforced.²⁸ Currently, Council Regulation (EC) 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community states in its Article 8 that the Commission (Eurostat) will assess the quality of the data reported by the Member States.

III. SOFT LAW AND THE MEASUREMENT OF PUBLIC DEBT BY EUROSTAT

The application of the hard law on budget stability has required the interpretative assistance of Eurostat, especially in relation to borderline cases such as PPPs. With this aim in mind, Eurostat has made use of different types of instruments which are or seem to be non-binding, such as general decisions in press releases, manuals or decisions on particular cases contained in letters to the national statistical authorities. In the following pages, the legal nature of these instruments will be discussed, focusing on the wide interpretative role of Eurostat in the area of PPPs.

I. *General Decisions of Eurostat*

In case of doubts on the correct application of the ESA95 accounting rules, the Member States can ask Eurostat for its position. In normal cases, Eurostat will communicate its view without requiring further advice to any other European institution or body, but in cases which are particularly controversial or which may be of general interest, Eurostat will take a decision after consultation with the Committee on Monetary, Financial and Balance of Payments Statistics (CMFB), which will be made public together with the opinion of the CMFB (Article 10 of Council Regulation 479/2009).²⁹ This type of decisions seems to go beyond the frequent interpretative character of soft law³⁰ and in practice its purpose is to fill the existing gaps.

In order to solve the methodological difficulties generated by the application of ESA95 to PPPs, a specific task force was established in 2003. The results of this work gave rise to the decision of Eurostat made public through press release 18/2004 of 11 February 2004. Previously, the

²⁸ See Schelkle (n 9) 716-717.

²⁹ The CMFB has only advisory functions and its opinions, which are not binding, are followed in most of the cases, although there have been exceptions to this (Frej Ohlsson (n 20) 38).

³⁰ In relation to the use of soft law as an interpretative tool in the context of the UE, see eg Wellens and Borchardt (n 1) 318.

Committee on Monetary, Financial and Balance of Payments Statistics had also endorsed the proposed interpretation. In particular, the Committee required the opinion of national statistical institutes and national central banks, and from the 27 replies which it received, only one was contrary to the proposed interpretation.³¹

In this decision, Eurostat recommends classifying the assets of the PPP as non-governmental assets if the private partner bears most of the risk of the project, which will be considered to be the case if both of the following conditions are met: a) the private partner bears the construction risk; and b) the private partner bears at least one of either availability or demand risk.

In this sense, ‘construction risk’ refers to aspects such as late delivery, non-respect of specified standards or technical costs; ‘availability risk’ covers the delivery of the service in the agreed conditions of quantity and quality; and ‘demand risk’ refers to the variations in demand which are independent from the activity of the private partner, that is, which derive from aspects such as the business cycle, new market trends, direct competition or technological obsolescence.³² Thus, when these risks are borne by the private party, the Government will be able to suspend or reduce its payments if the conditions agreed in the contract of the partnership are not respected by the other party.

Summing up, in order to classify the assets of a PPP off the government’s balance sheet, economic reality takes precedence over the legal form of the transaction and the construction risk must be borne by the private party, who, in addition, will also have to bear at least the availability or demand risk.

This general decision of Eurostat can be criticised both from the perspective of its form and its content. Thus, in the following pages these two aspects will be presented separately.

a. Form

With respect to the form, it is controversial whether the general decision of Eurostat on PPPs has a legally binding nature or, on the contrary, if it

³¹ See the CMFB opinion on the treatment in national accounts of assets related to ‘public-private partnerships’ contracts, of 30 January 2004 (included as an appendix to Eurostat’s press release 18/2004, of 11 February 2004).

³² For more details on the assessment of the risks, see EPEC – European PPP Expertise Centre, *Risk Distribution and Balance Sheet Treatment: Practical Guide* (EIB 2011).

should be considered a mere advice or recommendation, that is, soft law. This is due to the fact that general decisions of this kind are published as news releases of Eurostat in a rather informal way instead of including them in the Official Journal. Moreover, the mere use of the term ‘decision’ does not necessarily mean that we are in front of a formal source of EU law.

After the Treaty of Lisbon, the number of European Union legal acts has been reduced to five: regulations, directives, decisions, recommendations and opinions, but only the first three are legally binding (Article 288 TFEU). Decisions can be directed at particular cases and, in contrast to the situation before the Treaty of Lisbon, they may also have an abstract and general character and may not specify a particular addressee.³³ In this later case they have to be published in the Official Journal, which increases legal certainty with respect to aspects such as their date of entry into force.³⁴ Moreover, it has been clearly distinguished between legislative acts (Article 289 TFEU), delegated acts (Article 290 TFEU) and implementing acts (Article 291 TFEU). Thus, it is important to note that an act, such as a decision, could have different functions.³⁵

Even though Eurostat has not been particularly clear, it seems that the general decisions taken on interpretative issues should be considered as legally binding.³⁶ In this sense, it is important to note that decisions do not require any particular form, that is to say, unless otherwise specified in primary or secondary legislation, they could be made in writing or orally and the relevant factor to determine whether a certain measure can be considered as a binding decision and could be thus subject to judicial review is its substance and not its form, which would exclude decisions with a mere preparatory character.³⁷

The initial informal practice of Eurostat of providing advice has been

³³ See Herwig CH Hofmann, Gerard C Rowe and Alexander H Türk, *Administrative Law and Policy of the European Union* (OUP 2011) 625.

³⁴ See Craig and de Búrca (n 15) 104-105.

³⁵ For more details, see eg Hofmann, Rowe and Türk (n 33) 94-97; Deirdre Curtin, *Executive Power of the European Union: Law, Practices and the Living Constitution* (OUP 2009) 121-124; Joana Mendes, ‘Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design’ (2013) 19 ELJ 17, 27-30; and Thomas Christiansen and Mathias Dobbels ‘Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts’ (2013) 19 ELJ 42, 43-45.

³⁶ This is also the view of Antonio López Díaz, ‘La aplicación del principio de estabilidad presupuestaria: la prevalencia de lo económico sobre lo jurídico’ (2011) 5 Crónica Tributaria: Boletín de Actualidad 29.

³⁷ See Hofmann, Rowe and Türk (n 33) 628; and Craig and de Búrca (n 15) 487-488.

progressively regulated (it is now foreseen in Article 10(2) of Council Regulation (EC) 479/2009) and it seems that the clarifications expressed by Eurostat have to be followed by the Member States since otherwise Eurostat will end up amending their public finance statistics. However, we will see later that in the case of decisions of Eurostat with respect to particular cases, the Court of Justice has rejected their binding nature and they have been considered to be a mere advice in the framework of the cooperation among statistical authorities. Thus, given that there seem to be reasons both to argue that these general decisions should be considered as legally binding as well as mere advice, the current situation will not be completely clarified as long as the Court of Justice does not deal with this issue³⁸ or the normative framework is made more precise.

In this sense, the use of press releases to publish this type of general decisions seems clearly inadequate. Press or news releases should be aimed at the media and they should not be used as a source of law. As an alternative, the Commission (Eurostat) could use the following options.

To begin with, in a situation in which a legislative act (the regulation dealing with ESA95) has to be complemented in relation to certain technical aspects, a possibility would be to delegate to the Commission the power to adopt non-legislative acts of general application to supplement certain non-essential elements of the regulation on ESA95, following the requirements of Article 290 TFEU. With delegated acts, which lie between legislation under Article 289 TFEU and implementing acts under Article 291 TFEU,³⁹ the conditions under which the Commission may develop certain aspects would be clearer.

Another alternative is to regulate the statistical treatment of PPPs through an implementing act, such as an implementing decision. According to Article 291(2) TFEU, where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers to the Commission. With respect to the characteristics of the authorization to adopt implementing acts, in some cases the Court of Justice has interpreted that provisions which are too general or vague imply an authorisation for the authority to act.⁴⁰ It is therefore important to note that for the implementation of the Regulation on the European System of National and Regional Accounts (ESA95) the Commission has

³⁸ With respect to the role of the Court of Justice in the review of administrative rulemaking, see Alexander H Türk, 'Oversight of Administrative Rulemaking: Judicial Review' (2013) 19 ELJ 126.

³⁹ For more details, see Andrea Biondi, Piet Eeckhout and Stefanie Ripley, *EU Law after Lisbon* (OUP 2012) 74-77.

⁴⁰ For more details on the case-law dealing with this issue, see *ibid* 78-79.

already adopted several clarifying decisions addressed to the Member States, such as Commission Decision 98/715/EC of 30 November 1998, which has been published in the Official Journal, a practice that increases legal certainty.

In any case, it is important to remember that formal decisions are not necessarily discussed in all cases by the College of Commissioners. Depending on the topic, the Commission may empower an individual Commissioner to make a decision or, in case of routine business, decision making may be delegated to directors general and heads of service, who will act on behalf of the Commission.⁴¹ Thus, the Commission could delegate to the director general of Eurostat the capacity to take certain decisions on technical issues.

However, given that delegated and implementing acts are subject to strict conditions and supervision by other European institutions or by the Member States, the easiest alternative for Eurostat would have been to rely on recommendations or opinions, which are clearly non-binding. In fact, one of the reasons why the Commission may have preferred to act through mere press releases, which in principle should not be legally binding, may be its interest in limiting the influence or supervision of institutions such as the Council, the European Parliament or the Court of Justice.⁴²

b. Content

With respect to the content of the decision of Eurostat of February 2004 on PPPs, the proposed criteria were considered to be very weak and insufficiently strict by the International Monetary Fund, since in practice the private party usually bears the construction risk and the availability risk (which is usually low), while the public party bears the demand risk, which facilitates the use of PPPs as a means to avoid budget stability rules.⁴³ This is contrary to the position sustained by Benito *et al.*, who consider that the risks should be allocated to the party that is the 'least cost avoider', that is, the party in the best position to control or bear the risks, and not just to the private party in order to improve public accounts

⁴¹ See Craig and de Búrca (n 15) 35.

⁴² See *ibid* 108. This can also be observed in other areas, such as state aids, which have been regulated by the Commission mainly through soft law such as non-binding guidelines (Joana Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (OUP 2011) 428-431). In this sense, Schwarze notes that after the Treaty of Lisbon soft law has not lost its relevance (Jürgen Schwarze, 'Soft Law im Recht der Europäischen Union' (2011) 46 *Europarecht* 3, 14-15).

⁴³ IMF, *Public-Private Partnerships* (IMF 2004) 22.

in the short term at the expense of the global profitability of the project.⁴⁴

Moreover, the fact that the demand risk may not be transferred to the private party has been criticised by Posner *et al.*, who are of the view that demand risk is more difficult to anticipate and to value than construction and availability risks, which leaves governments with uncompensated costs which are not considered in the PPP contract and may not be reflected as possible liabilities in the balance sheet.⁴⁵ In this sense, in the case of those projects which are too big or important for governments to let them fail, if the government bears the demand risk, they should be directly seen as public because market discipline, the condition which causes the private party to be more efficient, will be missing.⁴⁶

Consequently, the intention to achieve mere accounting objectives may result in using PPP structures in cases in which they are not the best alternative from an economic perspective. As Boardman and Vining point out, governments may rely on PPPs in order to meet borrowing limitations and, furthermore, for mere electoral purposes. The reason is that with this system politicians can provide their voters with the benefits of public services and infrastructures (which increases their chances of re-election) while deferring the payments for decades, typically for 30 years, to future governments and a different set of voters.⁴⁷ When PPPs are used for this purpose they are normally more expensive than other alternatives, so they should be restricted to those cases in which the management expertise of the private party allows to achieve more efficiently the output determined and controlled by the public party.⁴⁸ In this sense, it has been pointed out in the literature that the advantages of PPPs may be outweighed in most cases by the higher financing cost of private parties and the transaction costs associated with partnerships.⁴⁹

In addition, the criteria proposed by Eurostat have other disadvantages. For instance, the analysis of all PPP projects creates an important administrative burden to national statistical institutes and to Eurostat,

⁴⁴ See Bernardino Benito, Francisco Bastida and María-Dolores Guillamón, 'Public-Private Partnerships in the Context of the European System of Accounts (ESA95)' (2012) 1 *Open J of Accounting* 9.

⁴⁵ See Paul Posner, Shin Kue Ryu and Ann Tkachenko, 'Public-Private Partnerships: The Relevance of Budgeting' (2009) 1 *OECD J on Budgeting* 13.

⁴⁶ See *ibid* 13.

⁴⁷ See Anthony E Boardman and Aidan R Vining, 'The Political Economy of Public-Private Partnerships and Analysis of their Social Value' (2012) 83(2) *Annals of Public and Cooperative Economics* 125.

⁴⁸ See Benito, Bastida and Guillamón (n 44) 2.

⁴⁹ See Posner, Ryu and Tkachenko (n 45) 11.

flooded with complex contracts.⁵⁰ Moreover, PPP contracts, which may last for decades, frequently suffer changes during the development of the project to adapt to the circumstances, which may require their constant assessment and reclassification.⁵¹

Summing up, the statistical criteria proposed by Eurostat have been a factor that has promoted the use of PPP contracts, sometimes beyond what was economically advisable. In fact, this favourable treatment that PPPs received in the decision of Eurostat may respond to the interest of European institutions to promote PPPs as a way of fostering economic recovery, which can be observed in several initiatives, such as the use of European funds to co-finance PPP projects, the technical assistance provided by the European Investment Bank⁵² or other soft governance initiatives.⁵³ In this sense, Frej Ohlsson notes that the European Council has encouraged on several occasions the use of PPPs as a way of improving public infrastructures.⁵⁴

An alternative to the criteria of Eurostat is to report PPP assets on a 'control' criterion. This approach has been recommended by the International Public Sector Accounting Standards Board (IPSASB), an institution which in general favours a move from cash to accrual accounting. In particular, IPSASB published a consultation paper in March 2008 on the treatment in public accounting of certain types of PPPs, according to which the grantor (in most cases the public sector entity) would have to report the assets and the related liabilities if the following criteria are fulfilled:

1. The grantor controls or regulates what services the operator must provide with the underlying property, to whom it must provide them, and the price ranges or rates that can be charged for services; and

⁵⁰ See Philippe de Rougemont, 'Accounting for PPP – The Eurostat Approach' (Presentation in the International Seminar on Strengthening Public Investment and Managing Fiscal Risks from Public-Private Partnerships, Budapest, 7-8 March 2007).

⁵¹ See EPEC – European PPP Expertise Centre, *Eurostat Treatment of Public-Private Partnerships: Purposes, Methodology and Recent Trends* (EIB, 2010) 22.

⁵² For more details, see Commission, 'Mobilising Private and Public Investment for Recovery and Long Term Structural Change: Developing Public Private Partnerships' (Communication) COM (2009) 615 final.

⁵³ The use of this type of initiatives, such as white papers and advice services, has been highlighted by Ole Helby Petersen, 'Emerging Meta-Governance as Regulation Framework for Public-Private Partnerships: An Examination of the European Union's Approach' (2010) 11(3) *Intl Public Management Rev* 1, 7-15.

⁵⁴ See Frej Ohlsson (n 20) 41-42.

2. The grantor controls –through ownership, beneficial entitlement or otherwise–, the residual interest in the property at the end of the arrangement.⁵⁵

The previous criteria were also criticised by the International Monetary Fund, who considered them to be too vague and susceptible to subjective and inconsistent interpretation.⁵⁶ However, after further work, the IPSASB published a new standard on this issue: *IPSAS 32 – service concession arrangements: grantor*. This standard also follows the control criteria, expressed in almost the same terms, but it is complemented by detailed application guidance, and pays more attention to the recognition and measurement of liabilities.⁵⁷

In the opinion of the IPSASB, EU Member States should adopt IPSAS, including IPSAS 32, in order to improve transparency and accountability.⁵⁸ However, the ‘control’ criterion would probably have as a consequence that most PPP assets would be recorded on the government balance sheet, which may prevent many PPP projects from being carried out because of their reporting impact on public debt and deficit, including projects which are economically justified, affordable and yield value for money.⁵⁹ Consequently, if Eurostat moved to a ‘control’ criterion it would be necessary to change the application of budget stability rules to long term investments, but reaching an agreement on the modification of the hard law framework may be very difficult.⁶⁰

⁵⁵ See International Federation of Accountants – International Public Sector Accounting Standards Board, ‘Accounting and Financial Reporting for Service Concession Arrangements’ (2008) IFAC Consultation Paper 36 <<http://www.ifac.org/sites/default/files/publications/exposure-drafts/00288.pdf>> accessed 15 December 2013.

⁵⁶ See the letter of 29 July 2008 responding to the consultation paper.

⁵⁷ In particular, see paras 9 and 14 of IPSAS 32, together with the Application Guidance of Appendix 1 (International Public Sector Accounting Standards Board, *Handbook of International Public Sector Accounting Pronouncements*, vol 2 (2012) 1403–1462). IPSAS 32 mirrors IFRIC 12 - *Service Concession Arrangements*, which contains the interpretation of the International Financial Reporting Interpretations Committee which is applicable to the private party (David Heald and George Georgiou, ‘The Substance of Accounting for Public-Private Partnerships’ (2011) 27(2) *Financial Accountability & Management* 238).

⁵⁸ IPSASB’s response to the public consultation paper on the suitability of international public sector accounting standards for EU Member States is contained in the letter to Mr. François Lequiller (Eurostat) of 10 May 2012 <http://www.ifac.org/sites/default/files/publications/files/IFAC_E_Letter_IPSAS_B.pdf> accessed 15 December 2013.

⁵⁹ See EPEC – European PPP Expertise Centre (n 51) 25.

⁶⁰ *ibid* 27.

Thus, it can be observed that the approach of Eurostat, focusing on risks and rewards, is not the only possibility and may be revised in the future,⁶¹ but the alternatives, such as the control criterion, also have certain disadvantages. In fact, as Heald and Georgiou point out, the criteria of the distribution of risks and control are not completely independent, since in some cases the allocation of risks can be an indicator of where control lies and, alternatively, control competencies may be an indicator of the allocation of risks.⁶² However, it seems that the general approach of European institutions towards the advantages of PPPs is more optimistic than most of the literature on this topic. As a consequence, the statistical criteria of Eurostat may be favouring projects which do not deliver value for money and which use this type of contract to shift costs to future budgets, that is, to future generations of taxpayers, limiting the ability of governments to adapt to new priorities.⁶³

2. *The Manual on Government Deficit and Debt*

In order to implement ESA95, Eurostat has published the *Manual on Government Deficit and Debt*.⁶⁴ However, the Manual is not prepared by Eurostat alone, but by a group of experts, under the coordination of Eurostat, which includes representatives from the EU Member States, the Commission (the Directorate General for Economic and Financial Affairs) and the European Central Bank. Moreover, the Committee on Monetary, Financial and Balance of Payments Statistics (CMFB), comprising officials from National Statistical Offices and Central Banks, also advises Eurostat on how to interpret ESA95.⁶⁵ Finally, the Manual is discussed and approved by the Working Parties on national and financial accounts, which are made up of statisticians from Eurostat, the Member States and other interested parties.⁶⁶

With respect to the legal nature of the Manual, it is not legally binding and its aim is simply to assist in the interpretation or application of ESA95.

⁶¹ Frej Ohlsson admits the possibility that the criteria proposed by Eurostat may have to be reviewed in the future (Frej Ohlsson (n 20) 43).

⁶² See Heald and Georgiou (n 57) 222.

⁶³ See Posner, Ryu and Tkachenko (n 45) 15.

⁶⁴ Eurostat, *Manual on Government Deficit and Debt – Implementation of ESA95* (Publications Office of the European Union 2013).

⁶⁵ This Committee is currently regulated by the decision of the Council of the European Union of 13 November 2006 and its functions are merely advisory, without legislative powers. Its origins date back to 1991 and in recent years its role has become particularly relevant with respect to consultations relating to the Excessive Deficit Procedure.

⁶⁶ See Eurostat (n 64) 1-2.

However, in practice it is considered to be ‘an indispensable complement to ESA95’.⁶⁷ Following the terminology of Senden, it could be considered an example of soft post-legislative rulemaking, since it indicates the view of the Commission on the interpretation and application of EU law but lacks legally binding force.⁶⁸

In relation to the treatment of PPPs in the Manual, following the decision of Eurostat of February 2004, a new chapter on this issue was added that same year.⁶⁹ The third edition of 2010 dealt with PPPs in part VI.5 with more detailed guidance, and the fifth and last edition of the Manual, dating from January 2013, has not included any fundamental change in this area.

In the opinion of the present author, there is nothing wrong with the publication of an interpretative manual on this issue and it should be seen as part of the normal activity of Eurostat, which has published other methodological manuals on complex issues such as the *Manual on sources and methods for the compilation of COFOG (Classification of the Functions of Government) statistics*, the *Manual on quarterly non-financial accounts for general government*, and the *Manual on sources and methods for ESA 95 financial accounts*. However, even though the clarifying purpose of Eurostat should be welcomed, it also entails certain risks. In particular, there is the danger that the Manual would go beyond a mere interpretative role and that it will be used as a source of law, as will be later commented on in the section dealing with the decisions of Eurostat on particular cases.⁷⁰

3. *Recommendations in Dialogue Visits*

In order to ensure the quality of the data reported by the Member States to Eurostat in the framework of the excessive deficit procedure, Council Regulation (EC) 479/2009 requires Eurostat to carry out dialogue or methodological visits (Articles 11 – 11b). Dialogue visits have a regular character and focus on the actual data which has been reported by the Member States to Eurostat, but also deal with methodological issues, statistical processes, sources of information and accounting rules. In turn, methodological visits have an exceptional nature and review the processes

⁶⁷ *ibid* 1.

⁶⁸ See Linda Senden ‘Soft Post-Legislative Rulemaking: A Time for More Stringent Control’ (2013) 19 *ELJ* 57, 60-62.

⁶⁹ Frej Ohlsson (n 20) 41.

⁷⁰ In the opinion of Scott, given that guidance materials may include substantive errors and their adoption process may be characterized by procedural flaws, it would be advisable to strengthen their judicial review (see Joanne Scott, ‘In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law’ (2011) 48 *CML Rev* 329, 344-353).

and accounts which justify the reported data, especially if there are frequent revisions of the deficit or debt of a Member State or if there are changes to the sources and methods for the estimation of public deficit and debt without a clear justification. Therefore, given that dialogue visits are the most common, the following paragraphs will comment on their main characteristics, focusing on the case of PPPs.

With respect to the legal nature of these dialogue visits, they should be seen as an example of cooperation among statistical authorities to ensure the quality of the data. In other words, they could be considered a particular example of the application of the principle of sincere cooperation between the Member States and the EU institutions which is foreseen in Article 4(3) of the Treaty on European Union. Therefore, in principle, the recommendations of Eurostat should not be considered to be legally binding, even though a lack of cooperation could give rise, under certain circumstances, to the imposition of fines. Similarly, the reports published by Eurostat summing up the content of these visits are merely informative, but despite their non-binding character they could be seen as an instrument to exert pressure on the Member States and guide their accounting practices.

In relation to the attention paid to PPPs during these visits, this type of projects is analysed in most of them, especially in those countries such as the United Kingdom and Spain where PPPs are very common. In the case of the dialogue visits to the United Kingdom in 2009 and 2011, Eurostat highlighted the need to verify whether the recording of PPPs according to British accounting criteria was consistent with the position of Eurostat, for instance, in relation to the treatment of the construction risk. Therefore, Eurostat required the British statistical authorities to review certain projects (which affected very different areas, from hospitals to prisons) and to send Eurostat more information on aspects such as the contracts of the projects.⁷¹

With respect to the dialogue visits to Spain, Eurostat has noted that PPP projects in this country are characterised by the fact that the construction and availability risks are always borne by the private investor, while the demand risk is normally on the side of the government; and that most

⁷¹ See Eurostat, 'EDP Dialogue Visit to the United Kingdom, 12-13 January 2009, Final Findings, 24 April 2009' 19-20; and Eurostat, 'EDP Dialogue Visit to the United Kingdom, 26-28 January 2011, Final Findings, 10 May 2011' 19. The reports with the final findings of the visits of Eurostat are available online: <http://epp.eurostat.ec.europa.eu/portal/page/portal/government_finance_statistics/excessive_deficit/eurostat_edp_visits_member_states> accessed 15 December 2013.

projects deal with the provision of health services, such as hospitals, and transport infrastructures, such as highways.⁷² During these visits, Eurostat has also required in several occasions clarifications in order to determine the statistical treatment of PPP projects, such as additional information concerning the design of PPP contracts, especially on the clauses of the contracts which allow for changes in the fees or the services provided, since this could affect the distribution of the risks.⁷³

In the dialogue visits to other countries, the classification of PPP projects is also a topic which appears very frequently. For instance, among other issues, the visit to Poland in 2011 dealt with the classification of a PPP for the construction and exploitation of a motorway, and finally it was agreed that the Polish statistical authorities would formally require Eurostat for *ex-ante* advice on the recording of the PPP project.⁷⁴ In the case of the visit to Greece, Eurostat required the Greek authorities to send a statistical analysis of the PPP contract concerning the construction, maintenance and operation of several fire department buildings.⁷⁵ Similarly, during the dialogue visit to Italy in 2011, Eurostat also asked for the PPP contract of a hospital in order to check whether the risks were borne by the private party and if, consequently, the corresponding assets and liabilities could be classified outside the government accounts.⁷⁶

Finally, with respect to the participants to the dialogue visits, it is important to mention that they will depend on the internal distribution of competences among the different levels of government. For instance, in Germany, the processing of data on the public accounts of local governments is carried out by the regional statistical offices and, therefore, the last dialogue visit to Germany in 2011 included a visit to the Regional Statistical Office of Hessen.⁷⁷ Moreover, in some cases, such as in the visit to Estonia in 2011, representatives of the private parties of the PPP projects also participated as observers.⁷⁸

⁷² See Eurostat, 'EDP Dialogue Visit to Spain, 05-06 February 2007, Final Findings, 14 June 2007' 9.

⁷³ See eg *ibid* 10; Eurostat, 'EDP Dialogue Visit to Spain, 15-16 June 2009, Final Findings, 28 September 2009' 22; and Eurostat, 'EDP Dialogue Visit to Spain, 17-18 November 2011, Final Findings, 22 November 2011' 24.

⁷⁴ See Eurostat, 'EDP Dialogue Visit to Poland, 5-6 September 2011, Final Findings, 19 January 2012' 20-21.

⁷⁵ See Eurostat, 'EDP Dialogue Visit to Greece, 22-23 March 2012, Final Findings, 8 June 2012' 8-9.

⁷⁶ See Eurostat, 'EDP Dialogue Visit to Italy, 27-28 June 2011, Final Findings, 30 August 2012' 23-24.

⁷⁷ See Eurostat, 'EDP Dialogue Visit to Germany, 5-6 May 2011, Final Findings, 27 July 2011' 27-35.

⁷⁸ See Eurostat, 'EDP Dialogue Visit to Estonia, 4-5 July 2011, Final Findings, 22

Thus, it can be observed that the dialogue visits are used by Eurostat as an opportunity to make recommendations and request further information. Even though these recommendations are not legally binding and the visits should be seen as an example of voluntary cooperation among statistical authorities, they are particularly influential on the Member States, especially taking into account that the reports on the visits are made public.

4. *Eurostat's Decisions on Particular Cases*

In principle, Eurostat could use both binding and non-binding decisions in order to solve controversial issues dealing with the statistical classification of particular operations. As Craig and de Búrca have noted, administrative decisions aimed at a particular individual in the sense of Article 288 TFEU may not fit within the categories of legislative, delegated or implementing acts, but this does not imply that such decisions cannot legally be made.⁷⁹ In fact, the possibility of using binding decisions in the sense of Article 288 TFEU is already followed in other areas in which the Commission also has important competences, such as competition and state aids.⁸⁰

In relation to the legal nature of the opinions of Eurostat on particular cases it is important to note that, even though the term 'decision' is frequently used, the Court of Justice has considered that they do not constitute the object of binding decisions, namely, they are not a formal source of law. On the contrary, they would fit more within the type of decisions which, according to Hofmann *et al.*, are not 'intended to produce legal effects' in the sense of Article 263(1) TFEU and consequently could be considered an example of 'factual conduct' or 'factual acts'.⁸¹ As a result, the legality of these decisions cannot be directly reviewed by the Court of Justice or, at most, these factual acts could only be reviewed when they are part of an administrative procedure and the final decision is challenged, even though by then it may be too late to protect the interests of the affected parties.⁸²

The advice of Eurostat can be required in advance to the implementation of a project, but it can also deal with on-going projects and can imply their accounting reclassification if there are changes in the way they are applied. In the following paragraphs the characteristics of these decisions of

March 2012' 13-15.

⁷⁹ See Craig and de Búrca (n 15) 118.

⁸⁰ See *ibid* 107.

⁸¹ For more details, see Hofmann, Rowe and Türk (n 33) 668.

⁸² *ibid* 667-668.

Eurostat will be analysed focusing on the case of PPPs and paying particular attention to their legal nature and practical consequences.

a. Decisions on Ex-Ante Consultations

Consultations on future projects were first regulated by the ‘Code of best practice on the compilation and reporting of data in the context of the excessive deficit procedure’, endorsed by the Ecofin Council on 18 February 2003. That Code was not legally binding, but most of its content has been later incorporated into Regulations. In this sense, Article 10(1) of Council Regulation (EC) 479/2009 of 25 May 2009 foresees the possibility to request clarifications from Eurostat on the application of ESA95, but the procedural details to request *ex-ante* advice are regulated by the guidelines published by Eurostat on this issue.⁸³

They deal with aspects such as the requirements to initiate the process or the effects of the advice. In particular, it is important to note that Eurostat will basically respond to the requests of national statistical authorities responsible for the government sector of the national accounts, and will not provide specific advice to private parties. Moreover, Eurostat’s *ex-ante* views are always preliminary and conditional on the information provided, that is, once the PPP project is effectively implemented Eurostat can check whether the initial opinion is still applicable. With respect to the transparency of the advice of Eurostat, in principle all preliminary views are made public, but their publication could be delayed or they could even remain confidential if the Member State requiring the opinion of Eurostat does not want to give information on possible future projects.

Another significant characteristic of the *ex-ante* consultation procedure is the fact that exchanges of views on different options are not generally welcome, in other words, Member States should only ask for advice on one design of an operation rather than present different options for borderline cases and negotiate a solution with Eurostat. Thus, once Eurostat has received all the relevant information of the case, it will provide its opinion in the form of a bilateral letter (or as a general decision in cases of particular relevance or complexity in which it is necessary to consult the CMFB), without entering into any further negotiation with the authority requesting for advice. In this sense, it is important to note that the procedure designed by Eurostat does not foresee any further step that

⁸³ The guidelines are available online: Eurostat, ‘Eurostat’s Ex-Ante Advice on Methodological Issues’ http://epp.eurostat.ec.europa.eu/portal/page/portal/government_finance_statistics/documents/EUROSTAT_ADVISE_19_JULY_2006.pdf accessed 18 October 2013.

could be followed in case of disagreement with the view of Eurostat on the statistical treatment of the proposed operation and in principle it is not possible to bring an action against this decision before the Court of Justice.

The reason is that these decisions are considered to be non-binding on the Member States and, therefore, if they are not satisfied with the content of the answer they could still go ahead with the project and classify its related assets and liabilities according to their view. In that case they should be aware of the fact that if they depart from the recommendation of Eurostat it is almost sure that the data on deficit and debt will be corrected. This amendment of the data by Eurostat is the act which in principle could be reviewed by the Court of Justice.

With respect to the effects of these decisions on Eurostat, if there are no changes in the circumstances of the case, Eurostat should be consistent with its initial opinion, but strictly speaking it is not legally bound and in practice, given the complexity of PPP projects, it may be easy to justify a change of position alleging that the initial information was not complete or that there have been changes in the implementation of the project. However, the activity of Eurostat should respect the principle of legitimate expectations, which is a general principle of EU law which applies both to its legislative and administrative acts and which may derive not only from legal acts conferring individual rights or benefits, but also from the conduct of EU authorities in the cases in which they give precise, unconditional and consistent assurances.⁸⁴

In relation to the consultations for *ex-ante* opinions on the statistical treatment of PPP projects which Eurostat has received in recent years, from the letters of Eurostat which have been made public on its website it can be observed that the country with more consultations on this topic was Spain. The projects in this country dealt with the construction of roads and motorways in the Autonomous Communities of Aragón,⁸⁵ Galicia⁸⁶ and Navarra,⁸⁷ as well as with the construction of a canal to

⁸⁴ For more details, see Hofmann, Rowe and Türk (n 33) 178.

⁸⁵ Letter of Eurostat of 21 June 2011 with the Subject 'Public-Private Partnership by Autonomous Community of Aragon' (reference ESTAT/C-3/FL/LA/DB/mb (2011) 721215).

⁸⁶ Letter of Eurostat of 3 June 2008 with the Subject 'Formal Consultation on the Classification of the Assets in the Public-Private Partnership (Autovía del Salnés, Tramo enlace con la PO-531-SANXENXO)' (reference ESTAT/C-3/LN/LA/FS/ji D (2008) 30147).

⁸⁷ Letter of Eurostat of 7 July 2011 with the Subject 'Consultation on the Classification of the Assets in the Public-Private Partnership (Autovía A-21 del

increase the irrigable area of Navarra.⁸⁸ In addition, Eurostat has also replied to a consultation from Poland⁸⁹ and Belgium⁹⁰ on PPP projects dealing, respectively, with the construction of a motorway and the reorganization of regional public transportation in Brussels.

From the analysis of the advice of Eurostat, the following aspects can be highlighted. To begin with, almost all of these projects were promoted by the regional governments (Autonomous Communities in Spain and Region of Brussels-Capital in Belgium), but these authorities could only relate to Eurostat through the National Statistical Institutes.

Second, in relation to the legal sources on which Eurostat bases its decisions, it is important to note that ESA95 is only referred to in one case among the ‘applicable accounting rules’, together with the *Manual on Government Deficit and Debt* interpreting (or developing) ESA95. In the rest of cases, the Manual (in particular its chapter on PPPs) is the only ‘rule’ which is mentioned and, in practice, the criteria of the Manual are in all cases the only aspects which are considered by Eurostat to solve the controversies, which shows that the Manual, despite not being legally binding, is treated in practice as a source of law.

b. Decisions on On-Going Projects

Eurostat may express its opinion on the statistical treatment of the assets of PPP projects which are already under implementation, which can have immediate practical consequences. In particular, if Eurostat decides to reclassify the assets involved in a PPP project on the government balance sheet, the impact on the levels of deficit and debt can be very relevant. Moreover, this type of decisions is also problematic because of the impossibility to bring an action against them before the Court of Justice, as can be observed in the following two cases.

Pirineo Motorway in the Autonomous Region of Navarra’ (reference ESTAT/C-3/FL/LA/SF/mb (2011) 745745).

⁸⁸ Letter of Eurostat of 11 August 2011 with the Subject ‘Formal Consultation on the Classification of the Assets in the Public-Private Partnership (Irrigable Area of the Navarra Canal, Phase 1)’ (reference ESTAT/C-3/FL/LA/SF/mb (2011) 7957626).

⁸⁹ Letter of Eurostat of November 2011 with the Subject ‘Ex-Ante Consultation on the Statistical Recording of the Project of Construction and Operation of A1 Motorway Tuszyn - Pyrzowice Stretch’ (reference ESTAT/C-4/FL/JV/GSR/eb D(2011) 1371309).

⁹⁰ Letter of Eurostat of 28 March 2008 with the Subject ‘Sector Classification of CITEO in the Context of a PPP Operation’ (reference ESTAT/C-3/LN/MW/mg D(2008) 30052).

To begin with, in order to expand the underground railway network of Madrid, the regional government of the Autonomous Community of Madrid established the company *Madrid, Infraestructuras del Transporte* (Mintra), which was a public-law entity attached to the regional ministry of transports and infrastructures. This entity had legal personality, its own assets and full capacity to act and to incur autonomous debts with regard to the Autonomous Community of Madrid. Initially, by letter of 14 February 2003, Eurostat had classified Mintra outside the government sector and therefore its debt was considered to be private, but it changed its opinion by letter of 3 February 2005, with an important impact on the public debt and deficit of the region of Madrid.

