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Crisis and International Law: Decoy or Catalyst?

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Mielle K. Bulterman · Willem J.M. van Genugten
Volume Editors

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Aims and Scope

The Netherlands Yearbook of International Law (NYIL) was first published in 1970. It offers a forum for the publication of scholarly articles in the area of public international law including the law of the European Union. In addition, each Yearbook includes a section *Dutch Practice in International Law*. The NYIL is published under the auspices of the T.M.C. Asser Instituut.

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Part I
Crisis and International Law: Decoy or Catalyst?

Chapter 1
Crises: Concern and Fuel for International Law and International Lawyers

Willem van Genugten and Mielle Bulterman

Abstract In the opening chapter the volume editors reflect on the content of the book. They do so, by first touching upon the ideas the Editorial Board of the Netherlands Yearbook of International Law (NYIL) had in mind when opting for a volume on the issue of crisis, including such questions as: how international law reacts to crises and whether or not crises in daily realities also cause crises within separate international legal sub-disciplines. Next to that they summarize the eight chapters, followed by a reflection upon four topics and perspectives that come to the forefront when taking the contributions together and not reading them as reflections on separate trends in separate fields of international law. The four topics relate to: the role of crises in developing international law; do we do the things right or do we do the right things?; reconsidering and sharpening compliance; and the role of international lawyers.

Keywords Crisis · International law · Compliance · Role of Lawyers

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Contents

1.1 Introduction

The combination of the words 'international law' and 'crisis' is intriguing and leads to a number of connotations and questions. How does international law react to crises? Is international law a vivid field of law due to and thanks to crises? How is international law influenced by crises? Are parts of international law maybe in crisis themselves? While the term 'crisis' in legal doctrine is used in several meanings and contexts, as will be seen below, successful invocations of the term call for vocabularies, norms and measures that go beyond normalcy. Events are perceived as 'crises' when one is no longer able to make sense of the world in terms of established normative and cognitive vocabularies. Taking the Kosovo crisis as an example, Hilary Charlesworth wrote in her 2002 article '*International Law: a discipline of crisis*' that a concern with crises skews the development of the discipline of international law.[1] According to her, by focusing on crises, attention is taken away from legal issues that occur in the day-to-day application of international law. As a consequence, legal doctrine fails to give an accurate picture of international legal practice. But these negative effects of crisis described by Charlesworth may not be the only effects of crisis on the discipline of international law. An often cited example of the positive impact a crisis may have (had) on the development of international law is the process of European integration. The establishment of the European Coal and Steel Community was directly inspired by a desire to start anew and to do away with established legal and political patterns and vocabularies that had so blatantly failed to prevent the atrocities of WWII. Another example relates to the establishment of the United Nations after WWII.

The authors of the present volume of the Netherlands Yearbook of International Law (NYIL) were asked to reflect upon the relevance of the phenomenon of crisis from the perspective of their field of expertise, and to respond to questions such as the following. What are the typical conditions under which the term 'crisis' is invoked? Can you identify a crisis which has been the focus of attention within

[1] Charlesworth 2002.

your field of expertise? To what extent is there a tendency in legal doctrine to focus on crises? Does this tendency in doctrine, if there is one, reflect a similar tendency in international legal practice? What has been the impact of the focus on crises on the development of international law? Has it unduly narrowed the agenda, or did it have a positive impact on the development of legal doctrine? To what extent has the focus on crises taken away attention from important legal questions in the day-to-day application of international law? Finally, the editors of the Yearbook asked the contributors to this volume to reflect upon the assumption that the focus on crisis might undermine analytic progress amongst scholars, who might think about crises as being something completely new, asking for new answers while ignoring the relevance of the existing 'international law acquis'.

Knowing that public international law is like a huge building with many different chambers or like a huge family with many children (like WTO law, peace and security law, human rights law, migration law, law of the sea, environmental law, criminal law, international labour law), and newborns slightly developing into a separate field of expertise (like the rights of indigenous peoples), the editors invited experts from various fields of international law to contribute to the discussion on crisis. This volume includes eight articles, in the domains of human rights law, migration law, environmental law, international criminal law, WTO law and European law. In this introductory chapter we will first give an overview of the different chapters of this volume. Subsequently, a number of general and generalized observations and conclusions will be drawn from the contributions to this volume. Both parts can be read separately and both are meant as appetizers for reading (selective parts of) the rest of the volume.

1.2 Overview of the Chapters

The second chapter, on 'The Crisis and the Quotidian in International Human Rights Law', is written by Benjamin Authers and Hilary Charlesworth, Australian National University. They discuss the idea that international human rights law is both produced by and dependent upon crisis. Doing so, they focus on how the idea of crisis has been differently deployed in the domains of civil and political rights and economic, cultural and social rights. They do argue for a critical engagement with the language of crisis in human rights law, and pose the question how that language has shaped the value and meaning of the rights discourse more generally. One of their conclusions is that crises galvanise, sustain and undermine international human rights law. Further to that, crises have influenced the scope of the human rights law discipline by creating hierarchical categories of both crisis-justified human rights violations and 'non-critical'—termed as 'quotidian'—human rights violations. They also observe that the multiple functions of crises in international human rights law will always be in tension. And while discussing ways to reduce this tension through, for instance, a redefinition of the quotidian as crisis, they also observe that this may not have great impact upon the

discipline. Moreover, as they observe, framing something as a crisis does not always deliver what one expects. In all cases, however, a critical engagement with the discourses through which crises are constructed is required:

> Crises should be subject to an ongoing interrogation, and criticism should itself be understood as invoking the temporal urgency that crises convey, albeit with an awareness of how those crises are constructed and the purposes to which they are put.[2]

The third chapter, on 'The Crisis of International Human Rights Law in the Global Market Economy', is written by Daniel Augenstein, Tilburg University, The Netherlands. His contribution argues that facticity of the human rights impacts of economic globalisation increasingly undermines the normativity of the state-centred conception of international human rights law. According to him, the exposure of the international legal order of states to the operations of global business entities leads to a collusion of sovereign state interest and globalised corporate power at the expense of protecting the rights of victims of human rights violations in the global market economy. Discussing this fundamental critique upon (key parts of) the human rights discipline, Augenstein focuses on two prominent attempts to address this lacuna of protection: transnational tort litigation and the UN Guiding Principles on Business and Human Rights. His conclusion is that international human rights law finds itself at crossroads, although he does not want to downplay the importance of transnational tort litigation in vindicating human rights values, nor to challenge the desirability of states mainstreaming human rights concerns into their business-related domestic and foreign policies. The 'crossroads' relate to the understanding and recognition that the manners in which the interaction between human rights and companies is organized are not normatively innocent but driven by the exposure of the international legal order of states to the operations of global business entities. And this 'path dependency' explains why the human rights responses to economic globalisation considered in his contribution are both an expression of the present crisis of the state-centred conception of international human rights law and risk contributing to its perpetuation. The 'governance gaps' in business and human rights, identified in the context of the UN Guiding Principles on Business and Human Rights, are seen by Augenstein as 'symptoms of a deeper crisis of the state-centred conception of international human rights law in coming to terms with the human rights impacts of economic globalisation.'[3]

The fourth chapter, on 'International Refugees and Irregular Migrants: Caught in the Mundane Shadow of Crisis', has been written by Juan M. Amaya-Castro, VU University, Amsterdam, The Netherlands. He proposes that international legal scholarship may, in its encounter with the phenomenon of migration, benefit from acquiring a sensitivity to the political economy of the distinction between crisis and 'the mundane' and does so by looking at two particular fields of international

[2] Authers and Charlesworth 2014, at 38.

[3] Augenstein 2014, at 63.

migration law: refugee law and the law of irregular migration. The two areas increasingly are seen through the same lens: refugees are potential irregular migrants, and irregular migrants claim to be (economic) refugees. The chapter considers both international refugee and irregular migrant to be legal subjects created by international law and argues that the difference in attention international legal scholars give to one or the other category of persons is the product of ideological and epistemological biases: international legal scholars tend to 'see' the international refugee, and to 'not see' the irregular migrant. Amaya-Castro rejects the notion that this difference is a difference of jurisdiction, or of the reach of international law, in opposition to national sovereignty. Further to that, and in order to make this visible, he relies on the notion of crisis, expanding it into a dichotomy by including the notion of the mundane. One of his conclusions is the following:

> it is by no means impossible to develop a legal consciousness that rejects the self-evidence of a human rights regime that is inoperative in the face of illegality regimes. This chapter is part of a push for such consciousness, even as it is aware of the fact that it operates within that very same structure of crisis and the mundane.[4]

The fifth chapter, on 'Saving Humanity from Hell: International Criminal Law and Permanent Crisis', has been written by Edwin Bikundo, Griffith University, Australia. The chapter compares and contrasts temporary international criminal tribunals to the permanent International Criminal Court and focuses first of all on the interaction between international criminal law and the need for support by the UN Security Council (UNSC) to make it a success. Bikundo observes that international criminal law is both made in and made for crisis and that the Security Council essentially administers the international order through, among others, international criminal justice. The purpose of his analysis is to show how and why individual criminal responsibility in the absence of state intervention 'demonstrates a globalising political power that is conjoined to a universalising legal glory.'[5] One of his conclusions is that

> [i]n international criminal law crisis is not an essence but an operation likewise and by extension guilt is not an essence but an operation. The action is effective regardless of the morality of the actor or the factual basis of the situation. The efficacy of official UNSC actions under crisis is indifferent to its morality because morality is not what effects its actions. Only its official status as being primarily responsible for keeping the peace brings efficacy to its acts. Moral principles are consequently only reached for to provide rhetorical legitimation.[6]

The sixth chapter, on 'Warming to Crisis: The Climate Change Law of Unintended Opportunity', has been written by Tomer Broude, Hebrew University of Jerusalem, Israel. The author discusses global warming as perhaps the ultimate crisis for humanity, while successively raising the question whether it also is a

[4] Amaya-Castro 2014, at 85.

[5] Bikundo 2014, at 108.

[6] Ibid., at 108.

crisis for international law. The chapter identifies elements of the crisis model in the development of international climate change law, and adds that they have transcended it and are evolving in much more complex and textured ways. The crisis-framing also has legitimated 'bottom-up' approaches and sub-global and unilateral action, as well as localized legal responses. It has led to sophisticated, yet plausible, reconciliations between climate concerns and international trade and has promoted reconsiderations of hard policy choices, such as between mitigation and adaptation. One of Broude's conclusion is that the framing of global warming as global environmental crisis has, without doubt, had significant and complex effects on the development of international legal responses to climate change, and therefore on the characterisation of contemporary international law in that domain. He also observes that crisis has served as a diversion and a decoy, and that the continuous pressure exerted for urgent and exceptional action at the multilateral level has led to acrimony between states, indifference and denial among important constituencies, and ultimately to weak arrangements within conventional intergovernmental models. If projected to international law in general, he observes that as a result of this development

> [t]he emergent outcome will be a multi-dimensional, multi-polar international law that interacts with law, both hard and soft, at multiple levels. These are the crisis opportunities of international law, and they are not limited to climate change; just as crisis is ubiquitous, so is opportunity.[7]

The seventh chapter, on 'Between Crisis and Complacency: Seeking Commitment in International Environmental Law', has been written by Karin Mickelson, University of British Columbia, Canada. She observes the major role crisis has played in international environmental law. In her view, the field as a whole might, to some extent, be characterised as a discipline *of* crisis and not as a discipline *in* crisis. In addition, the chapter elaborates upon the ongoing attempts to move away from a reactive focus on crisis to conceptualising international environmental law as part of a broader societal shift toward sustainability. While categorising a number of approaches to magnitude of environmental problems, Mickelson quotes the responses noted by James Gustave Speth: Resignation ('all is lost'); Divine Providence ('it's in God's hands'); Denial ('what problem?'); Paralysis ('it's too overwhelming'); Muddling through ('it's all going to be all right, somehow'); Deflection ('it's not my problem'); and Solutionist ('answers can and must be found'). Mickelson observes that this taxonomy would be amusing if it were not so distressingly accurate. According to her, the 'solutionist' category is the one in which international environmental lawyers are most likely to locate themselves, although 'many of us would have to admit that we often find ourselves occupying one of the other categories for brief (and sometimes not so brief) periods of time'.[8] Her overall conclusion is that

[7] Broude, at 135.

[8] Mickelson, at 157.

> [i]n the end, it may well be that commitment, that delicate balancing act between optimism and despair, rests on no more solid a foundation than one simple conviction: that we still live in a choosable world.[9]

The eighth chapter, on 'The WTO and the Doha Negotiation in Crisis?', has been written by Alexia Herwig, University of Antwerp, Belgium. She discusses whether or not the World Trade Organization (WTO) finds itself in a legitimacy crisis and whether or not the Doha negotiations can be evidence of that. The notion of 'legitimacy crisis' is presented as a severe, possible threat to the WTO, internally as well as externally. The article suggests that non-reciprocal trade liberalisation by developed countries only is no longer an option with some developing countries, such as China, India and Brazil, having reaped significant gains from trade. At the same time, the Doha commitment to place development concerns at the heart of the negotiations requires taking account of the different capacity of developing countries to benefit from integration into international trade. A real solution to the lack of progress must thus enable resolving concerns about reciprocity, symmetry across the different WTO member groups and the extent to which rules are to the advantage of individual WTO members. Herwig comes up with a number of proposals to be practiced in order to avoid a (deepening of the) crisis sphere. The proposals relate to, *inter alia*, benefit-and-burden sharing, adjustment assistance, training on trade policy and regulation, infrastructure development, and capacity building in production. One of her conclusions is that 'a greater aid budget for this component would be desirable, also so as to ensure the investments in infrastructure and production capacity building do not go to waste.'[10]

At the moment of finalizing this Introduction (early December 2013), the Bali Ministerial Conference of the WTO came up with solutions for some of these key issues. However, it remains to be seen what the actual impact will be and whether the crisis terminology is still warranted. After the Conference, Herwig added a footnote to her contribution, stating that '[c]ompared to the initial ambition of the Doha Development Agenda, the Doha-related results of the Bali conference are notable for what was *not* decided', and that the reforms decided upon 'are no doubt positive but … remain far below what should have been achieved to enable developing countries to derive greater benefits from participation in the multilateral trading system.'[11]

Chapter 9, finally, on 'The EU in Crisis: Crisis Discourse as a Technique of Government', has been written by Jessica C. Lawrence, VU University, Amsterdam, The Netherlands. The central thesis of the chapter is that crisis should be read as 'a technique of government' in the Foucauldian sense. According to Lawrence, experts produce knowledge about crises, and next to that operationalize the discourse of crisis as a tool for giving effect to governmental ambitions. Lawrence presents

[9] Ibid., at 158.

[10] Herwig 2014, at 183–184.

[11] Ibid., at 168, footnote 20.

several consequences of this reading, illustrated by examples taken from the EU context. If seen this way, Lawrence poses, crises are not exceptional events, but rather something common. Another consequence is that reading crisis as a technique of government 'refocuses attention away from diagnoses of cause and effect, and toward the ways in which crisis discourse allows actors to make truth claims and produce knowledge about the way that government can and should act with respect to its subjects.'[12] And finally, understanding crisis as a technique of government makes clear that crises are 'not necessarily points of change, but rather function as opportunities for the articulation of political discourse. As such, they may result equally in extending, reinforcing, or shifting the *status quo ante*.'[13]

1.3 Highlighting Issues of General Concern and Interest

There are at least four key topics and perspectives that come to the forefront when taking the contributions together and not reading them as reflections on separate trends in separate fields of international law. These are: (1) the role of crises in developing international law; (2) do we do the things right or do we do the right things?; (3) reconsidering and sharpening compliance; and (4) the role of international lawyers.[14]

1.3.1 The Role of Crises in Developing International Law

All authors in the present volume reflect explicitly upon the question what the phenomenon of crisis actually means or has meant in the past for their respective fields. They do so in a variety of ways, which we would like to divide into three layers: (a) the way the word 'crisis' is used to sensitise people; (b) the wish to see crises as 'normal' instead of 'exceptional'; (c) the neglect or non-recognition of crises.

(Ad a): In several sub-disciplines of international law very strong words have been used in order to sensitise academic colleagues, policy makers and the broader pubic as to the seriousness and urgency of the problem at hand. A great example is the 'Silent Spring', being the title of a book written in the early 1960s by Rachel Carson. Karin Mickelson observes that it is 'doubtful whether the book would have had anywhere near the same impact on the public were it not for the stark image of a world

[12] Lawrence 2014, at 201.

[13] Ibid.

[14] While discussing these issues, the names of the authors of this Volume are only mentioned in case of specific quotes. In other cases we do refer to 'some authors', 'several authors', 'the majority of authors' or 'all authors'.

devoid of bird song evoked by the book's title.'[15] Another example relates to the 'hole in the pole', an expression that, again according to Mickelson, 'supposedly galvanised the international community to undertake meaningful action on ozone depletion.'[16] Jessica Lawrence also is most explicit on the deliberate use of the notion of crisis to realise goals that without such an approach would not be at the table at all. She presents it as a 'technique of government' which can be used 'to expand, justify, or contract the perceived limits of the realm of governmental activity.'[17]

As to some authors, this way of sensitising people sometimes helps making progress, but also regularly leads to feelings of failure and helplessness, and to an atmosphere of threat or uncertainty. In addition, the risk of identifying something as a crisis entails the promise of quick solutions, and thus leads to frustration if these do not materialise. Further to that, it is observed by several authors that as side-effects crises can serve as a justification to suspend and violate existing norms. The War on Terror and its impact on human rights is a case in point. In a similar manner, as Jessica Lawrence observes in the context of the EU, crises as a technique of government can 'permit governmental intervention or abstention to ensure security, allowing the entrepreneurial game to continue, even in the absence of democratic legitimation.'[18]

All authors seem to agree that crises sometimes lead to a lack of analytical progress, i.e. their sub-disciplines do not build upon previous analytical insights and the state-of-the-art, but start from scratch. It also becomes clear, however, that the development of international law often profits from a good crisis and that crises are actually needed for commitment and for (re-)conceptualisation and can create moments of political opportunity. Crises can be seen as 'negotiable narratives that can mask as well as reveal'[19] and it is 'precisely its lack of definition that gives the idea of crisis its discursive force'.[20]

(Ad b): The second level of reflection on the use of the term 'crisis' relates to the wish and need to see crises as something not external to international law or coming coincidentally on its path, but (also) as something normal. The message: there have always been and there will always be crises, and it is better to see them as something to deal with constantly and structurally, rather than as something abnormal. Edwin Bikundo, for instance, observes that the UN Security Council

> is for better or worse *institutionally* charged with the primary responsibility to deal with crisis and crises that are *permanent*. Effectively, therefore, exceptional circumstances are normalised in reality, while at the same time [they] are rhetorically maintained as exceptional.[21]

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[15] Mickelson 2014, at 142.

[16] Ibid., at 140.

[17] Lawrence 2014, at 192.

[18] Ibid.

[19] Authers and Charlesworth 2014, at 38.

[20] Ibid., at 24.

[21] Bikundo 2014, at 93.

Another example is provided for by Juan Amaya-Castro, who states that 'not entirely without irony … the UNHCR, for all of its long impressive history, was itself meant to be a temporary institution whose status, until recently, was still renewed every year', and 'even now, it has not been made into a truly autonomous permanent UN specialized agency.'[22] And, according to him, that is 'a constant reminder that global policymakers view refugees as temporary phenomena, and the occurrence of refugee crises as an anomaly that requires correction, rather than as something that needs to be accommodated in a more durable way.'[23] In the same vein, Benjamin Authers and Hilary Charlesworth speak about the concept of non-derogable human rights as 'a rhetorical turn that masks that the capacity for derogation is in fact entrenched in law itself' and that 'rather than being novel, international law in fact ensures that derogation is potentially repeatable.'[24] Jessica Lawrence, finally, demonstrates how crises are in fact quite common occurrences in political discourse in the EU, illustrated by many examples. Accordingly, she observes that 'it is almost difficult to identify a period of EU history when the EU or its predecessors were *not* in the midst of one crisis or another.'[25] And although according to her '*particular* crises may be more or less exceptional in their breadth, scope, and disruptive potential', 'the *discourse* of crisis appears as a part of the *status quo* of EU government and… of contemporary government in general.'[26]

(Ad c): If linked to the question whether or not crises do lead to serious risks for specific legal disciplines, it is observed by some authors that disciplines sometimes seem to bury their heads in the sand and start using euphemistic terms. Juan Amaya-Castro, for instance, observes that 'a crisis-trope may not necessarily use the word "crisis"',[27] but may instead refer to terms such as 'urgency' or 'unprecedented'. Worse than an euphemistic denial and non-recognition of the fundamental impact of crises on disciplines, however, is the situation where people do not seem to be aware of the fact that their sub-discipline, or parts thereof, is or are involved in a fundamental crisis. A good example is provided for by Daniel Augenstein who fundamentally criticises the 2011 UN Guiding Principles on Business and Human Rights. He observes 'a collusion of sovereign state interest and globalised corporate power to the detriment of victims of human rights violations in the global market economy', and states that 'international law fails to address these impacts because it confines human rights obligations to public and territorial states.'[28]

Another example is presented by Alexia Herwig, who discusses the ins and outs of the WTO, while explicitly referring to the negotiations taking place outside the

[22] Amaya-Castro 2014, at 65.

[23] Ibid., at 65.

[24] Authers and Charlesworth 2014, at 19.

[25] Lawrence 2014, at 187.

[26] Ibid., at 187.

[27] Amaya-Castro 2014, at 65.

[28] Augenstein 2014, at 41.

organization on, *inter alia*, bilateral and regional investment treaties. For a long time, it looked as if the WTO was denying the risk of becoming obsolete as a multilateral platform. As said above, at the moment of finalising this Introduction the WTO members have found common ground on some issues of the Doha Round, but it remains to be seen what the actual impact will be and whether it escapes a crisis indeed.

1.3.2 Do We Do the Things Right or Do We Do the Right Things?

In line with the previous section, ad c), it can be observed that disciplines tend to develop a paradigmatic view in dealing with their topics. One of the recurring questions then is how long one believes in looking at issues with the established lenses, and, in addition, to what differences it might lead in practice if one develops other ways of looking. Daniel Augenstein is very explicit on that. He speaks, as we saw, of the collusion of state and business power, while according to him there is a conceptual gap between global constitutionalism on the one hand and the way economics and political structures are organized on the other hand—the latter being 'weakly globalised'.[29] In his view the Special Representative for Business and Human Rights of the UN Secretary-General, John Ruggie, has identified gaps, but not radical enough, while basically serving market forces. In Augenstein's view, the key issue left aside is 'to assert authority over conduct not exclusively of domestic concern.'[30] In his view, there is 'path dependency', which explains 'why the human rights responses to economic globalisation considered … are both an expression of the present crisis of the state-centred conception of international human rights law and risk contributing to its perpetuation.'[31] In line with what was said above on the non-acceptance of crises as normalcy, Juan Amaya-Castro states that his discipline always, and wrongly so, starts from the self-evidence of the sovereign rights of states to regulate and enforce migration controls, instead of taking 'the mundane' as a starting point. In other words: it forgets or neglects the real needs of those who are suffering from being refugees. Another example in the context of vested paradigms can be derived from Edwin Bikundo. He states that the NATO bombing campaign in the former Yugoslavia 'reinforced the idea that collective security and the international order, at the end of the day, are based on the threat of the use of force' and that 'this flight from law makes violence seem if not intuitive then inevitable.'[32] And all that leads to the perception that interventions are 'almost automatically active and productive,

[29] Ibid., at 61.

[30] Ibid., at 57.

[31] Ibid., at 60.

[32] Bikundo 2014, at 100.

while non-intervention is inactive and negative.'[33] As to the consequences of that view for international lawyers he observes that

> [i]nternational relations scholars appear less exercised taking a position on the NATO campaign, perhaps because it is more easily interpreted in the paradigm of power politics than in the international lawyers' world of objective legal principles that are justified by reference to the rule of law.[34]

Jessica Lawrence discusses the neoliberal philosophy behind the EU, stating that it is its 'risk-seeking behaviour which produces what Foucault called a "consciousness of crisis" that sees everywhere the "economic cost of the exercise of freedom".'[35] And as a result, 'these entrepreneurial subjects look to government to manage their choices at the margins, altering incentives and disincentives to shift the legal "rules of the game" and protect against significant social disruptions.'[36]

As editors of this volume, we observe that all authors in one way or another claim the importance of thinking out of the traditional boxes, and of developing other ways of looking than the ones largely agreed upon. For international lawyers, practitioners included, it is always mandatory to know the legal technicalities of their respective domains, without however thinking and accepting that they consist of answers to all questions. That asks for reflection upon the fundamentals of and the key assumptions behind the disciplines concerned. For us it is clear that legal disciplines always run the risk of focusing too much on the legal technicalities only, sometimes far behind the comma, while neglecting or not capturing the more fundamental and bigger picture. Framing the discussion on crisis in terms of paradigmatic views and as game changers then helps considerably. In that context Edwin Bikundo quotes Martti Koskenniemi's plea for the 'narrative as a style of legal writing [which] liberates the political imagination to move more freely in the world of alternative choices while illuminating its false necessities and false contingencies.'[37] This is a very telling way of looking. The 'only' thing to avoid is to end up in abstract blueprints only. As we see it, the best out-of-the-box-thinking combines theoretical approaches to capturing the hard realities of daily life.

1.3.3 Reconsidering and Sharpening Compliance

One of the images of international law at large relates to its presumed weaknesses in the domain of compliance to the norms agreed upon by states. This notion asks for tailor-made responses per sub-discipline, but nevertheless there is some truth in

[33] Ibid.

[34] Ibid., at 101.

[35] Lawrence 2014, at 191.

[36] Ibid.

[37] Bikundo 2014, at 95.

it. In this volume several authors do make observations as to the compliance part of international law, while stating as a general standard that good legal systems are systems in which rules are lived up to and where implementation and supervision are taken care of without too many structural problems, and words like that. In addition, it is regularly observed that the absence of actual implementation and compliance can easily lead to marking legal sub-disciplines as being sub-disciplines in crisis.

More specifically, all authors elaborate in one way or another upon the (actual functioning of) the specific implementation and supervisory mechanisms within their domains. Benjamin Authers and Hilary Charlesworth, for instance, elaborate upon the approach to implementation of the major UN human rights conventions and do address such notions as 'immediate implementation', 'direct incorporation of [the] provisions into national legal systems', and 'minimum core obligations'. They also observe that 'while crises are often associated with breaches of civil and political rights, violations of economic, social and cultural rights are rarely understood in the same terms' and that 'the crystallisation of these classifications has endowed civil and political rights with urgency, while the latter have become quotidian and less susceptible to redress.'[38] The language of crisis has thus 'created and sustained a hierarchy among rights.'[39] Juan Amaya-Castro is very critical about compliance in the domain of international migration law and observes, that 'illegality regimes rely very much on implementation and enforcement by private actors: employers, banks, insurance companies, owners of real estate seeking to rent, and so on.'[40] Quoting James Hathaway, he further points out that the long-term viability of refugee law is under threat from its 'atomised system of implementation, coupled with the absence of a meaningful mechanism to oversee respect for legal obligations and facilitate the sharing-out of burdens and responsibilities among State parties.'[41] As to the field of international criminal law, Edwin Bikundo highlights that there is a permanent paradox in that domain that comes to the forefront during crisis, i.e. its legitimacy depends upon the question to what extent the institutions of international criminal law are able to provide for justice in an effective way without other means supporting them. He quotes Kofi Annan's famous words: 'You can do a lot with diplomacy, but with diplomacy backed up by force you can get a lot more done',[42] and adds that the international community 'has itself set up a system where force is produced to "solve" problems.'[43]

Some authors also refer to the interaction between international law and the way it is enforced at the national level. Juan Amaya-Castro, for instance, observes

[38] Authers and Charlesworth 2014, at 31.

[39] Ibid.

[40] Amaya-Castro 2014, at 83.

[41] Ibid., at 71.

[42] Bikundo 2014, at 93.

[43] Ibid.

that the largest number of lawyers dealing with refugees are national lawyers, often operating within an administrative legal setting, and 'these lawyers tend to see their field of activities much more through the optic of judicial decisions creating precedents for the assessment of individual cases'[44] and thus maybe as success. In line with the observations made by us at the end of the previous section, the backside of that approach might of course be that these practitioners do not see the bigger picture or, alternatively, that they do see it but do not have the right legal instruments for effectively contributing to a compliance-driven paradigm shift.

Daniel Augenstein, while referring to the 1984 Bhopal tragedy, states that in the human rights domain, especially when it comes to the relation between companies and human rights, the victims are often left in the cold: 'the scale and gravity of the human rights violations committed at Bhopal stands in sharp contrast with the inability of the victims to obtain effective redress.'[45] According to him, the UN Guiding Principles on Business and Human Rights focus on 'the permissibility of the extraterritorial exercise of (legislative, judicial and executive) state authority in accordance with a recognised basis of jurisdiction under public international law',[46] and 'the Guiding Principles' preoccupation with states' competences to exercise extraterritorial jurisdiction in effect privileges states' sovereign territorial rights over the human rights entitlements of third-country victims of global business operations.'[47] All that 'leaves victims of human rights violations in "weak" host states of corporate investment at the goodwill of "strong" home state governments and at the mercy of corporate social responsibility' and 'Bhopal' illustrates 'why … this approach is unlikely to succeed in protecting and indemnifying the victims.'[48]

Several authors also observe that the compliance issue cannot be solved by lawyers alone. Karin Mickelson, for instance, observes that 'one could argue that *why* states act is by and large the question that preoccupies international relations scholars', while international lawyers 'tend to be more concerned with *how* they act.'[49] And '[i]nternational environmental lawyers, however, cannot afford to draw a neat distinction between "why" and "how"', because 'the answer to the former sometimes dramatically constrains the latter.'[50] This is the case for other subdisciplines as well. Mickelson also concludes that 'we often find ourselves circling back to the question of what motivates state (and non-state) action on environmental concerns, seeking to understand both the limitations of those motivations

[44] Amaya-Castro 2014, at 69, footnote 18.

[45] Augenstein 2014, at 49.

[46] Ibid., at 57.

[47] Ibid., at 58.

[48] Ibid., at 59.

[49] Mickelson 2014, at 141.

[50] Ibid.

and how they might be entrenched and expanded.'[51] We observe again that this conclusion should not be limited to international environmental law only and is in essence a plea for a multidisciplinary approach, or, as is regularly done by others as well, for a-law-in-context-approach. Something related comes to our mind when reading Tomer Broude's discussion of the choices of narrative in a Kosovo-type crisis, where he raises the (very pertinent) question from what source international lawyers, 'while [they] may have been right, betting on the winning horse as it were',[52] derive the confidence in issues that transcend their discipline. According to him, 'a jurist who disbelieves climate change or is agnostic about it, would generally oppose international climate change regulation, but could not base this opposition on any meaningful legal grounds.'[53] And in contrast to that 'an international lawyer who accepts global warming as fact and embraces it as crisis can proceed to discussing the design and effectiveness of international treaties or particular climate-change combating measures.'[54] To take it a bit broader, according to us the attention of international lawyers is or might be gradually shifting towards blends of law and politics, hard and soft law, as well as towards regulatory regimes invoking varying degrees of obligation and precision. As to the latter, international law increasingly allows regulatory regimes to be developed and applied by private parties instead of through diplomatic channels, foreign offices and treaties, and represents a growing range of different types of obligations, institutions and compliance and enforcement mechanisms. This is about trends visible all-over international law. Doing so, the key focus should time and again be on *effective* redress, seen from the perspective of the victims of the human rights violations by whatever state or non-state power.

1.3.4 The Role of International Lawyers

In all chapters, the authors slightly or more extensively discuss the role international lawyers do actually play and/or should play if confronted with crises. In line with the wish and need to raise public attention, several authors observe that scholars sometimes start acting as passionate activists and have the feeling that they have to speak out, knowing that 'morally based arguments dictate actions outside the law'.[55] Other scholars rather act as scientific analysts, trying to bring order to chaos, or see the need to think rigourously and independently as the best contribution to the development of the field concerned. All positions, and every position in between, can of course contribute to changing practices. In his article,

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[51] Ibid.

[52] Broude 2014, at 124.

[53] Ibid., at 125.

[54] Ibid.

[55] Bikundo citing Bruno Simma. Bikundo 2014, at 99.

Tomer Broude explicitly raises the question of how international lawyers have actually functioned in the context of scientific contestation and public scepticism as to climate change. His approach is in many ways indicative for other fields of international law as well. It begins with concerns by legal scholars about scientific insights and uncertainty, advocating flexible international legal approaches that could take that into account, while however still discussing the factual elements of, in Broude's case, the climate change crisis, followed by 'early on aligning with climate change believers and activists.'[56] The next step is getting confident about the parameters of the problem, leading to the situation where at some moment 'most legal analyses start from similar premises', adopting 'the dominant depiction of the facts despite factual uncertainty and dissent.'[57] According to Broude, in the end all that 'reflects to some extent the proactive structure of the international legal profession, as well as its vested interests', while it is 'the choice to believe that has made lawyers relevant within their discipline as well as outside of it.'[58] And finally, and to our mind most importantly, 'it provides international law and international lawyers with the opportunity of creativity and innovation',[59] either in or outside the traditional boxes and paradigms. The chapters in this volume are proof of that.

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[56] Broude 2014, at 124.

[57] Ibid., at 125.

[58] Ibid.

[59] Ibid.

Chapter 2
The Crisis and the Quotidian in International Human Rights Law

Benjamin Authers and Hilary Charlesworth

Abstract This chapter considers the idea that international human rights law is both produced by and dependent upon crisis. Surveying the capaciousness, ambiguity, and constructedness of the concept, we position the relative weight given to particular rights in terms of their framing as 'crises'. We focus on how the idea of crisis has been differently deployed in the Universal Declaration of Human Rights and in the division between civil and political rights and economic, cultural and social rights to argue for a critical engagement with the language of crisis in human rights law, and to ask how that language has shaped the value and meaning of rights discourse more generally.

Keywords Crisis · International human rights law · Universal declaration of human rights · Economic, cultural, and social rights · Civil and political rights

Contents

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2.1 Introduction

International human rights law is often presented as a product of catastrophe: the global community responding to atrocity through the regulation of states' treatment of their citizens. Jochen von Bernstorff, for example, locates in the Preamble of the Universal Declaration of Human Rights (UDHR)[1] a claim 'to be the political answer to the extermination of the European Jews'.[2] Joseph Slaughter similarly notes that 'in our forgetful era of crisis-driven human rights practice, we might remember that the UDHR was itself composed under the sign of emergency'.[3]

This sense that the foundations of human rights law were a reaction to crisis has continued to shape the discipline. Crises are held out as the catalyst to which human rights continually respond and through which rights are reproduced in new forms. The development of the 'responsibility to protect' doctrine in answer to various international crises including Somalia (1992), Rwanda (1994) and Kosovo (1999) illustrates this tendency.[4] However, crises also justify departures from human rights principles: the idea of crisis is enshrined in many international human rights treaties through provisions for legal derogation from certain human rights guarantees in times of emergency. Certainly, the post-11 September 2001 period has been rife with concerns that the privileging of 'security' by many states has led to an erosion of the protections offered by domestic rights laws, with a concomitant devaluing of human rights norms internationally.[5]

What this suggests is that crises, regardless of their specific impact on human rights laws or the extent to which they progress or constrain rights' development, robustness, and proliferation, have come to form an integral part of how rights are conceived. Discursively enabled in international law by a spectrum of terms, including 'atrocity', 'catastrophe', 'emergency', and 'event,' a crisis-sensibility often impels discussions of the place and meaning of rights. Crises can be either situations presently unregulated by international law or ones that overwhelm the regulatory capacity of the international system to which the law must nevertheless

[1] UNGA Res. 217, UN Doc A/810, 10 December 1948 (hereinafter UDHR).

[2] Von Bernstorff 2008, at 904.

[3] Slaughter 2007, at 74.

[4] See Evans 2008.

[5] This is discussed further in Sect. 2.3.2.

respond. In either situation rights' political, legal, and often moral force comes from their imbrication with crises, either as a consequence of it or a response to it.

In this chapter we consider the influence of crises on international human rights law, first by surveying the capaciousness, ambiguity, and constructedness of the term. Contemporary critics have pointed to ways in which crises have been defined and deployed for specific discursive ends,[6] and our analysis engages with how representing something as a crisis gives it a particular power in international human rights law. We then examine the way the concept is deployed in the human rights system to create a field that is both generated by and dependent upon crises, wherein crises act as both catalysts and distractions in law's production and application. One effect of this is that the absence of crisis language can make some human rights violations appear quotidian, a part of everyday life and less urgent to redress than crisis-generated rights. Economic, social and cultural rights, for example, are only infrequently depicted as the subjects of legal crisis. This separation centres on a crisis-driven hierarchy of urgency that has had pervasive consequences, casting economic, social and cultural rights issues as potentially deferrable (notably by rendering them subject to progressive realisation), and artificially distinguishing between categories of rights in a manner that makes little sense for their substantive protection.

The aim of this chapter, however, is not to argue that a heightened crisis-sensibility be uniformly applied to rights issues. Rather, we seek to highlight the multiplicity of uses to which the language of crisis has been put in international human rights law and to emphasise that this language, which can both prompt action and obscure responsibility for harms, has been central to how rights are valued and given meaning.

2.2 What is a Crisis?

The word 'crisis' had specific connotations in Ancient Greek law, theology, and medicine. It is derived from the Greek verb *kríno*, whose meanings include to decide, to quarrel, to judge, and to separate (as into part or divorce).[7] In law, it meant arriving at a verdict or judgment; thus Reinhart Koselleck observes that '"crisis" was a central concept by which justice and the political order … could be harmonised through appropriate legal decisions'.[8] The legal premise influenced the religious use of the term in an eschatological linking of apocalypse with divine judgment.[9] And the medical meaning comprised a determination about the progression of illness and whether or not there was the possibility of a relapse.[10]

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[6] This is discussed further in Sect. 2.2.

[7] Koselleck 2006, at 358.

[8] Ibid.

[9] Ibid., at 359–360.

[10] Ibid., at 360.

Today, crises are ubiquitous and Koselleck laments the modern loss of precision and rigour in uses of the term.[11] Nevertheless, 'crisis' still evokes the sense of 'inescapable pressures for action'[12]—of a critical time requiring a decisive intervention. The temporal span of a crisis may be short or long, it may change everything or it may change nothing, but the implication that a crisis marks a significant juncture in which a choice must be made has continuity with its ancient roots.

Beyond this element of decision, however, the meaning of crisis is both powerful and difficult to pin down. Colin Hay has observed that the word suggests 'a moment of objective contradiction yet subjective intervention',[13] a definition that emphasises how critical the story accompanying a crisis is. For Hay, crises are ideological constructions 'through which the disaggregated experiences of failure become "narrated"'.[14] He suggests that 'in as much as they abstract from the events they purport to explain and ascribe to them significance and meaning',[15] crises are acts of interpretation whose imposition invokes particular responses to an incident. This characterisation is illustrated in Chris Russill and Chad Lavin's analysis of the multiple accounts of crisis circulating in responses to post-Hurricane Katrina New Orleans.[16] Their study emphasises the centrality of human agency—especially of government and the media—to determining the nature of crises. The success or failure of a reaction is dependent on the way the story of the event is told: '[t]he identification of a crisis always projects a possible response, and requires narratives of these responses to resonate culturally.'[17] This process of interpretation broke down spectacularly in New Orleans from the Louisiana and federal governments' perspectives, as bureaucratic failure and incompetence became the dominant popular narrative of how the 'crisis' of Hurricane Katrina was handled.

In the terms of the theme of this volume, categorising something as a crisis can act as a catalyst or a decoy; it can prompt change or deflect it. Certainly, a pervasive cultural narrative exists about crises' capacity to lead to often radical social and political alteration. Despite cynicism about the ways states deploy the language of crisis, significant faith in crises' capacity to produce large-scale change persists amongst social progressives. Drawing on analyses of the Great Depression that emphasise its manifestation of the failures of capitalism and the increased governmental intervention in the economy that followed, Adam Harmes has suggested that 'crises occupy a special place in the progressive imaginary; [indeed] at times, they may become a substitute for political strategy'.[18] Harmes is

[11] Ibid., at 397.

[12] Ibid., at 370.

[13] Hay 1995, at 63.

[14] Ibid., at 68.

[15] Ibid., at 64.

[16] Russill and Lavin 2011, at 4.

[17] Ibid., at 16.

[18] Harmes 2012, at 217.

sceptical of the possibility that crises can produce sweeping political change in the contemporary neo-liberal period. Nonetheless, he argues that crises do still present opportunities for reform, albeit on an 'issue-by-issue incremental' basis.[19] More expansive understandings of the galvanising abilities of crises also persist: indeed, as we discuss below, international human rights law frequently sees itself acting in response to crises, a belief notably reflected in the genesis of one of its foundational documents, the UDHR.

Crises can also be deployed in ways that uphold the *status quo*. Hay points to the United Kingdom in the late 1970s where the Conservative Party was able to produce a crisis narrative of 'an overextended and ungovernable state in which trade unions were "holding the country to ransom"'.[20] By ascribing a coherent causality to a variety of disparate events, the Conservatives presented Britain as being in a crisis that needed a particular form of management, one that only they could provide. In such situations the function of crisis is to control and defuse disruptive change, but the proliferation of crises can equally obscure failures of the political or economic order. Rendering the problems of certain systems, for example those of global market capitalism, radical instead of persistent can position those failures as anomalous and so shield the system from more holistic critique. Thus Eric Cazdyn contends that such structures react pre-emptively to predicted crises, reinforcing the economic order rather than modifying it. The consequence is, Cazdyn argues, that we now live in a state of ongoing crisis.

> Crises occur when things go right, not when they go wrong. In other words, crises are built right into many systems themselves; systems are structured so that crises will occur, strengthening and reproducing the systems themselves. The boom-bust cycle of capitalism is only one of the more obvious examples of this logical necessity. Both contingent disasters and necessary crises, therefore, are linked in the way that their breakdown in relations is built back up again by a different set of relations within the same system.[21]

On this account crisis is essential to our political, economic and social structures, working to enable, sustain, and reproduce them. In doing so, crisis can also protect these systems from scrutiny. Because crises are understood culturally as unique, they are the consequence of anomalous actions and events, rather than inherent. Human actors and natural forces produce moments of crisis that can be responded to; the less individuated and cyclical systems that are at the root of those failures are presented as beyond fault and ultimately to be protected. Crisis derives its power from its continued denotation of an anomaly, then, even as it has (inconsistently) become a norm.

'Crisis' is malleable and ambiguous, a generic term for a type of transition, one framed by particular urgency. A crisis can be exceptional, predictable, repetitive,

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[19] Ibid., at 232.

[20] Hay 1995, at 74.