In the opinion of Eurostat, the change was due to the fact that Mintra did not fulfil the initial conditions to be considered as a non-financial corporation, since it did not carry out a significant part of its activities in the free market and depended only on the projects commissioned by the regional government of Madrid. However, the conservative government of Madrid declared that the change was only motivated by political and not by economic reasons, and raised doubts on the impartiality of Eurostat.⁹¹

Given that the regional authorities of Madrid considered that their interests were not properly defended by the Spanish National Statistical Institute, the President of the Autonomous Community of Madrid travelled directly to Brussels to interview with the Commissioner for Economic and Monetary Affairs to analyse the case of Mintra.⁹² Despite this, given that the position of Eurostat did not change, the Regional Government of Madrid and Mintra brought an action before the Court of First Instance on 11 April 2005 against the letter from Eurostat, alleging, among other reasons, that Eurostat's decision was contrary to the principle of legitimate expectations and that it lacked any reference to its legal basis.⁹³

⁹¹ In particular, the change was directly qualified as a manoeuvre of the new social-democrat Spanish government together with the European Commissioner for Economic and Monetary Affairs, the Spanish social-democrat Joaquín Almunia, under whose final responsibility Eurostat operates, with the aim of undermining the credibility of the regional government of Madrid and limit its capacity to initiate new public works. See eg M Calleja and E Serbeto, 'El Gobierno regional acusa a Zapatero de querer "asfixiar" a Madrid' *ABC* (Madrid, 4 February 2005) 40; Vicente G Olaya, 'El cambio en la deuda de Mintra obedece a motivos políticos' *El País* (Madrid, 7 February 2005); and 'La Comunidad exige al Gobierno que defienda los intereses de Madrid en la UE' *ABC* (Madrid, 9 February 2005) 37.

⁹² See M Calleja, 'Aguirre viaja a Bruselas para pedir a Almunia que cambie el informe sobre Mintra' *ABC* (Madrid, 15 February 2005) 44.

⁹³ Case T-148/05 *Comunidad de Madrid and Mintra v Commission* [2005] OJ C143/41.

However, the action was dismissed as inadmissible by order of the Court of First Instance of 5 September 2006.⁹⁴ The reason is that the letter of Eurostat was not considered to have binding legal effects, that is, it had to be seen as a mere opinion of Eurostat in the framework of its cooperation with the national statistical institutes and therefore it had to be considered that the Spanish National Statistical Institute could have departed from the suggested criteria.⁹⁵ In that case, Eurostat could have amended the data presented by Spain and this is the action which, according to the Commission, would have been binding and could have been reviewed by the Court of Justice. One of the aspects that the Court takes into account in order to justify the non-binding character of the letter is the fact that at the time it was sent, no legal act expressly foresaw this type of decisions or advice, even though the Code of best practice on the compilation and reporting of data in the context of the excessive deficit procedure already referred to this possibility. Given that the current regulations also place these decisions of Eurostat in the framework of the cooperation among statistical authorities it seems that their non-binding character remains unchanged.

Another important PPP project which was affected by a decision of Eurostat was the rehabilitation, operation and maintenance of the M-30 ring road of Madrid, which involved the creation of a company (Madrid Calle 30) with public (80%) and private (20%) capital. This company receives periodic payments for the operation and maintenance of the road during 35 years and its profits are distributed in the form of dividends to its shareholders (the city of Madrid and the private investors). In principle, the assets of this PPP were planned to be recorded off the government accounts, since the private partner would bear the construction and availability risks.

After consulting with Eurostat, the Spanish National Statistical Institute classified Madrid Calle 30 in the public administrations sector within ESA95, which had a direct impact on the levels of government deficit and debt of Spain for 2005 which were published by Eurostat in news release 48/2006, of 24 April 2006. The Madrid City Council and Madrid Calle 30 considered that the news release included an implicit decision of Eurostat

⁹⁴ [2006] ECR II-61*.

⁹⁵ In other cases, Eurostat has analysed if non-binding instruments, such as guidelines, affect the rights and obligations of individuals. This shows that the Court of Justice acknowledges that soft law may have legal effects, including legally binding effects (for more details, see Oana Stefan, 'European Union Soft Law: New Developments Concerning the Divide between Legally Binding Force and Legal Effects' (2012) 75 *Modern L Rev* 879, 885-888).

classifying Madrid Calle 30 in the public administrations sector and brought an action on 3 July 2006 to the Court of First Instance to seek its annulment.⁹⁶ In the opinion of the applicants, the private companies which were shareholders of Madrid Calle 30 had been selected after a call for tenders subject to strict criteria in respect of market prices and considered that Eurostat had not respected the rules of ESA95 and that it had not justified its decision adequately nor given a hearing to the affected parties. However, the Court of First Instance rejected the action as inadmissible by order of 12 July 2007 because it considered that the news release 48/2006 did not include an implied decision of the Commission (Eurostat) with binding legal effects and therefore it was not a legal act against which an action could be brought. In this sense, the advice provided by Eurostat at the request of the Spanish authorities had to be considered as a mere example of voluntary cooperation without binding nature. The authorities of Madrid brought that order to the Court of Justice but the appeal was also dismissed and the position of the Court of First Instance was confirmed.⁹⁷

From the analysis of the cases of Mintra and Madrid Calle 30 it is possible to observe two main limitations of the current procedure used by Eurostat to take decisions on on-going cases.

To begin with, the decisions of Eurostat, expressed in letters to the national statistical institutes or in press releases, cannot be directly reviewed by the Court of Justice.⁹⁸ The reason is that these decisions are not considered to be legally binding, even though in practice Eurostat officials recognise that the Member States have to follow the criteria that they propose.⁹⁹ This restrictive approach of the Court when reviewing these ‘intermediate’ decisions contrasts with the important attention that non-binding instruments, such as codes of conduct or recommendations, have received by the Court when interpreting or supplementing binding

⁹⁶ Case T-177/06 *Ayuntamiento de Madrid and Madrid Calle 30 v Commission* [2006] OJ C212/33.

⁹⁷ Order of the Court (Sixth Chamber) of 20 June 2008 in Case C-448/07 P *Ayuntamiento de Madrid and Madrid Calle 30 v Commission* [2008] ECR I-99*.

⁹⁸ Apart from the cases of Mintra and Madrid Calle 30, the Belgian authorities also brought an action on 22 December 2006 to the Court of Justice (Case T 403/06 *Belgium v Commission*) in order to annul a decision of Eurostat contained in a letter of 18 October 2006 on the classification of a railway infrastructure fund in the public administration sector ([2007] OJ C42/36). Among other reasons, Belgium alleged that the decision of Eurostat was contrary to the principle of protection of legitimate expectations since Eurostat had initially agreed with the inclusion of the fund in the non-financial corporations sector. However, the Court did not rule on the case since Belgium withdrew its action.

⁹⁹ See Östergen Pofantis (n 20) 11.

rules.¹⁰⁰

In principle, if a Member State does not agree with the classification proposed by Eurostat it should not follow it and wait until Eurostat amends its data on deficit and debt to bring the case to the Court of Justice. This situation is not satisfactory and some form of interim protection should be guaranteed. For instance, the courts should accept the existence of reviewable tacit or implicit decisions in the cases in which a factual measure is taken, or the judicial review system may be reformed to introduce some kind of declaratory judgement.¹⁰¹

In this sense, it is important to note that if the national statistical authorities follow the advice of Eurostat, it will not be possible for the affected administrations (regional in most cases) to bring an action to the Court of Justice because Eurostat will not have to amend the data. In these cases, López Díaz has suggested that the affected public administrations or private parties carrying out the projects could still apply to their national courts for the legal review of the decision of their national statistical institute applying the criteria of Eurostat.¹⁰²

A second limitation of the procedure followed by Eurostat to express its opinion on the classification of certain on-going projects is the fact that, as it was explained before, Eurostat only engages in dialogue with the competent national authorities, which are basically National Statistical Offices together with Finance Ministries and Central Banks, but does not enter into direct contact with other public authorities such as regional or local governments, even though in some countries, such as Spain, the majority of all PPPs take place in the regional government sub-sector.¹⁰³ Thus, these sub-central entities will have to rely on other instances to present their position to Eurostat, something which could be problematic if they have opposing political interests and which could raise doubts on the impartiality of the statistical decisions, a problem which was particularly clear in the case dealing with the classification of Mintra.¹⁰⁴

This situation does not seem to be satisfactory from the perspective of the right to be heard before individual measures which could have a negative

¹⁰⁰ For more details, see Jan Klabbbers, 'Informal Instruments before the European Court of Justice' (1994) 31(5) CML Rev 1011-1014.

¹⁰¹ For more details, see Hofmann, Rowe and Türk (n 33) 672-673.

¹⁰² See López Díaz (n 36) 29.

¹⁰³ Eurostat, 'EDP Dialogue Visit to Spain, 17-18 November 2011' (n 73) 24.

¹⁰⁴ See Juan Martínez Calvo, 'Hacia la construcción de un "Derecho Administrativo financiero": Crónica del Caso Mintra' (2005) 167 Revista de Administración Pública 400.

impact are taken, which is usually considered a part of the general principle of good administration.¹⁰⁵ In this sense, the participatory procedure followed by the Commission in the area of state aids, where the parties concerned, understood in a broad way, can make their views known,¹⁰⁶ could serve as a reference to improve the procedure dealing with the quantification of public debt.

Moreover, it is important to remember that Article 4(2) of the Treaty on European Union establishes the obligation to respect the national constitutional identity of the Member States, which according to authors such as Besselink includes the extent to which regional self-government is allowed in some countries.¹⁰⁷ Therefore, even though ‘national constitutional identity’ is an ambivalent and controversial concept,¹⁰⁸ it seems that the working procedures of Eurostat should be more flexible in order to take into account that many cases affect regional governments.

IV. CONCLUSION

The regulation of budget stability seems to be an area dominated by hard law, but in practice Eurostat has had to complement many aspects, such as the treatment of PPPs, with a wide set of instruments with a high degree of informality (decisions in press releases, manuals, recommendations during dialogue visits, opinions in letters to the national authorities, etc.). These instruments look in general like soft law, but their legal status is controversial and they have certain limitations.

To begin with, even though general decisions of Eurostat are published as mere press releases, taking into account the changes introduced by the Treaty of Lisbon, they should be considered to be legally binding decisions because of their content. In any case, in order to increase legal certainty it would be advisable to make clear the type of legal act which is being used and whether it has a legislative, a delegated or an implementing character. This is important because, as it could be observed with respect to PPPs, the activity of Eurostat is not merely interpretative and in practice it has been filling the gaps of the accounting norms, favouring criteria which are not devoid of debate.

¹⁰⁵ See, for example, Hofmann, Rowe and Türk (n 33) 198. For a detailed analysis of the case-law on this issue, see Mendes (n 42) 161-186.

¹⁰⁶ See *ibid* 380-402.

¹⁰⁷ See Leonard F M Besselink, ‘National and Constitutional Identity Before and After Lisbon’ (2010) 6(3) *Utrecht L Rev* 36, 44.

¹⁰⁸ For more details, see eg Alejandro Saiz Arnaiz and Carina Alcobarro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013).

With respect to the legal status of the manuals published by Eurostat and the recommendations expressed during dialogue visits, they could be considered as soft law because even though they are not legally binding, in practice they have an important influence on the behaviour of the Member States. In fact, on many occasions the *Manual on Government Deficit and Debt* seems to be treated as a source of law.

Finally, Eurostat's decisions on particular cases, which would seem to entail legal obligations, have been considered as non-binding by the Court of Justice. As a result, if a disagreement arises, the views of Eurostat cannot be subject to immediate judicial review and the affected Member State would have to wait until the statistical data is amended by Eurostat, which would cause unnecessary delays and damages. Therefore, this is an aspect which should be improved and probably the best alternative would be the use of binding decisions, an option that is already applied in the area of competition law. Furthermore, in the cases in which the affected parties are mainly regional or local governments, in order to avoid misunderstandings it would be advisable to establish mechanisms, such as hearings, to allow them to express their views directly to Eurostat instead of having to communicate always through their national statistical institutes.

To sum up, it can be observed that Eurostat has frequently made use of instruments of controversial legal status in order to interpret or develop the regulation of public finance statistics. For Eurostat, this is probably a comfortable situation since it offers greater flexibility, but several cases, such as those of Mintra and Madrid Calle 30, have shown that more clarity on the nature of the instruments which are used by Eurostat would be advisable in order to protect basic values such as the rule of law and facilitate the access to judicial review.

ON THE CONCEPTUAL ORIGINS OF THE LAW OF UNJUSTIFIED ENRICHMENT IN THE *DRAFT COMMON FRAME OF REFERENCE*

Jack Wright Nelson*

Book VII of the Draft Common Frame of Reference presents a codification of the law of unjustified enrichment, derived from European jurisdictions and legal traditions. Yet European private law lacks a ‘common core’ concerning unjustified enrichment. Thus the question arises: where did Book VII’s drafters derive their material, and which national jurisdictions are represented therein? Through comparative analysis, this paper aims to clarify the conceptual origins of Book VII, comment on the causes of divergence in this area of law, and consider the future uses of Book VII.

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I. INTRODUCTION

The Digest of Justinian contains the fundamental principle from which modern unjustified enrichment¹ law is derived: ‘it is a matter of natural equity that no one should be enriched to the detriment of another’.² This

* BA (University of Melbourne). My thanks go to Martin Vranken of Melbourne Law School and the anonymous reviewers for their insightful comments on earlier drafts of this article. Remaining errors are, of course, my own.

¹ For ease of reference and comparison, the terminology used in this paper is identical with that used in the *Draft Common Frame of Reference*. Thus, while ‘unjustified enrichment’ is usually rendered as ‘unjust enrichment’ in English, this paper will use the former.

² Adolf Berger, *Encyclopaedic Dictionary of Roman Law* (American Philosophical

principle informed several discrete actions, the ‘condictions’, that were available under Roman law.³ The 18th century breathed new life into this Roman learning: Lord Mansfield adopted the condictiones in *Moses v Macferlan*,⁴ and Pothier’s enthusiasm informed their selective incorporation in the *Code civil*.⁵ This process culminated in the following century, when most of the condictiones, as well as a general enrichment action, were codified in the *Bürgerliches Gesetzbuch* (‘BGB’).⁶

Despite this common Roman origin, the development of unjustified enrichment law across Europe has been highly divergent.⁷ As Smits and Mak note, ‘[u]njustified enrichment law is an area for which it remains hard to find a “common core” of European private law’.⁸ To wit, not every European country has rules on unjustified enrichment; when such rules do exist, they often differ greatly.⁹ Yet the principle underlying this area of

Society 1953) 405 [*Digest* 12.6.14, 50.17.206]. Zimmermann traces this principle back further, to Aristotle: Reinhard Zimmermann, ‘Unjustified Enrichment: The Modern Civilian Approach’ (1995) 15(3) *OJLS* 403, 403. Some authors identify this as the principle underlying the entire law of obligations: André Tunc, *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle* (6th edn, Éditions Montchrestien 1965) vol 1, 17. See also Jan Smits, ‘A European Law on Unjustified Enrichment? A Critical View of the Law of Restitution in the Draft Common Frame of Reference’ in Antoni Vaquer (ed), *European Private Law Beyond the Common Frame of Reference* (Europa Law Publishing 2008) 153, 155.

³ Martin Vranken, *Fundamentals of European Civil Law* (2nd edn, The Federation Press 2010) 103, para 505; Peter Birks, *The Foundations of Unjust Enrichment: Six Centennial Lectures* (Victoria UP 2002) 146; James Edelman, ‘Australian Challenges for the Law of Unjust Enrichment’ (Speech delivered at the University of Western Australia Summer School, Perth, 24 February 2012).

⁴ (1760) 2 Burr 1005, 1008 – 9, 1012. See generally Peter Birks, ‘English and Roman Learning in *Moses v Macferlan*’ (1984) 37 *CLP* 1.

⁵ See generally Daniel Patrick O’Connell, ‘Unjust Enrichment’ (1956) 5(1) *The American Journal of Comparative Law* 2 – 8.

⁶ The BGB was the first European civil code to codify unjustified enrichment law as a discrete branch of the law: Christian von Barr and Stephen Swann, *Principles of European Law: Unjustified Enrichment* (OUP 2010) para 20. See, eg, Lionel Smith, ‘Property, Subsidiarity, and Unjust Enrichment’ in D Johnston and R Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 588, 596; Reinhard Zimmermann and Jacques du Plessis, ‘Basic Features of the German Law of Unjustified Enrichment’ [1994] *Restitution L Rev* 14.

⁷ Von Barr and Swann (n 6) para 10.

⁸ Jan Smits and Vanessa Mak, ‘Unjustified Enrichment’ in Luisa Antoniolli and Francesca Fiorentini (eds), *A Factual Assessment of the Draft Common Frame of Reference* (Sellier 2008) 249, 250.

⁹ Detlev Belling, ‘European Trends in the Law on Unjustified Enrichment – From the German Perspective’ (2013) 13(43) *Korea U L Rev* 43, 45; Smits and Mak (n 8) 251.

law remains the same across Europe: where a person has conferred some benefit upon another, in a situation where it is unjustified for the latter to retain that benefit, that benefit should be reversed.¹⁰

Building upon this common principle, Book VII of the *Draft Common Frame of Reference* ('DCFR') presents unjustified enrichment law as a series of model rules and provisions¹¹ for potential application across the European Union ('EU').¹² Conducted under the auspices of the European Commission, the DCFR is supposed to 'mark the apogee of all European legal harmonization efforts'; while the drafters of the DCFR emphasise that the project is a 'toolbox', others consider it a codification 'in all but name'.¹³ Ultimately, the DCFR is intended to comprise the model for a future 'political' Common Frame of Reference, that would serve as an optional instrument of European contract law.¹⁴

The provisions of Book VII, like the other books of the DCFR, are drawn from the national jurisdictions and legal traditions found within the EU.¹⁵ In published commentaries,¹⁶ however, the drafters refrain from specifying

¹⁰ Brice Dickson, 'Unjust Enrichment Claims: A Comparative Overview' (1995) 54(1) *CLJ* 100, 103. See generally Jack Beatson and Eltjo Schrage (eds), *Cases, Materials and Texts on Unjustified Enrichment* (Hart Publishing 2003) 5.

¹¹ Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), *Draft Common Frame of Reference (Outline Edition): Principles, Definitions and Rules of European Private Law* (Sellier 2009) <http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf> accessed 1 October 2013.

¹² See generally Horst Eidenmüller and others, 'The Common Frame of Reference for European Private Law: Policy Choices and Codification Problems' (2008) 28(4) *OJLS* 659.

¹³ Reinhard Zimmerman, 'The Present State of European Private Law' (2009) 57 *The American Journal of Comparative Law* 479, 480, 490. The broader European codification project began at the initiation of the European Parliament, recognising that the common market and its preponderance of cross-border contractual relationship has led to a need for unification: Resolution of the European Parliament of May 26 1989 on action to bring into line the private law of the Member States [1989] *OJ* C158/89, 400. To achieve this aim, the Commission on European Contract Law prepared a draft treatise on European contract law, the *Principles of European Contract Law* ('PECL'). The Study Group on a European Civil Code succeeded the Commission, and drafted the *Principles of European Law* (PEL). The PEL adopted the PECL and supplemented it with additional principles, including those on unjustified enrichment. In cooperation with other European research groups, most notably the Acquis Group, the DCFR was drawn up incorporating the PEL with revisions.

¹⁴ Pieter Brulez, 'From the Academic DCFR to a Political CFR' (2010) 5 *European Review of Private Law* 1041, 1042.

¹⁵ Von Barr and Swann (n 6) vii.

¹⁶ See generally von Barr and Swann (n 6).

which national jurisdictions and legal traditions inspired Book VII. There may be good reasons for this silence.¹⁷ Nonetheless, this paper aims to clarify the conceptual origins of Book VII by posing two questions: First, what makes an enrichment *unjustified*? Second, is the enrichment claim *subsidiary*? The first question reveals how unjustified enrichment law approaches factual scenarios; the second question reveals how unjustified enrichment law interacts with the broader law of obligations. Together, these two questions illuminate the internal and external mechanisms of unjustified enrichment law.¹⁸

A comparison of the answers provided by Book VII with those from three major European jurisdictions (Germany, France and England)¹⁹ indicates that Book VII's conceptual origins are predominantly German and English. The penultimate section then discusses the causes of the divergent development of unjustified enrichment law, and outlines the future uses of the Book VII in light of the comparative findings.

II. WHAT MAKES AN ENRICHMENT UNJUSTIFIED

There are two broad approaches used to determine whether a particular enrichment is unjustified.²⁰ The first is the civilian 'absence of basis' approach. The second is the common law 'unjust factors' approach. Both approaches are outlined in this section. Chapter 2 of Book VII, concerning the circumstances in which an enrichment is unjustified, is partially reproduced, and compared with the approaches found in the national jurisdictions. The similarities between Chapter 2 and the German approach indicate that Chapter 2 of Book VII is conceptually German. A brief discussion concludes this section.

I. *Comparative Jurisdictions*

The *Code civil* contains codified claims for restitution of benefits arising from benevolent intervention in another's affairs, and mistaken payment.²¹ Other cases of *enrichissement sans cause* are remedied by a general

¹⁷ For example, the authors may have been concerned that interpretation of a given provision of Book VII may, if its national origin were identified, rely on previous interpretations of the equivalent national provision.

¹⁸ Dickson (n 10) 101.

¹⁹ A part of the English (but not French or German) law of unjustified enrichment is dealt with in a separate book, Book V of the DCFR, entitled 'Benevolent intervention in another's affairs'. For the purposes of this paper, this area of law is not discussed.

²⁰ Beatson and Schrage (n 10) 251.

²¹ *Code civil* [Civil Code] (France) arts 1372 – 75 ('gestion d'affaires d'autrui'), 1376 – 81 ('répétition de l'indu'). See generally von Barr and Swann (n 6) paras 11 – 12.

enrichment action that is the result of ‘judicial creativity’²² in the *Boudier* case.²³ The action established in this case took a Roman name, the action *de in rem verso*, but the Cour de cassation extended it far beyond its Roman origins.²⁴ Some twenty years later, in further judicial development, the action *de in rem verso* was limited by introducing the absence of basis requirement.²⁵ Thus, in modern French law ‘l’obligation de restitution s’explique par l’idée de l’absence de cause’²⁶ whereby restitution is granted to a claimant unless the defendant can demonstrate that there was ‘une cause légitime’ for the enrichment.²⁷ Given the amorphous nature of *cause* in French law, the French inquiry into justification is an expansive exercise.²⁸

As aforementioned, the German law of unjustified enrichment is codified in the BGB.²⁹ §812(1) of the BGB provides a general enrichment action that is predicated on the absence of basis approach:³⁰

Wer durch die Leistung eines anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet. Diese Verpflichtung besteht auch dann, wenn der rechtliche Grund später wegfällt oder der mit einer Leistung nach dem Inhalt des Rechtsgeschäfts bezweckte Erfolg

²² Vranken (n 3) para 505.

²³ Cour de cassation [French Court of Cassation] 15 June 1892 reported in (1892) DP I, 596.

²⁴ The Roman action *de in rem verso* was only applicable in a slaveholding context: Jeffery Oakes, ‘Article 2298, the Codification of the Principle Forbidding Unjust Enrichment, and the Elimination of Quantum Meruit as a Basis for Recovery in Louisiana’ (1996) 56(4) Louisiana L Rev 873, 877.

²⁵ *Leloup v Lutier*, Cour de cassation [French Court of Cassation], 18 October 1898 reported in [1898] Cass Req 105. See generally Beatson and Schrage (n 10) 333.

²⁶ Boris Starck, Henri Roland and Laurent Boyer, *Droit civil: obligations* (2nd edn, Litec 1986) vol 2, 2064.

²⁷ Dickson (n 10) 115; Beatson and Schrage (n 10) 333.

²⁸ Beatson and Schrage (n 10) 115 – 18. On the multiple definitions of ‘cause’, see Vranken (n 3) paras 526 – 535.

²⁹ A plurality of EU jurisdictions contain a codified enrichment action: *Αστικός κώδικας* [Civil Code] (Greece) §904(1)(i); *Codice civile* [Civil Code] (Italy) §2041(1); *Código civil* [Civil Code] (Portugal) §473; *Polgári Törvénykönyv* [Civil Code] (Hungary) §361(1); *Kodeks cywilny* [Civil Code] (Poland) §405; *Občanský zákoník* [Civil Code] (Czech Republic) §451; *Občiansky zákonník* [Civil Code] (Slovakia) §451; *Obligacijski zakonik* [Civil Code] (Slovenia) §190; *Обязателно право* [Law of Contracts] (Bulgaria) §59(1); *Burgerlijk Wetboek* [Civil Code] (The Netherlands) §6:212(1); *Civilinis Kodeksas* [Civil Code] (Lithuania) §6.237(1); *Võlaõiguseadus* [Law of Obligations] (Estonia) §3(3), 1027; *Civillikums* [Civil Code] (Latvia) §2391 – 2392.

³⁰ Von Barr and Swann (n 6) para 4.

nicht eintritt.³¹

Differentiating the German claim from the French claim is the regulation of individual cases.³² The second sentence of §812 is the best example of this. In effect, the second sentence posits a factor that, if fulfilled, renders the enrichment unjustified.³³ Latter provisions similarly govern specific cases in respect of the unjustness.³⁴ Thus, absence of basis is not the only determinant of unjustness in German law. Rather, it is first a question of basis, and then an inquiry into specific circumstances.³⁵

The English unjust factors approach is the inverse of the absence of basis approach: it is a search for a reason why restitution *should* be granted,³⁶ rather than the civilian search for a reason why restitution should *not* occur.³⁷ Under this approach an enrichment is unjustified if the claimant can establish one (or more)³⁸ unjust factors.³⁹ As the law currently stands, there appears to be thirteen recognised factors,⁴⁰ although the number of

³¹ “A person who obtains something by performance by another person or in another way at the expense of this person without legal cause is bound to give up to him. The same obligation exists if the legal cause later lapses or if the result does not occur which the performance had been aimed at producing according to the content of the legal transaction”: BGB [Civil Code] (Germany) §812(1) (emphasis added).

³² Arguably, this regulation of individual cases is required by the lack of ‘cause’ required in German contract law: Ole Lando and Hugh Beale (eds), *Principles of European Contract law* (Kluwer Law International 1999) pt 2, 141.

³³ Indeed, the second sentence in §812(1) appears to share much in common with the English unjust factor labelled ‘failure of consideration’: Andrew Burrows and others, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 12.

³⁴ BGB §813 – 817. See generally Belling (n 9) 49.

³⁵ Interestingly, this is the inverse of the scheme advocated by Birks, whereby absence of basis was to be employed in situations where the unjust factors approach was inadequate. See generally Peter Birks, *Unjust Enrichment* (Clarendon 2005).

³⁶ Edelman (n 3).

³⁷ Dickson (n 10) 115.

³⁸ Concurrence of unjust factors was discussed with approval in *Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 AC 558.

³⁹ Burrows and others (n 33) 31. See also *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 408 – 9 (Lord Hope). See generally Charles Mitchell, Paul Mitchell, and Stephen Watterson (eds), *Goff and Jones on the Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2010).

⁴⁰ Burrows and others lists the unjust factors as: mistake, duress, undue influence, exploitation of weakness, incapacity of the individual, failure of consideration, ignorance or powerlessness, fiduciary’s lack of authority, legal compulsion, necessity, illegality, and unlawful obtaining or conferral of benefit by a public authority: Burrows and others (n 21) 9 – 16.

factors is theoretically unlimited.⁴¹ Generally, one of the recognised factors, or a justifiable extension of a recognised factor, is pleaded.⁴²

An important qualification to the unjust factors approach is ‘that an unjust factor does not normally override a legal obligation of the claimant to confer the benefit on the defendant. The existence of the legal obligation means that the unjust factor is nullified so that the enrichment at the claimant’s expense is not unjust.’⁴³ In this respect, the methodology of the unjust factors approach can be broadly seen as the inverse of the two-stages that characterise the German absence of basis approach. There are, however, limited exceptions where the unjust factor ‘outweighs’ the legal entitlement,⁴⁴ namely where granting the enrichment claim would not conflict with the allocation of risk under the contract.⁴⁵

2. Chapter 2 of Book VII

Chapter 2 is entitled ‘When enrichment unjustified.’ The key provision of Chapter 2 is art 2:101, as follows:

2:101: Circumstances in which an enrichment is unjustified

- (1) An enrichment is unjustified unless:
 - (a) the enriched person is entitled as against the disadvantaged person to the enrichment by virtue of a contract or other juridical act, a court order or a rule of law; or
 - (b) the disadvantaged person consented freely and without error to the disadvantage.
- (2) If the contract or other juridical act, court order or rule of law referred to in paragraph (1)(a) is void or avoided or otherwise rendered ineffective retrospectively, the enriched person is not

⁴¹ ‘The categories of unjust enrichment are not closed’: *CTN Cash and Carry Ltd v Gallaher Ltd* [1993] EWCA Civ 19, [1994] 4 All ER 714, 720 (Sir Donald Nicholls VC).

⁴² *Uren v First National Home Finance Ltd* [2005] EWHC 2529, 2532 (Mann J).

⁴³ *Burrows and others* (n 33) 32 [s 3(6)].

⁴⁴ *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349, 480 (Lord Hope).

⁴⁵ *Burrows and others* (n 33) 34 [s 3(6)]. An example of this is the Australian case of *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 (High Court of Australia), where restitution was awarded despite a current contract, apparently on the grounds that the contract did not account for the particular risk that arose. See also *von Barr and Swann* (n 6) para 72.

entitled to the enrichment on that basis.

(3) However, the enriched person is to be regarded as entitled to an enrichment by virtue of a rule of law only if the policy of that rule is that the enriched person is to retain the value of the enrichment.

(4) An enrichment is also unjustified if:

(a) the disadvantaged person conferred it:

- (i) for a purpose which is not achieved; or
- (ii) with an expectation which is not realised;

(b) the enriched person knew of, or could reasonably be expected to know of, the purpose or expectation; and

(c) the enriched person accepted or could reasonably be assumed to have accepted that the enrichment must be reversed in such circumstances.

The drafters of Book VII claim that Chapter 2 is conceptually, and exclusively, civilian. In a paragraph entitled '[a]bsence of legal basis, not unjust factors', the drafters state that '[b]y virtue of [art 2:101] any enrichment which is not supported either by some legal basis ... is regarded as unjustified.'⁴⁶ Contrastingly, Smits and Mak, in a detailed analysis of Book VII published shortly before the publication of the drafters' commentaries, describe Chapter 2 as a 'a list of specific instances in which enrichment is deemed unjust, [that is] reminiscent of the "unjust factors" approach.'⁴⁷ Indeed, the title of Chapter 2, '[c]ircumstances in which an enrichment is unjustified,' accords with this analysis. While Smits and Mak acknowledge that Chapter 2's factors 'are much more abstract'⁴⁸ than the unjust factors currently recognised in English law, they nonetheless conclude that Chapter 2 is a codification of the unjust factors approach.⁴⁹

Resolution of these conflicting interpretations of Chapter 2 requires analysis of the steps required for an enrichment to be considered unjustified pursuant to Chapter 2. The wording of art 2:101(1), 'an enrichment is unjustified unless,' indicates the civilian position, whereby enrichments are *prima facie* unjustified. Thus the threshold issue echoes

⁴⁶ Von Barr and Swann (n 6) para 2.

⁴⁷ Smits and Mak (n 8) 266.

⁴⁸ Smits and Mak (n 8) 266.

⁴⁹ *ibid* 259.

the civilian absence of basis approach: is there a legal ground for the enrichment? Fulfilling either of the requirements in arts 2:101(a) or (b), however, does not render a given enrichment justified. Rather, the analysis then moves to consider the additional provision contained in art 2:101(4). Like BGB §812(1), art 2:101(4) resembles the ‘failure of consideration’ unjust factor of English law, and serves to enlarge the ‘ambit’ of what can be declared ‘unjustified’.⁵⁰

Clearly, Chapter 2 does not adopt the broad absence of basis approach favoured in France. However, contra Smits and Mak, it does not constitute a list of unjust factors.⁵¹ Rather, Chapter 2’s closest analogue is BGB §812(1). The two-stage analysis of art 2:101 corresponds with the two-stages mandated in §812(1). Both art 2:101 and §812(1) require the threshold of legal basis to be met, before consideration of an additional factor concerning failure of purpose. The key difference is that art 2:101 is generally more discursive than §812(1). For example, the drafters have provided a list of instances concerning consent and free performance in arts 2:103(1) and (2). In this respect, art 2:101 may echo the unjust factors approach. Ultimately, however, the similarities of method outweigh these differences. Given the centrality of art 2:101 to Chapter 2, it appears that Chapter 2 is predominantly German in conceptual origin.

3. Discussion

A general criticism of the absence of basis approach, as applied in both France and Germany, is that the determination of whether an enrichment is justified is an inquiry that largely takes place outside of unjustified enrichment law.⁵² The absence of basis approach turns away from unjustified enrichment law, and makes inquiries into, for example, the law of contract.⁵³ Consequently, the civilian law of unjustified enrichment may be regarded as ‘as having little to say on the injustice question’⁵⁴ as the ‘details of the unjust question’ are pushed into ‘categories of the law outside unjust[ified] enrichment.’⁵⁵

Zimmermann sees this as a benefit of the absence of basis approach: ‘All of this has to be determined according to the law of contract. The law of

⁵⁰ Von Barr and Swann (n 6) para 81.

⁵¹ Part 3 of the *Restatement of the English Law of Unjust Enrichment* provides an example of such a list: Burrows and others (n 33) 9 – 16.

⁵² Andrew Burrows, ‘Absence of Basis: The New Birksian Scheme’ in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Honour of Peter Birks* (OUP 2006) 36.

⁵³ *ibid* 40.

⁵⁴ Burrows (n 52) 40.

⁵⁵ *ibid* 37.

restitution does not have to concern itself with these issues.⁵⁶ Indeed, it is from this shifting of burden that Book VII can avoid the ‘inelegance’ of the unjust factors approach. After all, he notes, ‘it is hardly conceivable that a legal system engaged with the task of rationally reorganising its law of unjustified enrichment should take its lead from English jurisprudence.’⁵⁷ However, as Burrows notes, an important corollary of the unjust factors approach is that it ‘keeps the law directly in touch with the way real plaintiffs actually think. The unjust factors are not only the law’s reasons for restitution but also the reasons which lay people would commonly give for wanting restitution. “I made a mistake”, “I was under his thumb”, “I gave it because I thought we were going to stay together”, and so on.’⁵⁸ In this respect, the unjust factors approach may be more accessible to the layperson, and less ‘abstract and decontextualized’ than Zimmerman suggests this area of law is.⁵⁹ Thus, while Smits and Mak are concerned that the European lawyer may not be able to grasp art 2:101,⁶⁰ it should be of at least equal concern that the European *citizen* will not be able to grasp art 2:101 as presently drafted. After all, as Collins notes, ‘[p]rivate law can be viewed as the constitution of civil society.’⁶¹

A more specific criticism of Chapter 2 is that it does not accord with recent EU case law. In *Masdar (UK) Ltd v Commission of the European Communities*,⁶² the defendant Commission contracted with Helmico to establish farming organisations in Moldova and Russia. Helmico subcontracted the claimant Masdar to provide services required under the contracts between the Commission and Helmico. The Commission discovered that Helmico had engaged in fraud in completion of both the Moldovan and Russian projects. The Commission subsequently declined to pay any outstanding invoices, and requested return of all moneys paid to Helmico. Helmico’s directors promptly fled the EU, and recovery from Helmico failed. Masdar then claimed its own outstanding invoices from the Commission, arguing that the Commission had been enriched by Masdar’s performance of services in Moldova and Russia.

⁵⁶ Zimmermann (n 2) 407.

⁵⁷ *ibid* 416. Similar criticism are made by Smits and Mak (n 8) 266.

⁵⁸ Birks, *Six Centennial Lectures* (n 3) 73.

⁵⁹ Reinhard Zimmerman, ‘The Present State of European Private Law’ (2009) 54 *The American Journal of Comparative Law* 479, 497.