[21] Cadzyn 2007, at 649.

and possibly even perpetual.[22] Politically, a crisis can manifest the failure of a particular strategy, and provide resolve to start on a new course. It might also justify a trenchant defence of the *status quo*, an argument that it is best to 'stay the course'. In its constant reproduction, crisis rhetoric is simultaneously undermined and reinforced, rendered both commonplace and startling. The proliferation of the term and its multivalent meanings in contemporary discourse undermine its effectiveness as a discrete, descriptive category; and yet somehow the conceptual synonymy between crisis and exceptionalism is also constantly reinscribed. Crisis retains power as an analytic term to describe events and can speak to occasions that are both radical and reiterative. It is precisely its lack of definition that gives the idea of crisis its discursive force.

2.3 The Crises of International Human Rights Law

International law largely orients itself through crises, reproducing in the field many of the potentials and limitations described above.[23] In particular, the tension between the uniqueness and repetition of crises make it a staple of legal analysis. Martti Koskenniemi, for example, has described how lawyers control the perception of events as crises by demonstrating their analogic similarity with other events. He writes:

> One memory I retain vividly from work in the [Finnish] Foreign Ministry is that for the political decision-makers, every situation was always new, unprecedented and very often (and not least for that very reason) a crisis. It then became the legal adviser's task to calm down that decision-maker by explaining that situations of a similar type had arisen last year, five years ago, 30 years ago and that far from being singular or unprecedented, the situation … was in fact part of a recurrent pattern and could therefore be treated in the same way as 'we' had done with those previous cases.[24]

For Koskenniemi, the role of the international lawyer is to defuse political crises by reducing their exceptionality; the lawyer's province is to produce order through familiarity. Law is seen to provide abstract principles that resolve apparently new problems through reference to how their previous iterations (factually distinct but legally similar) were managed. Reducing their capacity to disrupt, international law renders crises part of the international legal order.[25] Koskenniemi points out, however, that the opposite process can be equally effective in legal argumentation—that is, the contention that a particular case does

[22] Hay rejects the idea of perpetual crises, as the endless deferral of decisive intervention that this would require would quickly become catastrophic, causing complete chaos and thus engulfing the crisis. Hay 1995, at 63.

[23] See Charlesworth 2002.

[24] Koskenniemi 2011, at xviii.

[25] Johns et al. 2011, at 3.

not fit any established patterns and should be treated as unique.[26] Here, crisis becomes productive and creative, and the *idea* of crisis proves as malleable in the realm of law as it is in political, economic, and popular discourse.

2.3.1 Crisis as Catalyst

Within international human rights law, times of crisis are frequently constructed as generative, with particular events acting as prompts to and legitimations of action. The UDHR, for example, announces itself as a response to evil, with crisis as its history and context. In the UDHR's Preamble the recognition of the universality of human rights is immediately followed by the evocation of past atrocity:

> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

This clause frames the Declaration as embodying a break from the violence of the past and a turn to human rights for the future. Here the crisis is embodied in 'barbarous acts' that, despite being unnamed, are generally associated with the First and Second World Wars. Thus Richard Goldstone describes international human rights law as springing from global alarm at the Holocaust:

> The shock to the conscience of humankind triggered by the Holocaust gave rise to the realization that it was necessary for the law of nations to protect individual members of the human race … [First realised in the Charter of the United Nations, the international protection of human rights] was followed in 1948 by the Universal Declaration of Human Rights. In a silent but obvious reference to the Holocaust one reads in its preamble of the 'disregard and contempt for human rights' which resulted in 'barbarous acts which have outraged the conscience of mankind'.[27]

Early drafts of the UDHR, produced after René Cassin was asked to revise the articles proposed by the Secretariat to the UN Commission on Human Rights, are more specific in their description of the atrocity precipitating the Declaration. Cassin's first draft opened with the assertion that 'ignorance and contempt of human rights have been among the principal causes of the sufferings of humanity and particularly of the massacres which have polluted the earth in two world wars'.[28] The Working Group of the Drafting Committee (of which Cassin was a member, along with Eleanor Roosevelt, Charles Malik, and Geoffrey Wilson)[29] submitted a revised Preamble, with a slightly differently-worded clause: 'that

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[26] Koskenniemi 2011, at xix.

[27] Goldstone 2009, at 48.

[28] Commission on Human Rights Drafting Committee, Report of the Drafting Committee to the Commission on Human Rights, UN Doc. E/CN.4/21, 1 July 1947, at 49.

[29] Ibid., at 3–4.

ignorance and contempt of human rights have been among the principal causes of the sufferings of humanity and of the massacres and barbarities which outraged the conscience of mankind before and especially during the last world war'.[30] In both drafts the crisis in the protection of human rights came about in the context of global warfare, producing, the drafters argue, a unique violation. The UDHR is cast as a response to this catastrophe.

The UDHR Preamble's invocation of 'barbarous acts' operates in concert with the immediacy of the following clause that 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'. The reference to past violations of human rights here acts as an aspirational response; it is a crisis that can only be answered with international human rights law unless open rebellion is considered a legitimate response, something that the Preamble clearly seeks to forestall. In this, perhaps, we can see the logic of generalising the reference to 'barbarous acts' in the Preamble, although we might simultaneously agree with the criticism levelled by some Communist states at the failure to condemn Nazism and fascism explicitly in the UDHR.[31] De-coupling the Declaration from identifiable historical events was, Glendon notes, an attempt to increase its universal relevance.[32] Cassin later recorded his agreement with this approach, observing that 'the United Nations refused to lower the Declaration to the rank of resentment turned toward the past'.[33]

This disassociation from the specifics of the past is, however, unsatisfactory as a strategy for acknowledging atrocity; it has also not succeeded in its aim of universalising the Declaration by reducing the interdependence between it and the Holocaust, as the ongoing scholarly tendency to draw connections between the two indicates. The Declaration remains tethered to a particular past crisis, the Holocaust, which serves as the justification for how the UDHR seeks to legally contain and manage *new* crises. Joseph Slaughter describes a 'tacit acknowledgment' in the UDHR of both the failures of the developmental model of European Enlightenment thought and a return to its promises in the Declaration's 'progress narrative', 'its anticipation of humankind's triumph over "barbarous acts which have outraged the conscience of mankind" through "the promotion of universal respect for and observance of human rights and fundamental freedoms"'.[34] Crisis is mobilised in legitimating the new instrument, serving as the reason it came into being while also justifying the UDHR's anticipatory, legalised response to future crises. The Holocaust precipitates the Declaration's novel means of understanding human relations through human rights, constituting the international human rights

[30] Commission on Human Rights Drafting Committee, Draft International Declaration of Rights, UN Doc. E/CN.4/AC.1/W.1, 16 June 1947, at 1.

[31] Charlesworth 2008.

[32] Glendon 2001, at 176; see the amendments proposed by Australia at UN Doc. A/C.3/257.

[33] Quoted in Glendon 2001, at 176.

[34] Slaughter 2007, at 15.

legal regime in response to crises of the past while also shaping it as a response to the crises of the future.

Read through crisis, the UDHR is both an answer to the 'disregard and contempt for human rights' of 'barbarous acts', and a prescription for a new and internationalised understanding of rights. Indeed, the UDHR explicitly articulates the discursive terrain in which rights can be realised. Article 28 states that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.' This includes the necessity for an ideological shift on the part of its addressees:

> every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[35]

In the rights that it sets out and the human landscape it requires for their realisation, the Declaration constructs a means for the protection of human rights. In doing so, the crises of the (now generalised) past are seen to be part of the framework of rights themselves. Contingent upon atrocity, rights solidify in the forms of international human rights law's response and, as a consequence, have cohered in the institutions of the UN.

It is striking that the preambles to the UDHR's progeny, the International Covenant on Economic, Social and Cultural Rights (ICESCR)[36] and the International Covenant on Civil and Political Rights (ICCPR),[37] have a more bland and bureaucratic than crisis-driven flavour. The rhetoric of crisis is present, however, in a number of other international instruments. The Preamble to the Rome Statute of the International Criminal Court (Rome Statute), for example, calls for the international community to be '[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.'[38] The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) cleaves to a lower-key crisis of inequality, noting in its Preamble that, despite instruments that prohibit it, 'extensive discrimination against women continues to exist'.[39] The Declaration on the Rights of Indigenous Peoples refers to an 'urgent need to respect and promote

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[35] UDHR, Preamble.

[36] 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (hereinafter ICESCR).

[37] 1966 International Covenant on Civil and Political Rights, 999 UNTS 171 (hereinafter ICCPR).

[38] 1998 Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9 (hereinafter Rome Statute).

[39] 1979 Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13 (hereinafter CEDAW).

the inherent rights of indigenous peoples' in its Preamble.[40] The language of exigency in these latter two instruments does not attach itself to a specific incident; rather, the discourse of crisis is invoked by the scale of the harm that they reference in general terms.

In texts like these, human rights law emerges as a response to crisis: crisis acts as a catalyst for normative development. Crises are seen to provide the impetus for substantive change, a means for rethinking existing protections and formulating new methods. The language of past catastrophes can thus legitimise the law, presenting human rights as the utopian means of representing a collective future and as a symbolic and practical response to harm. At a deeper level, the crisis-response pattern explicitly elaborated in international human rights law instruments also imbues the discipline with a sense of failure. In its repeated inability to prevent events described as crises from occurring, the law fails to uphold its promise of protection, proffering instead a self-reflexive (re)turn to its own norms and their reiteration in treaties and conventions. Crisis repeatedly appears as a catalyst for international human rights law, and the discipline's responses to this characterisation speak simultaneously to its potency and ineffectiveness in answer.

2.3.2 Crisis as Distraction

Crises can distract. Any account of a crisis will be partial, and the discipline of international law tends to concentrate on a single event or series of events, leading to abridged and decontextualized narratives of 'what happened'.[41] Thus, Jan Herman Burgers has criticised the accuracy of framing the UDHR as directly attributable to the Holocaust because it ignores the broader historical genealogy from which the language of human rights was drawn.[42]

Moreover, crises typically generate swathes of information that overwhelm judgment and hobble analysis. As W. J. T. Mitchell notes of the events of 11 September 2001, that historical moment produced an 'information overload' that made 'it very difficult to get any clear, distinct, or compelling message through. Only the simplest messages, generally conveyed by images, have any hope of making an impact'.[43] Crisis, in this instance, signalled the limits of effective representation, with references to '9/11' becoming metonymies for a series of complex events 'drowned in a flood of rhetorical figures and stark oppositions.'[44]

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[40] UNGA, United National Declaration on the Rights of Indigenous Peoples, UN Doc A/RES/61/295, 2 October 2007.

[41] Charlesworth 2002, at 384–386.

[42] Burgers 1992, at 448. See also Moyn 2010.

[43] Mitchell 2002, at 567.

[44] Ibid., at 567–568.

The language of crisis can also devalue human rights through treaty provisions allowing derogations in time of emergency. While some rights are established as non-derogable (genocide[45] and the right to be free from torture and associated practices,[46] along with a number of provisions in the ICCPR[47]), many treaties feature clauses that use the crisis-derived language of emergency to justify undermining rights in the name of state preservation.[48] In such cases, crises can distract from normative assertions of the primacy of human rights, legitimating their derogation in favour of other, apparently competing, interests. Law determines the nature of such derogations, but they nonetheless exist as potential—and legal—constraints on the scope and applicability of rights in specific circumstances.

For example, Article 4(1) of the ICCPR provides that:

> in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

The capacity for derogation here is not absolute. As the UN Human Rights Committee has noted, 'not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation'[49] for the purposes of Article 4. The Committee has also stated that the measures derogating from the Covenant must be both 'exceptional' and 'temporary'.[50] While emphasising the limitations that this places on the capacity for derogation, the language of the exceptional is integral in creating the circumstances wherein states might legally breach human rights. Establishing a 'public emergency'[51] at law implicates crisis in two intertwined ways: it constructs the situation calling for derogation as a crisis, but it also sees the derogation itself in the same light, constructing it as limited and unique.

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[45] Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), UN Doc.CCPR/C/21/Rev.1/Add.11, 31 August 2001 (hereinafter General Comment 29).

[46] 1987 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, Article 2(2).

[47] Listed in Article 4(2) of ICCPR.

[48] These include Article 4 of ICESCR, Article 15 of the European Convention on Human Rights, 213 UNTS 222 (hereinafter ECHR), and Article 27 of the American Convention on Human Rights, 1144 UNTS 123 (hereinafter ACHR).

[49] General Comment 29, at 3.

[50] Ibid., at 2.

[51] The European Court of Human Rights has described this as 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'. *Lawless v Ireland*, ECtHR, No. 332/57, 1 July 1967, para. 28.

Thus, crisis legitimates the undermining of rights not only because international law explicitly allows for such limits,[52] but also through a glossing of the legalised violation of rights as exceptional, a rhetorical turn that masks that the capacity for derogation is in fact entrenched in law itself. Rather than being novel, international law in fact ensures that derogation is potentially repeatable.

Outside the context of formally declared emergencies, ideas of crisis have also been deployed to whittle away human rights protection. The post-11 September 2001 'war on terror' has generated a self-sustaining state of abnormality wherein the language of crisis has justified extensive infringements of rights. Counter-terrorism measures have eroded human rights norms including the freedom from torture and cruel, inhuman, or degrading treatment,[53] the right to liberty and to a fair trial,[54] and the right to non-discrimination.[55] Another aspect of this erosion has been the redefinition of the human rights canon to give priority to the preservation of individual security.[56]

A focus on crisis restricts international human rights law through its inattentiveness to persistent patterns of discrimination and violence. Crisis imbues some human rights violations with drama, making others recede drably into the background. This in turn affects what it seems possible to achieve through human rights discourse. The next section examines this phenomenon in the distinctions drawn between categories of rights.

2.4 A Crisis-Driven Distinction Between Rights

The complex interweaving of crises and international human rights law is illustrated in the standard division between two categories of human rights—civil and political rights on the one hand and economic, social and cultural rights on the other. While crises are often associated with breaches of civil and political rights, violations of economic, social and cultural rights are rarely understood in the same terms. The crystallisation of these classifications has endowed civil and political rights with

[52] For a comprehensive discussion of the relationship between international human rights and states of emergency, see Gross and Ní Aoláin 2006, at 247–325.

[53] For example, arguments that the Convention against Torture and relevant provisions of the ICCPR lack extraterritorial applicability, the use by security agencies of information obtained from torture (and a paucity of investigation and accountability when allegations of this are made), practices involving 'enhanced interrogation techniques' and 'moderate physical pressure' that attempt to redefine the parameters of torture, and attempts to relax the rule of *non-refoulement*. See Sheinin 2010, at 592.

[54] For example, practices of secret and unacknowledged detention and concerns over the right to a fair trial in military and special courts that include a lack of judicial independence, the provision of proper counsel to the accused, and the selective sharing of evidence between prosecution and defence. Ibid., at 593–594.

[55] See ibid., at 955.

[56] See Carne 2008.

urgency, while the latter have become quotidian and less susceptible to redress. The language of crisis has thus created and sustained a hierarchy among rights.

The UDHR was based on a global survey of constitutional provisions dealing with human rights and included civil and political as well as economic, social and cultural rights. During its drafting, the Soviet Union worked to ensure that economic and social rights were given comparable status to civil and political rights.[57] This was based on a commitment to the state as responsible for central planning and caused some consternation at the time, particularly among Western countries who favoured a model of rights consistent with free markets. Third World states had separate concerns about their capacity to deliver immediate protection for economic, social and cultural rights.[58] Tension over the inclusion of economic, social and cultural rights was eventually diffused by a proposal by René Cassin to insert a *châpeau* provision for these rights, which became, after significant amendment, Article 22 of the UDHR.[59] It provides that '[e]veryone is entitled to realization of the economic, social and cultural rights enumerated below, in accordance with the organization and resources of each state, through national effort and international cooperation.' Eleanor Roosevelt, who was influenced by Franklin Roosevelt's inclusion of freedom from want among his four 'essential freedoms', finally persuaded the United States to accept such rights in the Declaration on the basis that it was not a binding instrument.[60]

At the time of its adoption in 1948, the assumption was that the UDHR would be developed into a single treaty. This aspiration held until 1952. Cold War politics contributed to the compartmentalisation of the two categories of rights in the human rights covenants. However, this politics may not have been as significant as the role of Third World states in promoting economic and social rights. Roland Burke notes that '[f]or Asian, Arab, and African states faced with seemingly insoluble under-development and poverty, economic and social rights held an immediacy that was missing from Western, and indeed communist, rhetoric.'[61]

During the drafting of the Covenants, delegates from the Third World pursued economic and social rights energetically, resisting moves to water down the language referring to these rights. Eleanor Roosevelt responded that the term 'rights' should be 'confined to those that could be realized in the very near term, with the requisite resources plausibly available.'[62] She later modified this position to contemplate economic, social and cultural rights if it were understood that they would be progressively realised.[63] In the end it was the Indian delegate, Hansa

[57] Glendon 2001, at 115–117.

[58] Ibid.

[59] Ibid., at 116–117. See also Dennis and Stewart 2004, at 477–480.

[60] Glendon 2001, at 42–43, 186–187. The other freedoms were freedom of speech and expression, freedom of worship and freedom from fear.

[61] Burke 2012, at 428.

[62] Ibid., at 432.

[63] Ibid.

Mehta, who proposed a division of the Human Rights Covenant into two instruments, following a similar logic to that of Roosevelt in insisting that economic and social rights were neither justiciable nor capable of precise definition.[64]

The fight to preserve the integrity of the Human Rights Covenant was lost in February 1952, but this did not deter Third World countries from emphasising the centrality of economic, social and cultural rights. Burke has chronicled a shift beginning in the 1960s from economic and social rights as essentially individual rights to also seeing them as belonging to the community and the state. This way of looking at economic, social and cultural rights was sometimes deployed to justify forms of authoritarian modernisation and development from the top down, impinging on individual rights.[65] By the 1970s and the end of the decolonisation era, Third World interest in the language of economic, social and cultural rights had given way to notions of development and redistributive justice between the North and South, alongside the strengthening of the recognition of these rights as individual rights as well.[66] Policies that promoted foreign aid and assistance appeared to respond to the crisis of underdevelopment in the Third World more adequately than the language of rights. And this was also more politically palatable to the aid donors, as the North's deep resistance to the attempt to marry the language of rights and development in the 1986 UN Declaration on the Right to Development shows.[67]

The early debates over the status of civil and political rights on the one hand and economic, social and cultural rights on the other continue to shape international human rights law. The rights set out in the ICCPR are often deployed to respond to crises of governance. An example is the invocation of the right to be free from torture and the right to bodily integrity in response to the images of torture and abuse of prisoners by the US military at Abu Ghraib prison in 2004, which became a symbol of the illegitimacy of the US-led occupation of Iraq.[68] While these rights are certainly applicable, the occupation implicated the full spectrum of human rights, but violations of the economic, social and cultural rights of Iraqis have received little attention. The rights set out in the ICESCR are typically analysed as rights that apply in a quotidian context, situations of unexceptional daily life that are easily swept aside in times of crisis or emergency. The construction of a barrier wall by Israel in the Occupied Palestinian Territories illustrates this. Israel justified the wall as a crisis-driven security measure to prevent attacks on its population. The associated violations of the economic, social and cultural rights of the Palestinians, through limiting access to their land,

[64] Ibid., at 434. Mehta's view was not shared by representatives of other Third World states, who were keen to retain a single instrument. See, for example, the speech by the Pakistani representative, Abdul Waheed, quoted in ibid., at 435.

[65] Ibid., at 436–441.

[66] Ibid., at 441–442.

[67] UNGA Res. 41/128, 4 December 1986. See Donnelly 1985.

[68] E.g. Constitution Project 2013.

to water, to schooling, to medical care, were regarded as a matter of temporary inconvenience.[69] On occasions, violations of economic and social rights attract the rhetoric of crisis, particularly in relation to famine and natural disasters, but the sense of crisis dissipates the longer the situation endures.

The distinction between the two categories of rights, and their relevance to apparent crises, is reinforced by the legal expression of the associated implementation obligations. Article 2 of the ICCPR imposes an obligation on states parties to 'respect and to ensure … the rights recognized in the present Covenant, without distinction of any kind' to all persons within their jurisdiction. It requires that parties 'take the necessary steps … to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.' States parties also commit to providing an effective and enforceable remedy, as determined by competent authorities, to victims of rights violations.

The ICESCR contemplates a much more diffused obligation than that of the ICCPR. States parties undertake 'to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'[70] Article 2 makes special provision for 'developing countries', which may 'with due regard to human rights and their national economy, … determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.' These different formulations provide one explanation for why the ICESCR contains no equivalent to Article 4 of the ICCPR, discussed above: there seems no need to allow derogation from many of the ICESCR rights because their implementation is already made subject to the availability of resources.[71]

The distinction between these categories of rights has been reflected to some extent in the jurisprudence of the two monitoring bodies for the treaties. The Committee on Economic, Social and Cultural Rights has referred to the length of time required for the realisation of all economic, social and cultural rights.[72] With respect to particular rights, however, the Committee has identified elements that

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[69] The UN Special Rapporteur on Human Rights and Counter-Terrorism has highlighted these issues. See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, UN Doc A/HRC/6/17/Add. 4, 16 November 2007. See also the *Wall in the Occupied Palestinian Territories* advisory opinion where the International Court of Justice briefly acknowledges Israel's violations of the ICESCR. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, ICJ, Advisory Opinion, 9 July 2004, paras. 190–192.

[70] ICESCR, Article 2.

[71] See Müller 2009.

[72] E.g. Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations, UN Doc. E/1991/23, para. 1 (referring to rights such as the right to non-discrimination etc.).

are susceptible to 'immediate implementation.'[73] These include the right to fair wages and equal remuneration for work of equal value in Article 7(a)(i), and the right to form trade unions in Article 8 of the ICESCR. The Committee has also called on states parties to 'modify the domestic legal order as necessary' to implement the treaty, including through 'direct incorporation' of its provisions into national legal systems.[74] The Committee has developed the notion of 'minimum core obligations' in relation to economic, social and cultural rights in order to distinguish between the mandatory, non-derogable aspects of rights protection and their penumbra, which is subject to the availability of resources and may be achieved progressively.[75] The language of minimum core obligations allows violations of these rights to be perceived more readily as forms of crisis. The entry into force of the Optional Protocol to the ICESCR in 2013 may reinforce this tendency.

The Human Rights Committee, which monitors implementation of the ICCPR, couches its jurisprudence in terms of immediate obligations more consistently than the Committee on Economic, Social and Cultural Rights. The language of its General Comment 31 on 'The nature of the general legal obligation imposed on States parties to the Covenant' is in markedly stronger terms than the parallel General Comment of the Committee on Economic, Social and Cultural Rights.[76] For example, it presents Article 2 of the ICCPR as an *erga omnes* obligation; in other words one that a state party to the treaty owes to every other state party, and refers to a 'legitimate [international] community interest' in implementing the treaty.[77] The General Comment emphasises that the obligation to respect and ensure ICCPR rights has an 'immediate effect'[78] and contemplates a broad operation for this obligation, including the duty of states parties 'to exercise due diligence to prevent, punish, investigate or redress the harm caused [by violations of rights] by private persons or entities.'[79]

Various human rights treaties protect both categories of rights in some measure. For example, the CEDAW, the Convention on the Rights of the Child (CRC)[80] and the Convention on the Rights of Persons with Disabilities (CRPD)[81] cover a range of rights that spans the two categories. The work of the UN Human Rights

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[73] E.g. Committee on Economic Social and Cultural Rights, General Comment No. 9: The Domestic Application of the Covenant, UN Doc. E/C.12/1998/24, para. 10.

[74] Ibid., paras. 3, 8.

[75] E.g. Committee on Economic, Social and Cultural Rights, General Comment No. 15: The Right to Water, UN Doc. E/C.12/2002/11, 20 January 2003, paras. 40, 47.

[76] Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

[77] Ibid., para. 2.

[78] Ibid., para. 5.

[79] Ibid., para. 8.

[80] 1989 Convention on the Rights of the Child, 1577 UNTS 3.

[81] 2006 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3.

Council's special procedures also manifests a move towards a more integrated approach to human rights. While initially the mandates of special rapporteurs were either geographical or focussed on particular civil or political rights, they have been expanded to include a number of economic, social and cultural rights or issues related to them, such as the right to education (1998), extreme poverty and human rights (1998), the right to adequate housing (2000), the right to food (2000), and cultural rights (2009).

Despite this recognition of the interrelationship of the categories of civil and political rights and economic, social and cultural rights, the distinction between them has been remarkably durable. Acknowledgement that all human rights are 'universal, indivisible, interdependent, and interrelated' forms part of official international discourse,[82] but these concepts are rarely elaborated or translated in concrete ways. The distinction is often contested in the human rights literature; typically, however, this is done in a general and unspecific manner. It also has some strong defenders.[83] The lines of accountability for breaches of civil and political rights appear more straightforward than for economic, social and cultural rights and thus more susceptible to a crisis analysis.

The apparently different status of the two categories of rights and their relationship to the immediacy of crisis-thinking is magnified in international advocacy. This can be observed in the way these categories are deployed by major human rights organisations, which place a strong emphasis on breaches of civil and political rights. In 2012, for example, the leading international non-government organisation, Human Rights Watch, published 73 major reports on what it regarded as situations of crisis. Over half of these (44) were focussed on civil and political rights (particularly extrajudicial killings and torture) and international humanitarian law, while only two focussed specifically on economic, social and cultural rights. The remainder (27) covered both categories of rights. Even where economic, social and cultural rights were included in a report, they were often submerged within what was depicted as the more critical question of the violation of civil and political rights. In a report on the repression of political protest in Yemen, for example, there is a brief reference to Yemen's obligations under the ICESCR to allow access to medical care, but the report's focus is on freedom of assembly and violence against civilians.[84] The Executive Director of Human Rights Watch, Ken Roth, has argued that human rights advocacy is most effective when there is an observable human rights violation, the identity of the violator is clear and the remedy is obvious.[85] This, he suggests, is straightforward in many

[82] E.g. UNGA, Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993 para. 5; UNGA Res. 60/1 (2005 World Summit Outcomes), 24 October 2005, para. 13. UNGA Res. 60/251 (establishing the Human Rights Council) adds the following words to this formula: 'mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis.' UNGA Res. 60/251, 3 April 2006, Preamble, para. 3.

[83] E.g. Ignatieff 2001; Dennis and Stewart 2004.

[84] Human Rights Watch 2012, at section IV.

[85] Roth 2004, at 67–68.

cases of breaches of civil and political rights, but more complicated when the issues of distributive justice that are implicated in economic, social and cultural rights are at stake.[86] Roth recommends that human rights organisations focus on cases where the cause of an economic, social or cultural rights violation is arbitrary or discriminatory governmental conduct, so that the violator and remedy are both clear. He refers to the 'futility' felt by international human rights activists because they 'see how little impact they have in taking on matters of pure distributive justice'.[87]

Another example of the influence of the distinction between categories of rights is in post-conflict peace-building. A major problem after conflict is economic and social disparity and insecurity exacerbated by conflict and endemic poverty.[88] Women are particularly affected by this because gendered discrimination in areas such as access to land or inheritance of housing and property is common.[89] But these are rarely analysed as crises that can be ameliorated by legal reform. Socio-economic injustice is at the heart of many modern conflicts, and yet the connection between violations of economic, social and cultural rights and those of civil and political rights is rarely explored in critical analyses of peace-building. It is also absent from most accounts of transitional justice, despite the prevalence of systemic asymmetries of power that can undermine fragile post-conflict settlements.[90] Accounts of the rule of law in such societies tend to focus on civil and political rights; economic, social and cultural rights are associated with political choices rather than legal ones. Rachel Kleinfeld illustrates this type of reasoning in her comment that:

> Not any human rights reform would necessarily count as a rule-of-law issue. The idea is not simply the growth of human rights, but the notion that the state should be reined in by the law and that law should have content to it – that is, the state cannot violate intrinsic human rights of individuals. Thus the rule of law is historically about negative rights, not positive rights or so-called economic and social rights.[91]

The relegation of economic, social and cultural rights to a different sphere is based on an unsustainable distinction between negative and positive rights, the assumption that civil and political rights entail only state restraint, while economic, social and cultural rights demand state action and expenditure or what Roth calls 'distributive justice'.[92] Protection of all human rights requires active policy reform and commitment of resources, and understanding the two sets of rights as qualitatively distinct makes little sense when applied to human lives. The relationship between the categories is better understood as symbiotic. Thus the right to

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[86] Ibid., at 68–70.

[87] Ibid., at 72.

[88] Niland 2004, at 322.

[89] See Chinkin and Charlesworth 2006.

[90] For a discussion of this point in the context of Zimbabwe, see Muvingi 2009.

[91] Kleinfeld 2006, at 69, footnote 47.

[92] Roth 2004, at 72.

form and join trade unions in the ICESCR[93] is a specific aspect of the rights to freedom of association and assembly contained in the ICCPR.[94] The right to an adequate standard of living in the ICESCR[95] is an element of the right to life in the ICCPR.[96] The right to education[97] is integral to the right to freedom of speech and expression.[98] Implementation of the right to be free from discrimination requires positive action, such as education and monitoring.[99] As Wendy Brown has noted, a failure to address the historical, political and economic contexts in which rights are exercised automatically curtails the idea of human agency on which rights are based.[100]

The shadow of crisis obscures the connections between the two categories and makes it harder to think about the indivisibility of rights. If a violation of rights is associated with a crisis, human rights law seems easier to apply. If it is not, it appears as routine and harder to ameliorate. In the context of economic, social and cultural rights the general lack of crisis thinking has pushed them to the periphery of human rights activism.

2.5 Conclusion

In this chapter, we have argued that crises galvanise, sustain and undermine international human rights law. While their reiteration suggests law's limited capacity to prevent them, crises can nonetheless prompt international human rights law into crafting a response to atrocities. Crises have also operated to contain the scope of the discipline by creating hierarchical categories of both crisis-justified human rights violations and non-critical—what we have termed quotidian—human rights violations.

The multiple functions of crises in international human rights law will always be in tension. One way to reduce this tension is through a redefinition of the quotidian as crisis, in order to make change appear more urgent. In a saturated field, however, this may not have great impact, adding one more crisis to a growing list. Moreover, as Harmes has observed in the area of economic theory, crises do not always deliver what we expect. He has pointed out that the 'big bang' or crisis-driven model of change is not supported by evidence and that coalition-building is more effective

[93] ICESCR, Article 8.

[94] ICCPR, Article 22. Article 22 of ICCPR also refers to the right to form and join trade unions.

[95] ICESCR, Article 11.

[96] ICCPR, Article 6.

[97] ICESCR, Article 13.

[98] ICCPR, Article 19.

[99] See also Van Boven's schema of the indirect protection of economic, social and cultural rights through civil and political rights (Table 8.1). Van Boven 2010, at 179.

[100] Brown 2004, at 455.

politically.[101] Another strategy could be to insist on straddling the quotidian and the crisis, recognising that any violation of rights implicates both a pattern of conduct and a need for decisive action, a background and a foreground. While a quotidian human rights law is neither a panacea for crisis thinking nor its ideal alternative, it may allow us to think more expansively of the spaces in which rights should operate.

All of these approaches, however, require a critical engagement with the discourses through which crises are constructed. Mitchell notes that '[c]riticism cannot wait for the crisis to be over to have a "perspective" on the events. Criticism is more properly understood, in fact, as a cultural practice that is, in some deep sense, synonymous with crisis.'[102] On this analysis, the critical moment is precisely the moment of crisis; it evokes anxiety and risk and the necessity of making a decision or forming a judgment. Crises should be subject to an ongoing interrogation, and criticism should itself be understood as invoking the temporal urgency that crises convey, albeit with an awareness of how those crises are constructed and the purposes to which they are put. Approaching crises with criticism reminds us that crises are produced: they are negotiable narratives that can mask as well as reveal, a recognition that should be central when we respond to crises of human rights with international law.

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[101] Harmes 2012, at 219.

[102] Mitchell 2002, at 570.

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Chapter 3
The Crisis of International Human Rights Law in the Global Market Economy

Daniel Augenstein

Abstract The contribution argues that facticity of the human rights impacts of economic globalisation increasingly undermines the normativity of the state-centred conception of international human rights law. The exposure of the international legal order of states to the operations of global business entities leads to a collusion of sovereign state interest and globalised corporate power at the expense of protecting the rights of victims of human rights violations in the global market economy. The contribution scrutinises two prominent attempts to address this lacuna of protection: transnational tort litigation and the UN Guiding Principles on Business and Human Rights. It is argued that both approaches are not only an expression of the present crisis of international human rights law but also risk contributing to its perpetuation. While the 'escape into tort' results in the privatisation of public human rights in the global market economy, the UN Guiding Principles entrench their territorialisation in the state legal order in the face of global economic challenges. The concluding section reflects on the future pathways of international human rights law by positing a choice between, on the one hand, a more radical departure from human rights' state-centred heritage and, on the other hand, a transformation of the international legal order of states by virtue of human rights. It highlights the importance of extraterritorial human rights obligations in recovering the state's legal accountability for human rights violations committed in the course of global business operations.

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Contents

3.1 Human Rights and Business

The past decade has seen an increasing public awareness of the detrimental impacts of global business operations on international human rights protection. The devastating effects of oil-drilling and gas-flaring activities by Europe and U.S.-based multi-national corporations on people and habitat in Africa and South-America are well-known and make the news at fairly regular intervals. Something similar may be said for human rights violations committed by private military contractors to protect foreign investment, or for the land-grabbing, environmental degradation and displacement of indigenous people involved in major infrastructure developments led by international consortiums. As people in the developed world become increasingly concerned about child labour and health and safety conditions in, say, the global textile and microchip industry, some businesses in developing and under-developed countries build new 'showcase factories' within easy reach of large airports to pacify international observers and satisfy enlightened Western consumer interest. Human rights defenders and trade union activists tirelessly expose best and worst corporate practices in the most remote corners of the globe, banks advertise with new socially responsible investment strategies, corporations pledge to codes of conduct saturated with human rights commitments, and states undertake to better educate 'their' businesses in human rights matters when operating abroad. In short, 'business and human rights' is on the march, not the least due to the influential work of Professor John Ruggie who was appointed Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business entities (SRSG) in 2005.

The SRSG was tasked to, *inter alia*, 'identify and clarify standards of corporate responsibility and accountability for TNCs [transnational corporations] and other business enterprises with regard to human rights'; and 'elaborate on the role of states in effectively regulating and adjudicating the role of TNCs and other business

enterprises with regard to human rights, including through international cooperation'.[1] In the course of his mandate that culminated in a set of Guiding Principles on Business and Human Rights (UN Guiding Principles) endorsed by the UN Human Rights Council in June 2011,[2] the SRSG collected rich empirical evidence of the cross-cutting and trans-boundary nature of the business and human rights challenge: while business operations can impact on virtually all internationally recognised human rights across the civil/political—social/economic/cultural divide, states need to mainstream human rights concerns into all business-related legal and policy domains, both internally and externally. To meet this challenge, the SRSG developed a 'protect, respect, remedy' framework of complementary and interlocking human rights duties and responsibilities of states and business entities structured around three pillars: the state duty to protect human rights against violations by corporations through appropriate policies, regulation, adjudication and enforcement measures; the corporate responsibility to respect human rights, meaning to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedies, both judicial and non-judicial, for corporate human rights violations.

This contribution argues that whereas the SRSG has been remarkably successful in forging a new political allegiance between states, business entities and civil society organisations to attend to the 'business and human rights predicament',[3] the UN Guiding Principles are also the expression of a persisting failure of the international community to address the root causes of this predicament *in international law itself*. In a nutshell, the exposure of the international legal order of states to the operations of global business entities leads to a collusion of sovereign state interest and globalised corporate power to the detriment of victims of human rights violations in the global market economy. This collusion is rooted in a tension between the global human rights impacts of states' business-related domestic and foreign policies and their sovereign territorial rights to independently conduct their domestic and foreign affairs. On the one hand, global business operations privatise and de-territorialise the human rights impacts of state action. On the other hand, international law fails to address these impacts because it confines human rights obligations to public and territorial states. The limitations of the state-centred conception of international human rights law are clearly visible in the SRSG's approach to business and human rights. Whereas the traditional preoccupation of human rights with protecting individuals against the public power of the state is increasingly overshadowed by concerns about private power that

[1] Human Rights Council, Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Dec/2004/116, 20 April 2004.

[2] Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy' Framework, UN Doc A/HRC/17/31, 21 March 2011 (hereinafter UN Guiding Principles).

[3] Indeed, the endorsement of the Guiding Principles by the UN Human Rights Council marks that first time that UN member states have agreed on a common position laying down standards of expected behaviour from business in relation to human rights.

coalesces around global business entities, the SRSG's 'corporate responsibility to respect' lacks binding legal effect as 'respecting rights is not an obligation that current international human rights law generally imposes on companies'.[4] Relatedly, the SRSG's own research shows that today the vast majority of corporate human rights violations is committed in under-developed and developing countries by business entities that are based in, and remain controlled from, states in the developed world.[5] Yet the UN Guiding Principles confine the 'state duty to protect' to violations committed on the state's territory as its extraterritorial application remains 'unsettled' in international law.[6]

Section 3.2 sketches out two consequences of the exposure of the international legal order of states to the operations of global business entities: the erosion of the substance of legal authority that states wield over their territory; and the expansion of state power beyond their borders. Section 3.3 revisits the 'Bhopal tragedy' to illustrate how these developments result in a legal disempowerment of victims of human rights violations in the global market economy. Sections 3.4 and 3.5 argue that prominent attempts to address this lacuna of protection—the vindication of human rights values through trans-national tort litigation and the transition from territorialised human rights law to global human rights governance—are as much an expression of the present crisis of international human rights law as they contribute to its perpetuation. While the escape into tort propels the privatisation of human rights in the global market economy, the turn to governance entrenches their legal territorialisation within the state in the face of global economic challenges. The concluding section reflects on the future pathways of international human rights law by positing a choice between, on the one hand, a more radical departure from human rights' state-centred heritage and, on the other hand, a transformation of the international legal order of states by virtue of human rights. It highlights the importance of extraterritorial human rights obligations in recovering the state's legal accountability for human rights violations committed in the course of global business operations.

3.2 The International Legal Order of States and the Challenge of Corporate Power

Early on in his mandate, the SRSG defined the challenge that the operations of global business entities pose to the international protection of human rights.

> The root cause of the business and human rights predicament today lies in the governance gaps created by globalisation – between the scope and impact of economic forces and

[4] Human Rights Council, Business and Human Rights: Further Steps towards the Operationalisation of the 'Protect, Respect, Remedy' Framework, UN Doc A/HRC/14/27, 9 April 2010, para. 4.

[5] Human Rights Council, Interim Report, UN Doc E/CN.4/2006/97, 22 February 2006.

[6] Human Rights Council, Business and Human Rights: Towards Operationalising the 'Protect, Respect, Remedy' Framework, UN Doc A/HRC/11/13, 22 April 2009, para. 15.

> actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.[7]

If read in isolation, this account of the corporate challenge may suggest that globalisation simply 'happens' to the state and its (domestic and international) human rights law.[8] The relationship between the 'scope and impact of economic forces and actors' and the 'capacity of societies to manage their adverse consequences' appears asymmetrical: globalisation 'creates' governance gaps and 'provides' the permissive environment in which corporations violate human rights. This resonates with broader narratives that associate economic globalisation—the increased interdependency of public and private actors across national-territorial borders brought about by global economic cooperation and competition[9]—with the demise of the sovereign state.[10] From a domestic point of view, economic globalisation erodes the substance of legal authority that states wield over their territory. Global business operations escape the regulatory grasp of territorial states while at the same time limiting states' ability 'to set the social, economic and political agenda within their respective political space', and therewith their capacity 'to secure the livelihoods of their respective citizens by narrowing the parameters of legitimate state action'.[11] Internationally, economic globalisation transforms states' external relations with each other. As De Feyter says, 'companies that organise across borders define the primary role of a state in terms of creating a space for the play of market forces. Not only should a state adopt a market-based system within its own territory …, the same system should apply to economic relationships *among* countries'.[12] Economic globalisation asserts pressure on developed states to create a global 'level playing field' for their corporate nationals by further dismantling legal barriers to the free flow of capital, production and labour in the developing world. At the same time, developing states will be reluctant to raise national standards of social and environmental protection for fear of losing their competitive advantage in attracting foreign investment in the global market.

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[7] Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, UN Doc. A/HRC/8/5, 7 April 2008, para. 3.

[8] The first pillar of the SRSG's 'Protect, Respect and Remedy' Framework gives due consideration to the role of states in protecting and violating human rights in relation to global business entities, see UN Guiding Principles and further below.

[9] See, e.g., UNGA, Report of the UN Secretary General, Globalisation and its Impact on the Full Enjoyment of All Human Rights, UN Doc A/65/171, 26 July 2010.

[10] For an insightful contribution that investigates the ramifications of an emerging global 'economic citizenship' attributed to trans-national firms on sovereignty and exclusive territoriality as foundational pillars of the modern state see Sassen 1996. More specifically on the relationship between economic globalisation and the state-centred conception of international human rights law, see De Feyter 2005.

[11] Thomas 1998, at 163.

[12] De Feyter 2005, at 11.

Granted that global business entities are important agents of economic globalisation, it would nevertheless be reductive to simply characterise the business and human rights predicament as a corporate takeover of the international legal order of states. Arguably, the rise of corporate power transforms, rather than marginalises, the role of sovereign states in the global market economy.[13] (Constituent parts of) global business entities continue to operate in the shadow of the territorial state legal order. 'Multi-national' corporations remain subject to the domestic laws of the states in which they reside, and often rely on these laws for the regulation and enforcement of their business transactions. Moreover, rules on extraterritorial jurisdiction under public and private international law can tie globalised corporate power back to the regulatory authority of the territorial state.[14] Hence, as Robert Wai perceptively notes, debates on (extra-)territorial corporate regulation will often turn less on *whether* the state should or could regulate than on *what interests* should be regulated.

> Predictably, the same parties which advocate an active governmental role in defending strong property rights and contractual enforcement in new areas of intellectual property and e-commerce across borders are often equally concerned to argue that governments not 'interfere' with the development and freedom of these realms through laws that regulate with respect to matters such as taxation, content (including pornographic and racist material), viewership, or the like.[15]

The flip side of this transformation of the role of the state is that increased global economic cooperation and competition enables governments to utilise the (legal) control they continue to exercise over their corporate nationals at home and abroad to assert power beyond their borders. The operations of global business entities amplify the impacts of states' business-related domestic laws and policies on individuals in other states.[16] Moreover, they enhance states' opportunities to use their corporate nationals to pursue foreign policy objectives.[17] Consider by way of example the recent U.S. government approach to 'economic statecraft':

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[13] Muchlinski, for instance, suggests that economic globalisation diffuses the traditional state-centred focus of international relations into a transnational 'tripartite system of international interactions' involving 'the relations of governments to governments, governments to corporations [and other non-state actors], and corporations to corporations'. Muchlinski 2007, at 82.