⁶⁰ Smits and Mak (n 8) 259. Belling shares the concerns of Smits and Mak: Belling (n 9) 58.

⁶¹ Hugh Collins, ‘Why Europe Needs a Civil Code’ (2013) 4 *Euro Rev of Private L* 907, 916.

⁶² Case C-47/07 *Masdar (UK) Ltd v Commission of the European Communities* [2008] ECR I-9761, affirming the decision of the Court of First Instance (now the General Court) in Case T-333/03 *Masdar (UK) Ltd v Commission of the European Communities* [2006] ECR II-4377.

The Court of Justice of the European Communities (now the Court of Justice of the European Union) agreed that the Commission had been enriched. However, Masdar's claim failed on the issue of whether the Commission's enrichment was 'without cause'.⁶³ Tellingly, once the Court determined that the enrichment arose from a 'contractual framework', the enrichment was justified, and the action failed. Additional factors, such as those found in the second sentence of BGB §812(1) or 2:101(4), were not considered. It therefore appears that the Court has followed the more general absence of basis approach found in French law, rather than that of German law. However, this departure is largely one of method. Both German law⁶⁴ and Book VII⁶⁵ would arrive at the same result as the Court, sans the expansive inquiry into cause. Given that codifying the extent and breadth of this inquiry would be a Herculean task, and that the overwhelming majority of EU jurisdictions employ the absence of basis approach, it appears that the adoption of the German approach to justification in Book VII was both prudent and necessary.⁶⁶

III. IS THE ENRICHMENT CLAIM SUBSIDIARY?

This second question illustrates the relationship between the enrichment claim and other legal principles.⁶⁷ Subsidiary, in this context denotes 'a relationship between different types of claims such that one type of claim is disallowed by the presence of another claim.'⁶⁸ The effects of subsidiarity can vary greatly. Subsidiarity can provide a hierarchical order of claims in situations giving rise to multiple viable claims. Alternatively, subsidiary can deny the claimant a remedy at all.⁶⁹

In this section, subsidiarity is outlined in respect of the comparative jurisdictions. Chapter 7 of Book VII is then partially reproduced, and compared with the approaches found in the comparative jurisdictions. The

⁶³ Case C-47/07 *Masdar (UK) Ltd v Commission of the European Communities* [2008] ECR I-9761, para 99.

⁶⁴ The availability of an undue payment claim against Helmico would likely exclude any enrichment claim against the Commission: Bundesgerichtshof [German Federal Court of Justice], VII ZR 285/61, 31 October 1963 [Beatson and Schrage trans (n 10) 457].

⁶⁵ The enrichment of the Commission would likely be considered justified pursuant to art 2:102(a) of Book VII.

⁶⁶ cf Zimmerman (n 59) 498.

⁶⁷ Dickson (n 10) 101.

⁶⁸ Smith (n 6) 599. Smith breaks the general concept of subsidiarity down into 'weak' and 'strong' subsidiarity, but for the purposes of this paper, such a technical distinction is not necessary.

⁶⁹ Beatson and Schrage (n 10) 457.

similarities between art 7:102 and the English approach to subsidiarity indicate that art 7:102 is conceptually English. A discussion of this choice concludes this section.

1. *National Jurisdictions*

Given that the French action *in de rem verso* is derived from equity,⁷⁰ it cannot replace or contradict the provisions of the *Code civil*: ‘It can only fill a gap.’⁷¹ Thus, resort may only be had to the action *de in rem verso* when the *Code civil* fails to govern the situation.⁷² This requirement was declared by the Cour de cassation in the *Clayette* case.⁷³ The operative clause in that judgment held that the *action de in rem verso* is only available if a claimant ‘ne jouissait, pour obtenir ce qui est dû, d’aucune action naissant d’un contrat, d’un quasi-contrat, d’un délit, ou d’un quasi-délit.’⁷⁴ A half-century later, in the *Decaens* case, the Cour de cassation further clarified the limitations imposed by subsidiarity on the action *de in rem verso*:⁷⁵

Attendu que l’action fondée sur l’enrichissement sans cause ne peut être admise qu’a défaut de toute autre action ouverte au demandeur; qu’elle ne peut l’être, notamment, pour suppléer a une autre action que le demandeur ne peut intenter par suite d’une prescription, d’une déchéance ou forclusion ou par l’effet de l’autorité de la chose jugée ou parce qu’il ne peut apporter les preuves qu’elle exige ou par suite de tout autre obstacle de droit.⁷⁶

⁷⁰ *Boudier*, Cour de cassation [French Court of Cassation], 15 June 1892 reported in (1892) *DP* 1, 596.

⁷¹ Beatson and Schrage (n 10) 427. The action *en répétition de l’indu*, and other enrichment actions codified in the *Code civil*, are not subsidiary: von Barr and Swann (n 6) 1.

⁷² Von Barr and Swann (n 6) para 103. See also O’Connell (n 5) 9.

⁷³ Cour de cassation [French Court of Cassation], S.1918.1.41, 12 May 1914.

⁷⁴ ‘[The claimant] does not have at his disposal, to obtain what is due to him, any action arising from a contract, quasi-contract, a delict or a quasi-delict’: Beatson and Schrage (trs) (n 10) 427. See generally Dickson (n 10) 116.

⁷⁵ Beatson and Schrage (trs) (n 10) 427.

⁷⁶ *Decaens*, Cour de cassation [French Court of Cassation], 70-10415, 29 April 1971 reported in (1971) *Bull civ* n° 277, 197 (“Considering that the action founded on unjustified enrichment can only be admitted if there is no other action open to the plaintiff; that in particular it cannot be admitted in place of another action which the plaintiff cannot bring because of prescription, a forfeiture, a foreclosure or because of the effect of *res judicata*, or because he cannot produce the evidence necessary for the success of the action or because of any other obstacle of law.”) [Beatson and Schrage (trs) (n 10, 428]. cf *Codice civile* [Civil Code] (Italy) art 2042.

This ‘strict subsidiarity’⁷⁷ means that if any other claim is available *in law* for the kind of loss in question, then the action *de in rem verso* is be excluded.⁷⁸ Where a contractual, tortious or other claim is, however, denied *in fact*, the action is allowed. Thus a contractual claim barred by time-limits or evidentiary issues excludes the enrichment,⁷⁹ but the insolvency of one of the contracting parties in a third party enrichment case will not prevent an enrichment claim against that third party.⁸⁰

German enrichment claims, being grounded in the BGB, are generally not subsidiary. A claimant may invoke any cause of action, and if the requirements of that claim are satisfied, other claims are to that extent extinguished.⁸¹ The primary exception to this principle first appeared in V ZR 130/94.⁸² In this case, the claimant leasee had a contract with the defendant landlord such that the claimant could purchase the leased property at a reduced price if the claimant maintained the property for the leasehold’s duration. The claimant maintained, and carried out construction on the leased property, substantially increasing its value. The defendant then sold the property to a third party. The claimant made contractual claims, and also argued, pursuant to BGB §812, that the defendant should give up the profit. The contractual claims failed because the right to purchase in the leasehold contract required notarial certification pursuant to BGB §313(1). Further, the Bundesgerichtshof held that, as a matter of interpretation, the specific provisions of the BGB governing the owner-possessor relationship⁸³ prohibited recourse to the general enrichment provisions contained in the BGB.⁸⁴ It therefore appears that the enrichment action of §812(1) will yield to sufficiently exhaustive provisions of the BGB.

Subsidiarity also applies within unjustified enrichment law itself, where the

⁷⁷ Zimmermann (n 2) 420; Paolo Gallo, ‘Unjust Enrichment: A Comparative Analysis’ (1992) 40 The American Journal of Comparative Law 431, 465.

⁷⁸ Dickson (n 10) 113; von Barr and Swann (n 6) para 1.

⁷⁹ Dickson (n 10) 116.

⁸⁰ Recent case law has, however, challenged the traditional understanding of the subsidiarity of the action *de in rem verso*. For example, in one case the action *de in rem verso* was not excluded despite the availability, but lack of proof, for a contractual claim: Cour de cassation [French Court of Cassation] 07-13902, 5 March 2008. See generally von Barr and Swann (n 6) para 1.

⁸¹ von Barr and Swann (n 6) para 3.

⁸² Bundesgerichtshof [German Federal Court of Justice], V ZR 130/94, 29 September 1995 [Beatson and Schrage (trs) (n 10) 448 – 9].

⁸³ BGB [Civil Code] (Germany) §994 – 1003 [Beatson and Schrage (trs) (n 10) 576 – 585].

⁸⁴ Bundesgerichtshof [German Federal Court of Justice], V ZR 130/94, 29 September 1995 [Beatson and Schrage (trs) (n 10) 448 – 9].

conditions based on performance (§812(1)) has priority over other conditions (which are thus subsidiary).⁸⁵ The primacy of the performance claim is primarily felt in respect of third party enrichment cases, where the claimant has enriched the defendant pursuant to the claimant's contract with a third party. Subsidiary denies a claim against the defendant in such situations,⁸⁶ because the claim should be for undue payment against the third party.⁸⁷ 'If the enriched person has received a benefit as a result of another's performance, a condition which is not based on performance cannot found a claim in relation to that enrichment – even for a third party who is seeking to recover the benefit from its recipient.'⁸⁸ The particulars of this rule are, however, controversial in many respects.⁸⁹

Enrichment claims in English law are generally not considered to be subsidiary.⁹⁰ Restitution may be claimed concurrently with another claim, such as a claim in tort.⁹¹ The practical limitation is, like German law, that 'satisfaction of more than one claim is not permitted where it would produce double recovery.'⁹² If both claims are successful, election between claims is made at judgment.⁹³ English law, however, does not need to rely on subsidiarity to limit enrichment claims from encroaching on other areas of law. Such limitation is instead inherent in the unjust factors approach, which restricts operation of English unjustified enrichment law to particular factual circumstances.

2. *Chapter 7 of Book VII*

7:102: Concurrent obligations

- (1) Where the disadvantaged person has both:
 - (a) a claim under this Book for reversal of an unjustified enrichment; and
 - (b) (i) a claim for reparation for the disadvantage (whether

⁸⁵ Bundesgerichtshof [German Federal Court of Justice], VII ZR 85/69, 27 May 1971. See generally Beatson and Schrage (n 10) 457.

⁸⁶ Smith (n 6) 619; Zimmermann (n 2) 420.

⁸⁷ Interestingly, the situation in *Boudier* was a third party enrichment case that would be denied under this principle.

⁸⁸ Von Barr and Swann (n 6) para 5.

⁸⁹ *ibid* para 5.

⁹⁰ Dickson (n 10) 105.

⁹¹ *Henderson v Merrett Syndicates Ltd* [1994] UKHL 5, [1995] 2 AC 145, 196 (Lord Goff).

⁹² Burrows and others (n 33) 5 [s 1(4)].

⁹³ *United Australia Ltd v Barclays Bank Ltd* [1941] 1 AC 1 (HL) 30 (Lord Atkin).

against the enriched person or a third party); or
 (ii) a right to recover under other rules of private law
 as a result of the unjustified enrichment,

the satisfaction of one of the claims reduces the other claim by the same amount.

Clearly, Chapter 7 does not consider the enrichment claim to be subsidiary to any other claim. Instead, there is free concurrence of actions between the enrichment claims and other claims.⁹⁴ The result of this, as the drafters of Book VII note, is that Book VII does not conceptualise unjustified enrichment as a ‘merely subsidiary field of law’ but rather as a separate and complete component of the law of obligations.⁹⁵

Analogising art 7:102 to the law of the comparative jurisdictions clearly fails in respect of France and Germany. Unlike France, there is no mention of the distinction between the availability of claims in law or in fact. Unlike Germany, there is no primacy of certain enrichment claims.⁹⁶ The English approach, however, fits with the clear and precise provisions of Chapter 7, as does the modern English understanding of unjustified enrichment as part of the law of obligations.⁹⁷ It therefore appears that Chapter 7 is predominantly English in conceptual origin.

3. *Discussion*

Why should a claimant not have a free choice between claims under contract, tort, and unjustified enrichment? Indeed, many advantages flow from Book VII’s adoption of the English approach to subsidiarity. On a conceptual level, the subsidiarity of the enrichment claim can be criticised on the grounds that imbuing ‘another remedy with the force to exclude the action for enrichment ... amount[s] to declaring the enrichment justified, as soon as another legal remedy is available.’⁹⁸ This is akin to the position taken in France, where subsidiarity is defended on the grounds that whoever has another action available in law cannot have suffered the necessary ‘appauverissement’.⁹⁹ As Zimmermann notes, ‘[t]his argument is not convincing, since it could equally be argued, the other way round, that someone who has an enrichment action cannot be said to have suffered

⁹⁴ Jan Smits, ‘A European Law on Unjustified Enrichment?’ (n 2) 158.

⁹⁵ Von Barr and Swann (n 6) 92.

⁹⁶ Third party claims are dealt with pursuant to art 2:102 of Book VII.

⁹⁷ *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] UKHL 7, [1999] 1 AC 221, 227 (Lord Steyn).

⁹⁸ Beatson and Schrage (n 10) 464.

⁹⁹ *ibid* 457.

damages.¹⁰⁰

However, by not regulating the enrichment claim to subsidiary status, Book VII once again sets itself against recent EU case law. The Court of First Instance in *Masdar* held that the enrichment claim is available ‘only in the alternative, that is to say where the injured party has no other action available to obtain what it is owed.’¹⁰¹ The similarities of this conception with that displayed in the French case of *Clayette* are clear. In civilian jurisdictions concurrence between an enrichment claim and all other claims ‘is often seen as a possible threat to other fields of private law because it may undermine the coherent structure of this domain: if the enrichment claims is freely available, it may mean that the law of contract and tort are circumvented by parties turning to an enrichment claim instead.’¹⁰² Thus the argument for subsidiarity is that it protects ‘the technical structure of the law from the disorder which would result from allowing more than one remedy on the same set of facts.’¹⁰³ Departure from this approach, as expressed in *Masdar* and *Clayette*, may result in disorder. For example, Smits argues that the law of unjust enrichment does not rest on a coherent principle, ‘but on the need in disparate cases to fill the gaps left by other branches of the law.’¹⁰⁴ Thus, by making the enrichment claim concurrently available without first unifying every other area of private law, the gaps to be filled by unjustified enrichment law are unclear. The common rejoinder to such objections is, as Nicholas notes, to cite the English and German jurisdictions, both without apparent disorder.¹⁰⁵

More generally, arguments concerning subsidiarity raise a long running debate about the place of unjustified enrichment in the law of obligations. Atiyah, for example, argues that unjustified enrichment should not be elevated to a separate legal subject.¹⁰⁶ Rather, it should be viewed as a principle running through several existing subjects such as property law, tort law and, most significantly, contract law.¹⁰⁷ On the other hand, Birks famously argued that the entirety of private law can be condensed to four

¹⁰⁰ Zimmermann (n 2) 420.

¹⁰¹ Case T-333/03 *Masdar (UK) Ltd v Commission of the European Communities* [2006] ECR II-4377, para 97.

¹⁰² Smits, ‘A European Law on Unjustified Enrichment?’ (n 2) 158.

¹⁰³ Beatson and Schrage (n 10) 439.

¹⁰⁴ Smits, ‘A European Law on Unjustified Enrichment?’ (n 2) 156; Smits and Mak (n 8) 256.

¹⁰⁵ Barry Nicholas, cited in Beatson and Schrage (n 10) 438.

¹⁰⁶ Patrick Atiyah, cited in Dickson (n 10) 109.

¹⁰⁷ *ibid.*

headings: wrongs, consent, unjustified enrichment and ‘other’.¹⁰⁸ The concurrent liability of Chapter 7 aligns with this Birksian taxonomy, and means that, as Lord Steyn noted in *Banque Financière de la Cité v Parc (Battersea) Ltd*, unjustified enrichment ‘ranks next to contract and tort as part of the law of obligations [and a] independent source of rights and obligations.’¹⁰⁹ But how does unjustified enrichment sit alongside contract and tort? Like tort, unjustified enrichment effects corrective justice, imposed by law.¹¹⁰ Unlike tort, however, an enrichment claim is not predicated on wrongdoing,¹¹¹ and although enrichment claims most commonly arise in the ‘aftermath of a failed agreement,’ it is not a sub-set of contract.¹¹² In this respect, unjustified enrichment is *sui generis*, arising through neither consensus nor fault. The boundaries, therefore, of unjustified enrichment law are likely to remain a source of contention in both common law and civilian jurisdictions.

Ultimately, the degree to which the enrichment claim is subsidiary appears to depend on the approach taken to the concept of unjustified enrichment: Is it a vague principle of justice? Or is it a category of law?¹¹³ Arguably, this question cannot be answered through imposition, nor through consensus, as it appears too fundamental, if not insurmountable. In this respect, it seems that the drafters of Book VII may have done better to adopt the provision specified for public law claims:

7:103: Public law claims

This Book does not determine whether it applies to enrichments which a person or body obtains or confers in the exercise of public law functions.

Such a provision leaves the subsidiarity issue to be determined by the national jurisdictions. By doing so, the drafters could have better achieved their goal of presenting the DCFR as a ‘toolbox’ from which model rules, and arguments, can be drawn.

IV. THE WAY FORWARD

This penultimate section first discusses how the differences in a legal system’s ‘style’¹¹⁴ may have caused the divergent development of unjustified

¹⁰⁸ See generally Birks (n 35).

¹⁰⁹ [1999] 1 AC 221, 227.

¹¹⁰ Beatson and Eltjo Schrage (n 10) 3.

¹¹¹ Birks, *Six Centennial Lectures* (n 3) 2.

¹¹² Dickson (n 10) 103.

¹¹³ Edelman (n 3).

¹¹⁴ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*

enrichment across Europe. The discussion then moves to potential uses of Book VII that are not hampered by the fundamental differences found between the legal systems of Europe.

Following Zweigert and Kötz, a legal system's style is constituted by five elements: history, mode of legal thinking, institutions, sources of law, and ideology.¹¹⁵ In respect of unjustified enrichment, it appears that the second, fourth and fifth of these factors are causative of the differences between common law and civilian jurisdictions.¹¹⁶

The influence that differing modes of legal thinking have had on unjustified enrichment is clear. The unjust factors approach is the result of the common law's inductive mode of thinking. There is no overarching principle that describes every unjust factor, just as there is no overarching principle that explains common law contractual vitiating. This necessitates a process of analogising and differentiating. Equally, the civilian absence of legal basis approach is the product of the conceptual and deductive approach that characterises the civilian legal family.¹¹⁷

Consideration of sources of law provides insight into the differences between the common law and civil law, and within the civilian jurisdictions. The common law's doctrine of precedent means that once a critical mass of enrichments have been declared unjustified on a similar ground, this ground becomes law. The growth of a list of unjust factors is the inevitable result of this approach. The French action *de in rem verso* is grounded in equity, whereas the BGB regulates the German enrichment claim. The knowledge that they have arguably overstepped their authority under the civilian system may be one reason why the Cour de cassation has limited the action *de in rem verso* to a strictly subsidiary and supplementary role.¹¹⁸

The influence of ideology is less clear. Vranken notes that ideology may be the 'least useful criterion when distinguishing between the civil law and the common law' due to the common 'political, economic or even cultural foundations of the law in both legal families'.¹¹⁹ Unjustified enrichment law

(Clarendon Press 1998) 67.

¹¹⁵ *ibid.*

¹¹⁶ *cf* von Barr and Swann (n 60) para 8.

¹¹⁷ See generally Vranken (n 3) para 121.

¹¹⁸ *cf* *Code civil* [Civil Code] (France) art 5: 'Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.' ('It is prohibited for judges to decide cases in a general and regulatory manner.') [Vranken (tr) (n 3) 281].

¹¹⁹ Vranken (n 3) para 125.

may constitute a counterexample to this general truth. As aforementioned, the common law and the civil law make diametrically opposed assumptions regarded the status of enrichments. In the former, enrichments are *prima facie* justified. In the latter, enrichments are *prima facie* *unjustified*. This indicates the effect of nuanced economic ideologies on the assumptions underlying private law, and the tension in European private law between jurisdictions that may favour ‘commercial justice’, rather than individualist, policy models.¹²⁰ However, as Brulez notes, resolution of these tensions is the task of politicians, not academics.¹²¹

Generally, ‘European legislation in the field of private law will not be able to achieve the uniformity of law sought by the internal market agenda because national courts would inevitably develop divergent interpretations of the legislation.’¹²² In the case of the DCFR more generally, it is, as Jarvinen notes, ‘a hollow core that is to be fulfilled by specific policy approaches of each national legal system.’¹²³ In other words, the legal system employing the DCFR will inevitably be informed by its own history, language, culture and legal tradition.

Attempts at unifying unjustified enrichment law across civilian and common law systems will inevitably be hampered by these fundamental differences in style.¹²⁴ For example, in a precedential system utilising Book VII, case law would likely build up around 2:101(4), and 2:103. Over the years, new lists of unjust factors could arguably be founded on these provisions, thus degrading the unity that Book VII seeks. This is the inevitable outcome of the common law method and sources of law. Given these fundamental differences, even extending to the ideological level, it seems that, as Burrows warns, mixing the common law and civilian approaches ‘is a recipe for confusion and inconsistency’.¹²⁵ Indeed, the conflicting interpretations of Chapter 2 discussed in Section 2.2 of this paper aptly illustrate this issue.

Ultimately, it is clear that Book VII is a very different project from other recent non-legislative projects on unjustified enrichment law, such as the

¹²⁰ Brulez (n 16) 1047.

¹²¹ *ibid* 1048.

¹²² Collins (n 63) 921.

¹²³ Leo Järvinen, ‘Finland and the European Civil Code: A Case for Convergence?’ (2013) 2 *Euro Rev of Private L* 507, 553.

¹²⁴ The drafters of Book VII disagree: ‘[t]he existing differences in viewpoint within Europe relate predominantly to matters of terminology rather than outcomes which are desired as a matter of substance’: von Barr and Swann (n 6) para [6].

¹²⁵ Burrows, ‘The New Birksian Scheme’ (n 52) 50.

American Law Institute's *Restatement (Third) of Unjust Enrichment and Restitution* or Burrow's *A Restatement of the English Law of Unjust Enrichment*. Fundamentally, Book VII is not a restatement of the law, nor is it a compilation. Rather, it is a work of originality that represents a departure from what came before: a true codification of unjustified enrichment law.¹²⁶ Complicating the bold nature of the work is the semi-official status of the DCFR arising from the support and funding that it has received from the European Commission. As Zimmerman notes, '[i]f it were a purely academic document, the DCFR would have to be welcomed as an important contribution to an ongoing debate' yet 'the DCFR is intended to be a reference text' that 'secures its authority not *imperio rationis* but *ratione imperii*, i.e., by virtue of the European Community endorsing or adopting it.'

While the publication of a far-reaching codification with semi-official sanction is cause for concern, it is important that Zimmerman's concerns have not materialised. The DCFR is not considered a reference text; it currently remains a document of academic interest and debate. And in this respect, Book VII can play a pivotal role in developing the common European legal science and culture that is required before a 'European civil code' is possible.¹²⁷ There are many interesting ways in which unjustified enrichment bridges and blurs the traditional divisions between European jurisdictions. For example, while it may be generally true that 'the common law is the law of the judges, [while] the civil law is the law of the law professors',¹²⁸ in respect of unjustified enrichment the situation appears to be reversed. In England the contribution of scholars such as Birks, Burrows and Chambers to the English law of unjustified enrichment arguably overshadows that of English judges. Conversely, in France it was the judges of the *Cour de cassation* who derived the concept of unjustified enrichment as a '*principe d'équité*', independent of the *Code civil*.¹²⁹

In light of these unique perspectives that unjustified enrichment law provides, the way forward for Book VII, or the DCFR more generally, may lie in its pedagogical uses. As Vranken notes, 'comparativism inevitably

¹²⁶ 'In reality, a source of inspiration should offer model rules that can be easily transposed into existing jurisdictions. The way in which Book VII is now drafted makes this very difficult: any other solution but to accept the set of rules as a whole seems not feasible': Smits and Mak (n 8) 261.

¹²⁷ Järvinen (n 123) 569.

¹²⁸ Vranken (n 3) para 423.

¹²⁹ The analogy is not perfect: in Germany 'the writings of von Savigny proved largely instrumental in persuading the drafters of the *BGB* to deal with unjust enrichment (*ungerechtfertigte Bereicherung*) in general terms': Vranken (n 3) para 505.

leads to a better understanding of foreign legal systems, but it also induces a deeper understanding of the law domestically.’¹³⁰ Comparison of a national unjustified enrichment law with Book VII is particularly illustrative of the myriad new ways that an old principle can be expressed in law, and the manner in which unjustified enrichment may be subsumed by, or separate from, the law of contract. Further, comparison of Book VII with Burrow’s *English Restatement* is a most pertinent example of the different legal superstructures that arise from the deductive civilian method and the inductive common law. In this respect, Book VII is a welcome, and in light of stark differences outlined above, courageous contribution to legal education that can further the European, rather than national, study of the law of unjustified enrichment.¹³¹

V. CONCLUSION

The conceptual origins of Book VII have been identified as predominantly German and English; the advantages and disadvantages of this approach have been discussed. In light of these findings, the penultimate section canvassed some causes for the divergent development of unjustified enrichment across Europe, and posited that the pedagogical value of Book VII may be, at present, its strongest attribute. These conclusions are tempered, however, by the limitations that are inherent in the methodology employed in this paper. Only three EU jurisdictions have been detailed; only two provisions of Book VII compared: only the ‘skeleton’ of unjustified enrichment has been discussed. Nonetheless, as Birks memorably writes, ‘a skeleton is not a body, but a body without a skeleton is just a heap on the floor... a heap is hopeless, [but] a skeleton is not. The flesh can be put back on.’¹³² Putting the ‘flesh’ on this topic would require, inter alia, comparison of the defences available in the national jurisdictions and under Book VII. Issues of causation and attribution would have to be explored, and the comparative jurisdictions extended to include more recent codifications, such as the Dutch *Burgerlijk Wetboek* or the Estonian *Võlaõiguseadus*. While such tasks are beyond the scope of this paper, they are surely worthy of future research.

¹³⁰ *ibid.*

¹³¹ cf Zimmerman (n 59) 496, 512.

¹³² Birks, *Six Centennial Lectures* (n 3) 1.

IN DEFENCE OF DEFENCE RIGHTS: THE NEED FOR COMMON RULES OF CRIMINAL PROCEDURE IN THE EUROPEAN UNION

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The phenomenon of globalization and the expansion of EU mobility rights have been a catalyst for cross-border crime and a driving force for Member State cooperation in the field of criminal law. This paper argues broadly that EU mechanisms which facilitate Member State cooperation in criminal investigations and prosecutions have problematic consequences for EU citizens and the functioning of the EU as an independent legal order. A comprehensive approach to criminal justice that balances the need to cooperate in combating crime and the need to respect the defence rights of suspects is necessary. In particular, for EU defence rights to be practical and effective, EU law must buttress the right of access to legal counsel and legal aid.

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I. INTRODUCTION

Imagine you are a citizen of the European Union (the ‘EU’) who travels to France, a neighbouring Member State, to participate in a peaceful protest against global warming. While exercising your EU-wide rights to freedom of movement¹, expression² and assembly³ a riot breaks out. Despite your peaceful demeanour, the police arrest you, along with everyone else who appears to be a protester. Communicating with the police is a challenge because you do not speak French. You are unable to obtain information on

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¹ Charter of Fundamental Rights of the European Union [2010] OJ C83/389 (EU Charter), art 45.

² *ibid*, art 11.

³ *ibid*, art 12.

the charges against you or on how long you will be in police custody. The police ask you questions without providing you with an interpretation or an opportunity to contact a lawyer. What are your options? Can you expect to enjoy the same defence rights that apply upon arrest in your country of nationality or residence? Do you have a right to be informed of the reasons for your detention in a language you understand? Do you have a right to legal counsel before participating in police interrogations? Do you have a right to free legal assistance if you cannot afford a lawyer?

Laws recently implemented by the EU address only some of these questions. The phenomenon of globalization and the expansion of EU mobility rights have been a catalyst for cross-border crime and a driving force for Member State cooperation in the field of criminal law. In the past decade, legislative developments in the EU have established several mechanisms that facilitate Member State cooperation with a view to enhancing security through the prevention and combating of cross-border crime. Such mechanisms also aim to enhance accountability within the EU by preventing persons with criminal charges or convictions, in a particular Member State, to escape justice by fleeing to another Member State. Member States acknowledge that defence rights are foundational to the development of the EU as an area of freedom, security and justice; however, the legal framework for defence rights at the EU level remains inadequate.

This paper argues broadly that EU mechanisms currently available to facilitate Member State cooperation in criminal investigations and prosecutions have problematic consequences for EU citizens and the functioning of the EU as an independent legal order. A comprehensive approach to criminal justice that balances the need to cooperate in combating crime and the need to respect fundamental rights is necessary. In particular, for EU rights to be practical and effective, the EU must buttress the right of access to legal counsel and legal aid. Defence rights, in the context of this paper, refer to rights that are necessary for criminal processes to be fair and just. This includes the right to a fair trial, the right against self-incrimination, the right to be informed of the reasons of arrest or detention, the right to remain silent and the right of access to legal counsel. Criminal proceedings refer broadly to all stages of the criminal justice process, including early pre-trial investigations by police.

II. GLOBALIZATION AND MOBILITY: FUEL FOR CROSS-BORDER CRIME

Globalization is a phenomenon that is generally understood as the

‘growing interconnectedness of the nations of the world’.⁴ An example of globalization is the ever-increasing openness in trade and movement of people, goods, services, and communication since the end of the Cold War. By-products of this openness and mobility include opportunities for serious cross-border crime and the international mobility of criminals.⁵ The intensity of contemporary migrant flows makes it difficult for Member State authorities to identify irregular migrants and the perpetrators of serious organized criminality, such as human trafficking, at external EU border controls.⁶ Since the development of ‘wide-body jumbo jets’ and airline deregulation in the 1970s, the number of air passengers worldwide has risen at a rate of approximately 5% per year and airfares have significantly decreased.⁷ This increase in the capacity and accessibility of air travel, in conjunction with EU policies that break down internal barriers to the movement of people, has contributed to a rise in organized criminal activity, such as human trafficking.⁸ Traffickers transport victims from their country of origin directly to destination countries using low cost airlines.⁹ The abolition of checks at internal borders in the EU with the Schengen *acquis* reduces the chance of detecting such criminal activity.¹⁰

Member States recognize human trafficking is a serious issue.¹¹ EU citizens who fall victim to human trafficking suffer grave human rights abuses. Human trafficking also poses serious security threats to Member States and the EU through links to organized crime, drug trafficking, corruption and terrorism. Specifically, criminal groups use the proceeds of human trafficking to fund and recruit people to engage in other criminal activities,

⁴ United Nations Office on Drugs and Crime, ‘The Globalization of Crime: A Transnational Organized Crime Threat Assessment’ (United Nations 2010) 29, <http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf> accessed 21 December 2013.

⁵ EUROPOL, ‘EU Serious and Organized Crime Threat Assessment (SOCTA) 2013’ (European Police Office 2013) <<https://www.europol.europa.eu/sites/default/files/publications/socta2013.pdf>> accessed 21 December 2013.

⁶ UNODC, ‘The Globalization of Crime’ (n 4) 29.

⁷ *ibid* 30.

⁸ EUROPOL, ‘EU Serious and Organized Crime Threat Assessment’ (n 5) 16.

⁹ EUROPOL, ‘Knowledge Product: Trafficking in Human Beings in the European Union’ (European Police Office 2011) 7.

¹⁰ EUROPOL, ‘EU Serious and Organized Crime Threat Assessment’ (n 5) 16.

¹¹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1 (HT Directive).

such as terrorism.¹² The United Nations estimates that human trafficking generates ‘tens of billions of dollars in profits for criminals each year’.¹³

Like air travel, transport by sea has rapidly expanded in recent years in ways that facilitate serious organized criminality. According to the UNODC, between 1996 and 2007, the volume of goods transported worldwide increased from roughly ‘332 million tons to 828 million tons’.¹⁴ This sharp increase in trade facilitates the flow of illicit drugs and sub-standard counterfeit goods.¹⁵ ‘Violence, public health issues, a high number of deaths and feelings of insecurity are all linked to the trade in drugs’¹⁶ and counterfeit goods pose health and safety risks for consumers.¹⁷

Communications technology has also rapidly developed, creating novel opportunities for cross-border crime. Notably, the Internet provides a global marketplace for illicit activities while allowing unprecedented anonymity. This has revolutionized traditional crimes such as child pornography and sexual exploitation.¹⁸ Through the Internet, criminals are able to target victims remotely, anywhere in the world, and obscure offences by concealing their real identity and important personal characteristics, such as age.¹⁹

III. CROSS-BORDER CONSENSUS: TRANSNATIONAL CRIME NECESSITATES A TRANSNATIONAL RESPONSE

The phenomenon of globalization and the implementation of EU mobility rights have intensified security concerns and fuelled Member State

¹² EUROPOL, ‘EU Terrorism Situation and Trend Report’ (European Police Office 2013) 11, 18 and 29 <https://www.europol.europa.eu/sites/default/files/publications/europol_tesat2013_lr_o.pdf> accessed 21 December 2013.

¹³ ‘Human Trafficking FAQs’ (UNODC, 2013) <<http://www.unodc.org/unodc/en/human-trafficking/faqs.html>> accessed 21 December 2013.

¹⁴ UNODC, ‘The Globalization of Crime’ (n 4) 30.

¹⁵ EUROPOL, ‘EU Serious and Organized Crime Threat Assessment’ (n 5) 22.

¹⁶ *ibid* 19.

¹⁷ *ibid* 22.

¹⁸ UNODC, ‘The Globalization of Crime’ (n 4) 31.

¹⁹ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ L 335/1 (Directive on sexual abuse and exploitation of children), preamble recitals 3 and 19. See also EUROPOL, ‘EU Serious and Organized Crime Threat Assessment’ (n 5) 7, 15 – 16.

cooperation in criminal law.²⁰ This is evident in a series of EU communications, action plans and legislative developments that articulate a commitment to strengthening the EU as an area of justice, freedom and security – that is, an area in which the free movement of persons is ‘assured in conjunction with appropriate measures relating to the prevention and combating of crime’.²¹ With a view to militating against the deleterious effects of mobility rights already in place to facilitate the development of the EU as an economic union, the Maastricht Treaty brought aspects of criminal law within the ambit of EU power.²² The Treaty of Amsterdam explicitly established the EU as an area of freedom, security and justice.²³

The Tampere Conclusions illuminate that a fundamental purpose of the Treaty of Amsterdam was to ensure that EU citizens could enjoy the right to move freely within the EU in conditions of security and justice:

The enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own. Criminals must find no ways of exploiting differences in the judicial systems of Member States. Judgments and decisions should be respected and enforced throughout the [EU], while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of Member States must be achieved.²⁴

With a view to achieving the objective of developing the EU as an area of

²⁰ Valentina Bazzocchi, ‘The European Charter of Fundamental Rights and the Area of Freedom, Security and Justice’ in Giacomo Di Federico (eds), *The EU Charter of Fundamental Rights From Declaration to Binding Instrument* (Springer 2011) 191; See also Sandra Lavenex and William Wallace, ‘Justice and Home Affairs’, in Helen Wallace, William Wallace and Mark Pollack (eds), *Policy Making in the European Union* (OUP 2005) 460–461.

²¹ Consolidated Versions of the Treaty of the European Union [2002] OJ C325 (TEU), art 2; Council Presidency Conclusions Tampere European Council 15–16 October 1999 [1999] (Tampere Conclusions); Council The Hague Programme: Strengthening Freedom, Security and Justice in the European Union 13 December 2004 [2004] OJ C53/1 (Hague Programme); Council The Stockholm Programme — An open and secure Europe serving and protecting citizens, 4 May 2010 [2010] OJ C115/01 (Stockholm Programme).

²² Treaty of the European Union [1993] OJ C191 (Maastricht Treaty), art K.I.(7) and (9).

²³ Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1 (Treaty of Amsterdam).

²⁴ Tampere Conclusions (n 21) para 5.

freedom, security and justice,²⁵ the Tampere Conclusions called on EU institutions and Member States to ‘reinforce the fight against serious organized and transnational crime’²⁶ and to step up co-operation between Member States when investigating,²⁷ prosecuting²⁸ and defining crime.²⁹

In response to the terrorist attacks in New York and Washington D.C. on 11th September 2001, and in Madrid on 11th March 2004, the Hague Programme reaffirmed the need to deepen police and judicial cooperation in order to address emerging security challenges, such as the threat of terrorism.³⁰ A few years later, in 2009, the Lisbon Treaty radically restructured the architecture of the EU in a way that brought criminal law under full EU control.³¹ Specifically, the Lisbon Treaty made criminal law an area of shared competence between Member States and the EU.³² As such, to the extent that the EU exercises its competence in a particular area of criminal law Member States will lose competence.³³ The Lisbon Treaty also repealed Article 34 of the TEU, which previously blocked the application of direct effect to Framework Decisions on police and judicial cooperation in criminal matters.³⁴ Moreover, the Lisbon Treaty explicitly gave the EU competence to establish common rules of criminal procedure through the implementation of directives.³⁵ Accordingly, under the contemporary legal framework, the EU has clear power to act in relation to criminal law and procedure. Any EU law that relates to criminal law or procedure and satisfies the conditions for direct effect will be immediately binding on Member States, without further formality, and be available for individuals to invoke in national courts.³⁶

IV. A PREDOMINATELY PROSECUTORIAL AGENDA

While a general intention to balance the need to safeguard security with the need to respect fundamental rights appears in all EU communications,

²⁵ *ibid* introduction.

²⁶ *ibid* paras 40 – 50.

²⁷ *ibid* paras 43 – 45, 49.

²⁸ *ibid* paras 46, 49.

²⁹ *ibid* para 48.

³⁰ Hague Programme (n 21).

³¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01 (Lisbon Treaty).

³² Treaty on the Functioning of the European Union (Consolidated version 2012) OJ C 326/01 (TFEU), art 4(2)(j).

³³ *ibid* art 2(2).

³⁴ Treaty of Amsterdam (n 23), art 34.

³⁵ TFEU (n 32), art 82(2).

³⁶ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR I.

action plans and legislative developments that relate to criminal law, the operation of the EU criminal justice mechanisms reveal a focus on security and a predominately prosecutorial agenda. The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (the 'EAW Framework Decision') provides the strongest example.³⁷ The EAW Framework Decision replaced the extradition system with the objective of increasing efficiency in conducting criminal prosecutions and executing custodial sentences and detention orders.³⁸ The EAW Framework Decision explicitly affirms the need to ensure respect for defence rights,³⁹ yet it removed protective barriers built into the former extradition system with a view to introducing 'speed and a considerable element of automaticity'.⁴⁰ A report by the Commission illuminates several shortcomings of the EAW system with respect to fundamental rights, including:

[N]o entitlement to legal representation in the issuing state during the surrender proceedings in the executing state; detention conditions in some Member States combined with sometimes lengthy pre-trial detention for surrendered persons and the non-uniform application of a proportionality check by issuing states, resulting in requests for surrender for relatively minor offences that,

³⁷ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1 (EAW Framework Decision), Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decision 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909 JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decision rendered in the absence of the person concerned at the trial [2009] OJ L81/24.

³⁸ *ibid* EAW Framework Decision, art 1(1).

³⁹ *ibid* EAW Framework Decision, art 1(3).

⁴⁰ Debbie Sayers, 'The European Investigation Order: Travelling without a 'roadmap'' (2011) Centre for European Policy Studies, 3 <<http://www.ceps.be/book/european-investigation-order-travelling-without-roadmap>> accessed 17 December 2013; see also, EAW Framework Decision (n 37), Preamble paras (1) and (5). See Also Commission, 'Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States' COM (2011) 175 final, 3: Prior to the introduction of the EAW system, the average surrender time of requested persons was on average one-year. Under the EAW system, between 2005 and 2009, the average surrender time of a requested person who consented to their surrender was 14 – 17 days and the average surrender time for those who did not consent was 48 days. Arguably, this efficiency suggests the EAW is an operational success. However, efficiency must not come at the expense of respect for the fundamental rights of EU citizens.

in the absence of a proportionality check in the executing state, must be executed.⁴¹

The Court of Justice of the European Union (the ‘CJEU’) has upheld the legality of the EAW Framework Decision and confirmed that Member States are obliged to act on an EAW,⁴² yet its transposition into the national law of Member States remains controversial with respect to fundamental rights.⁴³

In addition to the EAW, a series of legislative developments facilitate Member State cooperation with respect to storing and gathering of data, information, intelligence and evidence for criminal investigations.⁴⁴ To

⁴¹ *ibid* 6.

⁴² Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633, paras 52-53.

⁴³ Craig and de Burca (n 36) 950.

⁴⁴ See Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [2003] OJ L196/45 (Framework Decision on Freezing of Property). To prevent the destruction, transformation, moving, transfer or disposal of evidence, this framework decision establishes rules to facilitate, and in certain cases mandate, Member State cooperation in the recognition and execution of freezing orders in its territory issued by a judicial authority of another Member State. See also, Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54 (Directive on data retention): As a reaction to the acts of terrorisms in Madrid in 2004 and London in 2005, this Directive mandates blanket retention of non-content traffic and location communications data for six months to two years - to ensure that the data is available for the purpose of the investigation, detention and prosecution of serious crime. See also, Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L386/89: This decision establishes rules to facilitate and in certain circumstances mandate the exchange of ‘existing information and intelligence effectively and expeditiously for the purpose of conducting criminal investigations or criminal intelligence operations’. Interestingly, a proportionality check is built into the article to ensure only information and intelligence deemed ‘relevant and necessary’ must be provided. Refer also to Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/1: This decision (the Prüm Decision) requires Member States to establish national DNA analysis files and fingerprint identification systems for the purpose of criminal investigations. See also, Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the Purpose of Obtaining Objects, Documents and Data for Use in Proceedings in Criminal Matters [2008] OJ L350/72: This decision provides a tool for Member

further simplify, integrate and expand Member State cooperation in obtaining evidence for criminal cases with cross-border dimensions, the European Parliament and the Council have proposed the implementation of a European Investigation Order (the 'EIO').⁴⁵ The EIO would

replace all the existing instruments in this area, including the Framework Decision on the European evidence warrant, covering as far as possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal⁴⁶

without adequate contemplation of ramifications for defence rights.

The EIO is clearly a prosecution mechanism that prioritizes the need for efficiency in criminal processes over the need to promote defence rights.⁴⁷ While the EIO may effectively address the need for Member State authorities to access relevant evidence in a timely way, it 'provides no competence for the defence to apply for evidence'.⁴⁸ Further police cooperation in criminal investigations can occur under the EIO without the knowledge of the suspect and largely in the absence of judicial oversight or control.⁴⁹ Furthermore, many specific protections necessary to ensure the fairness of criminal proceedings are missing, such as guarantees that witnesses and suspects receive access to legal advice and that interviews are tape-recorded.⁵⁰

The need for EU-wide 'minimum standards' of procedural law to enhance defence rights has been anticipated since the Tampere Conclusions in 1999,⁵¹ yet EU legislative developments fail to provide effective and practical defence rights. In 2000, the Commission recommended the adoption of 'conterminously protective measures' to balance cooperation in criminal processes, including 'mechanisms for safeguarding the rights of [...] suspects' and 'the definition of common minimum standards necessary

States to obtain objects, documents and data for use in certain criminal proceedings.

⁴⁵ Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal, [2010] OJ C165/22.

⁴⁶ *ibid* preamble and para 6.

⁴⁷ *ibid* preamble and paras 11-13.

⁴⁸ Sayers (n 40) 8.

⁴⁹ *ibid*.

⁵⁰ *ibid* 16.

⁵¹ Tampere Conclusions (n 21) para 37.

to facilitate the application of the principle of mutual recognition'.⁵² Despite such recommendations, the legislative agenda thus far has developed largely without the establishment of minimum standards or protective measures. While the recent implementation of directives that affirm the right to interpretation and translation and the right to information in criminal proceedings represent crucial first steps, more comprehensive measures are necessary. In particular, common minimum standards with respect to the right to legal advice and legal aid are essential to the development of the EU as an area of freedom, justice and security.

V. MUTUAL RECOGNITION: THE CORNERSTONE OF COOPERATION

As a result of difficulty in reaching political consensus on common rules of criminal law, the principle of mutual recognition is the cornerstone of police and judicial cooperation between Member States. Mutual recognition provides a procedural tool for Member State cooperation without requiring Member States to harmonize their substantive law.⁵³ For example, the EAW system requires Member States to recognize and execute arrest warrants issued by other Member States without establishing common definitions for criminal offences.⁵⁴ The EAW operates according to definitions set out in the law of the issuing Member State.⁵⁵ Similarly, the Directive on data retention establishes EU-wide obligations to retain certain traffic and location communications data for the purpose of the investigation, detention and prosecution of serious crime, as defined by Member States in national law.⁵⁶ Member States also retain the power to define the procedures and conditions for gaining access to retained data.⁵⁷ More recent directives reflect an effort to establish common definitions and penalties for certain serious crimes – human trafficking and sexual abuse of children – which are particularly sensational, pose security threats and cause egregious harm and necessitate unique protections for victims.⁵⁸

Despite a trend towards deeper cooperation in the area of criminal law, Member States remain hesitant to harmonize rules of criminal procedure

⁵² European Commission Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters [2001] OJ C12/10, 10, parameters 3 and 4.

⁵³ Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Law Matters in the European Union' (2006) 43 CML Rev 1277, 1279.

⁵⁴ *ibid* 1283.

⁵⁵ EAW Framework decision, arts 2(1) and (2).

⁵⁶ Directive on data retention, art 1.

⁵⁷ *ibid*, art 4.

⁵⁸ HT Directive; Directive on Sexual Abuse and Exploitation of Children.

as a result of a fear that harmonization will bulldoze important differences between the adversarial and inquisitorial criminal justice traditions.⁵⁹ Under the adversarial model, criminal proceedings are ‘built around a contest between parties’ during which defence lawyers play an active role in ensuring protection for suspects’ rights.⁶⁰ Conversely, in the inquisitorial model, criminal proceedings are built around an active investigation by State authorities whereby a particular judicial authority supervises the treatment of suspects and defence lawyers play a subordinate role.⁶¹ Member States with inquisitorial traditions view recommendations to implement common rules of criminal procedure as an imposition of the adversarial tradition across Europe.⁶² This view stems from a controversial assumption that adversarial and inquisitorial traditions represent irreconcilable approaches to criminal justice.

An alternative view posits that legal traditions are evolving and overlapping entities that continually rub against each other and borrow values, beliefs and practices:⁶³

Rather than classifying contemporary jurisdictions in Continental Europe as being inquisitorial in attitudes and practices, it would be more accurate to say that they have been primarily ‘shaped by’ the ‘inquisitorial tradition’ [...] Contemporary practice is ‘mixed’ or ‘moderately inquisitorial’.⁶⁴

According to this view, legal traditions are best understood as sites of ‘ideological conflict’ that are ‘invented and reinvented through debate and dialogue.’⁶⁵ The fluidity of information across jurisdictional borders in Europe makes limiting and controlling debate between and within legal traditions impossible. Arguably, the ‘adversarial’ and ‘inquisitorial’ binary is ‘vague’ and ‘inconsequent’ because jurisdictions combine features of both traditions.⁶⁶

⁵⁹ Steward Field, ‘Fair Trials and Procedural Tradition in Europe’ [2009] 29:2 OJLS 365, 368.

⁶⁰ *ibid.*

⁶¹ *ibid* 368.

⁶² Jacqueline Hodgson, ‘EU Criminal Justice: The Challenge of Due Process Rights within a Framework of Mutual Recognition’ (2012) 37 NCJ Intl L & COM Reg 307, 309.

⁶³ Patrick Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2008).

⁶⁴ Field (n 59) 371.

⁶⁵ *ibid* 370.

⁶⁶ Sarah Summers, *Fair trials: the European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing 2007), 5.

Whether defence rights are unique to adversarial systems or a component of a system of universal rights that transcends all models of criminal justice remains a contentious issue.⁶⁷ A series of cases illustrate that the European Court of Human Rights (the 'ECtHR') has adopted a view that a common set of defence rights emerge out of the constitutional traditions of the Council of Europe Member States.⁶⁸ Although Member States generally agree procedural fairness concepts, such as equality of arms and judicial impartiality, apply during the trial stage of criminal proceedings,⁶⁹ Member States dispute the importance and scope of the right to legal counsel in the early pre-trial investigation stages of criminal proceedings.⁷⁰ At the heart of this dispute is divergence in understandings of the role of the defence lawyer, prosecutor, and judge. In Member States with broadly adversarial systems, such as the United Kingdom, Ireland, Cyprus and Malta, the prosecution and defence lawyers are responsible for conducting investigations and presenting evidence to argue their case. Police interrogations may be tape-recorded and defence lawyers may be present, however, police officers are not typically subject to external supervision.⁷¹ In the absence of external supervision, the right to legal counsel provides a counter balance to the power inherently held by the State, which puts the defence at a disadvantage *vis-à-vis* the prosecution. Conversely, in Member States with broadly inquisitorial systems, such as France, Belgium, Greece, Germany and the Netherlands, defence lawyers play a subordinate and passive role during investigations as judges play an active role.⁷² Judicial authorities have overall responsibility for the investigation of both incriminating and exculpatory evidence. Arguably, this authority provides external supervision of police and protects the fundamental rights of suspects; therefore, the right to legal counsel is not essential to ensure a fair trial.⁷³ Judicial authority provides an alternative means to ensure that police did not use coercive tactics to obtain confessions.⁷⁴

VI. DEFENCE RIGHTS: ESSENTIAL TO THE EU LEGAL ORDER

Contemporary EU laws that facilitate Member State cooperation in the investigation and prosecution of cross border crimes rest on a problematic

⁶⁷ Hodgson (n 62) 311.

⁶⁸ Field (n 59) 368. See also description of cases below.

⁶⁹ *ibid*, 372 – 373.

⁷⁰ Jacqueline Hodgson, 'Safeguarding Suspects' Rights in Europe: A Comparative Perspective' (2011) 14 New Crim L Rev 611, 638.

⁷¹ *ibid* 636.

⁷² *ibid* 637.

⁷³ *ibid* 637.

⁷⁴ *ibid* 638.

assumption that all Member States act in compliance with the defence rights set out in the Charter and the ECHR. Throughout this section, it is important to keep in mind that the CJEU hears complaints of violations of EU law and its decisions bind Member States of the EU. The ECtHR hears petitions that allege violations of the ECHR and its decisions apply to the Member States of the Council of Europe but are not directly binding under EU law. The ECHR is not a legal instrument formally incorporated into EU law.⁷⁵ The CJEU recently affirmed that EU law ‘does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine conclusions to be drawn by a national court’ where the ECHR is in conflict with a rule of national law.⁷⁶ Nonetheless, the ECHR influences EU law⁷⁷ and CJEU competence to apply the ECHR, directly as EU law, is on the horizon.⁷⁸

The Charter explicitly sets out defence rights, which are binding on Member States when they are implementing EU law. Article 47 provides a ‘right to an effective remedy and to a fair trial’.⁷⁹ A fair trial requires a public hearing within a reasonable time by an independent and impartial tribunal previously established by law with the ‘possibility of being advised, defended and represented’.⁸⁰ Article 47 goes on to specify ‘legal aid shall be made available to those who lack sufficient resources’ where such aid is ‘necessary to ensure effective access to justice’.⁸¹ Article 48 guarantees respect for ‘the rights of the defence’ of all persons charged with a criminal offence.⁸² Article 51 limits the scope of application of the Charter to Member States ‘when they are implementing EU law’.⁸³

The implications of this limitation and the situations in which the Charter applies to ‘Member States’ (in)actions’ in the context of defence rights is unclear. Citing a series of CJEU case law, the Explanations on Article 51 of the Charter set out an expansive definition of the ‘requirement to respect fundamental rights’ as being ‘binding on Member States when they act in

⁷⁵ Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, [2013] (not yet reported) (*Akerberg*) para 44.

⁷⁶ *ibid.* See also Case C-571/10, *Servet Kamberaj v Istituto per L’Edilizia Sociale della Provincia Autonoma di Bolzano, Giunta della Provincia Autonoma di Boizano, Provincia Autonoma di Bolzano* [2012] ECR I-0000, para 62.

⁷⁷ TEU, art 6: The ECHR is a source of inspiration for the general principles of EU law; see EU Charter, art 52(3): ‘The CJEU must give provisions of the Charter modeled on provisions of the ECHR similar meaning’.

⁷⁸ TEU art 6(2): ‘The Lisbon Treaty mandates EU accession to the ECHR’.

⁷⁹ EU Charter, art 47.

⁸⁰ *ibid* art 47.

⁸¹ *ibid* art 47.

⁸² *ibid* art 48.

⁸³ *ibid* art 51(1).

the scope of Union law'.⁸⁴ The CJEU recently gave teeth to this expansive definition in the case of *Akerberg*.⁸⁵ However, *Akerberg* concerns the prohibition of double jeopardy – that is, punishing persons who have already been punished for the same act through different proceedings⁸⁶ – in the context of tax offences.⁸⁷ The extent to which the conclusions and the approach of the CJEU in *Akerberg* are generalizable and applicable in the context of defence rights set out under Article 47 and 48 of the Charter is not crystal-clear. A narrow reading of *Akerberg*, which limits its application to its specific facts, is possible.⁸⁸ On such a reading, the CJEU has 'plenty of room' to adopt a more restrictive approach when it irons out the meaning of 'implementing EU law' in future cases.⁸⁹ Consequently, the implementation of directives under Article 82(2) of the TFEU that explicitly require Member States to implement defence rights under EU law is necessary to ensure the effective and practical enforcement of Article 47 and 48 of the Charter.⁹⁰

Moreover, the extent to which the CJEU has jurisdiction to rule on and enforce minimum standards of criminal procedure remains unclear.⁹¹ Article 276 of the TFEU carves out an explicit limitation on CJEU jurisdiction with respect to oversight of police operations:

In exercising its powers regarding the provisions of Chapters 4 [Judicial cooperation in criminal matters] and 5 [Police cooperation] of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities

⁸⁴ Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/32 (Explanations) Article 51.

⁸⁵ *Akerberg* (n 75) para 19–22. See also John Morihn, 'Akerberg and Melloni: what the ECJ said, did and may have left open' (*Eutopia Law*, 14 March 2013) <<http://eutopialaw.com/2013/03/14/akerberg-and-melloni-what-the-ecj-said-did-and-may-have-left/>> accessed 17 December 2013.

⁸⁶ The prohibition of double jeopardy falls under EU Charter, art 4.

⁸⁷ *Akerberg* (n 75) para 14.

⁸⁸ Morihn (n 85).

⁸⁹ *ibid.*

⁹⁰ European Commission, 'Commission Staff Document Impact Assessment Accompanying the Proposal for a Directive on the European Parliament and of the Council on the Right of Access to a Lawyer and of Notification of Custody to a Third Person in Criminal Proceedings' [2011] SEC(2011) 687, 18 (Impact Assessment).

⁹¹ Ed Cape, Zaza Namoradze, Roger Smith and Taru Spronken, 'Effective Criminal Defence in Europe' (Intersentia 2010) 12.

incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.⁹²

The implementation of EU rules of criminal procedure under the rubric of Article 82(2) of the TFEU may indirectly or progressively permit the CJEU to play a role in safeguarding defence rights across Europe.⁹³

The ECtHR has jurisdiction to review the validity or proportionality of acts by police and other law-enforcement services when considering allegations that relate to defence rights, however, the enforcement mechanisms of the ECtHR are notoriously weak. The number of ECtHR orders not fully respected by Member States after more than five years grew by approximately 28% between 2010 and 2011.⁹⁴ The number of repetitive cases⁹⁵ and repeat violations⁹⁶ is also alarming and indicative of the systemic weakness of ECHR enforcement.

The enforcement mechanisms of the CJEU are stronger than those of the ECtHR. The Commission has authority to bring claims against Member States before the CJEU for failure to fulfill obligations under EU law, including any directives on defence rights. A finding that the laws of a particular Member State are in breach of EU law will require that Member State to bring its laws into compliance and the CJEU may impose financial penalties for failure to do so.⁹⁷ No similar mechanism exists to ensure compliance with the decisions of the ECtHR.

Moreover, the ECtHR is currently facing major challenges in managing its caseload. Long delays in delivering judgments - a result of the inability of the ECtHR to manage its 'ever-increasing wave of applications' - negatively affects the legitimacy of the Court.⁹⁸ The number of cases pending before the ECtHR in 2011 was 10,689, which represents an

⁹² TFEU, art 276.

⁹³ Hodgson (n 70) 614.

⁹⁴ Council of Europe, 'Execution of Strasbourg Court Judgments: Considerable Progress but Concern about Major Structural Problems' Press Release DCo42 (2012).

⁹⁵ Council of Europe, 'Supervision of the Execution of Judgment and Decision of the European Court of Human Rights' Annual Report 2011 (2012), 34 (Council of Europe Annual Report 2011).

⁹⁶ Ed Cape (n 91) 12.

⁹⁷ TFEU, art 260. See also Sonja Boelaert, 'European Union Courts' in Chiara Giorgetti (ed), *The rules, practice, and jurisprudence of international courts and tribunals* (Martinus Nijhoff 2012) at 424- 425.

⁹⁸ Kanstantsin Dzehtsiarou and Alan Greene, 'Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners' (2011) 12:10 German LJ 1708, 1709.

increase of roughly 8% compared to 2010.⁹⁹ While the CJEU has a special procedure to hear complaints on an urgent basis where the applicant is in custody, the ECtHR has no similar procedure.¹⁰⁰

An Impact Assessment by the European Commission explicitly raises the concern that the ECHR fails to guarantee adequate protection of defence rights:

Abstractly, one could assume that the existence of an ECtHR body of case-law which interprets the ECHR provisions may lead to progressive acceptance of those common standards by all Member States. However, reliance on decisions of the ECtHR (even when they constitute settled case-law, which may take years) at best promotes piecemeal and *ad hoc* pressure to reform national practice rather than a comprehensive and consistent development of EU-wide procedures to ensure compliance with fair trial rights.¹⁰¹

Defence rights are set out in Article 5 and 6 of the ECHR.¹⁰² Article 5 guarantees the right to liberty and security of person and prohibits unlawful detention and arrest.¹⁰³ Article 6 of the ECHR provides minimum rights for anyone charged with a criminal offence, which includes: the right to be informed promptly, in a language he or she understands and in detail, of the nature and cause of the accusation against him or her; to have adequate time and facilities to prepare his or her defence; to defend oneself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.¹⁰⁴

ECtHR jurisprudence significantly expands the rights guaranteed under Article 6 of the ECHR. For example, in 2008 the Grand Chamber of the ECtHR issued a ground breaking decision in the case of *Salduz v. Turkey*, which set a strong precedent that establishes the right to legal representation applies during pre-trial investigations.¹⁰⁵ The Court recognized the vulnerability of suspects to 'abusive coercion' during the investigation stage of criminal proceedings.¹⁰⁶ The Court went on to find

⁹⁹ Council of Europe Annual Report 2011 (n 95) 34.

¹⁰⁰ *ibid* 12.

¹⁰¹ Impact assessment (n 90) 19.

¹⁰² European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, Eur TS 5 (ECHR) arts 5 – 6.

¹⁰³ *ibid*, art 5.

¹⁰⁴ *ibid*, art 6.

¹⁰⁵ *Salduz v Turkey* App no 3691/02 (ECtHR, 27 November 2008)

¹⁰⁶ *ibid* para 53.

that this vulnerability threatens the fundamental right of suspects to a fair trial and ‘can only be properly compensated for by the assistance of a lawyer’.¹⁰⁷ When a European State fails to provide access to a lawyer at this early stage, the defence rights of the accused of suspect are ‘irretrievably prejudiced’¹⁰⁸ and the State may be found in violation of the ECHR, unless ‘compelling reasons’ justify the restriction on access to a lawyer.¹⁰⁹

The case law of the ECtHR highlights significant variance in the extent to which Member States comply with defence rights and diversity in the ways that Member States achieve compliance.¹¹⁰ In determining violations of Article 6 of the ECHR, the ECtHR accepts a ‘margin of appreciation’ - space to manoeuvre in structuring their justice systems - in order to respect the divergent legal traditions of Member States.¹¹¹ On several occasions, the ECtHR has observed that the positive obligations in Article 6 of the ECHR give Member States wide discretion with respect to the choice of the means to ensure respect for defence rights.¹¹² For example, in the context of the right to legal aid, the case of *Quaranta v. Switzerland* explicitly reiterates that Member States ‘enjoy considerable freedom in the choice of the means of ensuring that their legal system satisfies the requirements of Article 6.’¹¹³ The task of the ECtHR is ‘to determine whether the method chosen by them in this connection leads to results which, in the cases which come before it, are consistent with the requirements of the ECHR’.¹¹⁴

This variance in compliance with defence rights among Member States highlights the need to establish uniform minimum standards of criminal procedure to ensure practical and effective protection for the defence rights of EU citizens.¹¹⁵ The operation of the EAW directly exposes EU citizens to unfamiliar criminal processes:

¹⁰⁷ *ibid* para 54.

¹⁰⁸ *ibid*.

¹⁰⁹ *ibid* para 55.

¹¹⁰ For several examples see Dovydas Vitkauskas and Sian Lewis-Anthony, ‘Right to a Fair Trial under the European Convention on Human Rights (Article 6)’ (*Interights*, 2009) <<http://www.interights.org/document/106/index.html>> accessed 17 December 2013.

¹¹¹ Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP, 2006) 251.

¹¹² ‘The Margin of Appreciation’ (*The Lisbon Network, Council of Europe*) <http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp> accessed on 17 December 2013.

¹¹³ *Quaranta v. Switzerland* (1990) Series A No 205, paras 30 and 34 -35.

¹¹⁴ *ibid*.

¹¹⁵ Hodgson (n 70) 635.

By recognizing and executing a decision by another Member State, the guarantees of the criminal law of the executing Member State are challenged, as the limits of the criminal law become uncertain. This may lead to the worsening of the position of the individual... compromising well-established constitutional protection in the executing of State and thus challenge the relationship between the individual and the States created on the basis of citizenship and territoriality.¹¹⁶

Moreover, amalgamating diverse criminal proceedings, using a ‘mix-and-match’ approach disrupts procedural integrity and makes determinations of whether, overall, a particular person has experienced a violation of his or her defence rights complex and difficult to ascertain.¹¹⁷ In cases involving cross-border crime, information and evidence may be drawn from multiple Member States where procedural rules differ. In certain circumstances, the application of mutual recognition in criminal law effectively turns the original rationale of mutual recognition, born in the Single Market context, ‘upside down’ by making individuals the object rather than the subject of mobility rights.¹¹⁸ A fundamental purpose of mutual recognition in the context of the single market is to facilitate rights to free trade and movement, which promotes the health of the economy and access to employment, goods and services. A core purpose of mutual recognition in the criminal field is to limit freedom and restrict mobility in order to enhance accountability for cross-border crime. Essentially, ‘the basic point of difference’ between the single market and criminal law is that the single market ‘is interested in the distribution of well-being’ whereas ‘the business of criminal law is meting out suffering.’¹¹⁹

In addition to the having deleterious effects for particular persons, egregious violations of defence rights or simply variance in their scope and application erodes mutual trust between Member States and undercuts the functioning of the EU. Mutual trust among Member States is necessary for mutual recognition to function smoothly, particularly in the area of criminal law. The reality that diversity among systems undermines trust is demonstrated in the series of cases where the legality of the EAW was at issue.¹²⁰ Courts in Poland, Cyprus, Germany and Italy grappled with

¹¹⁶ Mitsilegas (n 53) 1288.

¹¹⁷ Hodgson (n 70) 619.

¹¹⁸ Steve Peers, ‘Mutual Recognition and Criminal Law: Has the Council Got It Wrong?’ (2004) 41:5 CML Rev 5, 24.

¹¹⁹ Nico Keijzer, ‘The Fate of the Dual Incrimination Requirement’, in Elspeth Guild and Luisa Marin (eds), *Still not Resolved? Constitutional Issues of the European Arrest Warrant* (Wolf Legal Publishers 2009) 72.

¹²⁰ Refer to the judgment of the Polish Constitutional Tribunal, P 01/05, 27 April

determining whether the European Framework Decision on the EAW conflicted with constitutionally entrenched procedural protections that apply in the context of extradition.¹²¹ In Germany, the majority of the Federal Constitutional Court found that the German legislature was to blame for not making adequate use of the margin of appreciation to transpose the EAW in a way that reconciles with the German Constitution.¹²² Courts in Cyprus and Poland ordered amendments to their respective constitutions to accommodate the EAW.

The CJEU has upheld the legality of the EAW and confirmed that Member States are 'in principle obliged to act on an EAW', yet the application of mutual recognition in the field of criminal law without uniform and adequate defence rights remains a contentious issue.¹²³ In *Advocaten voor de Werld VAW*, a reference for a preliminary ruling by the Arbitragehof in Belgium, the claimant alleged that Article 2(2) of the Framework Decision on the EAW was contrary to the principle of legality because it listed vague categories of 'undesirable conduct', rather than the particular legal definitions of offences, for which Member States could execute an EAW, irrespective of whether the particular offence for which the EAW was issued existed in their domestic law.¹²⁴ The CJEU found that Article 2(2) of the Framework Decision did not conflict with the principle of legality because it 'does not seek to harmonize the criminal offences' or their penalties. The offences 'continue to be matters determined by the law of the issuing Member State' which must 'respect fundamental rights and fundamental legal principles' enshrined in EU law.¹²⁵ This conclusion did not fully tackle the root of the claimant's argument or acknowledge the issue of variance in the extent to which and the ways in which Member States exercise respect for defence rights.

2005; Berg, 18 July 2005 2 BvR 2236/04; Bundesgesetzblatt Jahrgang 2006 Teil I n. 36, 25 Juli 2006; *Att-Gen of the Republic of Cyprus v Konstantinou* [2007] 3 CMLR 42; Decision of the Czech Constitutional Court, 3 May 2006, No. Pl. ÚS 66/04.

¹²¹ Oreste Pollicino, 'European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems' (2008) 9:10 German L J 1313, 1314; See also Andrew Sanger, 'Force of Circumstance: The European Arrest Warrant and Human Rights' (2010) 6 Democracy and Security 42.

¹²² *Judgment of the Second Senate of 18 July 2005*, 2 BvR 2236/04, 'European Arrest Warrant Act case', online (in English) at: <http://www.bverfg.de/en/decisions/rs20050718_2bvr223604en.html> accessed 17 December 2013.

¹²³ Craig and de Burca (n 36) 950.

¹²⁴ Case C-303/05 *Advocaten voor de Werld VZW v LEden van de Ministerraad* [2007] ECR I-3633, paras 52-53.

¹²⁵ *ibid.*

More recently, in the case of *Stefano Melloni v. Ministerio Fiscal*, a preliminary ruling from the Tribunal Constitucional (Spain), the CJEU found that a controversial provision of the EAW Framework Decision relating to the grounds for the non-execution of an EAW is compatible with the defence rights set out in the Charter. The request concerned the execution of an EAW issued against Mr. Melloni by Italian authorities for the purpose of executing a custodial sentence rendered by judgment *in absentia* – where he did not appear for trial.¹²⁶ The Spanish court sought guidance on the interpretation and validity of Article 4a(1) of the EAW Framework Decision, which sets out situations where a Member State may refuse to execute an EAW in context of decisions rendered *in absentia*.¹²⁷ Citing its case law as well as the case law of the ECtHR, the CJEU found that the provision is compatible with the defence rights guaranteed by the Charter.¹²⁸ Specifically, while the ‘right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute’ – an ‘accused may waive that right of his own free will’ under certain conditions.¹²⁹ If an accused is ‘informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so’, his or her absence at trial does not constitute a violation of the right to a fair trial.¹³⁰ Against this backdrop, the CJEU found the EAW Framework Decision sufficiently lays down the situations in which persons named on an EAW can be deemed to have waived the ‘right to be present at trial’ and respects contemporary human rights standards.¹³¹

Defence rights are on the EU agenda and increasing in strength across Europe. With a view to fostering cooperation among Member States in efforts to curb serious cross border crimes, a roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings was implemented.¹³² This roadmap provides a step-by-step approach for ensuring respect for ECHR standards and their uniform application across Member States. The first step, Measure A, calls for the adoption of a directive on translation and interpretation in criminal proceedings whereby suspects or defendants who do not speak the language used in criminal proceedings or have hearing or speech

¹²⁶ Case C-399/11, *Stefano Melloni v Ministerio Fiscal* [2013] (not yet reported), paras 1 – 2.

¹²⁷ EAW Framework Decision, art 4a(1).

¹²⁸ *Melloni* (n 126) paras 47 – 54.

¹²⁹ *ibid* para 49.

¹³⁰ *ibid*.

¹³¹ *ibid*, para 52.

¹³² European Council, ‘Resolution of the Council of 30 November 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings’ [2009] OJ C295/1 (Roadmap).

impairments can understand what is happening and make himself or herself understood.¹³³ The second step, Measure B, focuses on the right accused to information on defence rights (the letter of rights) and information about the nature and cause of an accusation against him or her.¹³⁴ The third step, Measure C, calls for an act to ensure the effective implementation of the right to legal advice and the right to legal aid 'to ensure full equality of access to the aforementioned right to legal advice'.¹³⁵ Measure D calls for mechanisms to ensure access to communication with relatives, employers and consular authorities, and special safeguards for vulnerable persons. The roadmap was ultimately incorporated into the Stockholm Program (2010 – 2014) and adopted by the European Council on 10/11 December 2009, as a five-year framework work plan for EU action from 2010 – 2014.¹³⁶

Directives on Measures A and B of the roadmap have been adopted. Exercising competence under Article 82(2) of the TFEU, the EU Parliament and Council adopted Measure A of the roadmap by implementing the Directive on the rights to interpretation and translation in criminal proceedings in September 2010.¹³⁷ Measure B has also been adopted through the implementation of the Directive on the right to information in criminal proceedings in March 2012.¹³⁸ This EU law ensures that all persons subject to criminal proceedings in any Member State receive a 'Letter of Rights' which lists the basic defence rights available during criminal proceedings in a language that the person understands.¹³⁹ The Letter of Rights contains practical details on rights such as the right to remain silent, to a lawyer, to be informed of the charge, to interpretation and translation in any language for those who do not understand the language of the proceedings, to be brought promptly before a court following arrest, and to inform someone else about the arrest or detention. This will help 'safeguard against miscarriages of justice,' facilitate the mutual recognition of judicial decisions and improve

¹³³ *ibid* 3.

¹³⁴ *ibid* 3.

¹³⁵ *ibid* 3.

¹³⁶ European Council, 'Notices from European Union Institutions, Bodies Offices and Agencies The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens' [2010] OJ C115/1, 10. See also Ed Cape et al (n 91) 11.

¹³⁷ Directive 2010/64/EU of 20 October 2010 of the European Parliament and of the Council on the Right to Interpretation and Translation in Criminal Proceedings [2010] OJ, L 280/1.

¹³⁸ Directive 2012/13/EU of 22 May 2012 of the European Parliament and of the Council on the Right to Information in Criminal Proceedings [2012] OJ L142/1.

¹³⁹ Commission, 'EU-Wide Right to Information at Arrest is Now Law' (Press Release) IP/12/575, 7 June 2012 <http://europa.eu/rapid/press-release_IP-12-575-en.htm> accessed 17 December 2013.

police and judicial cooperation in the area of criminal law.¹⁴⁰

Another millstone for defence rights in the EU is within reach. The Commission put forward a Draft Directive to pave the way for the adoption of the right to legal counsel (Measure C – Part 1 – without legal aid) and the right to communicate upon arrest (Measure D). The Council of the EU adopted a problematic approach to the Draft Directive and amendments that diluted the right to legal counsel as well as the remedies available for persons who establish a violation.¹⁴¹ Subsequently, the Civil Liberties, Justice and Home Affairs Committee (LIBE) of the European Parliament adopted an approach that called for stronger protection of defence rights. After nine trilogue meetings – institutionalized informal meetings containing representatives of the Council, European Parliament, and Commission to facilitate inter-institutional compromise – an agreement was reached in the form of a compromise text for the Draft Directive. The full House of the European Parliament has accepted the compromise text¹⁴² and the Permanent Representatives Committee of the Council (Coreper) has endorsed it.¹⁴³ To enter into force as EU law, the Council must formally approve the compromise text.