[14] For an overview, see Zerk 2010.

[15] Wai 2002, at 266.

[16] For example, when applied to global business entities the doctrine of separate legal personality regulated by states' domestic corporate laws has significant impacts on human rights protection in other states as it creates a presumption of non-liability of constituent parts of the corporation operating in different territories for wrongful acts committed by other members of the corporate group.

[17] States' instrumentalisation of corporate power in foreign relations is by itself not a new phenomenon. Well-known examples include attempts of the U.S. Government to order an American parent corporation to halt sales of its French subsidiary into the People's Republic of China in the 1960s; and to prevent European subsidiaries of U.S. corporations, and European corporations using U.S. technology, from exporting equipment for the construction of a pipeline carrying gas from the USSR to Western Europe in the 1980s, see further Muchlinski 2007, at 130–132.

> In increasingly competitive and dynamic circumstances, the U.S. government recognises the valuable contributions that the private sector can make in promoting key U.S. foreign policy objectives, including economic inclusion, respect for labour and human rights, and environmental protection. The State Department is using all the tools at its disposal to support U.S. economic priorities, which at the same time foster global peace, stability, security and prosperity. In part, that means crafting policies that help create – and sustain the growth of – well-paying, productive American private sector jobs. It means elevating and updating commercial diplomacy to attract investment in America and ensure U.S. companies can invest on fair terms in overseas markets. Running throughout much of the economic statecraft agenda is the need to identify and respond to a set of strategic challenges posed by state capitalism, including the ability and willingness of some states to distort markets to achieve strategic aims.[18]

In short: states have an economic self-interest in supporting the global operations of their corporate nationals, which combines with their political self-interest in using corporate power to pursue their foreign policy objectives, including the protection of human rights.

At first sight, one may find little fault in states using corporate power to promote human rights in other states. However, the underlying 'business case' for human rights that is advanced in response to economic globalisation in effect risks further impelling the surrender of the state-centred conception of international human rights law to the 'laws' of the global market.[19] The global human rights impacts of states' 'privatised' domestic and foreign policies *de facto* undermine the principle of state sovereignty that once justified the territorialisation of human rights in the state legal order. At the same time, these human rights impacts are not mitigated by corresponding state obligations to respect, protect and fulfil the rights of third-country victims of corporate power. Rather, state sovereignty resurfaces in shielding public authorities from *de lege* accountability for human rights violations committed by (constituent parts of) their corporate nationals in other states. Hence, below the surface of 'governance gaps' lies another 'business and human rights predicament' that is rooted in the *interrelation* of the international legal order of states with the global market economy and that unleashes the human rights impacts of global business operations from the constraining force of international human rights law. From Colombia to the Philippines, the crisis of international human rights law is the crisis of the *victims* in 'weak' host states of corporate investment that lack the capacity (and at times also the willingness) to protect human rights against business operations conducted with the active support or passive connivance of 'strong' home state governments.

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[18] U.S. Department of State, Bureau of Democracy, Human Rights and Labour, U.S. Government Approach to Business and Human Rights, 1 May 2013.

[19] On the emerging market contingency of international human rights law see further Alston 1997, at 442–443.

3.3 Bhopal

The Indian city of Bhopal is remembered for one of the worst industrial accidents in recent human history that killed some 10.000 people and left more than 500.000 injured—estimates vary. Today, 'Bhopal' has become a paradigmatic example of the challenges that the operations of global business entities pose to the international protection of human rights.[20] In the night of 2/3 December 1984, a chemical plant operated by Union Carbide of India Limited (UCIL), a corporation jointly owned by the U.S.-based Union Carbide Corporation (UCC) and the Indian government, leaked massive amounts of toxic gas after water and other impurities had entered one of the plant's methyl isocyanate (MIC) storage tanks.[21] Before starting business in India, UCC had negotiated an exemption from Indian law limiting foreign investment in Indian corporations in order to acquire a controlling interest (50.9 %) in UCIL. While the course of events that led to the contamination of the tank remains contested, it transpired that UCC's centralised control- and decision-making powers over its Indian subsidiary did not translate into a diligent management of the plant necessary for its safe operation.[22] A series of previous incidents and operational surveys suggest that UCC was aware of major safety hazards at the plant site. Moreover, there is evidence that the operational and safety standards at Bhopal were considerably lower than those employed in another UCC plant located in West Virginia, United States.[23] Unlike in the U.S., there was a mismatch between the Indian plant's high production capacity and low processing capacity of MIC, resulting in the storage of large quantities of the toxic substance over long periods of time. Parts of the technology transferred by UCC were allegedly not proven and the tank's cooling system, as well as the monitoring of the plant's instruments and processes, did not live up to the Virginia standards. Cost-cutting measures implemented one year prior to the accident further eroded the safety standards. If the training of staff had always been poor, skilled workers were now replaced by cheap labour and specialised personnel were moved around the plant to compensate for the shortage in manpower. Whereas the Virginia plant

[20] For a recent critical re-assessment, see Deva 2012.

[21] The following summary draws mainly on ibid., Muchlinski 1987; Baxi & Dhanda 1990; and Amnesty International, Clouds of Injustice: Bhopal Disaster 20 Years On, 2004, www.amnesty.org/en/library/info/ASA20/015/2004. Accessed 1 November 2013 (hereinafter Clouds of Injustice). The corporation's view can be retrieved from http://bhopal.com.

[22] Pursuant to its Corporate Charter, UCC's management system was designed 'to provide centralised integrated corporate strategic planning, direction and control; and decentralised business strategic planning and operating implementation'. See further Muchlinski 1987, at 570–72. He summarizes the plaintiff's evidence to this effect as follows: '[c]ontrol of subsidiaries is achieved … through ownership of shares, a matrix system of reporting, that requires the subsidiary to inform management at all levels of the organisation of activities, and by the presence of Union Carbide representatives on the subsidiary's board of directors.'

[23] See Amnesty International, Clouds of Injustice, chapter 3; Deva 2012, chapter 6, with further references.

had a sophisticated emergency plan and system in place to alert public authorities and local communities of toxic emissions, in Bhopal a loud siren and MIC clouds arriving over the working class neighbourhoods built up to the factory walls did the job.

To the present day, the Bhopal tragedy stands out on two accounts: a massive and large-scale violation of human rights implicating one of the most powerful chemical multi-nationals; and a pervasive failure of the victims to obtain effective redress in India as well as in the United States. The gas leakage directly impaired, at a minimum, the Bhopal inhabitants' right to life and physical integrity, their rights to health and an adequate standard of living, their right to freedom from discrimination (particularly on grounds of gender), and their right to an effective remedy. Estimates of the death toll in the immediate aftermath of the leakage range from 2000 to 7000 people, and many more were to die in the weeks to come. Two thirds of the total population of Bhopal was affected by the toxic gas,[24] with many incurring chronic and debilitating diseases treatment of which often proved ineffective. The environmental pollution emanating from the plant before, during, and after the gas leakage had further adverse effects on people's enjoyment of their human rights. In a judgment of May 2004, the Supreme Court of India stated that as a consequence of 'indiscriminate dumping of hazardous waste due to non-existent or negligent practices together with lack of enforcement by the authorities, the groundwater, and, therefore, drinking water supplies have been damaged'.[25] The gas leakage and environmental pollution disproportionately affected the poorest and most vulnerable parts of the population. As an Amnesty International report concludes, 'it is clear that the gas leak radically altered the social fabric and economics of everyday life, and entrenched existing poverty and social disempowerment.'[26]

The scale and gravity of the human rights violations committed at Bhopal stands in sharp contrast with the inability of the victims to obtain effective redress. As Baxi says, the subsequent legal proceedings in the United States and India led to a 're-victimisation of the Bhopal victims' as they failed to produce any determination of the cause of the catastrophe; any declaration of legal liability; and 'any compensation/damages based on access to all relevant information about the post-catastrophe past, present, and future of men, women and children colonized by the MIC and related toxic substances'.[27] Having regard to UCIL's limited assets and concerned about the capacities of the Indian judicial system to handle a case of such magnitude, the victims and the Indian government opted for suing the U.S. parent corporation (UCC) in the United States. The U.S. District Court dismissed the lawsuit on grounds of *forum non conveniens* under the condition that UCC

[24] As estimated by the Government of Madhya Pradesh's Bhopal Gas Tragedy Relief and Rehabilitation Department, http://www.bhopal.net/oldsite/depbhopalgas.html. Accessed 1 November 2013.

[25] Order of the Supreme Court of 07 May 2004, as cited in Amnesty International, Clouds of Injustice, at 26.

[26] Amnesty International, Clouds of Injustice, at 18.

[27] Baxi 1990, at i, ii-iii.

submitted to the jurisdiction of the Indian courts.[28] The ensuing lengthy and protracted litigation in India confirmed the plaintiffs' concerns about the inadequacy of the Indian forum. With the 'Bhopal Act',[29] the Indian government assumed the exclusive right to litigate on behalf of the victims, and initiated proceedings in the District Court of Bhopal in September 1986.[30] Before the Indian court, UCC contested that there was 'a concept known to law as "multi-national corporation"', and that it had any decisive influence over what it considered a domestic enterprise (UCIL) regulated and controlled by the Indian public authorities.[31] The case was never judged on its merits. Instead, in two orders of 14 and 15 February 1989, the Indian Supreme Court approved an out-of-court settlement between UCC and the Indian government concluded without participation of the victims.[32] The terms of the settlement order repudiated UCC's putative legal liability and bestowed upon the multi-national corporation without legal personality (UCC; UCIL; Union Carbide Eastern, Hong Kong; all of their subsidiaries and affiliates; and each of their present and former directors, officers, employees, agents, representatives, attorneys, advocates, and solicitors) sweeping legal immunities for all past, present and future claims, causes of action and civil and criminal proceedings *vis-à-vis* all Indian citizens and all public and private entities. Attempts of victims' representatives to overturn the settlement in Indian and U.S. courts failed.

From the late 90s to the present, a multitude of further 'Bhopal' cases have been brought in U.S. courts—thus far with little success.[33] In June 2013, the U.S. Court of Appeals for the Second Circuit put an end to a decade of tort litigation against UCC in an attempt to recover from injuries caused by exposure to soil and drinking water polluted by hazardous wastes emanating from the UCIL plant.[34]

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[28] *In Re Union Carbide Gas Plant Disaster at Bhopal India*, Opinion and Order, 12 May 1986, 634 F Supp 842 (SDNY 1986), reported in 25 ILM 771 (1986). The decision was upheld by U.S. Court of Appeals for the Second Circuit, 809 F 2d 195 (USCA 2d Cir), reported in 26 ILM 1008 (1987).

[29] Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 (No. 21 of 1985).

[30] *Union of India's Plaint in Regular Suit No 1113/86*, reprinted in Baxi & Dhanda 1990, at 3–12.

[31] Baxi 1990, at xiv.

[32] *Union Carbide Corporation v Union of India* AIR 190 SC 273; see further Deva 2012, at 40–41.

[33] For an overview, see Deva 2012, at 42–44.

[34] United States Court of Appeals for the Second Circuit, *Sahu et al v Union Carbide Corp. et al*, No. 12-2983-cv, 27 June 2013 (hereinafter *Sahu I*). *Sahu* took its beginnings in a class action filed in 1999 that was dismissed, *inter alia*, on grounds of the expiration of the statute of limitations. See *Bano v Union Carbide Corporation*, No. 99 Civ. 11329, 2003 WL 1344884, 18 March 2003. Sahu and other plaintiffs whose claims were not barred filed a new case in the Southern District of New York in November 2004. After years of protracted litigation, the District Court for the Southern District of New York granted plaintiff's motion for summary judgment, see *Sahu et al versus Union Carbide Corporation et al*, No. 04 Civ. 8825 (JFK) (hereinafter *Sahu II*).

The Court recognised that plaintiffs 'may well have suffered terrible and lasting injuries from a wholly preventable disaster for which someone is responsible.'[35] Yet, while it was 'beyond dispute that UCIL generated and disposed of the waste which allegedly polluted Plaintiffs' drinking water',[36] the court found insufficient evidence to hold UCC either directly or indirectly liable for the damage.[37] In February 2001, UCC had become a wholly owned subsidiary of the Dow Chemical Company (Dow). Pursuant to the Merger Agreement, UCC did not face at the time of the merger, and was not expected to face in the future, any civil, criminal or administrative charges, which, individually or cumulatively, were 'reasonably likely to have a material adverse effect on it'.[38] While Dow regrets the Bhopal 'tragedy', it cannot accept responsibility for UCC's undischarged liabilities to which it had 'no connection', as it must strongly object on grounds of 'principles of the rule of law, due process and fundamental fairness' to attempts of the Indian government to re-open the 1989 settlement: 'The Government's ill-advised action puts at peril the image of India as a nation committed to promoting and adhering to accepted legal principles and the rule of law, with the inevitable result that confidence in investing in India will be undermined.'[39]

3.4 The 'Escape' into Tort

Dow's insistence on 'due process' and the 'rule of law' serves as a useful reminder that the state of India was implicated in Bhopal not only in its capacity as a party to a private tort litigation, but also in its capacity as a public and political institution acting in the name and on behalf of the people of India. Indeed, given the significant role the acts and omissions on the part of India and the United States played in the fate of the victims, it would be mistaken to simply shrug off Bhopal as a corporate disaster. Before the U.S. and Indian courts, UCC alleged joined liability of the Indian government, the State of Madhya Pradesh and the Municipality of Bhopal for having authorised the design, construction and operation of the plant without proper assessment of its hazardous nature and the safety measures provided; for having allowed residential slums to develop around the plant site; and for having failed to implement and enforce existing health, safety and environmental regulations, amongst others because the public agencies in charge were seriously understaffed.[40] The Indian state also contributed to inhibiting victims' access to

[35] *Sahu I*, at 9.

[36] *Sahu II*, at 26.

[37] *Sahu I*.

[38] Article V Merger Agreement, as cited in Amnesty International, Clouds of Injustice, at 55–56.

[39] The Dow Chemical Company, Dow will Object to Government of India's Request to Reopen Bhopal Settlement, 28 February 2011, http://www.dow.com. Accessed 1 November 2013.

[40] See Muchlinski 1987, at 575–578; Deva 2012, at 30, with further references.

justice. The government's Bhopal Act—initially justified on grounds of ensuring their quick and equitable compensation—in effect deprived victims of their right to sue and was later challenged in the Supreme Court of India for violating their constitutional rights.[41] The 1989 settlement concluded without their participation impeded the victims' quest to hold those responsible legally to account—for the mutual benefit of UCC that never admitted to legal liability and the Indian state that did not see its own regulatory failures exposed. The United States, in turn, did nothing to regulate, control and adjudicate activities of UCC on its own territory in relation to the Bhopal plant. The U.S.-based parent corporation had designed the plant on U.S. soil, had furnished it with allegedly dangerous technology from the U.S., and had failed to equip it with safety standards comparable to those at its Virginia production site. Moreover, it was UCC's headquarters in Connecticut that directed the operations of its Indian subsidiary; that determined the corporation's overall policy; and that took the key strategic decisions, including those that led to the implementation of cost-cutting measures at Bhopal one year prior to the industrial accident.[42] Finally, it was the U.S.-based parent corporation that cut the settlement deal with the Indian state for the benefit of the whole corporate group, which U.S. courts later refused to review on jurisdictional grounds.

Despite the considerable involvement of Indian and U.S. public authorities in the industrial accident that seriously impaired Indian citizens' enjoyment of their human rights, Bhopal does not easily lend itself to a human rights law analysis. That is to say, while Bhopal illustrates the potential and pitfalls of private litigation in vindicating interests and values embodied in human rights such as health or physical integrity,[43] it is less obvious what human rights *law* has to contribute to Bhopal. The public and territorial limitations of the state-centred conception of international human rights law translate into a corresponding paramountcy of private and transnational tort litigation, leaving victims with little other hope for effective redress.[44] The fact that the principal protagonists of the tragedy—a corporation that causes damage to natural persons as injured parties—were private actors seems to entail that the shortcomings in public regulation should be subsumed to a 'massive tort'. Moreover, the fact that the industrial accident implicated a 'multi-national' corporation seems to suggest that jurisdictional conflicts between public courts fall exclusively within the domain of private international law. However, and apart from the legal-doctrinal hurdles and practical problems (most prominently money, time and evidence) that victims litigating against global business entities have to overcome, as abundantly illustrated by Bhopal, there are weighty normative reasons against *assimilating* or *reducing* public human rights to private tort. The 'escape'

[41] *Charan Lal Sahu v Union of India*, AIR 1990 SC 1480.

[42] Deva 2012, at 28.

[43] In this sense Deva 2012, at 34, who argues that 'human rights, or at least the underlying interests, could be protected through non-human rights laws' including tort, and notwithstanding the conceptual differences between them.

[44] Newell 2001, at 908.

into tort propels the privatisation of human rights in the global market economy and severs their connection to the public good once vested in the sovereign state legal order. At the same time, states' insistence on their sovereign territorial rights impede victims quest for justice *via* trans-national tort litigation.

It is debatable whether the rationale of, and remedies provided by, tort law can fully do justice to human rights. Its focus on monetary compensation for damages caused to persons and property can vindicate some, but certainly not all, fundamental interests protected by human rights law. At the same time, tort law generally only vindicates those interests that are quantifiable in monetary terms. One reason why tort law is both attractive to redress *corporate harm* to human rights and unattractive to redress corporate harm to *human rights* is that it mimics the logic of market transactions.[45] If the corporate business case for human rights is thought to rest on maximising shareholder 'value' (read: profit),[46] the monetary compensation of 'stakeholders' (read: victims) appears an appropriate remedy. However, and put crudely, this transmutation of human rights violations into pecuniary damages risks to render corporate respect for human rights contingent on the financial losses incurred in their violation, which may falsely suggest that human rights were just another market commodity—for sale at the highest bid. From there it is but a small step to surrendering the inviolability of human dignity, the categorical prohibition of torture, or the protection of freedom of expression as 'one of the essential foundations of a democratic society'[47] to a litmus test of their market-friendliness. Yet, while for corporate perpetrators, human rights violations pay off all too often, for the victims the suffering involved in the violation of their most fundamental interests is something that money cannot offset. Below the surface of this 'value for money' problem lingers an ethical and political concern with the proclaimed 'equal and inalienable rights of all members of the human family'.[48] As Anderson says, the problem with 'tort-based approaches to valuation' that treat human injury and death 'as a cost of production' is that

> our ethical understanding of human life is not purely market-based. There is another legal principle at work, which is based on the sanctity of human life and the idea that each human being is entitled to an equal measure of dignity and respect, regardless of sex, age, nationality, race, or other status.[49]

The privatisation and trans-nationalisation of human rights through tort is meant to remedy the shortcomings of their legal compartmentalisation within and between

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[45] Which is true most forcefully but by no means exclusively of those approaches that view tort law as a means of wealth maximisation, see Posner 1995.

[46] One of the best-known accounts of corporations as profit-maximising entities is still Friedman 1962.

[47] This is the standard formula of the European Court of Human Rights, see e.g. *Lingens v Austria*, ECtHR, Application no. 9815/82, 8 July 1986, para. 41.

[48] Preamble of the Universal Declaration of Human Rights, GA Res. 217A (III), U.N. Doc A/810, 71 (1948).

[49] Anderson 2001-2002, at 421.

sovereign state entities. Yet this remedy is bought at the price of demoting the public and political thrust of human rights law into a private and 'bilateral' relationship between victim and tortfeasor.[50] Moreover, this approach obscures the way in which public human rights law (ought to) reign over private litigation. It is one (important) concern whether, as alleged by UCC during the Bhopal litigation, the Indian government should be held liable in tort for its own regulatory failures. It is quite a different concern what obligations international human rights law imposes on India and the United States to respect, protect, and fulfil the rights of the Bhopal victims.

Territorial state sovereignty resurfaces in the domestication of private international law that inhibits victims' access to justice in home states of corporate operations. As Muir Watt says,

> it is through the assertion of territoriality as a governing principle that private international law has been complicit in preventing the assertion of transnational corporate social responsibility. It has kept corporate liability within the limits of compartmentalised, local law through both *forum non conveniens* and the *lex loci delicti*.[51]

Before the U.S. District Court, the Bhopal victims contended that UCC was a 'monolithic multinational' which 'controlled the design, construction and operation of the Bhopal plant through its global network of corporate planning, direction and control'; and that the United States had a public interest in encouraging 'American multinationals to protect the health and well being of peoples throughout the world'.[52] Yet, despite the fact that the government of India had pressed for litigation in the United States, the U.S. District Court concurred with UCC's view that India's sovereign regulatory interest in the chemical accident and the ensuing judicial proceedings outweighed the U.S. interest in controlling the operations of American corporations abroad.[53] The recent U.S Supreme Court judgment in *Kiobel* is a fine illustration of how concerns with public state sovereignty serve to curtail assertions of extraterritorial jurisdiction over private conduct impairing human rights.[54] The case was brought under the Alien Tort Claims Act (ATCA) by Nigerian plaintiffs alleging that Anglo-Dutch Shell had aided and abetted the Nigerian military dictatorship in the 1990s in committing gross human rights violations. The Supreme Court considered that the ATCA entailed a 'presumption against extraterritorial application' which could only be rebutted if 'claims touch and concern the territory of the United States with

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[50] See Klabbers 2001, at 558–559.

[51] Muir Watt 2011, at 386; see further Wai 2002.