The Draft Directive is a breakthrough in achieving effective and practical EU-wide defence right. In many ways, the Draft Directive concretises standards set by the ECtHR. Notably, the compromise text explicitly addresses a common situation where authorities in Member States interrogate persons as ‘witnesses’, not as formal ‘suspects’, in order to avoid the application of the right of access to a lawyer.¹⁴⁴ This affirms the

¹⁴⁰ *ibid.*

¹⁴¹ European Council, ‘Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate upon Arrest’ Revised text [2012] ST 10908/12 (Council Draft Directive).

¹⁴² Commission, ‘Another Landmark of the Procedural Rights Agenda Has Been Met: European Parliament Adopts Commission Proposal on Access to a Lawyer’ Memo/13/772, 9 September 2013 <http://europa.eu/rapid/press-release_MEMO-13-772_en.htm> accessed 17 December 2013.

¹⁴³ European Council, ‘Coreper Confirms Agreement on the Directive on the Right of Access to a Lawyer’ (Press Release) 236 10495/13, 4 June 2013 <<http://register.consilium.europa.eu/pdf/en/13/st10/st10495.en13.pdf>> accessed 17 December 2013.

¹⁴⁴ Position of the European Parliament adopted at first reading on 10 September 2013 with a view to the adoption of Directive 2013/.../EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (EP-PE TCR-

decision of the ECtHR in the case of *Brusco v. France*, which establishes that all persons whether *de facto* suspects or accused persons are entitled to the procedural rights guaranteed under Article 6 of the ECHR.¹⁴⁵ In the initial approach and amendments to the Draft Directive by the Council, this explicit extension of procedural protections to *de facto* suspects was absent. Similarly, unlike in the initial approach of the Council, the compromise text mandates that persons subject to an EAW have a right of access to a lawyer in both the issuing Member State and the executing Member. This right to ‘dual representation’ is necessary for the proper functioning of the EAW as an institution.¹⁴⁶

With respect to remedies, the compromise text of the Draft Directive affirms the decision of the ECtHR in the case of *Salduz v. Turkey*, which establishes that statements or evidence made by a suspect ‘obtained in breach of his right to a lawyer’ cannot form the basis of a conviction at trial.¹⁴⁷ In *Salduz* that ECtHR also found that the absence of a lawyer for persons in police custody irretrievably affects defence rights¹⁴⁸ – ‘neither assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings’ cures such a defect.¹⁴⁹ The compromise text reflects this view that suspects or accused persons must receive early access to a lawyer, without delay, before police investigations or a deprivation of liberty.¹⁵⁰ A problematic aspect of the initial amendments of the Council was the creation of a concept of an ‘official interview’ to narrow the range of situations where a person may qualify for the right of access to a lawyer.¹⁵¹ This concept effectively enables authorities in Member States to question a suspect or accused persons in the absence of a lawyer simply by calling the interrogation an unofficial interview. In the absence of a broad and clear definition of ‘official interview’, such a concept is inconsistent

COD(2011)0154) (Compromise text); Art 2(3) and Preamble recital 21. See also European Criminal Bar Association, Amnesty International, Open Society Justice Initiative, Fair Trials International, Irish Council for Civil Liberties, Justice, ‘Joint briefing on the Directive on the Right of Access to a Lawyer in Criminal Proceedings and the Right to Inform a Third Party upon Deprivation of Liberty’ (*European Criminal Bar Association*, 2013) 4 <http://www.ecba.org/extdocserv/20130415_jointNGObriefindMeasureC.pdf> accessed 17 December 2013: ‘[...] calling a suspect by another name, such as ‘witness’ or ‘person of interest’ is a common tactic used by police in many Member States to avoid providing suspects with their due fair trial rights.’

¹⁴⁵ *Brusco v France* App no 1466/07 (EctHR, 14 October 2010)

¹⁴⁶ ECBA 2013 (n 144) 6.

¹⁴⁷ *Salduz v Turkey* (n 105) para 55.

¹⁴⁸ *ibid*, para 62.

¹⁴⁹ *ibid*, para 58

¹⁵⁰ Compromise text (n 144) art 3(2).

¹⁵¹ Council Draft Directive (n 141) recitals 31 to 34 and art 9.

with *Salduz*.¹⁵² Considering the initial purpose of the Draft Directive was to expand the right of access to a lawyer in the pre-trial phase of criminal proceedings, derogations from the standards set by the case law of the ECtHR would be alarming.

The compromise text also defines the role of defence lawyers in a way that brings EU law up to par with standards set by the ECtHR. In the case of *Dayanan v. Turkey*, the ECtHR establishes that a defence lawyer must be present and able to participate fully during pre-trial interrogations: ‘the accused be able to obtain the whole range of services specifically associated with legal assistance’, including a ‘discussion of the case, organization of the defence, collection of evidence and preparation for questioning’.¹⁵³ The compromise text buttresses this requirement by explicitly stipulating that the right of access to a lawyer must entail a right for suspects or accused persons ‘to meet in private and to communicate with the lawyer representing them’¹⁵⁴ and ‘a right for their lawyer to be present and participate effectively when questioned’.¹⁵⁵

Civil society organizations view aspects of the compromise text as ‘a real success’, yet highlight shortcomings and gaps that persist in the legal framework for defence rights at the EU level.¹⁵⁶ The most significant concern is the gap with respect to the right to legal aid. The compromise text of the Draft Directive largely ignores the reality that the implementation of a right to access a lawyer is not feasible without simultaneous rights to access legal aid for persons who do not have the resources to afford a lawyer. This gap will permit systemic violations of defence rights to continue. Legal aid is ‘the Achilles’ heel’ of several criminal justice systems in the EU – ‘the right to legal aid is not reliably guaranteed in many Member States and it definitely does not ensure effective access to the right to legal advice as demanded in the Road Map’.¹⁵⁷

¹⁵² ECBA 2013 (n 144) 5-6.

¹⁵³ *Dayanan v Turkey* App no 7377/03 (ECtHR, 13 October 2009)

¹⁵⁴ Compromise text (n 144), art 3(a).

¹⁵⁵ *ibid* art 3(b).

¹⁵⁶ ‘ECBA – LIBE Vote on Directive on Access to a Lawyer – 19 June 2013’ (*European Criminal Bar Association*, 18 June 2013) <http://www.ecba.org/extdocserv/20130619_ECBA_PressRMeasC.pdf> accessed 17 December 2013. The European Criminal Bar Association (ECBA), for example, highlights deficiencies in the compromise text with respect to minor offences and derogations.

¹⁵⁷ ‘ECBA Touchstones – Minimum Standards for the Right to Legal Aid (Measure C part 1)’ (*European Criminal Bar Association*, 25 June 2013) <http://www.ecba.org/extdocserv/projects/legalaid/20130625_ECBATouchstonesLegalAid.pdf> accessed 17 December 2013.

A primary challenge to procedural justice in the EU is that defence lawyers receive poor rates of pay and police or courts appoint lawyers without adequate experience in criminal law.¹⁵⁸ Remuneration for defence lawyers who work on legal aid mandates varies widely within the EU and the expenditure of Member States on legal aid suggests that compliance with the right to legal counsel set out in the Draft Directive will be an issue.¹⁵⁹ Moreover, low pay rates and fixed fee systems - which are typical characteristics of legal aid systems in the EU - have deleterious effects on the quality of legal services. A fixed and inadequate legal aid fee system effectively forces lawyers to allocate less time to client contact and case preparation.¹⁶⁰ Lawyers may accept plea bargains to avoid lengthy trials or 'cherry pick' less complex and more profitable cases.¹⁶¹ Such outcomes undermine the concept of equality before the law.

Another concern is variation in the timeliness of the appointment of legal aid across Member States. Germany, for example, provides a system of 'mandatory defence' for suspects and accused persons typically available only at the trial stage of criminal proceedings.¹⁶² No legal aid is available to facilitate access to legal counsel at the earlier stages, such as questioning, evidence gathering or a deprivation of liberty prior to a formal arrest warrant. In Poland, through a lengthy process, judges appoint legal aid lawyers for persons who are not able to pay for legal services.¹⁶³ Such processes may contribute to violations of the standard set by the ECtHR

¹⁵⁸ For an analysis of the UK, Germany and Hungary see Ed Cape (n 91), 4, 6, and 9.

¹⁵⁹ Council of Europe, 'Report of the European Commission for the Efficiency of Justice (CEPEJ) European Judicial Systems' [2010] 34: 'A 23% average increase in four years can be underlined in Europe [between 2004 and 2008]. There are, however, major gaps between states or entities. Some states, previously very active in financing access to justice, have sustained such major efforts (Belgium, Iceland, Ireland). Other states having just recently implemented legal aid systems still hold, perhaps modest but often key, commitments and should be encouraged to follow such path (Azerbaijan, Bulgaria, Moldova, Romania). Some states or entities seem no longer able to uphold the level within their systems that are (and remain) the more generous of all and are forced to cut budgets (UK-England and Wales, UK-Scotland, Norway, UK-Northern Ireland). Likewise, important reductions in legal aid budgets are recorded in Hungary and Slovakia.'

¹⁶⁰ Vicky Kemp, 'Transforming Legal Aid: Access to Criminal Defence Services' (2010) Legal Services Research Centre 114 - 115 <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2010/TransformingCrimDefenceServices_29092010.pdf> accessed 17 December 2013.

¹⁶¹ *ibid* 116.

¹⁶² ECBA, 'Legal Aid Touchstones' (n 157).

¹⁶³ *ibid*.

in *Salduz*, which requires that suspects receive access to a lawyer from the first interrogation by police.¹⁶⁴

The ECHR establishes that persons must have a right to legal aid in situations that satisfy the ‘means test’ (he or she is not able to pay for legal counsel) and the ‘merits test’ (the interest of justice require that the person receives legal counsel).¹⁶⁵ Although Member States may choose different tools for the implementation of the means and merit test, Member States must adopt an approach that ensures decisions of whether a person qualifies for legal aid is not arbitrary. Currently, according to the ECBA ‘only a bare majority of EU Member States have a legal aid merits test, and there is a considerable variation as to the content and meaning of the means tests.’¹⁶⁶

Concretising minimum standards for legal aid at the EU level is essential to ensure EU citizens receive effective defence rights. In the absence of such standards, the right to legal assistance effectively remains illusory. Although a complete harmonization of legal aid rules would likely be extremely complex and politically challenging, certain minimum standards are achievable and necessary. Of particular importance and within the realm of political possibility are minimum standards with respect to the quality of legal aid services, the timeliness of an appointment of legal aid, and the prevention of arbitrariness in establishing eligibility for legal aid.

Directives that reinforce defence rights echo the EU policy objective of creating an area of freedom, security and justice, set out in the TEU.¹⁶⁷ Article 2 of the TEU makes the intrinsic link between freedom, security and justice and the free movement of persons explicit and highlights that the fight against crime should not be at the expense of the free movement of persons. For that freedom to be exercised, EU citizens must be able to rely on the criminal justice systems of all Member States. Similarly, the smooth functioning of cooperation in the area of criminal law to curb cross-border crime requires that authorities in Member States trust that the criminal justice systems of other Member States treat all persons fairly, in accordance with contemporary human rights standards. Common minimum rules of criminal procedure on the right of access to legal counsel and legal aid at the EU level has potential to increase both respect for defence rights and confidence in the criminal justice systems of Member States across Europe. This will, in turn, foster a climate of mutual

¹⁶⁴ *Salduz v Turkey* (n 105) para 55.

¹⁶⁵ ECHR art 6(3)(c).

¹⁶⁶ ECBA, ‘Legal Aid Touchstones’ (n 157).

¹⁶⁷ ECHR, art 2.

trust and enhance efficient judicial cooperation. Legal aid in particular has broad benefits for the functioning of a criminal justice systems as meaningful legal assistance may 'reduce the length of time suspects are held in police stations and detention centres' as well as the 'prison population, wrongful convictions, prison overcrowding and congestion in courts'.¹⁶⁸

VII. CONCLUSION

Variance in Member State compliance with the ECHR reveals a clear need to enhance the protection of defence rights for all persons subject to criminal proceedings in Europe. In the absence of adequate protection, EU citizens will continue to suffer systemic violations of their rights. This will, in turn, have deleterious effects on mutual trust among Member States, undermine cooperation and disrupt efforts to achieve EU policy objectives. Access to effective defence rights in criminal proceedings is necessary to ensure that the EU is an area where commitments to freedom, security and justice are genuine.

While the implementation of the Directive on the rights to interpretation and translation in criminal proceedings and the Directive on the right to information in criminal proceedings represent significant steps towards the development of effective defence rights in Europe, more robust protection of the right of access to legal counsel is necessary. In particular, the right of access to legal counsel will remain insufficient unless EU institutions and Member States implement, interpret, and apply directives relating to criminal procedure and defence rights in ways that respect contemporary human rights standards set by the ECtHR. Moreover, the right to legal counsel is ineffective without an accompanying right to legal aid.

In an era of ever-increasing globalization, Member States must 'resist tendencies to treat security, justice and fundamental rights in isolation'.¹⁶⁹ Member States must adopt a 'coherent approach' to criminal justice that recognizes security and justice 'go hand in hand' and effectively balances the need to combat transnational crime and the need to respect

¹⁶⁸ Marion Isobel, 'Arrest Rights Brief No 3: The Right to Legal Aid' (2013) Open Society Justice Initiative, para 8 <<http://www.opensocietyfoundations.org/sites/default/files/arrest-rights-template-legal-aid-20130412.pdf>> accessed 18 December 2013.

¹⁶⁹ Commission, 'Delivering an Area of Freedom, Security and Justice for Europe's Citizens Action Plan Implementing the Stockholm Programme' COM (2010) 171 final 2-3.

fundamental rights.¹⁷⁰ The development of EU mechanisms to facilitate cooperation in criminal investigations and prosecutions requires the development of mechanisms that ensure defence rights are effective and practical.

¹⁷⁰ *ibid* 3.

RENT SEEKING WITH ASYMMETRIC PLAYERS: AN APPLICATION TO LITIGATION EXPENDITURES

Svetoslav Salkin *

This paper uses insights from the literature on rent-seeking contests to analyze the expenditure decisions of a Defendant and a Plaintiff in the course of their legal battle. It is shown that the total amount of litigation expenditures is affected by the sequence of moves (protocols of interaction), differences in stakes, and the effectiveness of the parties (or the strength of their cases) and information asymmetries. In particular, it is shown that allowing for different stakes many of the results in the rent-seeking literature may not hold.

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I. INTRODUCTION

In this paper I present a simple model that can serve as a framework for analyzing litigants' outlay decisions in the process of their legal battle. The legal battle is modelled as a rent-seeking contest in which players expend resources in order to increase their probabilities of winning a 'prize'. Thus the paper tries to connect, and heavily borrows from, two fields of research: the economics of litigation and the theory of contests (initially considering rent-seeking contests only).

A traditional question within the economics of litigation is: What affects the decision of participants in a legal dispute to go to court instead of

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settling out?¹ The theory of rent seeking, on the other hand, tries to determine the relationship between the various characteristics of the contest situation and the outlay decisions of the parties involved.² In this paper I analyse these outlay decisions taken by litigants once they have decided to go to court. There is a small number of papers that address this specific question, most notably Katz³, Hirshleifer,⁴ Farmer and Pecorino,⁵ and Kahan and Tuckman,⁶ among others. As Katz argues the legal battle itself is analytically prior to the decision whether to settle or not because this latter decision is affected by the expectations of the players with respect to their future legal expenditures. Several papers analyze related questions strictly within the context of rent-seeking contests. Risse analyses the total volume of rent-seeking expenditures for one-stage and two-stage rent-seeking contests involving players with negatively interdependent preferences, and concludes that rent dissipation is larger for one-stage contests.⁷ Yates presents a particularly interesting formulation in which the winner in a rent-seeking contest is selected probabilistically and pays her bid, while the other contestant pays nothing.⁸ He also studies how private information regarding the contest's stakes affects the equilibrium outcome. Contests in which only the winner pays her bid, however, do not model any meaningful kind of litigation contest. Chowdhury and Sheremeta use a general rent-seeking contest formulation similar to the one presented in this paper to show that minor changes in the parameters of the contest success function could result in rather substantial differences in rent dissipation.⁹ The results obtained in this paper are therefore special cases of the more general conclusions of Chowdhury and Sheremeta.

¹ See Thomas J Miceli, *Economics of the Law: Torts, Contracts, Property, Litigation* (OUP 1997).

² For a selective survey see Shmuel Nitzan, 'Modelling Rent-Seeking Contests' (1994) 10 *Eur J of Political Economy* 41-60.

³ Avery Katz, 'Judicial Decisionmaking and Litigation Expenditure' (1988) 8 *Intl Rev of L and Economics* 127-143.

⁴ Jack Hirshleifer, *The Dark Side of the Force: Economic Foundations of Conflict Theory* (CUP 2001).

⁵ Amy Farmer and Paul Pecorino, 'Legal Expenditures as a Rent-Seeking Game' (1999) 100 *Public Choice* 271-88.

⁶ Marcel Kahan and Bruce Tuckman, 'Special Levies on Punitive Damages: Decoupling, Agency Problems and Litigation Problems' (1995) 15 *Intl Rev of L and Economics* 175-88.

⁷ Sina Risse, 'Two-Stage Group Rent-Seeking with Negatively Interdependent Preferences' (2011) 147 *Public Choice* 259-276.

⁸ Andrew J Yates, 'Winner-Pay Contests' (2011) 147 *Public Choice* 93-106.

⁹ Subhasish Chowdhury and Roman Sheremeta, 'A Generalized Tullock Contest' (2011) 147 *Public Choice* 413-420.

The model in this paper analyses how litigation expenditures are affected by differences in terms of stakes and effectiveness of the litigants (or merit of their cases), as well as by informational asymmetries regarding the stakes. Linster¹⁰ presents a rent-seeking model in which players attach different values to the 'prize' they seek to win, while Kohli¹¹ and Dixit¹² study how differences in effectiveness affect rent-seeking outlays. Specifically, Kohli and Dixit show that the more 'effective' player commits to higher level rent-seeking outlays. The model in this paper shows that this result is crucially dependent on the assumption of equal stakes. Once this assumption is relaxed, as in Linster's model, Kohli's result, which he calls the Underdog Theorem, ceases to hold. With regard to asymmetric information, Fu¹³ showed that informational asymmetries regarding the value of the 'prize' are welfare enhancing in the context of sequential rent-seeking protocols, as they suppress the expenditures of the informed contestant. Section 3.3 of this paper shows that Fu's result is valid even when litigants differ in terms of effectiveness.

The next section presents the general setting and relates it to the literature. Section 3 specializes the model, motivates its assumptions, derives the equilibrium expenditures under the so called American rule for allocation of litigation costs for two protocols of interaction, Cournot-Nash and Stackelberg, and analyzes the effects of informational asymmetries. Section 4 summarizes the results and concludes the paper.

II. LITIGATION AS A RENT-SEEKING CONTEST

The simple world I envisage consists of a Plaintiff and a Defendant who are risk-neutral and have decided to go to trial. The economics of litigation literature explains the fact that people sue each other by referring to differences in perceptions regarding the outcome of the trial, ie each litigant is overly optimistic about her chances of winning.¹⁴ Failure to settle, however, might be also due to attitudes towards risk or simply to malevolence.¹⁵

¹⁰ Bruce G Linster, 'Stackelberg Rent Seeking' (1993) 77 Public Choice 307-21.

¹¹ Inderjit Kohli, 'Institutional Structure, Strategic Behavior and Rent-Seeking Costs' [1994] Working Paper 279, University of California Santa Cruz, Department of Economics.

¹² Avinash Dixit, 'Strategic Behavior in Contests' (1987) 77 American Economic Rev 891-98.

¹³ Qiang Fu, 'Endogenous Timing of Contests with Asymmetric Information' (2006) 129 Public Choice 1-23.

¹⁴ Miceli (n 1).

¹⁵ Hirshleifer (n 4).

Once at trial, the parties decide on their litigation expenditures (or legal efforts). The literature offers different interpretations here. Katz speaks about search of supporting arguments or favourable facts to be presented to a court, jury or administrative agency.¹⁶ Hirshleifer adopts a more general interpretation which may include costs of lawyers, resources devoted to factual investigation and legal research, and bribery.¹⁷ The litigation expenditures affect the probabilities of winning. Note that I am ignoring the Principal-Agent problems that exist between the litigants and their attorneys. It is not impossible, however, to extend the analysis along these lines following Baik and Kim¹⁸ and Schoonebeek.¹⁹

I will use the following notation:

- V_p - the stakes for the Plaintiff
- V_d - the stakes for the Defendant
- x_p - legal expenditures of Plaintiff
- x_d - legal expenditure of Defendant
- π_p - payoff to Plaintiff
- π_d - payoff to Defendant
- P_p - probability that Plaintiff wins
- P_d - probability that Defendant wins

Following the standard setting of the theory of contests, the objective functions of the players are formalized as follows:

The Plaintiff chooses x_p so as to maximize

$$(1) \quad \pi_p = P_p(x_p, x_d)V_p - x_p$$

Similarly, the Defendant chooses x_d so as to maximize

$$(2) \quad \pi_d = P_d(x_p, x_d)V_d - x_d$$

The important parts of these expressions are the probabilities of winning P_p and P_d . Hirshleifer calls them 'contest success functions'.²⁰ The usual

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ Kyung Hwan Baik and In-Gyu Kim, 'Delegation in Contests' (1997) 13 *Eur J of Political Economy* 281-98.

¹⁹ Lambert Schoonebeek, 'A Delegated Agent in a Winner-Takes-All Contest' (2002) 9 *Applied Economics Letters* 21-23.

²⁰ Jack Hirshleifer, 'Conflict and Rent-Seeking Success Functions: Ratio vs.

assumptions are that each player's probability of winning is increasing in her own expenditures and decreasing in the expenditures of her opponent, and that they sum up to one. Tullock's seminal paper offers the classical formulation, which for two players looks as follows:

$$(3) \quad P_i(x_p, x_d) = \frac{x_i^\gamma}{x_p^\gamma + x_d^\gamma}, \quad i=p, d,$$

where γ is a measure of the relative decisiveness of contest efforts. The intuition behind this game is the following:

...we assume two parties who are participating in a lottery under somewhat unusual rules. Each is permitted to buy as many lottery tickets as he wishes at one dollar each, the lottery tickets are put in a drum, one is pulled out, and whoever owns that ticket wins the prize.²¹

Hirshleifer offers two canonical formulations of contest success functions, one in which the relative success depends on the ratios of the respective expenditures (essentially Tullock's formula), and another in which success depends on the difference between the expenditures.²²

In the context of litigation expenditures expressions (1) and (2) can be extended in order to analyze the effect of different cost-allocation rules. Shavell²³ discusses four possible systems:

(i) Under the American system where each party bears her own costs the objective functions are as above.

(ii) Under the British system the losing party bears all the costs. The objective functions are as follows

$$\pi_i = P_i(x_p, x_d)(V_i + x_p + x_d) - x_p - x_d, \quad i = p, d$$

(iii) Under the system favoring the Defendant, each party bears her own costs if the Plaintiff wins, but the Plaintiff bears all

Difference Models of Relative Success' (1989) 63 Public Choice 101-12.

²¹ Gordon Tullock, *Efficient Rent Seeking*, in James M. Buchanan, Robert D. Tollison and Gordon Tullock *Toward a Theory of the Rent Seeking Society* (A&M Press 1980) 97-112.

²² The difference formulation, however, is not very convenient as it often requires numerical solutions.

²³ Steven Shavell, 'Suit Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs' (1982) 11 J of L Studies 55-82.

the costs if the Defendant wins. The objective functions are

(iv) Under the system favoring the Plaintiff, each party bears her own costs if the Defendant wins, but the Defendant bears all the costs if the Plaintiff wins. The objective functions are

$$\pi_p = P_p(x_p, x_d)(V_p + x_p) - x_p; \quad \pi_d = P_d(x_p, x_d)(V_d + x_p) - x_p - x_d$$

Other extensions are also possible. Miceli discusses the so-called ‘Rule 68 of the Federal Rules of Civil Procedure’ according to which a Plaintiff who refuses a settlement offer pays the Defendant’s post-offer legal costs if the Plaintiff receives a judgement at trial less than the rejected offer.²⁴ Daughety and Reinganum²⁵ consider ‘split-award’ statutes which allocate a portion of punitive damages awards won by successful plaintiffs to the state.

III. A SPECIALIZED MODEL

In order to derive analytical solutions, I select a particularly simple variant of contest success function, which nevertheless allows for obtaining non-trivial results. The model in this section combines and extends the rent-seeking models of Linster²⁶ and Kohli.²⁷ Both of these papers keep the spirit of the Tullock’s rent-seeking model, but modify some of his details. In particular, Linster analyzed a game where the players attach different values to the rent they compete for, while Kohli analyzed the case where the players differ in their effectiveness. Here I allow for both, ie the players differ both in their valuations of the stakes ($V_p \neq V_d$) and in their effectiveness.

Differences in stakes are particularly relevant in litigation since this is an empirically confirmed fact. From a sample of federal civil cases from the Southern District of New York (SDNY), filed between 1984 and 1987 and terminated by the end of 1998, Waldfogel²⁸ infers that the highest stake asymmetry pertains to intellectual property cases. The estimates indicate

²⁴ *ibid*, 170-171.

²⁵ Andrew F Daughety and Jennifer F Reinganum, ‘Found Money? Split-Award Statutes and Settlement of Punitive Damages Cases’ (2003) 5 *American L and Economics Rev* 134-64.

²⁶ Linster (n 10).

²⁷ Kohli (n 11)

²⁸ Joel Waldfogel, ‘The Selection Hypothesis and the Relationship between Trial and Plaintiff Victory’ (1995) 103 *J of Political Economy* 229-60.

that Plaintiffs stand to gain 33.6 percent more than Defendants stand to lose. Second are contract cases, whereby Plaintiff's stakes are again higher. The lowest stake asymmetry estimate (but still statistically significant) pertains to torts, whereby Defendant's stakes are higher.²⁹ A possible explanation is that when a tort Defendant loses she is often exposed to potential liability from additional Plaintiffs. Similarly, a losing intellectual property Plaintiff is more likely to become subject of additional encroachments.³⁰

The assumption of differences in effectiveness, on the other hand, is difficult to evaluate empirically, but actually has strong intuitive appeal. Hirshleifer and Osborne³¹ speak of one side or the other being more adept in converting legal effort into desirable outcome. Note, however, that a 'differences in effectiveness' parameter can represent differences in the true strength of the cases of the sides (ie one of the litigants having a more meritorious case) or the true degree of Defendant's fault. In what follows I will speak of one side being more effective than the other (although the true degree of Defendant's fault might be more appropriate).

A prominent example of the double asymmetry discussed in this paper is a lawsuit filed by Russian oligarch Boris Berezovsky against his former business partner, Roman Abramovich, in the UK in 2011-2012.³² Both businessmen were very close to former Russian President Boris Yeltsin in the 1990s, and used their political influence to amass huge fortunes through the Russian government's controversial loans-for-shares privatization programme. Whereas Roman Abramovich remained close to the Kremlin during the terms of President Putin, who succeeded Boris Yeltsin, and President Medvedev, Boris Berezovsky has been forced to flee to the UK in 2000 and was later convicted in absentia over alleged embezzlement and related crimes in Russia.

In 2011, Boris Berezovsky launched what turned out to be one of the most expensive lawsuits in the history of the UK against Roman Abramovich. The litigation expenditures associated with the four-month legal battle

²⁹ Waldfogel's study is much richer than that. In particular, he finds strong support for the so-called selection hypothesis according to which the sample of tried cases is unrepresentative of the population of underlying disputes (see also Miceli (n 1) 138)

³⁰ *ibid.*, 253.

³¹ Jack Hirshleifer and Evan W Osborne, 'Truth, Effort, and the Legal Battle' (2001) 108 *Public Choice* 169-195.

³² Jane Croft, 'Abramovich Case Awaits Ruling' *Financial Times* (London, 28 August 2012) <<http://www.ft.com/cms/s/0/fca2aa3a-f124-11e1-b7b9-00144feabdco.html#axzz2SatyOLoD>> accessed 3 May 2013.

exceeded £100 million.³³ Boris Berezovsky claimed that Roman Abramovich had used ‘threats’ and ‘intimidation’ to make him and Georgian-born businessman Badri Patarkatsishvili sell their stakes in oil firm Sibneft and aluminum producer RusAl at excessively low prices. All in all, Boris Berezovsky sought over \$5 billion in compensation for the ‘coerced’ sale of his stake in Sibneft, and over \$564 million in compensation for the ‘coerced’ sale of his stake in RusAl.³⁴

Roman Abramovich, however, denied that Boris Berezovsky and Badri Patarkatsishvili owned any stakes in Sibneft and RusAl, and alleged that he had paid a total of \$2.3 billion to Boris Berezovsky in exchange for ‘political protection’. Indeed, Boris Berezovsky failed to present any documents proving his claims. He insisted instead that all agreements regarding ownership in the two firms had been made orally. The court dismissed all claims made by Boris Berezovsky. He was described by Judge Elisabeth Gloster as ‘an unimpressive, and inherently unreliable, witness, who regarded truth as a transitory, flexible concept, which could be moulded to suit his current purposes’. Some of the evidence he gave was described as ‘deliberately dishonest’. Roman Abramovich’s answers, on the other hand, were considered ‘careful and thoughtful’. He was furthermore described as a ‘truthful, and on the whole reliable witness’ and ‘frank in making concessions where they were due’.³⁵

The lawsuit was obviously a desperate move by Boris Berezovsky, who had allegedly lost most of his wealth by the time of the trial. At the same time, Roman Abramovich, with an estimated net worth of around \$11.2 billion, was still one of the richest and most influential Russian oligarchs.³⁶ Therefore, the marginal utility of the \$5.564 billion sought by Boris Berezovsky was clearly much larger for Boris Berezovsky himself than it was for Roman Abramovich. Regarding the relative merits of the claims of the litigants, it must have been patently clear to both of them that given the lack of any written evidence or witnesses other than Boris Berezovsky, all Roman Abramovich had to do to win the case was deny anything that

³³ Jane Croft and Neil Buckley, ‘Berezovsky Loses against Abramovich’ *Financial Times* (London 31 August 2012) <<http://www.ft.com/intl/cms/s/0/8eec8602-f34d-11e1-9c6c-00144feabdco.html#axzzzSKTwRxp3>> accessed 3 May 2013.

³⁴ Executive Summary of the Full Judgement of Gloster J in Berezovsky v Abramovich, Action 2007 Folio 942 <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/berezovsky-abramovich-summary.pdf>> accessed 13 May 2013.

³⁵ *ibid.*

³⁶ Forbes (New York, 10 October 2010) <http://www.forbes.com/lists/2010/10/billionaires-2010_Roman-Abramovich_DG3G.html> accessed 5 May 2013.

Boris Berezovsky claimed.

With the above remarks and example in mind, the contest success functions I will use are the following

$$P_p(x_p, x_d) = \frac{ax_p}{ax_p + x_d}; \quad P_d(x_p, x_d) = \frac{x_d}{ax_p + x_d}$$

here a denotes the relative effectiveness of the Plaintiff. The Plaintiff is more effective when $a > 1$.³⁷

The major disadvantage of such a simple formulation is that it cannot be meaningfully applied to all four cost allocation systems outlined in the previous section. Except for the American system, it turns out that in equilibrium one of the players spends an infinite amount of resources in the legal conflict.³⁸ More complicated formulations avoid this problem, the disadvantage, however, is that the analysis should proceed by calculating numerical solutions (this is actually a problem in many rent-seeking models). The present formulation, however, nicely fits the American rule, thus I consider this system only leaving the other three for further investigation.

Under the American system the objective functions of the Plaintiff and the Defendant respectively are

$$(4) \quad \pi_p = \frac{ax_p}{ax_p + x_d} V_p - x_p, \text{ and}$$

$$(5) \quad \pi_d = \frac{x_d}{ax_p + x_d} V_d - x_d.$$

I examine two protocols of interaction, Cournot-Nash, ie when the players

³⁷ If the effectiveness of the players are measured by e_i , $i=p,d$, the contest success functions become $\frac{e_i x_i}{e_p x_p + e_d x_d}$. The above expressions are derived by setting

$$a = \frac{e_p}{e_d}.$$

³⁸ To prove that this is the case for the British system, note that differentiating the Plaintiff's objective function and setting it equal yields $V_p + x_p(1-a)$, which is positive and is independent of x_d . The same holds for the Defendant's objective function.

move simultaneously or in ignorance of each other's moves and Stackelberg, when the players move sequentially. I assume that it is the Plaintiff who moves first and commits to a level of expenditures. Hirshleifer and Osborne also consider what they call a 'threat-and promise' protocol in which the Defendant makes the prior commitment. The objective functions considered in this paper however are symmetric, which makes such an extension unnecessary.

I. Cournot-Nash Protocol of Interaction

The Cournot-Nash setting represents a standard simultaneous move game. Differentiating the objective functions and setting them equal to zero gives the following reaction functions

$$(6) \quad x_p(x_d) = \frac{\sqrt{aV_p x_d} - x_d}{a}$$

$$(7) \quad x_d(x_p) = \sqrt{aV_d x_p} - ax_p$$

At Nash equilibrium the expenditures of the players are

$$(8) \quad x_p^c = \frac{aV_d V_p^2}{(aV_p + V_d)^2}$$

$$(9) \quad x_d^c = \frac{aV_p V_d^2}{(aV_p + V_d)^2}$$

Thus the total amount of litigation expenditures in equilibrium, ie $C^c = x_p^* + x_d^*$ is

$$(10) \quad C^c = \frac{aV_d V_p (V_p + V_d)}{(aV_p + V_d)^2},$$

where the superscripts c stands for Cournot-Nash.

Kohli³⁹ shows that the total level of expenditures (in his terminology, rent-seeking costs) is maximized when the players are equally effective, ie when $a=1$. The result holds, however, only if the players attach the same value to the rent they are competing for (have the same stakes), ie whenever $V_p=V_d$. To find the maximization point under the current setting, I

³⁹ Kohli (n 11).

differentiate (10) with respect to a and set it equal to zero.

$$(11) \quad \frac{\partial C^c}{\partial a} = \frac{V_d V_p (V_p + V_d)(V_d - aV_p)}{(aV_p + V_d)^3}$$

This is equal to zero at $a = \frac{V_d}{V_p}$. In other words, in the Cournot-Nash setting the litigation expenditures are maximized when the relative effectiveness of the players equals the ratio of their stakes.

It is also interesting to find the equilibrium payoffs of the players derived by Linster⁴⁰ for equally effective players, and show that they differ when asymmetric effectiveness is introduced. The expressions are the following

$$(12) \quad \pi_p^c(x_p^c, x_d^c) = \frac{aV_p^2}{aV_p + V_d} \left(1 - \frac{V_d}{aV_p + V_d} \right)$$

, for the Plaintiff, and

$$(13) \quad \pi_d^c(x_p^c, x_d^c) = \frac{V_d^2}{aV_p + V_d} \left(1 - \frac{V_d}{aV_p + V_d} \right)$$

, for the Defendant.

When the players have equal effectiveness, a is equal to 1 and I obtain Linster's result

$$\pi_i^c(x_p^c, x_d^c) = \frac{V_i^2}{(V_p + V_d)^2}, \text{ for } i=p,d.$$

2. *Stackelberg Protocol of Interaction*

In this setting the players move in sequence. Dixit⁴¹ analyzes a more general model than the present one and identifies a very interesting result: If pre-commitment to effort level (in my case litigation expenditures) is allowed, then the 'favorite' in the contest will commit herself to a higher level of effort than would have been the case if commitment was not allowed, and the 'underdog' will commit herself to a lower level. Hirshleifer and Osborne reach the same conclusion.⁴² Kohli obtains a similar result

⁴⁰ Linster (n 10).

⁴¹ Dixit (n 12).

⁴² *ibid*, 160.

independently and calls it the ‘Underdog Theorem’. The interesting implication for the present analysis is that the total litigation expenditures under Stackelberg differ from Cournot-Nash. The present section enriches Kohli’s formulation by allowing for different stakes.

I assume that the Plaintiff moves first. The game is solved along the lines of backwards induction, ie what I derive is the sub-game perfect equilibrium of the game. Knowing the best response function of the Defendant (expression (7)), the Plaintiff’s objective function becomes

$$(14) \quad \pi_p(x_p, x_d(x_p)) = V_p \sqrt{\frac{ax_p}{V_d}} - x_p$$

This is maximized at

$$(15) \quad x_p^s = \frac{aV_p^2}{4V_d}$$

The Defendant’s response is

$$(16) \quad x_d^s = \frac{aV_p}{2} \left(\frac{2V_d - aV_p}{2V_d} \right)$$

,which is positive for $a < 2V_d / V_p$. For $a \geq 2V_d / V_p$, however, the Defendant spends zero in equilibrium and the Plaintiff spends V_d / a .

It is straightforward now to present Dixit’s over-commitment result for equal stakes. If $1 < a < 2$ (ie the effectiveness of the Plaintiff is higher) the Plaintiff’s equilibrium expenditures in the Stackelberg protocol are greater than the respective expenditures in the Cournot-Nash setting. The result is obtained after examining the inequality $x_p^c < x_p^s$. Substituting the respective expressions from (8) and (15) and setting $V_d = V_p$ this inequality boils down to $a > 1$, which is true by assumption. As Hirshleifer and Osborne put it “merit and effort are complements”.⁴³ Of course, with asymmetric stakes the result holds only if $a > V_d / V_p$, ie when the relative effectiveness parameter is larger than the ratio of the stakes.

I further examine the total expenditures in the Stackelberg scenario for

⁴³ *ibid*, 161.

$a < 2V_d / V_p$, by summing x_p^s and x_d^s . This results in

$$(17) \quad C^s = \frac{aV_p}{2} \left(\frac{V_p(1-a)}{2V_d} + 1 \right)$$

, which is maximized at

$$(18) \quad a = \left(\frac{1}{2} + \frac{V_d}{V_p} \right).$$

If the stakes are equal, the result coincides with the one obtained by Kohli (Proposition 2) - total outlays in the Stackelberg setting are maximized when the Plaintiff's effectiveness is greater, ie at $a=3/2$. The present formulation shows that this need not be the case with asymmetric stakes. If $2V_d < V_p$, ie the stakes of the Defendant are sufficiently smaller than those of the Plaintiff, the litigation expenditures reach their maximum at a point where the Defendant is more effective, $a < 1$. This result is perhaps best explained by the fact that stake asymmetries change the relative marginal benefits of litigation expenditures. In other words, if the stake of the Plaintiff is sufficiently larger than the stake of the Defendant, then the Plaintiff's marginal benefits from an extra unit of expenditures on litigation is too small, and therefore not worth making, if the Plaintiff's effectiveness, or the merit of her case, is sufficiently smaller than the Defendant's effectiveness, of the merit of her case.

Let us see now the net payoffs of the players in the Stackelberg scenario. For the Plaintiff, the net payoff is

$$(19) \quad \pi_p^s(x_p^s, x_d^s) = \frac{aV_p^2}{4V_d}, \text{ for } a < 2V_d / V_p, \text{ and}$$

$$(20) \quad \pi_p^s(x_p^s, x_d^s) = \frac{aV_p^2 - V_d}{a}, \text{ for } a \geq 2V_d / V_p.$$

The net payoffs for the Defendant respectively are

$$(21) \quad \pi_d^s(x_p^s, x_d^s) = V_d + aV_p \left(\frac{aV_p}{4V_d} - 1 \right)$$

, for $a < 2V_d / V_p$, and

$$(22) \quad \pi_d^s(x_p^s, x_d^s) = 0, \text{ for } a \geq 2V_d / V_p.$$

Now it is possible to compare the net payoff of the Plaintiff in the Stackelberg setting with the respective payoff under the Cournot-Nash protocol for $a < 2V_d / V_p$. The interesting result to note is that the net payoff of the Plaintiff is always better in the Stackelberg protocol than on the Cournot-Nash protocol. This becomes evident when examining the following inequality

$$\pi_p^s(x_p^s, x_d^s) \geq \pi_p^c(x_p^c, x_d^c).$$

After substituting with the respective expressions from (19) and (12) and rearranging this expression reduces to $0 \leq (aV_p - V_d)^2$, which is obviously true. Under the present formulation, however, similar comparisons with respect to the Defendant yield ambiguous results.

Next, for the sake of completeness, I compare the amount of total litigation expenditures under the two protocols of interaction. First, by examining expressions (10) and (17) it is easy to check that total outlays are equal under Cournot-Nash and under Stackelberg if the players are equally effective and have equal stakes ($a=1$, $V_p=V_d$). Similarly, in this case, their net payoffs are the same (by checking expressions (12), (13), and (19) through (22)). Second, with equal stakes, but not necessarily equal effectiveness this no longer holds. For $V_p=V_d=V$ and $a < 2$, subtracting C^s from C^c results in

$$(23) \quad C^c - C^s = \frac{aV}{(a+1)^2} (5 + a^2)(1 - a).$$

This is positive for $a < 1$, zero for $a=0$, and negative for $a > 1$.

For $a > 2$, the expenditures of the Defendant in the Stackelberg protocol are zero, and the total amount of expenditures is simply V/a . Thus

$$(24) \quad C^c - C^s = \frac{V}{a(1+a)^2} (a^2 - 2a - 1).$$

This is negative for $2 < a < 1 + \sqrt{2}$, and non-negative for $a \geq 1 + \sqrt{2}$.

What is the intuition behind these results? The litigation expenditures are lower in the Stackelberg protocol than in Cournot-Nash for $a < 1$. The Defendant spends less because she is strategically disadvantaged, while the Plaintiff spends less because she is less effective. If $1 < a < 1 + \sqrt{2}$, the expenditures are higher in the Stackelberg protocol because the leader spends more to take advantage of her increased effectiveness. For even larger values the Plaintiff is much more effective, the defendant spends zero and the total level of expenditures is again lower.

It can be also shown that for $a < 1$ the net payoff of the Defendant is lower under Stackelberg than under Cournot-Nash. Having in mind that this is true for the Plaintiff for any a , Kohli's claim (recast in the terminology of this paper) is that if the Plaintiff is less effective, the Stackelberg equilibrium is more efficient than the corresponding Cournot-Nash, ie leads to a lower level of expenditures and higher payoffs for the litigants.

Finally, it is possible to compare the litigation expenditures when the players are equally effective, $a=1$, but the stakes are different

$$(25) \quad C^c - C^s = \frac{V_p}{2(V_p + V_d)} (V_d - V_p)$$

This is positive for $V_d > V_p$, negative for $V_d < V_p$, and zero for equal stakes. In words, with equal effectiveness the total level of expenditures is greater in the Cournot-Nash case if the Defendant has larger stake, otherwise the Stackelberg case involves a higher level of expenditures.

3. *Rent Seeking with Asymmetric Information Regarding the Value of the Prize*

The last extension of the basic litigation model considered in this paper assumes that the two contestants attach the same value to the prize, but one of the contestants has superior information about that value. The most interesting scenario in this setting occurs when the contestants move sequentially, as this would have the informed contestant trying to signal her information to the uninformed contestant.

A prominent example of lawsuits with asymmetric information involves disputes over oil extraction rights. Firms bidding for oil rights typically attach the same value to the 'prize' they bid for. In the terminology of auction theory they have common values Cramton.⁴⁴ Once a firm wins the

⁴⁴ Peter Cramton, 'How Best to Auction Oil Rights' in Macartan Humphreys, Jeffrey D Sachs, and Joseph E Stiglitz (eds), *Escaping the Resource Curse* (Columbia

right to search for oil, it quickly updates its estimate for the actual value of the deposit in question. Suppose then that one of the losing bidders takes the winner to court over alleged irregularities during the bidding process. If the winner (or Defendant) is the first one to choose litigation expenditures, then the interaction has the structure of a signaling game.⁴⁵

Fu,⁴⁶ among others, analyzed such an extension and reported the main result obtained in this subsection, namely that the low value informed contestant would like to spend less on rent seeking in order to credibly prove that the prize's value is indeed low. Hence, in the context of dissipative contests (lobbying, corruption and other rent seeking contests), informational asymmetries are welfare enhancing in that they reduce the total amount of rent-seeking expenditures. In the literature on industrial organization Gal-Or⁴⁷ studies Cournot's duopoly model when one of the firms is better informed about demand. Tirole⁴⁸ provides an especially instructive presentation of Gal-Or's model and the analysis below follows Tirole's exposition. This subsection shows that Fu's result remains valid in the case of differences in effectiveness. In other words, informational asymmetries reduce litigation expenditures even when effectiveness asymmetries are allowed.⁴⁹ The remainder of the subsection assumes that the informed contestant moves first in order to send a signal regarding the value of the prize.

Assume that the Defendant and the Plaintiff attach the same value to a prize, but this value can be of two types, V_L and V_H , such that $0 < V_L < V_H$. The Defendant learns the prize's type, which hereafter will be referred to as the Defendant's type, and chooses her rent seeking expenditures. Thereafter the Plaintiff observes the Defendant's choice, but not her type, and chooses her rent seeking expenditures. This ends the game.

To find the sequential equilibria of this game, denote the Plaintiff's prior beliefs by $p(V_L) = q$ and $p(V_H) = 1 - q$. After observing the Defendant's move, the Plaintiff updates her beliefs as follows $p^o(V_L | x_D) = \mu(x_D)$ and $p^o(V_H | x_D) = 1 - \mu(x_D)$ and maximizes her payoff function given these updated beliefs. Symbolically, the Plaintiff maximizes the following expression

University Press 2007).

⁴⁵ Michael Spence, 'Job Market Signaling' (1973) 87 Q J of Economics 355-374.

⁴⁶ Fu (n 13)

⁴⁷ E Gal-Or, 'First Mover Disadvantages with Private Information' (1987) 54 Rev of Economic Studies 279-292.

⁴⁸ Jean Tirole, *The Theory of Industrial Organization* (MIT Press 1988) 450-452.

⁴⁹ A more complete treatment would include stake asymmetries as well. However, such an extension makes the model technically very difficult and should be treated in a separate paper.

$$(26) \quad \left\{ \mu(x_d) V_L + [1 - \mu(x_d)] V_H \right\} \frac{\alpha x_p}{\alpha x_d + x_p} - x_p$$

Hence her best response function is given by

$$(27) \quad BR(x_d) = x_p(x_d) = \sqrt{\alpha x_d} \left\{ \sqrt{\mu(x_d) V_L + [1 - \mu(x_d)] V_H} - \sqrt{\alpha x_d} \right\}$$

Expression (27) is decreasing in $\mu(x_d)$, the belief that the prize is low, therefore, the Defendant will try to convince the Plaintiff that the prize is low in order to make the Plaintiff devote less resources to rent seeking and thereby increase her (the Defendant's) chances of winning.

Using incentive compatibility logic, it is straightforward to show that in any separating equilibrium the Defendant spends more resources on litigation when the prize is high. Denote the optimal choices of the high and the low type by x_d^H and x_d^L , respectively. To ensure that these choices satisfy incentive compatibility, it must be the case that neither type has an incentive to select the equilibrium choice of the other type. In other words, the following two inequalities should be satisfied

(28)

$$V_L \frac{x_d^L}{x_d^L + \alpha BR(x_d^L)} - x_d^L \geq V_L \frac{x_d^H}{x_d^H + \alpha BR(x_d^H)} - x_d^H \quad (ICL)$$

(29)

$$V_H \frac{x_d^H}{x_d^H + \alpha BR(x_d^H)} - x_d^H \geq V_H \frac{x_d^L}{x_d^L + \alpha BR(x_d^L)} - x_d^L \quad (ICH)$$

The first inequality is the low type's incentive compatibility condition and the second inequality is the high type's incentive compatibility condition. Subtracting the right hand side of *(ICH)* from the left-hand side of *(ICL)*, and subtracting the right-hand side of *(ICH)* from the from the left-hand side of *(ICH)* yields

$$(30) \quad (V_H - V_L) \frac{x_d^H}{x_d^H + \alpha BR(x_d^H)} \geq (V_H - V_L) \frac{x_d^L}{x_d^L + \alpha BR(x_d^L)}$$

Since $V_L < V_H$, this expression is equivalent to

$$(31) \quad \frac{x_d^H}{x_d^L} \geq \frac{BR(x_d^H)}{BR(x_d^L)}$$

From expression (27) it can be shown that the best response correspondence $BR(\cdot)$ is an increasing concave function, hence the last inequality is true if and only if $x_d^H > x_d^L$, which proves the claim that the high-type Defendant spends more on litigation than the low-type Defendant.

The remaining part of this sub-section identifies the separating equilibria of the game.

4. Separation

In a *separating* equilibrium the type of the Defendant is revealed. The preceding analysis implies that the high type plays her full information strategy, $V_H/4, \frac{V_H}{4}$, and obtains her full equilibrium payoff, $V_H/4$. Denote the low type's separating equilibrium strategy by x_d^{LS} . To simplify notation, set $L = \sqrt{x_d^{LS}}$.

To achieve separation, in equilibrium the beliefs of the players should be confirmed. The incentive compatibility constraint for the low type that sustains such an outcome is the following

$$(32) \quad \frac{\sqrt{V_L} - \sqrt{V_H - V_L}}{2} \leq L \leq \frac{\sqrt{V_L} + \sqrt{V_H - V_L}}{2}$$

The incentive compatibility constraint for the high type is given by

$$(33) \quad \frac{V_H - \sqrt{V_H^2 - V_H V_L}}{2\sqrt{V_L}} \leq L \leq \frac{V_H + \sqrt{V_H^2 - V_H V_L}}{2\sqrt{V_L}}$$

Next, if the low type is thought to be a high type and maximizes her payoff function given that belief, she (the low type) would obtain

$$(34) \quad \frac{V_L^2}{4V_H} = \max_{x_d^L} \left\{ V_L \frac{x_d^L}{x_d^L + BR(x_d^H)} - x_d^L \right\}$$

Hence, the following rationality condition should hold

$$(35) \quad L(\sqrt{V_L} - L) \geq \frac{V_L^2}{4V_H}$$

This inequality is satisfied for

$$(36) \quad \sqrt{V_L} - \sqrt{V_L - \frac{V_L^2}{V_H}} \leq 2L \leq \sqrt{V_L} + \sqrt{V_L - \frac{V_L^2}{V_H}}$$

To conclude, the range of separating equilibria is given by

$$(37) \quad \frac{\left(\sqrt{V_L} - \sqrt{V_L - \frac{V_L^2}{V_H}}\right)^2}{4} \leq x_d^{LS} \leq \frac{\left(V_H - \sqrt{V_H^2 - V_L V_H}\right)^2}{4V_L}$$

Typically signalling games exhibit a multiplicity of both pooling and separating equilibria. Most equilibrium refinements developed by game theorists select the least-cost-separating equilibrium, or Riley equilibrium.⁵⁰ Following the intuitive criterion proposed by Cho and Kreps,⁵¹ least-cost separation occurs at the upper bound of the interval in expression (37).

$$(38) \quad x_d^{LCS} = \frac{\left(V_H - \sqrt{V_H^2 - V_L V_H}\right)^2}{4V_L}$$

Hence the low type has an incentive to bid below its equilibrium strategy under complete information in order to credibly prove her knowledge. The expression x_d^{LCS} is increasing in V_H and is decreasing in V_L .

IV. SUMMARY OF RESULTS AND CONCLUSION

Whether Stackelberg or Cournot-Nash is the appropriate protocol and the extent to which asymmetric information plays a role in the Stackelberg setting is context-specific and depends very much on the information flows between the players. Clearly this is a crucial question when it comes to empirical testing. Nevertheless, the present analysis can be helpful in

⁵⁰ John Riley, 'Informational Equilibrium' (1979) 47 *Econometrica* 331-359.

⁵¹ In-Koo Cho and David Kreps, 'Signaling Games and Stable Equilibria' (1987) 102 *QJ of Economics* 179-221.

advancing some propositions. Most of the results below are obtained by others in the literature. Allowing for different stakes, however, leads to a number of modifications.

The results in the paper are as follows:

1. In the Cournot-Nash protocol the level of litigation expenditures is maximized when the relative effectiveness (or the relative merit of the cases) of the parties equals the ratio of their stakes. In the Stackelberg protocol with equal stakes the level of litigation expenditures is maximized when the Plaintiff's effectiveness (merit) is sufficiently greater. With unequal stakes, however, this is no longer true. If the stakes of Defendant are sufficiently smaller, the litigation expenditures reach a maximum at a point where the Defendant is more effective (has stronger case).
2. In the Stackelberg protocol the Plaintiff's expenditures are greater than in Cournot-Nash if her effectiveness (merit) is higher (but not too high, $1 < a < 2$).
3. If the stake of the Plaintiff is sufficiently smaller than the stake of the Defendant, relative to her effectiveness or the merit of her case, the Plaintiff is better off (has higher net payoff) in the Stackelberg protocol than in Cournot-Nash, ie pre-commitment is desirable for the Plaintiff. The situation of the Defendant is ambiguous.
4. With equal stakes, if the Plaintiff is less effective (has less merit), the Stackelberg equilibrium is more efficient than the corresponding Cournot-Nash, ie leads to lower legal expenditures and higher payoffs for the litigants (Kohli's "Underdog theorem"). Again the result may not hold if the stakes are different.
5. With equal effectiveness, the total level of expenditures is greater in the Cournot-Nash protocol if the Defendant has a larger stake, otherwise the Stackelberg protocol involves a higher level of expenditures.
6. Informational asymmetries tend to suppress litigation expenditures regardless of differences in effectiveness or merit, as the informed party has an incentive to signal the low value of the prize to the uninformed party. With asymmetric information total litigation expenditures might be smaller than litigation expenditures in the cases of perfect information or imperfect but symmetric information, ie when both litigants lack information.

A number of extensions are possible. In particular, it is important to examine what happens under the different cost allocation rules outlined in section 2. Furthermore, a more realistic analysis would explicate the role of the decision maker, ie the court or the jury. The analysis of Congelton offers a general framework for addressing this problem.⁵² Finally, the principal-agent problems in the relationships between the litigants and their attorneys should be accounted for.

⁵² Roger D Congelton, 'Committees and Rent-Seeking Effort' (1984) 25 J of Public Economics 197-209.

THE CONTROVERSIES ABOUT LEGAL INDETERMINACY AND THE THESIS OF THE 'NORM AS A FRAMEWORK' IN Kelsen

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One of the most persistent controversies in law is related to its completeness or incompleteness. In the context of the debate between inconclusive law or the completeness of the law, the main argument of the paper is that Hans Kelsen paradoxically converges with Ronald Dworkin in denying legal indeterminacy, and albeit from radically different and opposing positions, both of them would arrive at the same conclusion in the discussion about completeness or incompleteness in the law: the law is 'complete'. Both advocate a position contrary to HLA Hart.

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I. INTRODUCTION

Roughly speaking, the law is *complete* when within the universe of *foreseen* (real) and *unforeseen* (possible) cases, *all* are envisaged by the legal system in their full scope. Fullness or completeness is synonymous with 'regulation' or 'deontological qualification' and its consequence on implementation and interpretation is the absence of legal *indeterminacy*. An action or situation is 'regulated' –and consequently 'determined'– in a legal system if there is a

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rule or principle belonging to this system that qualifies the action or system. Thus, law is declared to have fullness or completeness when it provides a legal qualification in every specific case for *every* action or situation, real or possible.¹ On the other hand, the law is *inconclusive* when it does not contemplate a specific solution for each and every given case.

There are three areas that can provide information on whether the law is or isn't *complete*: the criteria of legal validity; the rules and principles of law; and judicial decisions. In this text I will refer to the question of fullness or incompleteness in relation to the *rules* and *principles* of law, as well as the influence of the aforementioned positions on legal interpretation (judicial decisions). To this end I will take into account canonical legislative formulations (rules), but also the *implicit* content of legislation (principles); in other words, both statutory law and the law implicit in statutory law.

As mentioned by Rafael de Asís, the problem under discussion can be approached synthetically as follows: we begin with the fact that it's obviously difficult to believe that the legal system has sufficient rules to solve all conflicts, even though the legal system is obliged to view the law as something capable of providing solutions to all problems that may arise. Fullness is therefore a kind of *ideal* view of the law to be pursued by legal practitioners who should act as if the legal system were complete. This allows us to distinguish two senses of the term 'fullness' (*completeness*) of the law: an *absolute* and a *relative* sense. From the 'absolute' point of view fullness is associated with the existence of norms that solve, as it were, all problems. From the 'relative' point of view, the absence of specific norms for solving certain problems is accepted, but (at the same time) so is the existence of mechanisms that integrate these problems into the legal system.² In both senses (absolute and relative), the law is full and complete.

In this respect, of the three cases that diminish the occurrence of fullness or incompleteness of the law, it is only the absence of a norm with a precise solution and (furthermore) the impossibility of finding a solution through various techniques that would allow us to say in the strict sense that 'fullness has deteriorated'. The other two cases (the existence of a norm that provides a precise solution to the problem –in a legal dispute–; and the absence of a norm with a precise solution, but the possibility of reaching a solution through various techniques) would not constitute cases

¹ M^a Cristina Redondo, 'Teorías del Derecho e Indeterminación Normativa' (1997) 20 Doxa 180 ff.

² Rafael de Asís Roig, *Jueces y normas. La Decisión Judicial desde el Ordenamiento* (prologue by G Peces-Barba, Marcial Pons 1995) 29 and 32.

of incompleteness of the law.³

From the above we can infer that the fullness or completeness of the law is assessed according to the following criteria:

Firstly, the ability of the rules and principles to cover any *actual* or *possible* (future) case that presents itself within the legal system. If the rules and principles apply to *any* actual or possible case, they constitute a *factor* of the completeness of the legal system. If the opposite is the case, the law lacks fullness.

And secondly, for the law to be full or complete, its rules and principles must 'regulate or contemplate in *all* their scope' those cases which they cover, without leaving *any* aspects of these cases indeterminate. If this is the case, and the rules and principles extend their application to '*any* aspect' of the cases they relate to, this favours the completeness of the law; if they do not, they affirm incompleteness as a characteristic of inconclusive law.

In section two of the paper I will briefly describe the conceptual context, in the sphere of legal theory, in which the debate on the indeterminacy or completeness of the Law is developed. In section three I will refer to this discussion in the area of adjudication. In addition to the above, in sections four and five I will discuss the doctrine of the norm as a framework and the thesis of indeterminacy in Kelsen. And I will conclude, as a central argument of the paper, that whilst Kelsen paradoxically converges with Dworkin in denying legal indeterminacy set out from opposing positions and moving in different directions, both of them would arrive at the same conclusion that the law is 'complete': both theories include a thesis of the completeness of the law against the position of Hart.

II. INCONCLUSIVE LAW OR THE COMPLETENESS OF THE LAW

Approaches to inclusive law or the completeness of the law vary according to the various *theories of law* and of the *legal argument* used.

Thus, the *completeness* of law is discussed by contemporary legal positivism with the idea that the law is indeterminate because it is incomplete, as it is impossible for it to regulate the entire universe of *foreseen* (real) and *unforeseen* (possible) cases. Consequently, *not* all legal controversies that judges must resolve can be solved through established law, but rather sometimes (partial indeterminacy) or always (complete indeterminacy) the

³ *ibid* 32 ff.

judge must use his powers of discretion to resolve a particular case.⁴ Positivists believe that this conceptual framework –which includes a significant thesis on legal indeterminacy– receives the greatest support when *testing the suitability* of legal theory to the practice of law.⁵

In this debate, an argument that has increasingly gained favour in determining the fullness or incompleteness of the law is related to the explanations given by various legal theories as to why *genuine disagreements* occur between jurists in a legal case. As Albert Calsamiglia rightly states, one of the fundamental characteristics of the legal profession is *controversy*; jurists discuss and have numerous disagreements about the solutions offered by positive law, and yet very few theories have paid attention to the analysis of these disagreements.⁶ However, the genuine disagreement between jurists involved in a legal case, in terms of legal reasoning, has been explained primarily from two points of view: firstly, from the fundamentals of law applicable to the particular case ('theoretical disagreement'); and secondly, from the question of whether or not these fundamentals are in fact satisfied in a particular case ('empirical disagreement').⁷

The main explanation supplied by legal positivism is *empirical* and is directly related to: a) the notion of 'open texture' in law; b) the consideration of 'borderline cases' in the legal system; and c) the *significant* affirmation of (partial or complete) indeterminacy of the law. *Borderline* cases (doubtful, indeterminate or marginal cases) must be taken into consideration, as must those legal cases that involve indeterminacy at the moment of application and interpretation, whether in all legal controversies (if it is believed that the law is *always* indeterminate) or only in some of them (if it is believed that the law is *sometimes* indeterminate). In other words, the mechanisms of legal interpretation that may be able to solve borderline cases will either never be able to solve them (complete indeterminacy) or sometimes will and sometimes won't (partial indeterminacy).

⁴ cf Marisa Iglesias Vila, 'Discreción Judicial y Positivismo Jurídico: Los Criterios Sustantivos de Validez', in Roberto Saba (ed), *Estado de Derecho y democracia. Un Debate Acerca del Rule of Law* (Sela 2001) 92; cf also Marisa Iglesias Vila, *El problema de la discreción judicial. Una aproximación al conocimiento jurídico* (CEPC 1999) Chapter I.

⁵ cf Juan Alberto del Real Alcalá, 'Ámbitos de la Doctrina de la Indeterminación del Derecho' (2006) 56 *Jueces para la Democracia* 48-58.

⁶ Albert Calsamiglia, 'El Concepto de Integridad en Dworkin' (1992) 12 *Doxa* 159 ff; also Albert Calsamiglia, 'Ensayo sobre Dworkin', in Ronald Dworkin, *Los Derechos en Serio* (Ariel 2005) 7-29.

⁷ Ronald Dworkin, *Law's Empire* (Hart Publishing 2000) 4-6.

One legal positivist has been most successful in explaining genuine disagreements between jurists: Hart, with his notion of the *open texture* of the law,⁸ which arrives at the conclusion that the genuine disagreement between jurists is an '*empirical* disagreement'. Thus, when jurists must apply a legal term to a particular case, genuine disagreement arises because this particular case has fallen into the *twilight zone* of the area in which the *paradigm* case of a legal term can be applied. This generates *subjective uncertainty* or *doubt* (which may lead to legal indeterminacy) as to whether the particular case falls *within* or *outside of* the area of clear application or clear non-application. The result in this case is that the legal term is 'indeterminate' within the legal system, which consequently lacks fullness and is inconclusive. The disagreement or dispute is an *empirical* one because it centres on the act of *applying* (qualifying) a legal concept to a *particular* case. It is true, as Jules Coleman warns, that if we pay too much attention to the genuine controversies between jurists when resolving the issue of fullness or incompleteness we may end up understanding law exclusively in terms of *litigants* and judges, and overlook the important role of law as a 'guide' for citizens.⁹

In opposition to the current positions of legal positivism, the contemporary anti-positivist approach, as developed by Lon L Fuller and Dworkin, uses two core arguments to support the fullness of the law: a) the radical statement that the *implicit contents* of the law are *integrated* into the judicial sphere, and that these implicit contents avoid legal indeterminacy by producing an '*ex post* determinacy' of law in relation to any given legal case, whether in relation to the explicit law of rules or the implicit law of principles;¹⁰ b) the 'argument of controversy' in response to the question as to why genuine disagreements arise between jurists.

The anti-positivist theory of Fuller already provided an argument in favour of *implicit* law.¹¹ Fuller also uses other arguments in the field of constitutional law to explain why a *theory on the sources of law* must include implicit law:

(i) because the drafting of any Constitution would be impossible unless the

⁸ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 124-136.

⁹ Jules Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (OUP 2001) 166 ff.

¹⁰ cf Juan Alberto del Real Alcalá, '¿Certeza del Derecho vs. Indeterminación Jurídica? El Debate entre Positivistas y Anti-Positivistas' (2007) 106 *Archiv für Rechts-und Sozialphilosophie, Beiheft* 94-106.

¹¹ Lon L Fuller, *The Anatomy of Law* (Frederick A Praeger Inc 1968) 44, 48 and 57: in the law or in legal provisions there is always a substratum of implicit law.

writer can assume that the legislator will agree to accept certain implicit notions;¹²

(ii) because it is necessary to anticipate emergency situations, and to foresee the necessary modifications in order to confront such situations;¹³

(iii) another reason why a written Constitution cannot avoid assuming implicit principles on the integrity of the law that cannot be formulated is that the words of a Constitution must be interpreted before they can be applied. Fuller talks of the 'implicit sources' of law, which are derived from the uses, practices, community attitudes and a sort of consensus in relation to them, which allows the law to cover the whole range of cases the judge is presented with, and to do so to their full extent.¹⁴

Given that for Dworkin the legal norm is an ideal more noble than the norm of a legal text, only a theory on the sources of law as described above (that includes implicit law) can allow the rules and principles to *cover* any legal case, in such a way that the judge is able to *determine* the 'demands' of the law in *every* legal dispute.¹⁵ For citizens, this would make it possible for every one of them to have rights and duties in relation to other citizens and in relation to their government, even when not all of these rights and duties are codified and written down in books.¹⁶ This leads him to reject the positivist claim that if a legal dispute is not regulated by *explicit* law it is because the law is indeterminate. From this anti-positivist approach, a legal system will always have rules and/or principles (identified and determined by the criteria of legal validity) that are able to contemplate any problems of any case that presents itself to the legal system. This means that any legal dispute can always be resolved –and to its full extent– by the law, and that the law is therefore complete.

This position depends largely on the 'argument of controversy' as an explanation of *genuine disagreements* between jurists. In fact, modern anti-positivism resolves this issue in such a way that, through interpretation, rules and principles can be determined for every real or possible case. This is the case even where these rules and principles include *imprecise* terms that may at first appear to generate indeterminacy in their application to a particular case. Thus, in contemporary anti-positivism the *argument of controversy* constitutes a factor of the completeness of law in relation to

¹² *ibid* 63.

¹³ *ibid* 65.

¹⁴ *ibid* 58–59 and 66.

¹⁵ Ronald Dworkin, *Taking Rights Seriously* (2nd edition, Duckworth 2002) 339.

¹⁶ *ibid* 339–342.

rules and principles, and in the two following senses:

a) In relation to the ‘disputed’ nature (as opposed to open texture) of law, and the Dworkian distinction between the *concept itself* (legal) and *conceptions* (of the concept).¹⁷ One should bear in mind that Dworkin, in opposition to the ‘open texture’ nature of law described by Hartian legal positivism, claims that the law (rules and principles) is always ‘determinable’ (for every case) even when it is ‘disputed’. This means that any problem in law dealt with by legal practitioners that is initially indeterminate can always be resolved by the mechanisms of legal interpretation and integration.¹⁸

There is a prior reasoning that underlies the anti-positivist explanation as to why jurists disagree. It is crucial to understand that when the argument of *controversy* distinguishes between a ‘concept’ (legal) and ‘conceptions’ (of the concept) it is not referring to the difference between the *meaning* of a legal term that is part of a norm and its empirical application (extension) or non-application to a given case. Rather, the distinction is a ‘conceptual’, theoretical one concerning *differing conceptions* (of a theoretical/doctrinal nature) that each of the parties have in a legal dispute in relation to the term or legal concept included in the norm that the legal practitioner is interpreting. In other words, the argument centres on the distinction between the ‘abstract idea (or conception)’ and the ‘specific idea (or conception)’ that the legal practitioner applies to the legal term in order to particularise the abstract idea in a given case.¹⁹

Therefore, the reason why genuine disagreements occur between jurists is not, as the positivists wrongly claim, because the legal terms or concepts under discussion (as to whether they should or shouldn’t be applied in a particular case) have an *open texture* and are therefore *indeterminate*. They occur because such legal terms are ‘abstract’ concepts. And in order for the abstract concepts contained in a rule or principle to be applied to a *specific* case, it is not enough to simply observe the facts and subsume them under some applicable *paradigm*; but rather a particular ‘conception’ of the legal concept must be developed in relation to the given case. In short, the key to explaining legal controversy is the fact that each party to the dispute

¹⁷ Ronald Dworkin, ‘Thirty Years On’ (2002) 115 Harvard L Rev 1655 ff.

¹⁸ Dworkin, *Taking Rights Seriously* (n 15) 128 ff; also cf Juan Igartua Salabarría, ‘El Indeterminado Concepto de los Conceptos Indeterminados’ (2000) 56 Revista Vasca de Administración Pública 151 ff; Walter Bryce Gallie, ‘Essentially Contested Concepts’ (1995-1996) 56 Proceedings of the Aristotelian Society 167-198 who originally defined concepts that invoke conceptions as ‘essentially disputed concepts’.

¹⁹ Dworkin, *Law’s Empire*, (n 7) 71.

develops a '*different* conception' of the *same* legal term. This is where legally controversy truly derives from.

In fact, Dworkin classifies abstract *concepts* (those that necessarily require a particular theoretical/doctrinal *conception* in order to be applied) as 'disputed' concepts. Of course, to say that a concept is *disputed* does not in any way imply that the concept is *vague* and *indeterminate*.²⁰ In fact, disputed concepts are not *indeterminate* but simply *subject to litigation*: the parties dispute over their specific meaning in a given legal case.

b) In view of the above, the *argument of controversy* that states that in legal disputes there is a theoretical disagreement between jurists regarding the conception of legal terms, and not an empirical disagreement regarding their application, represents, for anti-positivists, an important factor in the completeness of the law in relation to rules and principles. In fact, according to Calsamiglia, the argument of *disagreement between jurists* is the Dworkian anti-positivists most potent weapon for challenging contemporary positivism: if jurists agree on which laws are in force, and agree on the meaning of the wording of the law, theoretical disagreements about what the law demands (in each case) can and do arise.²¹

The conclusion is that, from a contemporary anti-positivist –and especially Dworkian– point of view, the controversies between jurists are 'interpretative' and can therefore be resolved through the methods of interpretation afforded by the legal system. Consequently, these controversies do not imply any legal indeterminacy.²²

III. COMPLETENESS, INDETERMINACY AND ADJUDICATION

The issue of whether or not the law is complete or incomplete has an impact on how judges approach the task of legal interpretation. They can either accept the thesis that cases which are (partly or completely) 'non-regulated', and the rights and duties of citizens that are argued over judicially, are *ineradicably* indeterminate, meaning that the law is an

²⁰ For Timothy Endicott, the 'abstract' concepts that Dworkin speaks of are 'vague' concepts. See Timothy AO Endicott, 'Herbert Hart and the Semantic Swing' (1998) 4.3 Legal Theory 283-300.

²¹ Calsamiglia, 'El Concepto de Integridad en Dworkin', (n 6) 160: Dworkin would suggest that the law is an interpretative concept and that texts say nothing in and of themselves. A particular approach is required and that is what positivism has not understood.

²² Dworkin, *Law's Empire*, (n 7) 71, 37-44 and 87-90; and Marisa Iglesias Vila, 'Los Conceptos Esencialmente Controvertidos en la Interpretación Constitucional' (2000) 23 Doxa 101.

inconclusive system. Or they can preserve their decision-making capacity through interpretative methods and rules of construction that always and in every case resolve the initial indeterminacy, meaning that the law is a *complete* system.

So, according to the anti-positivists, the resolution of a legal dispute is never *indeterminate* as long the judge is always able to identify a *unique* and *correct* response within the law. This statement that the law is complete is of crucial importance to anti-positivism, as it is the final and most important step of the argument that it uses to *reject* the conclusion of legal indeterminacy. It is so important that anti-positivist law is largely reduced to a theory of adjudication, a theory of how to construct the judicial decision: it practically views law as an argumentative practice, wherein the most important development is the judicial process. Naturally this may give the impression that, according to anti-positivism, what makes the law *complete* is not that it is complete in and of itself, but rather that the anti-positivist *theories of law* (particularly its *theories of adjudication*) act as a *factor* of completeness (and the main factor) while constructing the judicial decision.