[52] Plaintiff's Executive Committee Memorandum in Opposition to Union Carbide Corporation's Motion to Dismiss on grounds of Forum Non Conveniens, 6 December 1985, as cited in Muchlinski 2007, at 155.

[53] *In Re Union Carbide Gas Plant Disaster at Bhopal India*, Opinion and Order, 12 May 1986, 634 F Supp 842 (SDNY 1986).

[54] Supreme Court of the United States, *Kiobel v Royal Dutch Petroleum Co.* 185 L. Ed. 2d671, 17 April 2013.

sufficient force'.[55] Mere 'corporate presence' of the defendant on U.S. soil is not enough.[56] This presumption against extraterritoriality is to guard U.S. courts against 'imposing the sovereign will of the United States on conduct occurring within the territorial jurisdiction of another sovereign', which can lead to clashes between U.S. laws and the laws of other nations and result in 'international discord';[57] against 'the danger of unwarranted judicial interference in the conduct of foreign policy', which would impinge 'on the discretion of the Legislative and Executive Branches in managing foreign affairs';[58] and against putting U.S. citizens at risk of equally being dragged into foreign courts for human rights violations 'occurring in the United States or anywhere else in the world'.[59] In a rabbit-duck switch, *global* business entities reappear in (international) law as *multinational* corporations subject to the sovereign territorial rights of the state. As the UK and Dutch governments submitted to the Supreme Court in *Kiobel* in support of their 'corporate national',

> [t]he Governments' policy is that companies should behave with respect for the human rights of people in countries where they do business. They also believe that the most fair and effective way to achieve progress in this area is through multilateral agreement on standards, achieved through multilateral cooperation with other States, and then the effective national implementation of those standards. It is then for countries to regulate and control business operations in their territories to ensure they meet the implemented standards.[60]

3.5 The Turn to Governance

The weakness of the state-centred conception of international human rights law in addressing the human rights impacts of global business operations also manifests itself in the transition in much of the recent business and human rights debate from territorialised human rights law to global human rights governance. The language of 'governance gaps created by economic globalisation' coupled with an appeal to states' 'policy rationales' to 'promote' human rights in relation to global business entities[61] gives a face lift to governments' persistent refusal to accept legal

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[55] Ibid., at 14.

[56] Ibid., at 14. *In caso*, the 'presence' of the defendants in the U.S. consisted of an office in New York owned by an affiliated corporation that was to explain their business to potential investors.

[57] Ibid., at 4, 10.

[58] Ibid., at 5.

[59] Ibid., at 13.

[60] *Kiobel v Royal Dutch Petroleum*, No. 10-1491, 3 February 2012, Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* in Support of the Respondents, at 1.

[61] See UN Guiding Principles. To be fair, the UN Guiding Principles' call to close governance gaps and enhance policy coherence has been taken up by a number of states (including the United States., the United Kingdom, and the Netherlands) in their recent/forthcoming action plans on business and human rights and will, if effectively implemented, yield positive results. Moreover,

accountability for human rights violations committed by their corporate nationals abroad.[62] Absent a clear recognition of legal state obligations to protect human rights against extraterritorial corporate abuse, the debate shifts from third-country victims' (putative) entitlements to have their rights respected, protected and fulfilled as provided by international human rights law to states' policy rationales to protect human rights in their external relations. At the same time, states' rebuttal of extraterritorial human rights obligations is but the mirror image of their insistence to independently conduct their domestic and foreign policies as a matter of sovereign territorial right. In this vein, the German government contended before the U.S. Supreme Court in *Kiobel* (citing U.S. jurisprudence) that the 'projection of U.S. laws into foreign countries' creates 'serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs'.[63] As in the case of the recent U.S. government's approach to 'economic statecraft',[64] the subsequent move to reconcile human rights and economic objectives under the umbrella of a 'business case' for human rights barely conceals that these objectives will often conflict with each other, and that (developed and underdeveloped) states will have very different views on how such conflicts should be resolved.[65]

The UN Guiding Principles highlight the *problematique* of human rights violations in the 'state-business nexus' that concurrently implicate public and territorial states and private and globally operating business entities.

> States should take additional steps to protect against human rights abuses by business enterprises that are owed or controlled by the state, or that receive substantial support and services from state agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.[66]

The commentary to this provision recognises that 'where a business enterprise is controlled by the state, or where its acts can be attributed otherwise to the state, an abuse of human rights by the business enterprise may entail a violation of the state's own international law obligations'.[67] This tentative language of legal

(Footnote 61 continued)
the SRSG's hands were arguably somewhat tied as his mandate did not include developing proposals for international legal reform. For an excellent and balanced assessment of the UN Guiding Principles in this regard see Mares 2012.

[62] For instance, in November 2013 the Human Rights Committee is set to scrutinise U.S. insistence that the ICCPR only applies within US territory, in spite of the Committee's view that the ICCPR imposes obligations on states to protect human rights outside their territory, including against violations committed by corporations.

[63] Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents, *Kiobel v Royal Dutch Petroleum*, No. 10-1491, 2 February 2012, at 15, with reference to *F. Hoffmann-La Roche Ltd. v Empagran*, 542 U.S. 155, 165 (2004).

[64] See above, Sect. 3.2.

[65] For an instructive recent collection of case studies, see Coomans and Künnemann 2012.

[66] UN Guiding Principles, para. 4.

[67] Ibid.

obligations is bolstered by an appeal to states' reputational, prudential, and business-related 'policy rationales' for ensuring that corporations respect human rights. Moreover, the Guiding Principles stress that a failure of home states to prevent and redress corporate harm outside their territory may 'add to the human rights challenges faced by the recipient state', that is the host state of corporate investment.[68] Yet, crucially, these human rights challenges faced by the host state are not met with corresponding human rights obligations of the home state to protect third-country victims against corporate violations. There are

> strong policy reasons for home states to set out clearly the expectation that businesses respect human rights abroad, especially when the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.[69]

However, home states are 'not generally required under international law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognised jurisdictional basis.'[70]

The assertion that states are neither 'generally required' nor 'generally prohibited' to regulate business operations outside their territories shapes the SRSG's approach to extraterritorial jurisdiction. The Guiding Principles focus on the permissibility of the extraterritorial exercise of (legislative, judicial and executive) state authority in accordance with a recognised basis of jurisdiction under public international law. What is at issue is the competence of states, as delimited by general international law, to assert authority over conduct not exclusively of domestic concern. Relatedly, the Guiding Principles are primarily concerned with the territorial location and/or nationality of the business entity as the perpetrator of extra-territorial human rights violations. The inquiry thus turns on whether a state can exercise jurisdiction over corporate actors violating human rights abroad because they reside within the state's territory (the territoriality principle) and/or because they can be considered 'corporate nationals' of that state (the nationality principle).[71] However, the question whether states are permitted to assert extra-territorial authority over corporate perpetrators of human rights violations is *not reducible to* the question whether they are obligated to protect third-country victims against corporate violations.[72] Otherwise, a state could circumvent its

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[68] Ibid.

[69] Ibid.

[70] Ibid, para. 2. The commentary adds that 'some human rights treaty bodies recommend that home states take steps to prevent abuse abroad by business enterprises within their jurisdiction'.

[71] In his earlier work, the SRSG has also explored other bases of extra-territorial jurisdiction under general international law, including the nationality of the victim (i.e., the passive personality principle), see, e.g., Human Rights Council, Corporate Responsibility under International Law and Issues of Extra-territorial Regulation, A/HRC/4/35/Add.2, 15 February 2007.

[72] This argument and its implications for the conceptual foundations of states' extraterritorial human rights obligations in relation to global business operations is further developed in

obligations under international human rights treaties by exceeding its jurisdictional competences under public international law. Whereas extraterritorial jurisdiction in general international law is a function of state sovereignty and concerns the state's right to exercise jurisdiction abroad,[73] extraterritorial jurisdiction under international human rights treaties is a function of protecting the rights of the individual and concerns the state's obligations when exercising jurisdiction abroad.[74] Put differently, whereas the former establishes whether the state has jurisdiction to act extraterritorially, the latter establishes whether an extraterritorial act brings the individual within the state's jurisdiction for the purpose of extraterritorial human rights obligations. The Guiding Principles' preoccupation with states' competences to exercise extraterritorial jurisdiction in effect privileges states' sovereign territorial rights over the human rights entitlements of third-country victims of global business operations. However, as in Bhopal, it is one question—often discussed under the heading of 'home state' or 'parent-based' regulation[75]—whether the United States had an overriding policy interest in regulating and controlling the operations of UCC in India. It is quite a different question whether international human rights law imposes obligations on the United States to protect the rights of the Bhopal victims against violations committed by its own corporate national operating from its own territory.

The ramifications of the transition from states' territorialised legal human rights obligations to their policy rationales to promote human rights in relation to business operations of their corporate nationals abroad are not dissimilar from those of the 'escape' into tort discussed in the previous section. The turn to governance resolves the tension between the human rights impacts of economic globalisation and states' sovereign territorial rights to independently conduct their economic affairs at the expense of protecting the legal human rights of third-country victims against corporate violations. On the one hand, the global human rights impacts of home states' domestic and foreign business-related policies *de facto* undermine the capacity of host states to protect human rights within their territorial borders. On the other hand, the territorialisation of human rights in the

(Footnote 72 continued)
Augenstein and Kinley 2013. For a good overview of the doctrinal state of the art see Langford, Vandenhole, Scheinin and Van Genugten 2013.

[73] See Mann 1964, at 15. In his view, the concept of jurisdiction fulfils 'one of the fundamental functions of public international law', namely 'the function of regulating and delimiting the respective [legislative, judicial and administrative] competences of States'.

[74] According to the Inter-American Commission of Human Rights, for instance, 'any person subject to [a state's] jurisdiction' in Article 1 of the American Convention of Human Rights refers to 'conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.' *Coard et al* v. *The United States*, Inter-Am. C.H.R., Judgment, Case 10.951, Report No. 109/99, 29 September 1999, para. 37.

[75] See, e.g., Joseph 1999; Deva 2004.

state legal order shields home states from *de lege* accountability for human rights violations committed by their corporate nationals in other states. This leaves victims of human rights violations in 'weak' host states of corporate investment at the goodwill of 'strong' home state governments and at the mercy of corporate social responsibility. Bhopal illustrates why—on its own—this approach is unlikely to succeed in protecting and indemnifying the victims. The host state of corporate operations (India) will often be unable or unwilling to live up to its territorial human rights obligations due to low regulatory and judicial capacity or collusion with business out of fear of discouraging foreign investment. These problems are aggravated by failures of home states to prevent and redress corporate harm to human rights outside their territory. Yet the home state (U.S.) will generally have little policy incentive to regulate and control the human rights impacts of its corporate nationals abroad.[76] Whereas the profits of corporate undertakings accrue on the home state's territory, the prevention and redress of corporate human rights violations falls within the sovereign right and legal and political responsibility of the host state.

3.6 International Human Rights Law at the Crossroads

The point of the foregoing considerations is not to downplay the importance of transnational tort litigation in vindicating human rights values, nor is it to challenge the desirability of states mainstreaming human rights concerns into their business-related domestic and foreign policies. It is only to query how these developments reflect on the state of international human rights law in the global market economy. In an important contribution to the debate, Craig Scott complains about the tendency of lawyers to 'organise the normative world of human rights in terms of (unduly) dichotomous ways of thinking'.[77] On the one hand, the '(stylised) restrained conservative' maintains that 'international human rights standards are a matter of public law (vertical) applicability wherein corporate conduct is regulated through indirect state responsibility which attaches only to corporate harm caused within a state's own territorial space'. On the other hand, the

> (stylised) activist radical insists that international human rights standards are (not only, but) also a matter of private law (horizontal) applicability wherein corporate conduct may be regulated through direct civil liability which is capable of attaching to harm caused by corporate conduct outside the state's own territorial space.[78]

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[76] Indeed, research conducted in support of the SRSG's mandate indicates that whereas states fairly frequently resort to extraterritorial regulation in some policy areas, this is typically not the case in the area of business and human rights, see Human Rights Council, Business and Human Rights: Further Steps towards the Operationalisation of the 'Protect, Respect, Remedy' Framework, para. 46, with reference to Zerk 2010.

[77] Scott 2001, at 45.

[78] Ibid., at 46.

To thus construe the public and the private, and the territorial and the extraterritorial, as binary oppositions conceals that the relationship between 'torture' and 'tort' involves a 'two-way normative traffic' in which one system of norms becomes translated into, and accommodated within, the other.[79]

There is much to commend in Scott's analysis and his call to move beyond dichotomies to explore the benefits of mutual translation and cross-fertilisation between 'torture' and 'tort'. However, the appeal of mutual accommodation should not distract from the fact that such translations are not normatively innocent but driven by the exposure of the international legal order of states to the operations of global business entities. This path dependency explains why the human rights responses to economic globalisation considered in this contribution are both an expression of the present crisis of the state-centred conception of international human rights law and risk contributing to its perpetuation. The political economy of tort and private international law as applied to global business entities hampers the effective realisation of victims' rights in private litigation and relegates the regulatory risks of private human rights harm to host countries of corporate operations often ill-equipped to prevent and redress violations. At the same time, the turn to global human rights governance reinforces the territorial constraints state sovereignty imposes on international human rights law and shields home states of corporate operations from legal human rights accountability for violations committed by their corporate nationals in other states. The result is a collusion of sovereign state interest and globalised corporate power that disempowers victims of human rights violations in the global market economy. The distinction between the 'public' and the 'private' that once aspired to protect the human rights of private individuals against the public power of the state is transformed to defend the trans-national economic interests of corporate rights holders against political interventions in the name of the public good. Relatedly, the distinction between the 'territorial' and the 'extraterritorial' that was once premised on the equal sovereign entitlements and responsibilities of states to protect human rights within their territory unleashes global market forces from the constraints of international law.

This crisis of the state-centred conception of international human rights law—the 'business and human rights predicament'—stems less from a marginalisation of sovereign states than from a transformation of their international relations in the global market economy. Accordingly, as Andrew Clapham notes, 'it is not simply the development of the global market, deregulation, or privatisation which is threatening the enjoyment of human rights; but rather, it is the ways in which governments are responding to these developments'.[80] Let me therefore conclude by briefly sketching out two (again rather stylised) views on the future pathways of the state-centred conception of international human rights law under conditions of economic globalisation. According to one view, the collusion of sovereign state interest and globalised corporate power that unties the human rights impacts of

[79] Ibid., at 61.

[80] Clapham 2006, at 5.

global business operations from the human rights accountabilities of public and territorial states leads to the emergence of new private and trans-national human rights regimes that further undermine the hegemony of states' (constitutional and international) human rights law. In a memorable lecture, Neil Walker has captured the tentative correlations between the rise of the global and the fall of the international legal order of states.[81] At one end of the national-international continuum, state law 'is increasingly rivalled by law otherwise spatially extended, including … transnational domain-specific private ordering, hybrid public-private ordering and, increasingly, new forms of global legal regime that neither claim universality nor obviously emanate from or respect the aggregative sovereign will.' At the other end of the continuum, the emergence of trans-national regimes and new forms of private and hybrid ordering threatens to undermine 'the idea of a shared "public" concern joining the various elements of international law'.[82] For some, this de-centring of law from the public and territorial state emplaces human rights in sectorally differentiated private and transnational regimes that claim global validity.[83] However, the ensuing de-territorialisation of human rights comes at the price of their further privatisation and de-politicisation in a 'global law without a state' that has 'no legislation, no political constitution, and no politically ordered hierarchy of norms'.[84]

According to another view, the collusion of sovereign state interest and globalised corporate power calls for a recovery of the public nature of human rights beyond the international legal order of territorial states. In this vein, global constitutionalism strives to compensate for negative externalities of economic globalisation on the territorial state and its citizenry by re-constituting public human rights law at the global (UN) level.[85] However, while the attraction of a global constitutionalisation of human rights lies in the shortcomings of their emplacement in the sovereign state, global constitutionalism cannot lay claim to a political community akin to that of the state which could render human rights law legitimate in the light of a global public good.[86] This discrepancy between highly globalised economies and weakly globalised political structures, in turn, has led to a revival of state sovereignty to fence off new waves of (market-driven) Western imperialism on the back of human rights.[87] An arguably more promising way to address the bifurcation between the human rights impacts of global business operations and the territorial limitations of the state-centred conception of

[81] Walker 2010, at 13.

[82] Ibid., at 36–37.

[83] Fischer-Lescano and Teubner 2004.

[84] Teubner 1997; see further Teubner 2011.

[85] For example, Anne Peters' 'compensatory global constitutionalism' and Jürgen Habermas' call for the development of a world domestic politics. See Peters 2006; Habermas 2001.

[86] For a balanced and well-conceived critique of Habermas' cosmopolitanism see Fine and Smith 2003.

[87] See, e.g., Koskenniemi 1991; and Cohen 2004.

international human rights law is the recognition of extraterritorial state obligations to protect the human rights of third-country victims against corporate violations. For more than a decade, the UN Human Rights Treaty Bodies have called upon state parties to regulate and control their 'corporate nationals' to prevent human rights violations in third countries, as well as to ensure effective redress in home-state courts of corporate operations. For instance, in its early General Comment No. 14 concerning the right to health, the Committee on Economic, Social and Cultural Rights noted that 'to comply with their international obligations in relation to Article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.'[88] With regard to the right to water, the same Committee called upon states parties 'to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries … [w]here States parties can take steps to influence other third parties to respect the right, through legal or political means.'[89] The Committee's more recent General Comment on social security provides that 'state parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries'.[90] The other UN Treaty Bodies,[91] as well as the recent Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,[92] express similar views.

The 'governance gaps' in business and human rights identified by the SRSG are but symptoms of a deeper crisis of the state-centred conception of international human rights law in coming to terms with the human rights impacts of economic globalisation. The operations of global business entities effectuate an increasing bifurcation between, on the one hand, territory-based forms of public legal authority that lose their regulatory grasp over global developments and, on the other hand, a privatisation and de-territorialisation of legally unfettered state power in the coattails and at the service of the market. Extraterritorial human rights obligations can redress the ensuing collusion of sovereign state interest and globalised corporate power by legally empowering third-country victims of human rights violations committed by private and globally operating business entities

[88] Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4, 11 August 2000, para. 39.

[89] Committee on Economic, Social and Cultural Rights, General Comment No. 15: The Right to Water, UN Doc. E/C.12/2002/11, 20 January 2003, para. 33.

[90] Committee on Economic, Social and Cultural Rights, General Comment 19: The Right to Social Security, UN Doc. E/C.12/GC/19, 4 February 2008, para. 54.

[91] For an overview see Augenstein and Kinley 2013.

[92] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, September 2011, published with extensive commentary in Human Rights Quarterly 34: 1084–1169.

with the passive acquiescence or active support of public and territorial states. John Ruggie (the former SRSG) intervened in *Kiobel* warning that should Shell succeed in 'destroy[ing] an entire juridical edifice for redressing gross violations of human rights … its road back to the corporate social responsibility fold will be long and hard.'[93] Home states of global business entities should begin pondering the corresponding challenge: so long as they refuse to accept legal accountability for the global human rights impacts of their business-related domestic and foreign policies, there remains the nagging suspicion that the new business and human rights talk is but the old emperor with new clothes. *Honi soit qui mal y pense*.

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Chapter 4
International Refugees and Irregular Migrants: Caught in the Mundane Shadow of Crisis

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Abstract This chapter proposes that international legal scholarship may, in its encounter with the phenomenon of migration, benefit from acquiring a sensitivity to the political economy of the distinction between crisis and the mundane. It does so by looking at two particular fields of international migration: refugee law and the law of irregular migration. The first enjoys a large degree of attention from international lawyers, while the other enjoys almost none. Moreover, within these two categories of migrants, international legal scholars tend to 'see' some subjects, such as refugee crises and human trafficking, and 'not see' others, such as the legal limbo of the 'temporary' refugee camp and the daily life of the irregular migrant. This chapter argues that the difference in attention international legal scholars give to one or the other category of persons is the product not of the jurisdiction or the reach of international law, but rather of ideological and epistemological biases. These biases cause international lawyers to 'see' crisis, and to 'not see' that which is *not* crisis—that which is quotidian, mundane, or 'normal', in the 'everyday' sense of the word. By focusing on the crisis/mundane distinction and the privileging of 'crisis', this chapter helps to identify the specific focus and boundaries of the epistemic bias of international migration law scholarship.

Keywords Refugees · Refugee camps · Irregular migrants · Crisis · International law · Human rights

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4.1 Introduction: The Crisis-Mundane Distinction

If crisis is not merely 'out there', but rather a part of our consciousness, a part of the *habitus*[1] of international lawyers, a part of contemporary ideology,[2] as Charlesworth seems to suggest,[3] then any (self-conscious) invocation of crisis by a reflexive international lawyer is bound to be deeply problematic. For one, a crisis-trope may not necessarily use the word 'crisis', but may instead refer to 'urgency', or to an 'exceptional' or 'unprecedented' situation, and may therefore not always be readily what it says it is. Crisis tropes should be met with care and a pinch of skepticism and seen a means of mobilizing political will, and thus never neutral. Though Charlesworth, in her analysis of international law as a 'crisis-discipline', argues in favor of an international law of 'the mundane', what her intervention actually does is to construct the big international legal concern with *certain* crises as being exactly that: 'mundane'. International lawyers' concern with crisis situations is an element of our professional identity, an intrinsic anxiety about the significance and relevance of international law that is part of the everyday routine of what international lawyers work on, part of how we see ourselves. It is why, as she argues 'international lawyers concentrate on the public realm, of war and conflict and violence, where crises now occur under the glare of television lights'.[4] But this 'crisis lens' also means that international law 'steers clear of analysis of longer-term trends and structural problems'.[5]

Instead, Charlesworth proposes a different ideological sensibility, and moves to suggest a different set of priorities, a different sense of urgency. 'One way forward', Charlesworth argues, 'is to refocus international law on issues of structural justice that underpin everyday life …. Why are these phenomena not widely studied by

[1] Bourdieu 1980; Kennedy 1999.

[2] Hardt and Negri 2000; Agamben 2005.

[3] Charlesworth 2002.

[4] Ibid., at 388.

[5] Ibid., at 389.

lawyers? Why are they at the margins of the international law world?'[6] In short, she proposes a set of *alternative crises*, themes and realms of political life that have been starving for attention, that have been languishing in the shadows of international legal sensibility. Themes, moreover, that she has selected out of hundreds of potential candidates, and that have been at the forefront of a magnificent effort by the feminist legal movement and its many sympathizers[7] as they have vied for international legal attention. In other words, by problematizing the distinction between crisis and the mundane, Charlesworth is giving international lawyers a gift: she opens the door to a reconfiguration of our sense of being in the world as a discipline.

This chapter aims to make use of this gift by proposing that international legal scholarship may, in its encounter with the phenomenon of migration, benefit from acquiring a sensitivity to the political economy of the distinction between crisis and the mundane. It will do so by looking at two particular fields of international migration: refugee law and the law of irregular migration. The first one enjoys a large degree of attention from international lawyers, while the other enjoys almost none.

The choice for these particular subjects is a bit contingent, but relates to two areas that are generally the stuff of headlines. Refugee crises are an enormous challenge to the international community, as it seeks to provide humanitarian assistance and relief. Likewise, irregular migration is a topic that is frequently high on political agendas, especially, but not exclusively, in affluent countries. Both involve the movement of people across international boundaries. They are legally qualified, however, in drastically different ways. Despite their legal distinctness, these two areas increasingly tend to be seen through the same lens: refugees are potential irregular migrants, and irregular migrants claim to be (economic) refugees.[8] In short, politically, the groups are often confused with each other, even as the legal regimes see two completely different things. Depending on the situation, both can be the stuff of crisis, described in the language of floods, tsunamis, or invasion. However—and here lies my interest in examining them together—the international refugee is a clear subject of international (migration) law, while the irregular migrant is not. Or so it would seem, from a quick look at how the two topics are usually organized in the literature.[9]

This chapter takes a different approach. First, it considers both the international refugee and the irregular migrant to be legal subjects created by international law,

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[6] Ibid., at 391.

[7] However, feminist approaches to international law are mired in complexity and controversy. See Charlesworth 2011; Otto 2009; Halley et al. 2006.

[8] The term economic refugee has no legal currency, although state authorities in fact often use it to disqualify people who claim refugee status. In order to avoid this confusion, some scholars and activists will choose the term 'forced migrants' to refer to both legal refugees and irregular migrants.

[9] There are less than a handful of (recent) books that present international migration law in a comprehensive manner. The place of irregular migrants in them is, at best, very marginal. A recent one (Cholewinski et al. 2007) only has one of twenty-six chapters devoted to irregular migrants, and focuses on detention only. A more recent one (Opeskin et al. 2012) does not have any of its chapters devoted to this at all.

even if not by a specific international treaty. It considers that the difference in attention international legal scholars give to one or the other category of persons is the product of the ideological and epistemological biases articulated by Hilary Charlesworth. In other words, international legal scholars tend to 'see' the international refugee, and to 'not see' the irregular migrant.[10] This chapter rejects the notion that this difference is a difference of jurisdiction, or of the reach of international law, in opposition to national sovereignty. Instead, rather than just assume that one area is regulated and the other one is not, it will approach both areas from an international law perspective.

Second, and in order to press the first point, the chapter articulates how even within the recognized category of international refugee law, there is a realm that receives a lot of attention, and a realm that does not. Here too, it has nothing to do with the jurisdictional reach of the treaty regimes, and more with a bias along the lines Charlesworth articulates.

In order to make this visible, the chapter relies on the notion of crisis. However, it expands it into a dichotomy by including the notion of the mundane or the quotidian. If international law is a discipline of crisis, and if this is the result of a bias, rather than of real or potential jurisdictional reach, then what is left out is that which is *not* crisis—that which is quotidian, mundane, or 'normal', in the 'everyday' sense of the word.[11] Focusing on the crisis/mundane distinction and the way that the 'crisis' side is privileged helps to identify the specific focus and boundaries of the epistemic bias of international migration law scholarship.[12]

The remainder of this chapter will use the crisis/mundane distinction as a lens to analyze how the bias toward crisis affects two areas of international migration law. First, Sect. 4.2 will identify how this bias operates within international refugee law

[10] This article does not take a positive law perspective in which international law is a thing in and of itself, and what international legal scholars do is merely to describe it. Rather, international law is what the myriad of actors (political, legal, academic, or otherwise) engaging in the grammar and vocabulary of international law, say that it is. As such, I prefer to say that international law 'sees' or 'does not see', rather than international law 'covers' or 'regulates' a particular something. In this way, and following Charlesworth, this article aims to highlight that when we talk about crisis, we are talking about bias. Charlesworth 2002. For the notion of international law as a grammar, see Koskenniemi 2005, at 562–617.

[11] This focus on 'the mundane' is inspired by a varied tradition in 20th century thinking that focused on that which, for not being sensational, epic, or otherwise grand, did not merit the attention of art or scholarship, starting with James Joyce and Marcel Proust, and further developed by philosophers Henri Lefebvre and Michel de Certeau, as well as the work of historians influenced by the *Annales School*, and other scholars who focused on the everyday as part of a long term social history. In journalism, this vein is colloquially referred to as 'human interest' stories. In legal scholarship, this focus is akin to the broader field of critical and social legal studies. One explicit engagement is to be found in the various contributions in: Sarat and Kearns 1995.

[12] The main advantage of working with a dichotomous distinction is that one avoids the pitfalls of ontology and conceptual definition. Instead, one can focus on the way in which false or indeterminate oppositions are discursively deployed in the construction of meaning. For examples of this type of analysis see Kennedy 1976; Kennedy 1987; Koskenniemi 2005; and Olsen 1983.

to divert attention away from the legal limbo in which hundreds of thousands of refugees find themselves. Subsequently, Sect. 4.3 uses the crisis/mundane distinction to explain why irregular migration receives so little attention from international lawyers, and how this points to a deeper bias at the heart of international human rights law that impedes the efforts of those striving to improve the plight of irregular migrants. Finally, Sect. 4.4 concludes by reflecting on how this critique of the bias of international migration law scholarship is itself caught up in the contingencies of the crisis/mundane distinction.

4.2 The Refugee Crisis: The Legal Limbo of the Refugee and the Normalization of the Camp

4.2.1 Refugee Law: A Discipline of Crisis, a Discipline in Crisis

As noted above, refugee law in general is one area that receives a great deal of attention from international legal scholars. There is a dimension of the international refugee regime, however, that receives very little scrutiny: the temporary nature of refugee status, which has created the institution of the refugee camp. This section uses the crisis/mundane distinction described in Sect. 4.1 to explain this bias, or economy of attention, in international refugee protection. It argues that the crisis/mundane distinction interacts with a central feature of the refugee law regime, the temporary nature of refugee status, to perpetuate this bias.

While most handbooks on international law do not contain a chapter on 'international migration law', they do often have a chapter on 'international refugee law'. Indeed, international refugee law offers all that is required to be a clearly recognizable autonomous regime in international law: a number of widely ratified multilateral treaties, global and regional institutional mechanisms, and an extensive practice that involves international courts and other international bodies, as well as national courts, interpreting the rules and central notions contained in the treaty law. This legal field has existed for over half a century, and its (interpretative) practices have only become more numerous and significant.

International law clearly *sees* those who flee. However, it quickly moves to define who the refugee is, and of course, who he or she is not. The definition of a 'refugee' contained in the Refugee Convention focuses on those fleeing persecution and excludes other reasons why people might decide to abandon their countries.[13] In its long history, refugee law has interpreted this definition in

[13] Article 1A(2) of the 1951 Convention Relating to the Status of Refugees, 189 UNTS 150 (hereinafter Refugee Convention), defines a refugee as a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is

various ways, and over time has arguably expanded its recognition of the scope of reasons for which people flee. Nevertheless, many still criticize the Convention for excluding large numbers of people from its protection, in particular those who flee poverty and environmental disasters.[14] International refugee law therefore sees two types of people who flee: Convention refugees, and others.

Distinguishing refugees protected by the Convention from people who move for non-Convention reasons is a primary task of international refugee law. For international refugee lawyers, this task is made all the more important by the narrative of sudden and massive streams of refugees that is a significant part of how they characterize their field. At the time of writing there is a refugee crisis as a result of the war in Syria. Two years ago, there was a refugee crisis as a result of the violence surrounding the so-called Arab Spring and in particular the war in Libya. Depending on their location, these refugee crises often dominate news headlines.[15] Any introduction into international refugee law will soon present the reader with statistics regarding the large numbers of people enjoying the protection of the 1951 Convention and its 1967 Protocol.[16] The relentless recurrence of refugee crises and the accompanying fear of even more people on the move in a future of ecological disasters is a permanent feature in public opinion debates about refugees.[17] For international refugee lawyers, refugee law is a law of crisis.[18]

(Footnote 13 continued)
unable or unwilling to avail him- or herself of the protection of that country, or to return there, for fear of persecution.

[14] For an in-depth analysis of the expanding definition of refugee, as well as current controversies, see Glynn 2012.

[15] The 30 thousand or so Tunisian refugees trying to make it into Italy in the spring of 2011 received much more coverage, globally, than the 350 thousand that found refuge in Egypt around the same time.

[16] 1967 Protocol Relating to the Status of Refugees, 606 UNTS 267.

[17] One may observe that there is a complex political economy of numbers and scale in representations of the refugee phenomenon. Proponents of national restrictions on the acceptance of asylum seekers will often throw about large numbers, while proponents of a more generous acceptance policy will focus on the individual stories of individual refugees. Humanitarian organizations will often use a combination of both.

[18] A distinction should be made, in this regard, between international and national refugee lawyers. National lawyers, whether in an administrative law setting or within a regional refugee mechanism that has been integrated into national law, represent by far the largest percentage of lawyers dealing with refugees. These domestic lawyers tend to see their field of activities much more through the optic of judicial decisions creating precedents for the assessment of individual cases. This difference in scale is quite significant: for these lawyers, the steady stream of individual cases is the normal, the mundane, albeit now and then marked by a background in which refugee crises determine the general mood in which the decisions regarding cases are taken. Refugee crises represent something different, therefore, for national administrative lawyers dealing with individual asylum decisions and struggling to capitalize on the juridical spaces left by national and international judicial precedents. The analysis presented in the remainder of this section focuses on the perspective of *international*, rather than national, refugee law scholars.

Not only do international refugee lawyers see refugee law as a law *of* crisis, but also as a law *in* crisis, as James Hathaway and Alexander Neve wrote in 1997.[19] With these alarming words, Hathaway and Neve expressed their serious concern about the willingness of states to make the international refugee law regime work as it should and could. This is a familiar concern, and not just among international refugee lawyers but among international lawyers in general. A smoothly running legal system is one in which rules are implemented and followed without much resistance. If the norms and rules are not ideal, states may improve them (if they have the political will), or judges may see an opening to 'develop' international law in the desired direction. Non-compliance, on the other hand, can prompt international lawyers to talk about a law in crisis.[20]

There seems to be a general sense, among many international refugee lawyers, that a lack in political commitment could make the international refugee system dysfunctional and ultimately unable to cope with refugee crises. Again, in Hathaway's words

> the normative structure of refugee law is sound. There is no need to revisit the content of refugee law – thanks to a combination of judicial reinvigoration of the refugee definition, the evolution of powerful general human rights standards to buttress the Refugee Convention's own creative rights regime, and the rise of ancillary regional protection regimes. But the long-term viability of refugee law is under threat from its atomised system of implementation, coupled with the absence of a meaningful mechanism to oversee respect for legal obligations and facilitate the sharing-out of burdens and responsibilities among State parties.[21]

This chapter takes issue with Hathaway's version of events; with what in this narrative is perceived as okay, and what is not. Instead, it argues that there is 'another crisis' concerning international refugee law that lies in one of its more unnoticed dimensions. This side of refugee law goes unnoticed because it is part of the mundane and quotidian operation of the international refugee law system. It is unseen because it is part of what happens when states comply, rather than when they do not.

4.2.2 The Temporary Nature of the Refugee

When a person becomes a refugee, the 1951 Refugee Convention affords protection against *refoulement*: being returned to a country where he or she would be in danger. The Convention does not guarantee, however, that a refugee will be granted asylum or permanent residence in their host state. The legal condition of

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[19] Hathaway and Neve 1997, at 115.

[20] Charlesworth, for example, describes how a breach of the UN Charter system can provoke a sense of crisis. Charlesworth 2002, at 387.

[21] Hathaway 2012, at 203.

the refugee is thus a *temporary* one—premised on the idea that they will one day return to their country of origin when the situation has normalized.

This temporariness has important effects. Those refugees who are unable to trod the paths of formal asylum and, eventually, full naturalization, on the one hand, or repatriation, on the other hand, will hover in the legal sphere of refugee status, being temporarily here, or, as Nanda Oudejans puts it, 'neither here nor there'.[22] The institution of refugee status allows states to deal with refugees by not dealing with them, since it is premised on the idea that unless the state *wants* to take refugees in and allow them to integrate, it can decide not to do so, so long as it does not return them to harm's way. Not entirely without irony from this perspective, the United Nations High Commissioner for Refugees (UNHCR), for all of its long impressive history, was itself meant to be a temporary institution whose status, until recently, was still renewed every year.[23] Even now, it has not been made into a truly autonomous permanent UN specialized agency. This may or may not be practically significant for the institution's functioning. Nevertheless, it is a constant reminder that global policymakers view refugees as temporary phenomena, and the occurrence of refugee crises as an anomaly that requires correction, rather than as something that needs to be accommodated in a more durable way.[24]

This temporariness distinguishes the refugee from the regular migrant. However, international refugee law does not explicitly recognize the centrality of this temporariness. This holds true despite the fact that a central aim of the UNHCR is to offer a *solution* to individual refugees, which means either being repatriated or becoming a 'regular migrant', i.e. somebody who is legally integrated into her new home, with the eventual perspective of naturalization. Regular migrants can legally come and go, and stay for as long as they are allowed to. Refugees, on the other hand, are expected not to stay refugees. There is only one type of 'normalization': not being refugees anymore. The unassailability of the temporary nature of being a refugee is implicit, and even hidden and forgotten.

As if to (unwittingly) make this point, international refugee law scholars, policy makers and activists have recently been pursuing the development of a new form of protection: 'temporary protection'.[25] Targeting situations in which there is a sudden

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[22] Oudejans 2011. See also Kennedy 2004, at 199–233.

[23] The UNHCR was established in 1951. UNGA Res. 319 A (IV), 3 December 1949. Its Statute states that its mandate shall be reviewed in 1953. UNGA Res. 428 (V), 14 December 1950, Art. 5. Since then the UNGA periodically renewed the UNHCR's mandate until 2003, when it decided 'to remove the temporal limitation on the continuation of the Office of the High Commissioner … and to continue the Office until the refugee problem is solved.' UNGA Res. 58/153, 24 February 2004.

[24] Even when commentators acknowledge refugees as a group that will not disappear, they frame the problem not in terms of 'flows of refugees' or something equivalent, but in terms of 'humanitarian needs'. As the UNHCR, for example, recently quipped: 'An organization with a three-year mandate to solve the problem of refugees celebrated its 60th anniversary on 14 December 2010, aware that the humanitarian needs are unlikely to disappear.' History of UNHCR, http://www.unhcr.org/pages/49c3646cbc.html. Accessed 6 October 2013.

[25] Edwards 2012.

'mass influx' of refugees, this type of protection would allow states and international humanitarian organizations the ability to offer temporary protection to groups, and deal with the individual cases later. The notion of temporary protection would allow states to offer a lesser degree of protection than what is currently required by international refugee law. Hence, technically, states need to 'suspend' or 'derogate' from their obligations, which can only be justified by reference to a temporary situation.[26] 'Temporary protection' in this sense indicates that what used to be exceptional—the figure of the long-term or permanent refugee—has become normal. Once a mass influx of refugees subsides, the various actors can move from temporary to 'normal' refugee protection, which is not meant to be permanent either. So, while international refugee law deals with a refugee crises, temporary protection would allow it to deal with a refugee crisis–crisis.

The fact that the temporariness of refugee status exists purely in the background, rather than as an explicit characteristic that is routinely acknowledged, has allowed a system designed to deal with temporary situations to slowly develop into a system that is often quite permanent. This legal temporariness hides many instances of factual permanence. It is hard to put a number on the amount of people for whom this temporary situation has become permanent, partially because it is hard to decide at what point a temporary situation turns into a permanent one. Moreover, refugees, even without formal asylum, may *informally* integrate into the social and political fabric of their host state, even if they remain formally an alien minority. In other words, an informal 'solution' may come in imperceptible ways, or may not be registered at all.[27]

Another example of temporariness in refugee law is the case of UNRWA (the United Nations Relief and Works Agency for Palestine Refugees in the Near East). UNRWA is a temporary organization that provides assistance, protection and advocacy for some 5 million registered Palestine refugees in Jordan, Lebanon, Syria and the occupied Palestinian territory. The temporariness of both the institution and its charges is of prime institutional importance: as UNRWA itself puts it, since 1949 it has offered assistance, protection, and advocacy to Palestinians 'pending a solution to their plight'.[28] Legally and institutionally, UNRWA and the Palestinian refugees seem to be caught in a time capsule.[29]

The Palestinian situation in the occupied territories is all the more interesting because, legally speaking, Israel is bound by obligations as an occupying force under the 4th Geneva Convention. One could argue that UNRWA is somehow

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[26] Ibid.

[27] This may be especially true in poor countries, as they come to rely on the financial burden carried by the UNHCR, IOM, and others, for their functioning. Letting a situation persist formally may be preferable to considering the case closed.

[28] UNWRA at a glance, http://www.unrwa.org/userfiles/2011120121038.pdf. Accessed 6 October 2013.

[29] Part of this has to do with the fact that 'solution' in the context of Palestinian refugees, and in the mandate of the UNRWA, has been defined as return to their properties in Israel. This has made other options, such as integration or resettlement, politically unviable.

keeping Israel from being called upon to live up to its 4th Geneva Convention obligations.[30] The 4th Geneva Convention, while similar in that it also seeks to protect the population, points in the opposite direction of the refugee regime, in the sense that it does not offer solutions, but is rather focused on maintaining all the features of normalcy, such as a functioning government administration, a judicial system, schools, hospitals, and allowing life to go on as usual. It maintains its legal subjects, the people under occupation, in as much normalcy as possible, instead of in the well-meaning limbo of international refugee law.

Under the UNHCR umbrella, too, we can find situations that may no longer be considered temporary. There are camps in East Africa and South Asia that are decades old and that house hundreds of thousands of people.[31] But, even away from those camps, refugees spend their lives, build families, and grow old in a legal limbo, allowed to remain on the national territory in order to avoid *refoulement*, but not allowed to settle and integrate either.

Until formal asylum is granted by a receiving state, refugees remain in the legal penumbra of international protection and concern. This protection and concern is exercised primarily by the UNHCR. Like other international agencies, the UNHCR is always in need of additional funds, and will be careful to maintain a good and formal relation with states and not to antagonize them. In this, the UNHCR tends to be very conscientious in how it deploys its formal mandate and the limitations thereof.[32] However, most international legal attention to the plight of refugees ends here; once refugee status has been ascertained, *non refoulement* secured, and the legal mandate of the UNHCR been specified. After this, protection and concern for the refugees becomes a practical matter, related to the mundane day-to-day management of refugee camps. How these camps are managed is not discussed by international legal scholars, partially because of the fact that they are transient places,[33] existing only temporarily, while a (practical and legal) 'solution' is pursued and brokered by the relevant agencies.

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[30] Thus, one could argue that so long as UNRWA is in operation, Israel can defer to the organization rather than fulfilling its Geneva Convention obligations. This argument, though, is immediately complicated by the fact that Israel's official position is that its control over these territories does not fall under the 4th Geneva Convention.

[31] Michel Algier offers the most detailed overview of the network of camps, the numbers, and life within the camps. In general, the most rigorous examinations of this dimension of international refugee protection come not from legal scholars, with some scarce exceptions such as Michael Kagan, but from anthropologists like Algier and Barbara Harell-Bond. Algier 2011; Harrell-Bond 2002; Harrell-Bond and Verdirame 2005.

[32] David Kennedy describes the endless oscillation between the discursive tropes of 'jurisdiction', 'protection', and 'solutions' that the UNHCR moves in, and that creates a relatively undefined and very narrow, but politically manageable space for the organization to move in. Kennedy 1984.