A closely related point is that the anti-positivist approach has largely focused on how to tackle the *hard cases* that arise in law, a test bed for theories of law and adjudication in observing how the judicial decision is constructed in legal practice. Indeed, Dworkian anti-positivism largely reduces contemporary positivism to an erroneous ‘theory of hard cases’ where Dworkin understands hard cases as those that arise in a legal system when a particular litigation cannot be clearly subsumed under a legal norm previously established by an institution, (and that in order for them to be settled) the judge has ‘discretion’ to decide the outcome of the case.²³

However, Dworkin argues that where, in positivism, the judge has discretion to decide the outcome of the case, this implies that if one of the parties has a pre-existing right to win the case this idea (from the positivist point of view) is no more than a fiction. Indeed, when positivism settles a legal case in this way it is *creating* ‘new rights’: the judge has introduced new rights (through the interpretative solution, granting them to the party that wins the case), and) applying them, retroactively, to the case.²⁴

From an anti-positivist point of view, the description of the judicial function in terms of discretion in *hard cases* does not give a satisfactory

²³ Hart, *The Concept of Law* (n 8) 124-128.

²⁴ Dworkin, *Taking Rights Seriously* (n 15) 293 and 352.

account of what adjudication is or of the structure of *judicial duty*.²⁵ The alternative for anti-positivism is to try to present and defend a better theory that more plausibly reflects legal practice.²⁶ To this end, Dworkian anti-positivism must construct the ‘judge Hercules procedure’: a model of an *ideal* judge, a paradigm of how to construct the judicial decision in *hard* cases, although equally valid for *easy* cases.²⁷ The *Hercules* procedure is also a *descriptive* and *prescriptive* perspective on adjudication, based on the idea of law as an *integral* social practice that takes into account the internal point of view of those who participate in the legal practice; in other words, arguments in the practice of law that develop within the judicial process while solving the legal *controversies* that arise therein.

In fact, the Herculean procedure constitutes one of the most important strategies that anti-positivism (in its paradigmatic Dworkian version) uses to provide grounds for the *completeness* of the law, and to counter the thesis of its partial or complete indeterminacy. The basis of the Herculean procedure is the conceptual link between law and morality, based on a *theory of the sources of law* that includes both explicit statutory law and the implicit content of statutory law. This theory leads to the claim that the legal system has always envisaged a ‘correct’ response to every real or possible legal dispute. The result is that the judge can settle all cases in law.

As an argument generated by anti-positivism in favour of completeness, the unique *characteristics* of the Herculean procedure which provide an ideal model of judicial decision-making, do a great deal to vindicate the view of law as a full system. I refer to the following characteristics:

(1) Always settling a dispute *according to* the law; that is, through *arguments of principle*, and not with *political* or *opportunistic* arguments (discretionary arguments).²⁸

(2) The bivalent structure of the judicial decision, by virtue of which the Hercules procedure contains a ‘bivalent’ logical and conceptual scheme for judicial decision-making. The judge does *not* have a third possibility available in which a rule and/or principle neither applies nor does not apply, as this would constitute an ‘indeterminate’ response. In anti-positivist theories, *judicial bivalence* is a technical resource for the *completeness* of the law, even for confronting the

²⁵ Dworkin, *Law's Empire* (n 7) 37-39.

²⁶ Dworkin, *Taking Rights Seriously* (n 15) 81-82 ff.

²⁷ Dworkin, *Law's Empire* (n 7) 352-354.

²⁸ According to the opinion of Dworkin, *Taking Rights Seriously* (n 15) 82-83, 90-96 and III.

most complex legal disputes.

(3) The *correct univocal* response that the law has for any present or future legal dispute.²⁹

(4) The strength of *principles* in constructing the judicial decision: to bring about a situation wherein the law covers *all* cases (foreseen and unforeseen), the (implicit) *principles* of law play a very important role in the legal argument of the Herculean procedure. The use of principles for the completion of law has often been used in contemporary anti-positivism as, for example, Fuller's theory on adjudication when used to solve what he called problematic cases.³⁰

(5) The 'unlimited capacity' of the interpretative resources of law as a factor in the completeness of law.³¹

By virtue of these premises, judges perform their duties with the supposition that for any legal dispute that citizens bring before them 'there is some solution inherent in law that is waiting to be discovered'. For this reason, the judge 'must never assume that the law is incomplete, inconsistent or indeterminate'; and when it appears to be so, he must realise that the defect is not within the law but rather due to the limited abilities of the judge himself to discover the solution that the legal system envisages for the particular dispute, whether by virtue of rules (explicit statutory law) or principles (implicit law). So the judge not only has no room to create law in the performance of his duties, but he must also justify what he believes the law *to be*. He must work to identify the *principles* that are objectively enshrined within the system, and if divergent ideas (*conceptions*) on these principles exist, he must decide which of these ideas corresponds to the best conception of these principles.³²

Completeness in the area of the judicial decision means that every case compiled involves an opinion (the judge's decision) that maintains that one of the parties has, after the judge's assessment, the best legal argument and therefore wins the case within the legal dispute.³³ Thus, according to this

²⁹ Dworkin, *Law's Empire* (n 7) 239-240.

³⁰ Fuller, *The Anatomy of Law* (n 11) 105 and 144; see also Dworkin, *Taking Rights Seriously* (n 15) 81 ff.

³¹ Timothy AO Endicott, *Vagueness in Law* (OUP 2000) 99-100; Spanish translation: Timothy AO Endicott, *La vaguedad en el Derecho* (translated by Juan Alberto del Real Alcalá and Juan Vega Gómez, Dykinson 2006) 159-160; also, Dworkin, *Law's Empire*, (n 7) 44.

³² Dworkin, *Law's Empire*, (n 7) 337-350.

³³ See Ronald Dworkin, 'Is There Really no Right Answer in Hard Cases?', in

anti-positivist position, if the judges did not follow the Herculean procedure as an objective and decisive procedure for resolving both hard and easy cases, it would be impossible for them to fulfil the professional duty required of them by the Rule of Law to *always settle* any legal dispute raised by citizens.³⁴ This is the *sine qua non* for satisfying the *fundamental right* of citizens to effective justice.³⁵

However, two significant kinds of objections have been made to the anti-positivist view of adjudication. First of all, is it really possible (and not merely *conceptually*) to *totally* eliminate the indeterminacy that sometimes occurs in law? Or is this not a *useless* task, or even a not really *desirable* one, as Hart³⁶ or Timothy Endicott³⁷ claim, for any theory of adjudication, given the *structure* of the law? Another objection relates to the question of whether this doctrine can adequately respond to challenges such as the argument of *higher-order vagueness* (for example, the distinction between *clear cases* and *hard cases* is not always clear cut). According to Endicott, the legal theory of Dworkin –to which the thesis of the completeness of the law is fundamental– cannot respond to this argument.

IV. THE DOCTRINE OF THE ‘NORM AS A FRAMEWORK’ AND LEGAL INDETERMINACY IN Kelsen

According to the criteria discussed in the text, Hans Kelsen’s theory of law, a paradigm of legal positivism, should be classified as one of the legal theories that accept the incompleteness of law due to its indeterminacy. Traditionally, it has been claimed that Kelsen’s thesis of the indeterminacy of law derives from his doctrine of the ‘norm as a frame’.

However, I would like to briefly present a number of important points that question this affirmation. If these reasons are valid, it would be more correct to say that Kelsen’s legal theory contains a ‘thesis of the completeness’ of law than a thesis of indeterminacy. Consequently, whilst Dworkin and Kelsen set out from opposing positions and move in

Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 120–145.

³⁴ See HLA Hart, ‘El Nuevo Desafío al Positivismo Jurídico’ (1980) 36 *Sistema* 14 (text from the talk given by the author at the Autonomous University of Madrid on the 29th of October 1979, translated by Liborio Hierro, Francisco Laporta and Juan Ramón de Páramo).

³⁵ See art 24 of the Spanish Constitution.

³⁶ HLA Hart, ‘Postscript’, in HLA Hart, *The Concept of Law*, (n 8) 251–253.

³⁷ Timothy AO Endicott, ‘Law is Necessarily Vague’ (2001) 7 *Legal Theory* 379–380; Spanish translation Timothy AO Endicott, ‘El Derecho es Necesariamente Vago’ (2003) 12, translated by Juan Alberto del Real Alcalá, *Derechos y Libertades* 180.

different directions, both of them would arrive at the same conclusion that law is 'complete'.

The reasons I put forward can be resumed as one: Kelsen's legal theory does not really contemplate borderline cases, as long as it can settle all *present* and *possible* cases 'according to the law'. And it would seem meaningless to 'accept' the thesis of legal indeterminacy, while simultaneously 'denying' the existence of *indeterminate* cases in law. In my opinion, this is precisely what Kelsen's thesis of law does. I therefore question the traditional view that Kelsen accepts the thesis of legal indeterminacy.

Four strong arguments serve to undermine the view that Kelsen's theory of law contains a thesis of indeterminacy. They are as follows:

1. *The Argument for the Distinction between 'Individual' and 'General' Norms*

From a Kelsenian point of view, 'a norm is individual if it decrees a once-only individually specified instance of behaviour to be obligatory'; when it dictates a unique and individually determined required behaviour; 'for example, the judicial decision'. And 'a norm is general if it decrees some generally specified behaviour to be obligatory'; when it dictates a required behaviour determined at a general level.³⁸

From the Kelsenian perspective, the individual norm seems to correspond to *clear* cases. Logically, the Rule of Law provides judges with *precise*, and largely *objective* cases, and these are used to settle clear cases *in accordance* with *pre*-established law. In this type of court case the ruling must be made from *within* the law, in contrast to cases that can only be settled *discretionally*. However, these procedures are insufficient when the legal case has no solution *within* the legal system because it is a *borderline* case.

If we consider the fact that Kelsen equates the individual norm with the typical situations of *clear* cases, it is probably true that the general norm should correspond to those represented by *borderline* cases. However, this is where the contradiction arises in Kelsen's legal theory, as will now be explained.

2. *The Argument of the 'Norm as a Framework', Based on the Above Distinction*

As Hart observed, borderline cases are located in the area of indeterminacy or twilight zone of the area in which rules can be applied,

³⁸ Hans Kelsen, *General Theory of Norms* (trans Michael Hartney, Clarendon Press 1991) 7 and 279.

for in any legal system there will also be cases that are not legally regulated.³⁹ These cases are then *indeterminate*.⁴⁰

Borderline cases are characterised as being:

- i) 'marginal cases', in that they are at the limit between the *clear* applicability or *clear* inapplicability of the law.
- ii) 'doubtful cases', in that it is uncertain whether or not the law can be applied to them with certainty.
- iii) '*indeterminate* cases' by virtue of the consequence of *indeterminacy* they produce when applying the law.
- iv) 'hard cases', by virtue of the *complexity* involved in constructing the judicial decision in these indeterminate cases, which are either *incompletely* regulated or even *not regulated* in any sense by the legal system. This contrasts with the simplicity of constructing a decision in *clear* cases.

According to Endicott, *borderline* cases can be synthetically defined as those cases in which one does not know whether the rule should be applied or not, and the fact that one does not know is not due to ignorance of the facts.⁴¹ I use the nomenclature *borderline* cases or *marginal* cases, as this is the most common in legal theories that accept the thesis of indeterminacy.

Traditionally, the category *borderline* cases and the thesis of legal indeterminacy are common to positivist legal theories. However, an interesting case arises in this context: Kelsen's theory of law, considered as one of the paradigms of legal positivism. Kelsenian legal theory *supposedly* allows some type of a thesis of legal *indeterminacy*, but it also tries to make it compatible with the opposite thesis of the *completeness* of the law. In my opinion, stating one thing alongside its opposite is inevitably paradoxical. This contradiction arises because in Kelsenian legal theory, genuinely *incomplete* legal cases do not really arise. In fact, all legal cases that this legal theory considers can be resolved 'according to the law'. This seems to run counter to the very nature of an authentic *borderline* case.

The work of completing the law, and of consequently eliminating all legal

³⁹ Hart, 'Postscript' (n 36) 272-273.

⁴⁰ Hart, *The Concept of Law* (n 8) 126-128.

⁴¹ Endicott, *Vagueness in Law* (n 31) 31-33

indeterminacy, is performed by Kelsen through his theory of the 'norm as a framework'. For Kelsen, the legal system is a system of general and individual norms that are interrelated in accordance with the principle that law regulates its own creation. Every law of this system is created according to the prescriptions of another and, ultimately, according to the fundamental norm that constitutes the unity of the system.⁴² In this regard, 'From a dynamic point of view, the decision of the court represents an individual norm, which is created on the basis of a general norm of statutory or customary law in the same way as this general norm is created on the basis of the Constitution'.⁴³ And, for this reason, the judge is always a legislator, even in the sense that the content of his rulings can never be exhaustively determined by a pre-existing norm from substantive law.⁴⁴

Consequently, for Kelsen, a judicial decision 'is an act by which a general norm, a law, is applied; but at the same time it is an individual norm that imposes obligations on one or both of the parties in conflict'. So 'by resolving the dispute between two parties', what occurs is that 'the court actually applies a general norm of customary or statutory law'. And although, as Kelsen claims 'the court simultaneously creates an individual norm establishing a particular sanction to be imposed upon a certain individual', this creation does not mean that the judge is going 'beyond' the law. This is because 'this individual norm can be referred to general norms just as the law is referred to the Constitution'.⁴⁵ From this it can be deduced that the legal system can always provide the solution to any legal case from 'within' the law.

What seems to be clear is that the judicial decision in Kelsenian indeterminate cases, which are resolved using the notion of the norm as a framework, does not present exactly the same characteristics as those typical of the judicial ruling in genuine borderline cases: that is, those that do not just present themselves as indeterminate 'initially' but 'ultimately' turn out to be indeterminate. And for this reason they find no solution within the legal system. However, Kelsen does not consider this type of case. Moreover, from his point of view, when the judge resolves indeterminate (Kelsenian) cases, he is not 'stepping outside' of the law, but rather reaches a resolution from within the possibilities of the norm, and hence, according to the law.

The question that now arises is whether a genuinely indeterminate case

⁴² Hans Kelsen, *General Theory of Law and State* (Transaction Publishers 2005) 124.

⁴³ *ibid* 144.

⁴⁴ *ibid* 145, 146, 148-149 and 166-168.

⁴⁵ *ibid* 125-131.

can be resolved according to the law, because then it would not ‘ultimately’ be an indeterminate case, but rather a hard case contemplated by the law (a pivotal case).

3. *The Argument that the Kelsenian Legal Theory Refutes the 'Theory of Gaps' in the Law*

Even where Kelsen accepts the notion of the judge as legislator, Kelsenian legal theory refutes the ‘theory of gaps’ in the law rejects the indeterminacy of the law: ‘This theory [of gaps] is erroneous because it ignores the fact that the legal order permits the behaviour of an individual when the legal order does not obligate the individual to behave otherwise’.⁴⁶ The theory of gaps is based on ignorance of the fact that when the legal system does not impose any obligation upon an individual, his behaviour is permitted. And where an isolated legal norm cannot be applied, it is nonetheless possible to apply the legal system, and this is also an application of the law.⁴⁷

Moreover, Kelsen believes that ‘the theory of gaps in law –it is true– is a fiction; since it is always logically possible, although sometimes inadequate, to apply the legal order existing at the moment of the judicial decision’.⁴⁸

4. *The Argument for the 'Completeness' of the Law and the 'Consistent Positivism'*

The argument for the ‘completeness’ of the law, which he advocates from a legal positivist position that he defines as ‘consistent’, is incompatible with the thesis of legal indeterminacy. Kelsen tries to safeguard first and foremost the postulate of legal positivism that every specific case must be resolved on the basis of current positive law; and, in his opinion, it is essential for a consistent positivist theory of law to show that the system of positive law contains this express or tacit authorization (to fill this or that gap).⁴⁹ But the idea that positive law can resolve any type of case does not seem very compatible with the thesis of indeterminacy.

V. CONCLUSION

For contemporary legal anti-positivism, the law is clearly complete in

⁴⁶ Hans Kelsen, *Pure Theory of Law* (translation from the 2nd German edition by Max Knight, University of California Press 1967) 246.

⁴⁷ Kelsen, *Pure Theory of Law* (n 46) 246–247.

⁴⁸ Kelsen, *General Theory of Law and State* (n 42) 149.

⁴⁹ Kelsen, *General Theory of Norms* (n 38) 131–132 ff.

relation to laws and principles, because the legal system is always able to provide complete regulation through the interpretation of these laws and principles in relation to any real or possible case. This approach argues for the completeness of the legal system through a theory on the sources of created law, including explicit and implicit law, from which a solution to the Universe of real and possible cases can be provided. Non-regulated cases are seen as gaps, a sort of defect of the law, but one that can be fixed through a theory of interpretative adjudication, which is always able to provide a correct response to any legal dispute. It follows that the completeness of law is one of the theses that most clearly distinguishes anti-positivism (especially the Dworkian paradigm) from contemporary legal positivism. On the other hand, legal positivism claims that the nature of the legal practice is such that the law is *inconclusive as it is incomplete*, and supports a (partial or complete) thesis of legal indeterminacy.

This has a consequence on the application of the law and on legal interpretation. For anti-positivists, completeness necessarily evokes a 'model judge' capable of resolving all current or future disputes, regarding which the law will never be indeterminate; and even if a case is initially indeterminate, this has no *significance* or *relevance* to the law, as the case can always be resolved through the interpretative methods supplied by the law itself. Legal positivism, by contrast, questions the fullness of the law by noting its open texture, the existence of borderline cases and the resulting conclusion of legal indeterminacy that gives rise to judicial discretion. The inevitable result is that the law is inconclusive as it is incomplete.

The disagreement between the two legal theories seems to reside in the 'ideal description' of the law given by anti-positivism and the more *realistic* description of the legal practice given by Hartian positivism and by the followers of this doctrine. In any case, both theories currently compete with each other to provide the best description of the legal system underlying the Constitutional Rule of Law.

However, this account of the differences between positivism and anti-positivism breaks down when we consider the thesis of indeterminacy in Kelsen and his doctrine of the norm as a framework. If the four arguments we put forward to consider his (apparent) thesis of legal indeterminacy are correct, they may put into question the claim that Kelsen's legal theory allows for legal indeterminacy. This is because it does not appear logical to accept a system of law that both 'indeterminate' and yet 'without gaps', as suggested by Kelsen. In other words, if we accept that Kelsen's legal theory allows both one thesis (legal *indeterminacy*) and its opposite (the *completeness* of the law), we must at least accept that Kelsen's legal theory contains a 'paradox' in relation to indeterminacy.

In my opinion, these considerations show that this legal theory is closer to the thesis of the *completeness* of law than it is to the thesis of the *indeterminacy* of the law. Or at least, they seem to seriously challenge the idea that this theory of law is really a thesis of indeterminacy.

Perhaps the issue can be clarified by distinguishing between cases that are indeterminate in the *Kelsenian* sense, which are not real borderline cases as they can be resolved *within* the law and *according* to the law; and cases that are indeterminate in the *Hartian* sense, which can only be resolved by 'stepping outside' the legal system, as they consist of cases that are really *not contemplated* by the law, or *incompletely* contemplated. Only these latter cases constitute genuine *borderline* or *indeterminate* cases.

It seems that contemporary legal positivism of the *Hartian* variety understands indeterminacy in terms of cases that are 'un-regulated' (or at least *incompletely* regulated) by the law. And indeterminacy from Kelsen's perspective refers, by contrast, to cases that are *regulated* by the law 'within the norm as a framework'. Therefore, whilst cases that are indeterminate in the Hartian sense *cannot* be resolved by the legal system, the indeterminate cases considered by Kelsen can *always* be resolved by the law and by the system of established sources by applying the doctrine of the 'norm as a framework'. Consequently, such cases never *ultimately* imply the indeterminacy of applicable law. So why is it claimed that Kelsen's theory of law contains a thesis of legal indeterminacy? It should also be considered that if Kelsen's legal theory does indeed contain a thesis of indeterminacy, it would be a thesis of indeterminacy that denies the existence of *indeterminate* cases, which seems meaningless.

Thus, if this reasoning is valid, it means that the legal theories of Kelsen and of Dworkin paradoxically converge in denying legal indeterminacy, albeit from radically different and opposing positions. It would also follow that both theories include a thesis of the completeness of the law. Both advocate a position contrary to Hart.

EXEMPLARY DAMAGES: A GENUINE CONCEPT?

Vaclav Janecek*

In this article I examine the concept of exemplary damages. Unlike many other studies this paper omits policy reasons and focuses primarily on the very concept of exemplary damages. My aim is thus not to argue for or against this remedy but rather to show whether or not it is a coherent and genuine legal category. Following relevant case law I will develop a conceptual definition of exemplary damages under English law of tort. This, I argue, is subject to three types of critical arguments – an argument from insufficiency, from positive exclusivity and from negative exclusivity – that highlight its incoherence. With respect to problematic aspects of the concept I compare exemplary damages under English law to germane Czech law which helps to show the relevance of ontology to law of damages. I suggest that from certain ontological perspective, we can reinterpret exemplary damages in a more coherent and acceptable manner. I conclude that such an understanding of exemplary damages makes them immune to the previous critique and also to the objection of ‘ordre public’ in private international law.

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I. INTRODUCTION

Exemplary damages are considered to be one of the most controversial areas of tort law. There are many different comments on how to understand them both in common law as well as in academic literature, so it is becoming increasingly difficult to reconcile these views into one

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coherent category. However, it is widely recognized that exemplary damages are established as a distinctive remedy. Recent developments in common law (vindicatory damages)¹ and statutory regulation (*Crime and Courts Act 2013*)² have led to a renewed interest in the unification of tort law doctrine, particularly in a principled approach to the concept of exemplary damages.

The aim of this paper is to determine whether there is a genuine framework behind the concept of exemplary damages under English law of damages, or if it is just a fictional notion. I will therefore begin with positive law and develop a core definition of exemplary damages. Then, I will go on to confront this definition with three elementary objections (argument from insufficiency, and arguments from positive and negative exclusivity). I will argue that all these counter-arguments are based on correlativity between the tort and remedy in question and that exemplary damages are, according to the core definition, lacking such a feature. Further, I will compare English and Czech law of damages. This allows me to highlight some theoretical underpinnings that affect the basic structure of damages. In the last part, these considerations will be crucial for a suggested reformulation of the exemplary damages definition.

This paper attempts to show that current understanding of exemplary damages under English common law is, at least at a conceptual level, highly problematic and that it is important to reinterpret this concept as a type of compensatory remedy in order to retain its coherence and normativity. However controversial this might appear, it is a strictly doctrinal and conceptual approach that is not bound with any policy reasons and thus it in principle provides general availability and enforceability of exemplary awards in other European countries. It is also worth noting that the author is not concerned here with American conception of exemplary (punitive) damages.

II. EXEMPLARY DAMAGES – A DEFINITION

Exemplary damages can briefly be described as a type of damages that are

¹ Vindicatory damages are a new type of damages that are designed to vindicate the claimants violated rights. They have only recently started being awarded as a sum of money that recovers the mere fact of violation of some basic right of the claimant. In this sense, vindicatory damages might seem to be similar to exemplary damages since they probably do not recover any material loss and thus are extra-compensatory.

² In the last year the British Parliament enacted *the Crime and Courts Act 2013* that explicitly deals with exemplary damages although they had traditionally been part of common as opposed to statute law.

contrary to the basic principle of damages, ie compensation. In contrast to compensatory damages, they seek to *punish* and *deter* a defendant but not to compensate the loss. Exemplary damages are awarded for the most outrageous conduct of the defendant where he acts with a reckless disregard of the plaintiff's rights³ and where his behaviour is so unacceptable or even shocking that the court must show its disapproval of it.⁴

At first glance, the idea of punishment clearly belongs to the domain of criminal law. In tort law we consider any sort of punishment as an anomalous method of correction. However, this was not so obvious in the past.⁵ In Roman law, the concepts of tort and crime fell under a single type of obligation (*delictum*). In essence, *delictum* could be characterised as a voluntary act of an injury. Roman law then distinguished between public and private injuries (*delicta publica* and *delicta privata*) depending on whether it was public or private legal interest that was injured by a wrongful act. As a consequence of *delictum* the aggrieved party was entitled to perform personal revenge and punish the wrongdoer. After some time, the wrongdoer was enabled to repay himself from the threat of this punishment by an agreed amount of money that was acceptable for the aggrieved party, although it is worth noting that this figure was primarily in no relation to suffered loss and that the wrongdoer was basically at the hands of the victim.⁶ This right of punishment then developed into a specific form of claim (*actiones poenales*)⁷ which enabled the claimant to sue for a fine (*poena*), ie for monetary punishment. In general, this award was based on the type of injury committed and, in the case of interference with proprietary rights of the claimant, on the claimant's material loss multiplied by some number.⁸

³ See eg *Cassell & Co Ltd v Broome and another* [1972] 1 All ER 801, 803, 821; *Drane v Evangelou and others* [1978] 2 All ER 437, 438.

⁴ *Rookes v Barnard* [1964] AC 1129, 1228; *Cassell & Co Ltd v Broome and another* [1971] 2 All ER 187, 198.

⁵ See Harvey McGregor, 'Compensation versus Punishment in Damages Awards' (1965) 28 Modern L Rev 629, 629; Gerhard Wagner, 'Punitive Damages in European Private Law' in Klaus J Hopt, Jürgen Basedow and Reinhard Zimmermann (eds), *Handbook of European Private Law* (forthcoming), <<http://ssrn.com/abstract=1766113>> accessed 1.6.2013, 2.

⁶ David Elischer, 'Ke genezi a vyvoji konceptu individualí občanskoprávní odpovědnosti za škodu' in Vlastimil Pihera and Bohumil Havel (ed), *Soukromé právo na cestě* (Ales Cenek 2010) 121.

⁷ cf Wagner (n 5) 2.

⁸ Elischer (n 6) 123; see also James Gordley, 'The Structure of the Modern Civil and Common Law of Torts' in J Gordley (ed), *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (OUP 2006) 163.

Probably the most important step towards modern law of damages comes with recognition of liability in negligence and even more with the concept of strict liability where a subjective requirement of a voluntary act that the wrongdoer could be held liable for is missing.⁹ Although the defendant could not be punished for his conduct, he still could be responsible for damage he caused.

Another important factor was an increasing role of public institutions. According to the theory of social contract it is perfectly rational for every citizen to delegate many of his rights to some public body (entity) and thus legitimize its power. In this sense, the criminal justice system clearly illustrates that it would be very problematic if in every single case of injury we were all allowed to perform a private retribution. Hence, from the individual's perspective, we should rather seek for balance in terms of compensation that also better complies with any private type of injury (*delicta privata*) since the damage caused by the defendant interferes usually only with private proprietary rights. In short, we can say that tort law damages are now therefore linked with occurrence of damage caused by the wrongdoer, and their aim is to compensate this damage, whereas the criminal system penalizes certain types of wilful conduct that interferes with public interests and its aim is to mark social disagreement with it.

However, because any sort of punishment represents the most intensive violation of one's personal rights, there is the need for strict and clear conditions under which it is possible to impose it. Criminal law fulfils these requirements through basic principles such as *nulla poena sine lege* or *nullum crimen sine lege*.¹⁰ Similarly, in tort law, it is important to define and follow some limits that protect a defendant from unjustifiable punishment, and it is undoubtedly the House of Lords' decision in *Rookes v Barnard*¹¹ that draws these limits in the first place. Lord Devlin defines here three categories of cases where it is, in principle, possible to punish the defendant by means of exemplary damages. These categories are: (1) 'oppressive, arbitrary or unconstitutional action by the servants of the government'¹²; (2) torts where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff'¹³; and (3) cases where 'exemplary damages are expressly authorised by statute'.¹⁴ This is sometimes called

⁹ cf McGregor (n 5) 629.

¹⁰ See eg Jerome Hall, 'Nulla Poena Sine Lege' (1937) 47 Yale LJ 165.

¹¹ [1964] AC 1129.

¹² *ibid* 1226.

¹³ *ibid* 1226.

¹⁴ *ibid* 1227.

‘the categories test’¹⁵ and in principle it could be applied to any wrongful conduct.

Based on a different understanding of *Rookes v Barnard*¹⁶ it had not been clear until 2001 whether or not it was only ‘the categories test’ or also ‘the cause of action test’ that Lord Devlin had established in his speech. The cause of action test, according to which it was possible to award exemplary damages only for those claims where the cause of action corresponded with the claims for which exemplary damages had been awarded before 1964, ie before *Rookes v Barnard*,¹⁷ was first advocated by the Court of Appeal.¹⁸ Nonetheless, a few years later, when this question was assessed by the House of Lords in *Kuddus v Chief Constable of Leicestershire Constabulary*, the cause of action test has been clearly rejected.¹⁹ This was, I believe, a correct step that re-affirmed a principled juristic approach to damages. Exemplary damages must therefore again be seen as a normative (as opposed to descriptive) concept. The concept itself should structure the court’s reasoning and instruct the judge on how to award this type of damages and not vice versa. Moreover, it also implies that exemplary damages must in principle be a logically possible and coherent concept. Otherwise there would be nothing to follow, ie it would have no normative function and this construct would be mere fiction. It follows that we need to examine the category of exemplary damages not only through case law, but also at a conceptual level. Thus, I will now turn to some other crucial characteristics of exemplary damages from which I will develop a basic definition of this legal instrument.

In order to award exemplary damages there are at least another four restrictions that need to be fulfilled. Therefore, not only must the defendant’s conduct fall within one of Lord Devlin’s three categories, it must also be a case where first, the total sum awarded in compensatory and aggravated damages is not adequate to punish the defendant.²⁰ In other words, it is insufficient to teach the defendant that tort does not pay.²¹ Hence, for example, in the case of *Watkins v Home Office and others*,²² the House of Lords refused to award exemplary damages where the claimant

¹⁵ See eg *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 3 All ER 193, 217.

¹⁶ [1964] AC 1129.

¹⁷ *ibid.*

¹⁸ *AB v South-West Water Services Ltd* [1993] 1 All ER 609.

¹⁹ [2001] 3 All ER 193.

²⁰ [1964] AC 1129, 1227f.

²¹ [1964] AC 1129, 1227 or *Cassell & Co Ltd v Broome and another* [1972] 1 All ER 801, 826, 874, 875.

²² [2006] UKHL 17.

had not suffered any damage. The House of Lords argued that it is impossible to establish whether or not compensation payable to the plaintiff is insufficient to punish the defendant if there are no compensatory damages at all. Second, the plaintiff must be the victim of the wrongful conduct;²³ so, in *Ashley v Chief Constable of Sussex Police*²⁴ the House of Lords refused to award any extra-compensatory damages (including exemplary damages) to the plaintiffs who were relatives of the victim.²⁵ Third, given that a civil proceeding does not protect the defendant with the same procedural safeguards as the criminal justice system, a total sum awarded in exemplary damages should not exceed possible punishment for similar criminal conduct.²⁶ When determining this figure, the court must be cautious and never abuse its powers. In this sense, there is a clear guidance for the assessment of exemplary damages, at least for the first Lord Devlin's category in the case of *Thompson v Commissioner of Police of the Metropolis*²⁷ that makes these awards more predictable and therefore helps to prevent the defendant from any arbitrariness. Finally, according to the fourth important consideration, unlike in compensatory damages, wealth of the defendant plays a fundamental role here. As Lord Devlin puts it, '[e]verything which aggravates or mitigates the defendant's conduct is relevant'.²⁸ In accordance with this principle only £1,000 damages were awarded in an unlawful eviction case where the defendant was a natural person,²⁹ whereas in case of commercial law, the defendant, a corporate legal entity was punished by £60,000 in exemplary damages.³⁰

All these limitations including the categories test should be understood as constitutive elements of a core definition of exemplary damages. By the core definition I mean such a normative structure that every competent person would accept and that could usually be followed simply by understanding, ie with no need for interpretation.³¹ In this sense we can say that a vast majority of cases converges to the following normative

²³ [1964] AC 1129, 1227.

²⁴ [2008] 1 AC 962.

²⁵ *ibid* 975, 979.

²⁶ [1964] AC 1129, 1227f.

²⁷ [1997] 2 All ER 762, 763, 776.

²⁸ [1964] AC 1129, 1228.

²⁹ *Drane v Evangelou and others* [1978] 2 All ER 437. There was no separate figure for compensatory damages so it could be argued that exemplary damages were even less than £1,000.

³⁰ *2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19.

³¹ cf HLA Hart, 'Positivism and the Separation of Law and Morals' (1957) 71 *Harvard L Rev* 593; Andrei Marmor, *Interpretation and Legal Theory* (Hart Pub 2005) 118.

definition of exemplary damages that helps judges to decide when and how to use this form of punishment:

In order to punish and deter a defendant, but only if³² compensation payable to a victim is insufficient to do so, the victim of punishable conduct that falls within one of three categories of cases (oppressive, arbitrary or unconstitutional conduct by the servant of the government; conduct that has been calculated by the defendant to make him a profit which may well exceed the compensation payable to the victim; exemplary damages are expressly authorised by statute) can be awarded exemplary damages in total sum that reasonably reflects the defendant's wealth and other relevant aggravating or mitigating circumstances.

Provided that this is a normative concept it then follows that, when defendant's wrongful conduct fits into this definition, he will, as a consequence of this fact, also have a corresponding duty to pay some money (in exemplary damages) to the claimant. Otherwise, the core definition would either be non-normative, or an award of exemplary damages would be completely arbitrary. As we have seen earlier,³³ the House of Lord acknowledged normative reading of *Rookes v Barnard*³⁴ therefore it cannot be the first case. But it also cannot be the case of absolute arbitrariness as it would not only neglect basic principles of justice such as principle of equal treatment or right of fair procedure, but it would also violate *nullum crimen sine lege* and *nulla poena sine lege* principles that should apply here to some extent. In other words, judges cannot simply abuse their powers. Thus, there must be some underlying substantive law that gives rise to the exemplary damages claim and to the corresponding tortfeasor's duty.³⁵

³² I do not want to use material implication here ('if, but only if' – cf *Rookes v Barnard* [1964] AC 1129, 1228) because it is simply not this type of implication. The fact that compensation is not sufficient to punish the defendant does not imply that exemplary damages can be awarded. It is possible that the goal of punishment will be reached by some other form of punishment (eg criminal or administrative). The case *Archer v Brown* [1984] 2 All ER 267, 281 or 2 *Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19, [497] illustrates this point clearly.

³³ See *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 3 All ER 193.

³⁴ [1964] AC 1129.

³⁵ Pursuant to the substantive (as opposed to procedural) understanding of exemplary damages it is apparent that current common law terminology is not very accurate. The terms claimant or defendant do not reflect the substantive nature of their legal relation but rather just evoke the procedural aspect. This is perfectly in accordance with judicial demands but in jurisprudential writings it should usually not be the same. Otherwise, it would suggest that exemplary

However, this could sometimes be very problematic because the core definition consists of too many vague terms and categories.³⁶ This, in effect, forces any practicing judge or lawyer to use his skill of interpretation as he would otherwise be unable to decide whether the facts that he is accessing fall under the core definition or not. This is a very important moment because while interpreting, we in fact apply some other rules that tell us how to use our concept of exemplary damages. In other words, we use higher-order rules (meta-rules)³⁷ to re-shape our former understanding of this concept into some more applicable version of it that better helps us to find the answer.

One of these higher-order rules are legal principles.³⁸ It then seems that some of these principles speak against the concept of exemplary damages and undermine its function. For instance, when we try to interpret exemplary damages as an inherent part of tort law damages, we will inevitably come across the principle of compensation that obviously clashes with our core definition.³⁹ We may thus either accept the position that compensation is not a universal and constitutive principle of damages or it is also possible that exemplary damages are not a coherent concept. In the next chapter, I will therefore examine some key objections to exemplary damages in respect/relation to the principle of compensation.

Further, it is worth noting that the following analysis will not be concerned with arguments of public policy. There are many strong doctrinal arguments against exemplary damages;^{40,41} nonetheless, in its

damages are just an arbitrary, discretionary and purely procedural remedy which is an absurd position.

³⁶ See also *Cassell & Co Ltd v Broome and another* [1972] 1 All ER 801, 837f (as per Lord Reid).

³⁷ Ludwig Wittgenstein, *Philosophical Investigations* (GEM Anscombe, PMS Hacker and J Schulte (translation), Blackwell 2009).

³⁸ Principled approach to legal interpretation is now well established and explicitly began in 19/20th century jurisprudence when English lawyers started with reception of civil law systematics and rationality [see Gordley (n 8) 159]. I am not concerned here with linguistics, logic or any other disciplines that with no doubt also affect our interpretation.

³⁹ See also Jules Coleman, 'Tort Law and Tort Theory: Preliminary Reflections on Method' in Gerald J Postema (ed), *Philosophy and the Law of Torts* (CUP 2001).

⁴⁰ For common law critique see eg Law Commission, 'Aggravated, Exemplary and Restitutionary Damages' (1997) Law Com No 247; Solene Rowan, 'Reflections on the Introduction of Punitive Damages for Breach of Contract' (2010) 30 OJLS 495 or Stephen Todd, 'A New Zealand Perspective on Exemplary Damages' (2004) 33 Com L World Rev 255.

⁴¹ For continental critique see eg Helmut Koziol and Vanessa Wilcox (eds),

report on *Aggravated, Exemplary and Restitutionary Damages* (1997), the Law Commission concluded that it is rather policy arguments than any conclusive theoretical reasoning that speaks for current retention of exemplary damages in English law.⁴² But if we want to evaluate the core definition we cannot simply rely on policy reasons as they take the category of exemplary damages to be clear, coherent and given, so in fact they are based on a presumption that is never questioned and thus might be false. We therefore need to take a step back and look at the critique of this legal instrument at an adequate (in this case conceptual) level. It means that we need to examine which part of the core definition faces most of the critical arguments and why it is so.

III. ARGUMENTS AGAINST EXEMPLARY DAMAGES

In this section, I will (at the conceptual level) analyse three close-knit arguments against exemplary damages.⁴³ First, I will look at the main argument according to which exemplary damages are an undeserved and unjustifiable windfall to the plaintiff. I will present this objection in form of an argument from absurdity that highlights the weaknesses of the core definition. This will also enable me to show how a different legal system (Czech) could face it. After this short comparison, I will turn to the two remaining questions, ie I will examine whether or not exemplary damages violate the distinction between criminal and tort law and whether punishment is a legitimate aim of tort law.

I. *The Argument from Insufficiency*

The first objection, which I call the argument from insufficiency, deals with the problem of justification of an award of money adjudicated by a court to the plaintiff under the heading of exemplary damages. The

Punitive Damages: Common Law and Civil Law Perspectives (Springer-Verlag 2009); Thomas Rouhette, 'Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept' (2007) 74 Def Counsel J 320; Bernhard A Koch, 'The "European Group on Tort Law" and Its "Principles of European Tort Law"' (2005) 53 Am J Comp L 189 or Regulation (EC) No 864/2007 of the European Parliament and of the Council, on the law applicable to non-contractual obligations (Rome II).

⁴² Law Commission (n 40) 100ff.

⁴³ There are of course many other arguable or controversial aspects, for instance the aim of exemplary damages, proportionality of total sum awarded, vicarious liability, multiple plaintiffs/defendants, insurance etc.; but I believe it is sufficient to demonstrate my argument only by those three as they in some respect illustrate all the important issues. For other counterarguments see eg Richard Mulheron, 'Exemplary Damages and Tort: An International Comparison' (2000) 2 U Notre Dame Australia L Rev 17 or Law Commission (n 40) 94ff.

argument itself consists of two parts. The first part states that it is fair, just and reasonable to compensate claimant's damage with an adequate sum of money. In principle, damages should put the claimant in the position as if no wrong had been committed,⁴⁴ thus the sum awarded must equal the damage suffered. This reflects an intrinsic correlativity between the damage and damages. Pursuant to this assumption, we can in principle always critically evaluate whether or not the award was reasonable and adequate, and therefore also legitimate. Now, analogically, there needs to be some sufficient reason according to which it would be legitimate for the claimant to receive the money in exemplary damages. However, since these damages cannot be compensatory, there also cannot be the legitimizing fact of correlativity between the defendant's obligation to pay the sum and the claimant's right to receive it, and although we can provide some reasons in favour of exemplary damages, none of them would be sufficient to legitimize the award. Hence, the sum of money is a windfall to the plaintiff.

This position rests on the very notion of damages and in its alternative formulation, has a form of *reductio ad absurdum* argument. If we take damages to be a sum of money awarded *for* damage, it seems that exemplary damages are *contradictio in adiecto* because they cannot be awarded *for* damage; rather, they are adjudicated as a *consequence of* this damage.⁴⁵ The notion of correlativity or reciprocity expressed here by the respective term '*for*' is a distinctive feature of compensation that is *per definitionem* excluded from the concept of exemplary damages (cf. 'only if compensation [...] is insufficient to do so').⁴⁶ However, since there is no damage that would be covered exclusively by an exemplary award, there also cannot be a sufficient mutual justification of this civil form of sentence. Similarly, Zipursky believes that '[t]he relational nature of the liability distinguishes [damages] from a fine.'⁴⁷

The fundamental idea of correlativity could be laid out in the following

⁴⁴ *Livingstone v Rawyards Coal Co* (1880) 5 App Case 25, 39 (as per Lord Blackburn).

⁴⁵ Although we can define damages also alternatively, for example as a sum of money awarded *for* a wrong (Basil Markesinis, Simon Deakin and Angus Johnston, *Markesinis and Deakin's Tort Law* (7th edn, OUP 2012) 940), or as a sum of money awarded *for* a violation of a legally recognised interest (eg James Edelman, *Gain-Based Damages* (Hart Pub 2002) 5), there is still very clear notion of compensation or correlativity between the sum of money and the wrong committed, so the implication here holds.

⁴⁶ See the relevant part of the core definition (above).

⁴⁷ Benjamin C Zipursky, 'Philosophy of Private Law' in JL Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 627.

terms. First, there needs to be a good reason why the defendant should have a duty to pay, and second, we also need to justify why the plaintiff has a correlative right according to which he is entitled to receive the payment. Now, as soon as the second requirement is fulfilled, it will make no sense to treat exemplary damages as a non-compensatory remedy.⁴⁸ At the conceptual level, the fulfilment of both conditions implies that any punishment is *de facto* compensation for a wrong. Therefore, the only difference between punishment and compensatory damages would be in the type of wrong in question or in other words, whether it is public or private interest that has been violated.⁴⁹ Nonetheless, if exemplary damages are to be paid into the claimant's pocket it obviously cannot be the case of public wrong, but only that of private wrong. So, we can conclude that exemplary damages do not substantially differ from compensatory damages, which is indeed an absurd outcome.

The classic way of legitimizing exemplary damages in legal doctrine⁵⁰ highlights private nature of the wrong committed. It is only the victim who has the right to be punitive and therefore it is just to award him the money. According to Hampton, it was the plaintiff's own value that was damaged and it needed to be restored.⁵¹ It is the plaintiff who brings the claim to the court and who is redressing an injury and not anyone else.⁵² All these reasons seem to support legitimacy of the exemplary award being paid straight to the claimant rather than to anyone else. However, we can ask how this conception differs from legitimization of any compensatory award. In the end, these arguments are misleading since they draw from the idea of correlativity between the violated interest and the duty to pay some money. If we appeal to the concept of reciprocity that bears an important notion of legitimacy and fairness,⁵³ I can see no reason why we should define the exemplary award as purely non-compensatory.

⁴⁸ Similarly also Helmut Koziol, 'Punitive Damages - A European Perspective' (2008) 68 *La L Rev* 741, 752.

⁴⁹ cf *delicta privata* and *delicta publica* in Roman law (above).

⁵⁰ Although we may also justify exemplary damages from the Rawlsian standpoint appealing to a political conception of justice it is not my concern here since I want to examine the doctrinal approach; see John Rawls, *Political Liberalism* (Columbia University Press 1993) or John Rawls, 'Political Liberalism: Reply to Habermas' (1995) 92 *The J of Philosophy* 132, 133.

⁵¹ Jean Hampton, 'Forgiveness, Resentment and Hatred' in Jeffrie G Murphy and Jean Hampton (eds), *Forgiveness and Mercy* (CUP 1990).

⁵² Benjamin C Zipursky, 'Palsgraf, Punitive Damages, and Preemption' (2011) 125 *Harv L Rev* 1757, 1759.

⁵³ Arthur Ripstein, 'Philosophy of Tort law' in Jules L Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 681, 57.

Possibly, we can also defend the core definition by adding a public element into it, ie to divert the sum that is awarded to a public fund. The state recovery of these awards would probably require a statutory regulation.⁵⁴ Nonetheless, this solution, that already applies in the USA⁵⁵ to some extent and is also proposed to become part of French civil law,⁵⁶ gives us no good explanation as for why we should award exemplary damages within civil rather than criminal trial. Moreover, if we accept this approach, it would actually bring us more trouble as it would violate some basic criminal law principles expressed by a number of procedural safeguards (although they should systematically apply to exemplary damages awards as well). This is because if exemplary damages are to be diverted to a public fund and if they are to be strictly punitive (*per definitionem*) they will in practically no respect differ from a criminal sentence.⁵⁷ Thus, again, the argument from insufficiency remains valid.

However, there are three more ways that can resolve the issue at hand. In the first place, we may point out that in tort law there are also some other types of damages such as restitutionary or nominal damages that are not based strictly on compensation.⁵⁸ In fact, the concept of damages is much wider than the argument from insufficiency presupposes and thus it fails even on its very first premise. Although this appears to be a strong counterclaim, it cannot succeed. Quite contrary, it would lead to an undeserved misapprehension. The notion of correlativity, which, as we have seen, was crucial for the first premise of the argument from insufficiency, does not necessarily exclude other than compensatory types

⁵⁴ Jane Mallor and Barry Roberts, 'Punitive Damages: On the Path to A Principled Approach' (1999) 50 Hastings Law Journal 1001, 1006.

⁵⁵ For an interesting analysis of split-recovery schemes see Catherine M Sharkey, 'Punitive Damages as Societal Damages' (2003) 113 Yale Law Journal 347. However, Sharkey's concept of societal damages covers only particular types of torts – cf *ibid* 389.

⁵⁶ See more in Solene Rowan, 'Comparative Observations on the Introduction of Punitive Damages in French Law' in John Cartwright, Stefan Vogenauer and Simon Whittaker (eds), *Reforming the French law of obligations* (Hart Pub 2009) 336 or Rowan (n 40) 513-16.

⁵⁷ Although the proportionality of an award corresponds to the *Criminal Justice Act 2003* (c.44) s 164(4) and to the principle of equality before the law and the principle of equal impact, it previously might have been in contrast to some earlier authorities, cf eg *R v Markwick* (1953) 37 Cr App R 125: 'There should be no suggestion that there is one law for the rich and one for the poor.' Thus, the exemplary award might have been harsher than any similar criminal sentence. The critique of this practice has still its place as it is hard to understand 'how the means of the claimant can have any real relevance to the amount to be awarded on an exemplary basis.' Harvey McGregor, *McGregor on Damages* (18th edn, Sweet & Maxwell 2009) 444.

⁵⁸ *ibid* 4, 411.

of damages. Hence, it is legitimate to award restitutionary damages for the correlative gain⁵⁹ of the defendant, or nominal damages for a sole injury, ie *ijuria sine damno* (I return to this problem at the end of this section). Both types of these damages are based on mutual justification. They are collateral to some value, so in fact they stand in line with the premise they were supposed to undermine.

Second, the claim can be made that exemplary damages are just an instrument, ie that we do not accept them as a genuine concept, but rather that we accept them as means to an end or, maybe even a fiction regardless of its inner coherence.⁶⁰ Thus we can say that the insufficiency problem does not efficiently address our understanding of exemplary damages at all. In fact, we would resign on any conceptual consistency. This instrumental approach commits us to hold both that we believe that exemplary damages are in fact a non-existent concept, and that we accept this concept only because it is very desirable for us to do so. But again, this gives us no good explanation as for why the claimant should receive these damages. Jeremy Bentham expressed this point very clearly when he claimed that '[any] fiction is a syphilis, which runs in every vein, and carries into every part of the [legal] system'.⁶¹ Under this instrumentalist approach the substantive law would remain unprincipled and unpredictable. Thus, it would be contrary to the reasons exposed in *Kuddus v Chief Constable of Leicestershire Constabulary*⁶² and therefore also contrary to the normative understanding of exemplary damages. To conclude, we still need some better response to the argument from insufficiency.

⁵⁹ I do not want to develop here the conceptual distinction between unjust enrichment and restitutionary damages because both of them bear the notion of correlativity. Thus, both of them are legitimate in the same sense. Moreover, for judges, who usually do not commit themselves to any theory or any such terminology, it does not matter if they assess any amount of money under the heading of unjust enrichment or restitutionary damages - see Steve Hedley, 'Restitution and Unjust Enrichment' in Margaret Halliwell and Steve Hedley (eds), *The Law of Restitution* (Butterworths 2002) 11. This also speaks for a common intellectual frame of these concepts. On the other hand, some authorities; eg *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197 - use their terminology too loosely that they in fact dismiss the distinction between exemplary and restitutionary damages. For more see eg R Cunnington, 'The Border between Compensation, Restitution and Punishment' (2006) 122 LQR 382.

⁶⁰ For the theoretical background see eg Mark E Kalderon, *Moral fictionalism* (OUP 2005) 3-8.

⁶¹ Jeremy Bentham, *The Works of Jeremy Bentham*, vol 5 (John Bowring ed, W. Tait 1843) 170.

⁶² [2001] 3 All ER 193.

The third possible answer that I want to follow here accepts the need for correlativity in any justification of tort law damages. It is clear that the absurdity emerging from the insufficiency objection rests on the strict separation between compensatory and punitive aims of damages, which, I claim, is only artificial. We cannot draw a clear distinction if in reality there is none since we would commit ourselves to the instrumentalist stance that we have previously refused. Calabresi makes the point when he argues that the complexity is an intrinsic feature of tort law and it makes no sense to strictly separate these aims. He believes it should rather be the opposite, ie that we should realize multiplicity of objectives that could be reached through exemplary damages including recovery of non-recoverable compensatory damages and vindication of wronged rights.⁶³ Although the idea of the recovery of non-recoverable damages seems to be very problematic, we can make good sense of it.

The fundamental assumption is that it is permissible to recover not only damage (*damnum*) but also an injury (*injuria*). While the first is generally recoverable by compensatory damages, the second is usually not. However, if we want to fulfil the principle of full compensation, we have to recognize that even a sole injury regardless of any explicable damage (in terms of loss) lowers the position of the claimant. Therefore, we should also compensate a mere breach of the claimant's rights. Subsequently, we should differ between compensation as a principle on the one hand, and compensatory damages as a legal remedy on the other. The principle of compensation is an organizing element of law and tends to put everything into a balanced state. Every slight correlative shift of this balance (caused by a wrong) needs to be recovered primarily by means of compensatory damages. Now, the key issue is that what will be recoverable by compensatory damages is essentially a matter of our ontological and epistemological beliefs. From this perspective, we can say it is mostly random historical circumstances that determine what will be included in the concept of damages, ie what would be explicable in terms of substantial damages for a *real* injury (damage).

We can conclude that it is coherent to hold different conceptual categories of damages pursuant to our ontology or epistemology. However, in this respect, I would claim that there are only two elementary options. Based on our philosophical presuppositions, we can seek compensation either for *real* or *unreal* injury. The current position in English law is that *real* injury can be both material as well as immaterial, and it is recovered by compensatory and aggravated damages. An *unreal* injury (*injuria sine damno*)

⁶³ Guido Calabresi, 'The Complexity of Torts - The Case of Punitive Damages' in SM Madden (ed), *Exploring Tort Law* (CUP 2005) 343-47.

does not even raise the question of the value of the loss since it is immanent to this concept that there is nothing substantial to be measured. The sole injury to private interest can so far be recovered only by nominal damages.⁶⁴ Now, I want to hold that in the same sense that criminal punishment recovers a sole injury to public interest, the concept of exemplary damages should recover a private *unreal* injury. The difference between nominal and exemplary damages should be analogical to the relation between compensatory and aggravated damages. In other words, exemplary damages should express and recover the seriousness of the violation of the private interest.⁶⁵

At this point, we can successfully defend exemplary damages against the argument from insufficiency as we already have a sufficient reason for legitimacy of an exemplary award, but at the same time we should partially resign on the core definition of exemplary damages, in particular on the strict distinction between the principles of compensation and punishment.

2. *A Comparison to Czech Law*

The differences between ontologically various types of wrongs (injuries) and related legal remedies can be illustrated by civil law tradition, particularly by damages under Czech law. Due to its historical development and political circumstances, Czech law of damages originally only applied to material loss. Until 1989, communists following Karl Marx's legacy governed the Czech Republic; it is thus not hard to see that, because of its prevailing materialist ontology, the only recoverable injury in terms of damages was material loss.⁶⁶ Subsequently, the decline of the communist regime marked the appearance of other monetary remedies that could be systematically categorized as damages. It was a monetary award for immaterial loss⁶⁷ under the heading of just satisfaction, and an award for loss of future earnings⁶⁸ under the heading of damages. It is worth noting that positive Czech law does not distinguish between different types of damages, thus, in statutory terminology, it is only material loss (real damage and loss of future earnings) that falls under the

⁶⁴ Here I want to omit the category of vindictory damages since it would make my argument less clear. Nonetheless, it does not change the implication of it. I will return to the question of vindictory damages later.

⁶⁵ cf. § 36(1)(b) Crime and Courts Act 2013 (c.22): '[T]he amount must be proportionate to the seriousness of the conduct.'

⁶⁶ See § 442 odst. 1 zákona č. 40/1964 Sb., občanský zákoník (Czech Civil Code), version before 1.1.1992: 'Only real damage shall be recovered [...] in money.'

⁶⁷ See § 13 odst. 2 zákona č. 40/1964 Sb., občanský zákoník (Czech Civil Code), version after 29.3.1990.

⁶⁸ See § 442 odst. 1 zákona č. 40/1964 Sb., občanský zákoník (Czech Civil Code), version after 1.1.1992.

scope of damages. Nonetheless, in Czech legal theory,⁶⁹ it is uncontroversial that both just satisfaction and damages (in positive legal terminology) should be conceptually treated as part of 'law of damages'. For the sake of clarity I will use the term compensatory damages for the statutory concept of damages, while the term damages shall be appointed to a more abstract legal category, ie for the law of damages in general.

In general, Czech law of damages consists of two main parts, compensatory damages and just satisfaction, which corresponds to the material versus immaterial loss dichotomy. As to the concept of compensatory damages (real damage and loss of future earnings), the underlying justification for an award is clear and uncontroversial and it is mostly the same as in English law. The interesting point in terms of comparison comes with the Czech concept of just satisfaction.

First of all, just satisfaction is not entirely a monetary remedy. Quite contrary, the statutory provision says that the court can recover immaterial loss of the claimant in money only if other forms of just satisfaction, such as the judgement itself, seem to be unsatisfactory.⁷⁰ So, if there is no immaterial loss, it would usually be satisfactory to vindicate the claimant's rights simply by declaring that these rights have been infringed, ie the very fact of publication of the judicial decision would do justice. In this respect, the non-pecuniary forms of Czech legal remedies could be assimilated to the English concept of nominal damages as they are also meant not to compensate an injury, but rather just to indicate the mere fact of an injury.⁷¹ Although, unlike in common law, under Czech legal regulation, every type of injury is in principle actionable. It is also worth noting that just satisfaction is strictly bound to rights in person, so whereas compensatory damages can for example be awarded for the infringement of the claimant's proprietary rights, just satisfaction applies only to an injury to person.

Now, if an injury causes some immaterial loss (harm), the claimant is also entitled to a monetary recovery of this harm. The Czech statutory terminology consistently uses the term 'harm' since it better illustrates the nature of just satisfaction, which is conceptually bound not only with the

⁶⁹ See eg David Elischer, 'Nove i staronove jevy v deliktnim pravu - vybrane aktualni otazky v pravu odpovednosti za skodu' in Monika Pauknerova (ed), *Promeny soukromeho prava* (Karolinum 2009) 147f; Josef Fiala et al., *MERITUM Obcanske pravo* (Wolters Kluwer 2012) 247ff.

⁷⁰ cf § 13 odst. 1, 2 zakona c. 40/1964 Sb., občanský zákoník (Czech Civil Code).

⁷¹ This goes in hand with the claimant's right to recover legal costs since, under Czech law, in order to recover these costs, it is not necessary to award him any damages.

claimant but also with the defendant. We can demonstrate it by using the following linguistic examples. A victim *suffers harm* in a similar sense as he *suffers loss*. However, a wrongdoer can *do harm* but cannot *do loss*. From now on, in relation to Czech law, I will therefore use the term ‘immaterial harm’ or simply ‘harm’ instead of ‘immaterial loss’ for the element of an injury that is recoverable in money. The amount of money awarded under the heading of ‘just satisfaction’ thus needs to be proportionate not only in relation to the immaterial harm suffered (compensation for immaterial loss in English law), but also in relation to the defendant and all the relevant circumstances of the injury in question.⁷² So, in principle, the claimant can be awarded a substantial sum of money in addition to the compensatory damages and the first compensatory element of just satisfaction.

At first glance, this resembles the English concept of exemplary damages, nonetheless it might be a huge misapprehension since just satisfaction is not *primarily* meant to punish the defendant; rather, it should vindicate the claimant’s rights. The award of money recovering or compensating the harm is thus always legitimate since it is always collateral to it. The compensatory element is just and reasonable in relation to immaterial loss and the vindictory element in relation to every aggravating or mitigating circumstances of the injury. The aim of vindication is, however, similar to the aim of exemplary damages, ie to teach the defendant that he cannot breach other people’s rights. So, in the vast majority of cases, it will be sufficient to satisfy the claimant’s injury (apart from his immaterial loss) by a sole declaratory judgement (analogically by an award of nominal damages under English law), and only in very rare and exceptional cases can the claimant recover more than was his loss, both material and immaterial, if the compensatory award for both material and immaterial loss and the publication of the judgement would not be sufficient to indicate the seriousness of an injury and to fully compensate the immaterial harm.⁷³

To summarize, Czech law of damages comprises of two basic domains that can possibly give rise to a monetary remedy – damage and harm. Damage can be described as a material loss, it has two elements (real loss; loss of future earnings) and is recovered by compensatory damages. Harm can be characterized as an immaterial loss and a sole injury to the personal interests of the claimant, and is compensated by just satisfaction. Just

⁷² See more in Karel Elias et al., *Obcanský zákoník: velký akademický komentář* (Linde 2008) 156-58.

⁷³ This approach has been recently acknowledged by the Czech Constitutional Court (the highest judicial authority) in its decision: *nález Ústavního soudu sp. zn. I. US 1586/09, 6.3.2012*. On the analysis of this decision in relation to exemplary damages see Vaclav Janecek, ‘K připustnosti sankční náhrady škody’ (2013) *Právní rozhledy* 153.

satisfaction can take a form of a declaratory judgement, or, if insufficient, it can establish the defendant's duty to pay a monetary compensation for the harm. So, paradoxically, since the concept of harm includes also an *injuria sine damno*, Czech law has shifted from purely materialist understanding of damage to a much wider and innovative scheme where it is possible to reflect and compensate even a mere injury, or in other words to treat its seriousness as a material and recoverable element. As a consequence, such an underlying ontology makes the award of just satisfaction immune to the argument from insufficiency since there will always be a necessary correlative reason for this award.

In comparison to Czech law we can see some interesting similarities between English and Czech compensatory damages; further, between aggravated damages and just satisfaction for immaterial loss;⁷⁴ third, between nominal damages and non-monetary form of just satisfaction; and finally, between exemplary damages and monetary form of just satisfaction for a sole injury. Nonetheless, from the perspective of exemplary damages there is at least one important difference, ie that the concept of just satisfaction does not exclude the principle of compensation. Moreover, just satisfaction includes the principle of vindication, prevention and the principle of punishment.

In his well-argued study, Colby pointed out that exemplary damages historically developed from a special form of compensation for a private injury and that the understanding of them as a punishment for a private wrong was just an ex-post rationalization of such an award.⁷⁵ Hence, it might be arguable whether or not punishment without compensation is a legitimate goal of damages. As Lord Hoffmann puts it, the fact that compensatory damages can 'have a punitive, deterrent or exemplary function [has not been controversial]'. What distinguishes exemplary damages for the purpose of the *Rookes v Barnard* dichotomy is that they do not have a compensatory function.⁷⁶ This brings us to the second and third elementary objections to exemplary damages dealing with the principle of punishment.

⁷⁴ Also the Law Commission's proposal to replace the concept of aggravated damages by a concept of damages for mental distress supports this conclusion - cf Law Commission (n 40) 10-27; or from contrary perspective Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 OJLS 87, 90.

⁷⁵ Thomas B Colby, 'Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs' (2002) 87 Minn L Rev 583, 613-36.

⁷⁶ *The Gleaner Co Ltd and Another v Abrahams* [2004] 1 AC 628, [41] (per Lord Hoffmann).

3. *Positive and Negative Argument from Exclusivity*

Looking at the core definition, we can draw from it that exemplary damages should not bear any notion of compensation. As we have shown earlier, this presumption makes it impossible to provide any sufficient reason for legitimacy of the award being given to the claimant. Now, the same part of our definition is often subject to another criticism that takes basically two different forms. I call them positive and negative argument from exclusivity.

The positive argument from exclusivity rests on punishment being an exclusive principle of public law since only the state (as a public entity) can legitimately punish its citizens⁷⁷ and because it has more adequate procedural safeguards. Therefore, there is no room for the principle of punishment outside the public law domain. It positively states where the principle of punishment belongs to and excludes it as a leading principle from other legal disciplines.⁷⁸

On the other hand, the negative argument from exclusivity says that principles of tort law are not mutually exclusive. It is true that various remedies have their respective prevailing principles but none of these principles is an exclusive one.⁷⁹ There are more aims of tort law damages such as compensation, deterrence, prevention, punishment, vindication, declaration that are complementary and that cannot be fitted into a single compartment.

It might therefore be legitimate to follow the principle of punishment through the civil law⁸⁰ but not as a dominating and sole aim (as it seems to be in case of exemplary damages); otherwise we would face many other difficulties such as risk of double punishment etc.⁸¹ Moreover, if we accept that exemplary damages are meant to punish the defendant, we will in cases such as *Thompson v MPC*⁸² where the defendant is a public body come to another absurd conclusion, ie we will allow an individual to punish the public body. This is very problematic since it is contrary to the political consensus that only the state or some other public entity can legitimately

⁷⁷ There is obviously some contract theory basis in this assumption.

⁷⁸ cf also *Rookes v Barnard* [1964] AC 1129, 1221.

⁷⁹ See eg Andrew S Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 10 and Edelman (n 45) 4.

⁸⁰ Law Commission (n 40) 94, 99.

⁸¹ See eg *AT and others v Dulghieru and another* [2009] EWHC 225; *Borders (UK) Ltd and others v Commissioner of Police of The Metropolis and another* [2005] EWCA Civ 197; or *Lancashire County Council v Municipal Mutual Insurance Ltd* [1996] 3 All ER 545, 553.

⁸² [1997] 3 WLR 403, 417.

punish its citizens. Although common law judges might not have previously consented to the theoretical dichotomy between public and private law or to any similar doctrinal approach,⁸³ we should keep in mind that in the context of modern law, ‘theoretical coherence [should not be] regarded as, at best, a luxury, and more typically an obstacle to achieving [justice]’.⁸⁴

To conclude, it is now easy to see that all three arguments against exemplary damages (from insufficiency; from positive exclusivity and from negative exclusivity) clash primarily only with one part of the core definition. Subsequently, I claim that since we cannot provide any good response to these objections we should alter the definition. These three arguments represent the very basis for any critique of exemplary damages and they also efficiently highlight the most problematic feature of this concept, ie complete elimination of the compensatory principle.

We have seen that the difference between punishment and compensation is not so clear-cut and that it is closely related to our ontological assumptions. From a certain perspective it is thus possible to compensate the claimant’s violated rights since they have their own value and could be treated as a form of damage.⁸⁵ Such an ontological understanding of the claimant’s rights, although formerly connected only to the concept of nominal damages, has been part of English law for a long time. Hence, at this point, in accordance with a coherent tort law doctrine, I shall try to incorporate the principle of compensation into the concept of exemplary damages.

IV. EXEMPLARY DAMAGES FROM THE COMPENSATIONAL PERSPECTIVE

However controversial it might appear, if we want exemplary damages to be an inherent part of the system of tort law damages, we should understand them as compensation for the harm caused by the defendant to the claimant. The idea here is similar to the rationale of nominal damages that seem to be damages only by their name since the ontological status of damage they are supposed to recover is somewhat puzzling. The judgement for nominal damages basically declares that there has been some infringement of the claimant’s right. Nonetheless, this alone does

⁸³ *Cassell & Co Ltd v Broome and another* [1972] 1 All ER 801, 860.

⁸⁴ Gerald J Postema, ‘Philosophy of the Common Law’ in JL Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 595.

⁸⁵ In similar sense we can understand criminal sentence as compensation for violation of public right(s). See also Sharkey (n 55).

not imply that the violated right has also been vindicated.

As we have seen in comparison to Czech law, the infringement is twofold. It can be both mere formal interference with the claimant's protected interest (recoverable by nominal damages), as well as material breach of this right. The material element stands for the gravity or seriousness of a wrong, and is in relation to the claimant's private interest, and thus needs to be recovered (compensated) based on these factors.⁸⁶

Unfortunately, there is a slight complication with the recognition of these protected interests, since (in respect to nominal damages) not every tort is actionable *per se* and thus recoverable. It is then arbitrary and luck-dependent⁸⁷ whether any subsequent exemplary damages can be awarded. That is clearly against our proclaimed normative approach to damages. Quite contrary, exemplary damages should in principle be available for every injury. This means that they should also not be limited to the three Lord Devlin's categories.^{88,89}

Now, if we reformulate the core definition in a more coherent way, ie if we omit the elimination of compensatory principle, it seems that vindictory damages can be treated as a model type of tort law remedy that consolidates both compensatory and punitive functions. Many authors pointed out that vindictory damages can replace exemplary damages since they play exactly the same role.⁹⁰ Vindictory damages are, just as nominal damages, so-called 'right-based' remedy since they are in the first place connected to an injury (as opposed to damage or gain). So the fundamental idea of correlativity here is bound to the seriousness of an injury and the type of right in question. Although the aim of vindication is widely recognised in practically all types of damages, it is conceptually usually associated only with the breach of constitutional rights.⁹¹ Nonetheless, the

⁸⁶ For more on the formal element see eg *Ashby v White* (1703) 2Ld. Raym. 938, 955 or McGregor et al. (n 57) 414.

⁸⁷ cf Todd (n 40) 268; or Robert Stevens, *Torts and Rights* (OUP 2007) 88-91.

⁸⁸ For more on the same conclusion see Law Commission (n 40) 96.

⁸⁹ We can see very similar normative approach in the *Crime and Courts Act 2013* (c.22) s 34(7): 'Exemplary damages may be awarded [...] whether or not another remedy is granted.'

⁹⁰ This applies at least to the first Lord Devlin's category. See eg David Pearce and Roger Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication' (2008) 28 OJLS 86; Eddy D Ventose, 'Damages for Constitutional Infringements: Compensation and Vindication' (2010) Commonwealth Law Bulletin 245; Robert Stevens, 'Torts, Rights and Losses' (2006) 122 LQR; or Lord Scott, 'Damages' (2007) 4 LMCLQ.

⁹¹ cf eg *Regina (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, 283; *Takitota v Attorney General* [2009] UKPC 11, 15; *Merson v Cartwright* [2005]

aim of full vindication that cannot be carried out by the current concept of compensatory damages but that is essentially related to the injury appears to be instructive.

Moreover, vindictory or some other extra-compensatory damages seem to be of higher legitimacy these days since most judicial decisions do not have sufficient public attention and thus nominal damages, ie pure declaration, do not fully recover the claimant's injury. On the other hand, I see no reason as for why we should pretend that such a remedy only needs to punish the defendant if we can reach the same goal by compensatory interpretation of exemplary damages. They can be seen as a sum of money awarded for the seriousness or gravity of violated right.

As a result, it seems that exemplary damages (in their current position) are not a genuine and coherent normative concept. They might even be seen as a fictional category that Jeremy Bentham was so desperately fighting against. It thus seems that in terms of exemplary damages, judges do not obey the rules of common law; rather they govern these rules,⁹² which is contrary to the normative approach to exemplary damages established in *Kuddus v Chief Constable of Leicestershire Constabulary*.⁹³ In this context, it is more important that these rules and the concepts that are used are transparent, principled and coherent. Hence, we should reformulate our core definition in a way that it does not exclude compensation and that it is generally applicable to any tort. Exemplary damages under English law of tort may thus be possibly expressed in the following terms:

In order to punish and deter a defendant, but only for the harm not recoverable by another type of damages, the victim of punishable conduct can be awarded exemplary damages in total sum that reasonably reflects the defendant's wealth and other relevant aggravating or mitigating circumstances, i.e. recovers and vindicates seriousness or gravity of an injury regardless of any material or immaterial loss.

Here, in accordance with the argumentation of this paper, the principle of punishment is still legitimate but not an exclusive principle of exemplary damages. Further, exemplary damages are not meant to duplicate other remedies (risk of double punishment); rather they should be a complementary and inherent part of the system of damages that seek for full compensation. On the other hand, the award here is not dependent on

UKPC 38; or *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15.

⁹² Postema (n 84) 589.

⁹³ [2001] 3 All ER 193.

any prerequisite, such as the least compensation payable in terms of other remedies which actually makes it more foreseeable and, in a way, a less exceptional remedy. However, this does not mean that every injury is so serious that the claimant can be awarded exemplary damages for it.

The reformulated definition is also immune to the three arguments against exemplary damages. Further, it lays out exemplary damages as a type of right-based remedy and thus draws a clearer relation to aggravated damages. Finally, it may also bring in better enforceability of common law judgements under other European jurisdictions since it can no more be contrary to public policy (*ordre public*).⁹⁴

V. CONCLUSION

The purpose of the current study was to determine whether exemplary damages under English law are a genuine concept or just an instrumental or fictional category. I have argued that it is necessary to establish a coherent and principled understanding of exemplary damages because of their normativity. Therefore, I have extracted a core definition of this concept and checked it against three basic counterarguments – the argument from insufficiency, and arguments from positive and negative exclusivity. In this part, the study has shown that it is impossible to face these objections and hold a non-collateral interpretation of exemplary damages at the same time.

As a result, I claimed that any justification of the core definition rests on our ontology, ie what type of damage are we able to express as recoverable. Compared to the Czech legal doctrine, we have seen that it might be possible re-interpret the English concept of exemplary damages as a form of compensation for generally non-recoverable harm. In other words, the distinction between immaterial loss and a sole injury to the personal interests of the claimant as two elements of harm enables us to recover the injury itself.

In the vast majority of cases it will be sufficient to recover or vindicate such an injury by nominal damages. However, if the interference with the claimant's rights will be too serious that a mere declaratory award of nominal damages (with some other available remedies) will not adequately punish the defendant, it might be desirable to recover this infringement by means of exemplary damages. The award here would be collateral to the

⁹⁴ cf Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), s 32.

material element of the sole injury and thus still in compliance with the principle of compensation. Subsequently, drawing from these assumptions, I have suggested a reformulated definition of exemplary damages that appears to be conceptually more coherent. Such an interpretation might also affect enforceability of at least English exemplary awards under private international law.

Undoubtedly, there are still many questions left. Further research might thus for example investigate the ontological basis of the current law of damages or the relation between vindictory and exemplary damages under English law. In the end, it will also be interesting to follow the upcoming application of the new British legislation (*Crime and Courts Act 2013*) that explicitly deals with exemplary damages. Since the scope of this paper was limited to English and Czech law it seems to be important to analyse the concept of damage and damages in other jurisdictions as well. This may lead to some stronger implications for the general legal theory.