[33] Algier has organized the various 'encampments' in a set of very rough categories that offer an impression of the complexity and diversity of this phenomenon: self-organized refuges ('cross-border points', informal camp-grounds, 'jungles', 'ghettos', 'grey zones', 'squats'); sorting centers (transit centers, 'way stations', 'holding centers', camps for foreigners, waiting zones);

While the camps legally remain firmly within the national (territorial) jurisdiction most states seem to be happy to leave the camps to the devices of the international agencies. From a state's perspective, the camps may function more to contain the influx of refugees, rather than as places where refugees receive assistance. As David Remnick put it recently in the context of Syrian refugee camps in Jordan, '[r]efugee camps are born of emergency and evolve into cities of dependency, bureaucracy, and static suffering. They rescue human beings, and then they warehouse them. They relieve the host country of the financial burden and diffuse it among the member states of the United Nations.'[34] Either way, the assistance itself can be easily perceived as the responsibility of the UNHCR. Additionally, the camp becomes the physical manifestation of the limbo in which refugees find themselves. They become places where receiving states need not deal with the presence of the refugees, or where the refugees actually lose their legal presence on the national territory.[35] Recently, the exclusive reliance on camps has lost some of its centrality,[36] as the various actors are adapting to deal with what are called 'urban refugees'. Partially, this has to do with a perceived change in the demography of refugees, who originate more and more from urban areas.[37] It is also a situation that allows refugees to better integrate and normalize their lives,[38] even if that does not change their legal situation. However, it seems that the territorial seclusion and exclusion that camps offer is something that states find beneficial. As an example of this, Kenya recently ordered refugees to leave urban areas and return to crowded and secluded refugee camps, and also decreed that all assistance for refugees should be limited to the camps.[39]

Writing in the context of refugee protection in the Middle East, Michael Kagan, one of the very few international refugee law scholars writing about this phenomenon, refers to this legal space in which refugees find themselves, held at arm's length by the host state under whose territorial jurisdiction they fall, as that of 'UN Surrogate States'.[40] Formally speaking, these surrogate states do not figure on the international legal map. But in the daily lives of hundreds of thousands of people, they are the only or the closest thing to state authority. As Kagan explains, the shift of de facto responsibility for refugees from states to the UN servers many purposes,

(Footnote 33 continued)
spaces of confinement (refugee camps, UNHCR rural settlements); and unprotected reserves (camps for internally displaced persons). Algier 2011, at 36–59.

[34] D. Remnick D, City of the Lost, *The New Yorker*, 26 August 2013. http://www.newyorker.com/reporting/2013/08/26/130826fa_fact_remnick?currentPage=all. Accessed 29 November 2013.

[35] One could go further and explore how refugee camps become territorial constructions of exception, not entirely unlike places such as Guantanamo Bay.

[36] Verdirame and Pobjoy 2013.

[37] Kagan 2012.

[38] Ibid.

[39] Kenya orders all refugees back to camps, *RNW*, 18 December 2012, http://www.rnw.nl/africa/bulletin/kenya-orders-all-refugees-back-camps. Accessed: 10 April 2013.

[40] Kagan 2012. See also Verdirame 2011.

political and practical, symbolic and material. As he explains, the UNHCR has managed this legally anomalous situation relatively well. However, he warns of a blurring of the lines of accountability and responsibility. His call for a comprehensive Middle Eastern *asylum* regime, rather than the unavoidably 'temporary' refugee protection, points out the main legal condition for the existence of the UN-surrogate state, and offers grim support for the idea that international protection stands in the way of durable solution and the end of the limbo of refugee status. Why would poor countries offer to carry the full burden of asylum when the UN can take care of protection at the expense of the international community? Moreover, what makes the situation politically acceptable, to both host states and the international community, is that this is a temporary situation, even if it has lasted for decades. One may thus view this anomaly less as an exception, or as a failure in an otherwise functional normative and institutional framework, and more as a systemic characteristic of a global regime that seeks to keep the international movement of people in the framework of national states. It is less a bug, and more a feature.

In counterpoint to Hathaway's concern about the long-term validity of the refugee regime, this article argues that refugee law is very much secure. Refugees are going to keep moving, whether it is because, as some alarmists are predicting, climate change will generate natural disasters that may spur the movement of millions,[41] or whether refugee law is, as many governments in receiving states suspect, increasingly being invoked (in 'bad faith') by people who should not receive its protection, in particular 'economic refugees', and/or irregular migrants. The current system will prove indispensable in dealing with ongoing and future flows, and will be impossible to replace with a completely new one, for which there are no real plans anyway. For sure, there have been proposals: a more centralized system of implementation, more differentiated responsibility with regard to resources,[42] and the development of various types of innovations, such as extra-territorializing and outsourcing the management of refugee flows,[43] or further developing the new category of 'temporary protection'. All of these things may help in their own way. They may 'help' even if they may mean raising the threshold that many see being progressively lowered by courts.[44]

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[41] McAdam 2012.

[42] Hathaway is a big proponent of differentiated responsibility.

[43] Gammeltoft-Hansen 2013.

[44] However, even if broader categories of people may fit the mold of the refugee, we may see a shifting and multiplying of that very same threshold. IDPs (internally displaced people) are one example of this waterbed economy of thresholds (which, when you push it down in one place moves up elsewhere). In the last decade or so, a lot of political energy has been put towards some form of recognition for IDPs, a group that outnumbers international refugees but that is not covered by the normative structure of refugee law. Recently, the UNHCR has managed to gain some traction and IDPs are becoming an increasingly fixed feature of the refugee law picture. However, international refugees are increasingly denied asylum with the argument that they could have displaced themselves internally to safe areas within the national jurisdiction (Ferris 2008). I do not take a *general* position in regard to this development. I merely want to illustrate how a solution (for some) may create a problem (for others).

What will probably not change, especially because it is not perceived as a serious, let alone urgent, problem to begin with, is the fact that refugee status is legally constructed as a temporary condition. This may lead to occasional 'crises', as refugees may challenge the system and demand normalization and protest against their plight, or as host states develop a sense that the camps bring more costs than benefits. But, the only way to unravel this knot is for the international community to accept the reality that the temporary nature of international protection has become calcified into a permanent state. If anything, the type of progression that Hathaway and others would like to see, towards a more centralized and more coherent international normative and institutional regime that can coerce recalcitrant national sovereigns, or act without needing their assistance, will only help to further solidify this feature.[45]

Whether in camps or not, the presence of a group of people who exist permanently in the exception of a temporary status, has given rise to important legal and political philosophical work on what has been called 'the state of exception'.[46] Agamben in particular has focused on the specific phenomenon of the camp as an illustration of the new order, a manifestation of the exception becoming the normal, and the temporary becoming the permanent. Refugee camps, even those that actually protect and provide assistance, are sites of exclusion, sites that prevent integration. They contain individuals, in the same way that detention camps do, and thus also connect the tale of the refugee crisis with our next tale: that of the crisis of irregular migration.

4.3 Irregular Migration: Cracking the Black Box of Sovereignty

Irregular migration is generally considered to take place in the realm of domestic affairs, within the black box of sovereignty. States have the intrinsic sovereign right, or so the story goes, to control the entry of non-nationals.[47] Some limitations, generally human rights-related, apply to this theoretically unlimited sovereignty, such as in the example of family reunification.[48] However, when it comes to those without an entitlement, such as in the case of irregular migrants, it is up to the state to decide.

Unlike with those who seek refuge, the international law of migration does not *see* irregular migrants. Though geographically the irregular migrant is a transnational agent, from the perspective of international law irregular migration takes

[45] Hathaway 2012.

[46] Agamben 2005.

[47] The European Court of Human Rights, for example, maintains that the Contracting States enjoy the right 'as a matter of well-established international law and subject to their treaty obligations to control the entry, residence and expulsion of aliens'. *Moustaquim v. Belgium*, ECtHR, No. 12313/86, 18 February 1991, para. 43.

[48] See, e.g., *Moustaquim v. Belgium*; *Sen v. the Netherlands*, ECtHR, No. 31465/96, 21 December 2001.

place within the black box of sovereignty. Recent years have seen efforts to crack that black box and even though the jury is still out as to their success, we can already discern the ways in which these attempts are framed and what they aim at. The language of crisis, in its varying manifestations, plays an important role.

Refugees and irregular migrants are connected through their separation. This connection is revealed in the phenomenon by which public discourse has shifted from talking about refugees or asylum-seekers, to talking about 'bona fide' or 'genuine' asylum-seekers. Recognizing refugee status, or granting asylum, has become increasingly focused on catching impostors or those who seek to abuse the refugee regime.[49] The slippage from refugees towards potential impostors is driven by fear of irregular migration. This fear is significant, and often supported by (intrinsically unreliable) numerical evidence of irregular migrants on the move. It plays an important role in political discourse in many receiving countries, often in ways that indicate that irregular migrants, along with asylum seekers and regular migrants, are just another unwelcome group of immigrants.[50]

Irregular migration is special, however, in several important ways. First, whereas immigration in general is said to endanger local identity, social, political, or even ethnic cohesion, irregular migration offers a much more profound challenge, as it lays bare that states will have immigrants, whether they want them or not. Irregular migration is, in that sense, a frontal challenge to the idea of sovereignty.[51]

Second, irregular migration lays bare the *territorial* dimension of the state, just as smuggling and foreign invasions have done throughout the life of the modern state. The challenge posed by irregular migration goes so far that international legal analysis of this problem always starts by stating the self-evidence of the sovereign right to regulate and enforce migration controls. This may perhaps explain why something that is intrinsically *transboundary* is nevertheless seen as a concerning the core of the national, rather than the transnational. In similar fashion, we can understand how the so-called 'war on terror' has been seamlessly and effortlessly connected with the importance of being able to control who enters and who leaves the national territory.[52] Here too, a transnational activity, international terrorism, is cast as an intrinsically *national* concern, falling within the sovereign authority of the national state. We can see here a clear example of how the language of national sovereignty versus international law fails to grasp the clear international political choice between a decentralized approach and one coordinated by international mechanisms and institutions.

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[49] Hathaway and Neve 1997.

[50] Recent electoral platforms in various countries of destination (such as The Netherlands, the UK, and Australia), even those of 'respectable' political parties, have promised reduced numbers of irregular migrants and reduced numbers of refugees.

[51] Schotel 2012.

[52] The connection between migration and security is often referred to as the 'securitization of migration'. See e.g. Huysmans 2002. However, one could equally call it the 'migratization of security'. Migration control through security, or security through migration control—both seem to apply in equal measure to this phenomenon.

Though territorial integrity is the most important trope when thinking about migration control, in their drive to control migration, states have also reached outwards, away from their territory. Visa requirements and procedures offer a first hurdle to would-be irregular migrants.[53] Airlines are requested to verify that passengers carry valid passports and valid visas. States even sometimes post agents at foreign airports check-in desks.[54] States have also begun to cooperate with each other in developing border control mechanisms. Sending and transit states, for example, have begun to develop an increasingly tight-knit regime, made up of bilateral and multilateral treaties, aiming to control the movement of irregular migrants.

At the same time, there is an increased militarization of border controls, with states building fences and walls, and with significant amounts of resources being spent on so-called 'smart borders', a catchword for border control equipped with state-of-the-art surveillance technology.[55] Additionally, government agents have been given increased competences to perform identity controls, to collect and store biometric data, to detain irregular migrants and to deport them. Though here too the sovereign authority to control migration is somewhat curtailed by international human rights obligations, international human rights bodies indicate a significant degree of understanding for state immigration control goals.[56] For sure, irregular migrants have rights under international law. Generally speaking, though, their plight of being actually irregular, and sometimes criminalized or otherwise detainable and deportable, falls squarely within the national prerogative.

Despite all of this activity at, outside, and between national borders, irregular migration has thus far failed to draw the attention of most international lawyers. Treatises on international migration law do not have individual chapters on irregular migration, and may only mention irregular migration in passing, if at all.[57] Nowhere is there a justification for this omission.

This section aims to do three things. First, it argues that irregular migration can and should be seen as being addressed by international law. In other words, it contends that the absence of irregular migration from overviews of international migration law betrays a bias. It does this by recasting trafficking, currently portrayed as a significant aspect of the international legal struggle against organized crime, as actually more concerned with controlling irregular migration. Second, it looks at two efforts by legal scholars to bring irregular migration into the international legal fold: scholarship on the human cost of border control and detention. Third, it argues that despite these efforts, international legal scholarship on migration continues to fail to see irregular migration because it falls on the

[53] In this sense one can see the law on consular relations as not only allowing foreigners to have contact with their national authorities (and vice versa), but also as allowing for the extra-territorial control of migration.

[54] Den Heijer 2012; Taylor 2008.

[55] Regulation of the European Parliament and Council establishing the European Border Surveillance System (EUROSUR), PE-CONS 56/13, 11 October 2013.

[56] Cornelisse 2011.

[57] Opeskin et al. 2012.

'mundane'-side of the crisis/mundane distinction. This, it argues, explains the limited effectiveness of international human rights regimes and strategies in assisting irregular migrants.

Despite its absence from most international migration law scholarship, important aspects of irregular migration are regulated by international law. One example of this is the regulation of human trafficking and smuggling. Concerns regarding trafficking and smuggling have resulted in two protocols under the United Nations Convention Against Transnational Organized Crime.[58] Though the difference between the two seems clear enough—trafficking concerns moving people clandestinely across national borders *against* their consent, while smuggling takes place *with* their consent—both scholars and people 'in the field' recognize the difficulty of making this distinction in concrete cases. On the one hand trafficking as become a major area of international concern, and is conflated with modern slavery.[59] Here, one sees an ongoing effort by various actors to mobilize state efforts towards the protection of the victims of trafficking,[60] with a sense that states are not doing enough to fight against the 'trafficking-crisis'. This approach often relies on a strong separation between trafficking victims and those that have been smuggled. On the other hand, states rely on the discourse of trafficking to argue that one of the aims of the fight against irregular migration is protecting people against becoming victims of trafficking and related types of exploitation, and to cast it as a problem of organized crime. Here, there is a push to conflate smuggling and trafficking, even while the victims of trafficking are presented as a main concern. And though victims of trafficking may sometimes be 'regularized' and allowed to stay in the host state, at least while the prosecution of the traffickers takes place, special consideration of their victimhood remains scarce. This is often seen as fatal flaw in the struggle against trafficking, since victims are frequently threatened with deportation by their captors, and as such have little incentive to reach out to the authorities. It is also seen as an indication that the trafficking regime cares more about combating the organizations that smuggle (and traffic), than about the victims of trafficking. And thus the trafficking regime can be seen as an instantiation of how the effort to contain irregular migration is by no means a purely national enterprise. Rather, by collectively placing it in the context of international organized crime, a clear 'crisis'-trope, it falls squarely within the international realm.

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[58] 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2237 UNTS 319; 2000 Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, 2241 UNTS 507.

[59] *Rantsev v. Cyprus*, ECtHR, No. 25965/04, 7 January 2010; *SERAP v. Nigeria*, ECOWAS Court of Justice, No. ECW/CCJ/JUD/18/12, 14 December 2012.

[60] See, e.g., Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, 2011/36/EU, 5 April 2011.

Some migration law scholars have attempted to make irregular migration a more prominent part of the scope of international human rights law. A first group highlights how international legal responsibility can be expanded to account for a tragic dimension of irregular migration: border deaths. This is the discourse on the so-called 'human costs of border control.' In this argument, scholars have pointed at the fact that many irregular migrants, whether acting alone or with the assistance of smugglers, take increasingly higher risks in trying to reach their destinations—risks that may result in their deaths. Focusing primarily on those trying to enter into the EU, Thomas Spijkerboer has identified many thousands of deaths over the course of several years, and argues that there has to be some legal responsibility on the side of states, especially in view of the strong indications that stricter border control leads to more deaths.[61] At the very least, he argues, the EU and its member states should attempt to count the dead. The word 'crisis' is not deployed here, but the vast numbers, laid out in fairly detailed tables, forcefully push in the direction of a sense of urgency, and a sense that the border is not just a line, a division between jurisdictions, but is rather a wide field upon which border control takes place, and upon which people die as a result. International legal responsibility is not directly articulated, but the argument is clear that, in view of the dead floating across jurisdictional boundaries, there has to be some accountability somewhere.

A second ongoing project that tries to enlarge the reach of international human rights highlights how migrants in general, and irregular migrants in particular, enjoy a lesser protection of international human rights standards and institutions than nationals. A particular focus is the detention of (irregular) migrants,[62] often under administrative law, which allows states to bypass the relatively high standards of due process rights that rule criminal law proceedings. In activist contexts, and referring to the large number of migrants in detention, the word 'gulag' is often deployed,[63] a clear crisis-trope.

The main trope here, however, is not directly that of crisis, but rather that of the progress narrative.[64] According to this narrative, the past is the past of Westphalian black boxes, the black boxes that produced the horrors of World War II and that have been curtailed by international human rights. With this as their past, human rights projects are all too often embedded in a narrative of a heroic struggle against a dangerous, or at least anachronistic, national sovereignty.[65] Indeed, one could argue that this memory of the Westphalian horrors of WWII is what gives international human rights law its crisis-bias. It allows for a casting in which the international lawyer is the hero,[66] rather than one in which international law is what makes possible the structural discrimination against irregular migrants, exactly by

[61] Spijkerboer 2007; Grant 2011.

[62] Cornelisse 2010; Cornelisse 2011.

[63] Dow 2005.

[64] Skouteris 2009.

[65] Cornelisse 2011; Mutua 2001.

[66] Mutua 2001; Charlesworth 2002, at 387–388, citing also Anne Orford and David Kennedy.

framing it as a part of the black box. Ironically, or tragically, the human rights approach strengthens the sense that states have to adopt at least some unpleasant measures for the purposes of migration control.[67] Not coincidentally, the argument for transcending the Westphalian paradigm when it comes to detention coexists with the acceptance of the Westphalian paradigm when it comes to migration control itself. This focus on human rights thus hides a larger systemic or structural issue that falls beyond the horizon of international (human rights) lawyers.

Despite the efforts of the scholars that focus on border deaths and detention, international legal scholarship on migration continues to fail to see irregular migration. This is because it falls on the 'mundane'-side of the crisis/mundane distinction. Here, the crisis/mundane distinction may help to explain the limited effectiveness of international human rights regimes and strategies in assisting irregular migrants.

Legal scholars working with migration control often seem fixated on the question of admission, on the sovereign right to select who enters and who can stay. But the quest to keep irregular migrants away does not stop there. Within the national territory, states have been developing legal mechanisms designed to identify irregular migrants and distinguish them from nationals and migrants with resident status. Much of the attention is directed at the enhanced competences of government agents and the increased use of high tech, biometric, hand-held finger print verification equipment. Less attention is given, however, to the fact that individual citizens are both empowered and even required to perform identity controls.

These *illegality regimes* go far beyond simply granting broad powers to state agents to track down and detain irregular migrants.[68] Rather, illegality regimes make the checkpoint, the border control moment, and the verification of legal residence as ubiquitous as possible by requiring regular residence status for all types of legal transactions or relations. Irregular migrants in Switzerland, for instance, are barred from getting married. In the Netherlands, they cannot obtain health insurance, which means that they are excluded from most medical services. In most of the EU, they cannot open a bank account. In many countries, they cannot work lawfully. A federal program in the United States allows employers to check electronically whether employees are irregular migrants. This program is still voluntary, but there are calls to make it compulsory. Attempts by individual states to make such checks mandatory have so far stranded in the courts, but only for reasons of the division between state and federal powers,[69] and not because the

[67] For an alternative approach, see Schotel 2012.

[68] Amaya-Castro 2011.

[69] Though these powers are often also part of the picture. See, e.g. the laws of Arizona, Georgia, Alabama, and other states. Alabama House Bill 56; 2010 Arizona Session Laws 113 (State Bill 1070); Georgia House Bill 87. In general, the anti-immigrant legislations in these states is based on the idea of not allowing any contact between the state and the irregular migrant, whether it is for social services, a driver's license or anything else. One particular proposal in Alabama would make it impossible to legally enforce a contract in which one of the parties was an irregular migrant.

measures themselves constitute a violation of rights. Illegality regimes may be more or less strict and more or less effective, depending on things like the degree to which a state bureaucracy is formalized, making informal access to services difficult. Illegality regimes can be flexible too, enforced stringently during particular periods, for instance by performing controls on employers, and much more loosely during others.

States adapt their legal systems to rigorously exclude irregular migrants from having access to a normal life. This may not always be by explicit design. Sometimes, though, it is a conscious political choice. In the United States, for example, it is referred to as facilitating 'self-deportation'.[70] By excluding irregular migrants from ordinary legal and economic activities, the argument goes, their lives will become so unpleasant that they will simply leave, presumably based on a straightforward economic analysis of costs and benefits. Additionally, and crucially, illegality regimes rely very much on implementation and enforcement by private actors: employers, banks, insurance companies, owners of real estate seeking to rent, and so on.

Unsurprisingly, international human rights standards seem to be mostly silent on this topic. It is not just that international law may, or may not, allow states to rigorously deny human beings access to a normal life, as part of their sovereign right to control immigration. Rather, it would seem that international human rights standards do not occur to most people in this context, because of the *mundane* dimension of illegality regimes.[71] This 'politics of everyday life' as Charlesworth would call it, does not trigger human rights alarms, even if it means that irregular migrants become more and more dependent on others, and therefore vulnerable to exploitation. It does not trigger international legal sensibilities, even though it creates an invisible *apartheid*-type regime that permeates society with hyper-effective discrimination.[72] By requiring a particular type of victimhood, a particular type of bloody or tearful drama, international human rights law can shrug its shoulders at the mundane, systematic but gentle oppression of rules like 'valid ID required'. As Charlesworth argues, '[i]n this way international law steers clear of analysis of longer-term trends and structural problems.'[73]

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[70] Kobach 2008. This is based on an economic theory that is called 'attrition through enforcement'.

[71] International human rights scholarship has generally been quite silent on the plight of irregular migrants. Aside from few recent publications, such as that of Dembour and Kelly 2011, by far most general overviews are practically mute on the topic. One recent and notable exception is Bantekas and Oette 2013.

[72] One official comparison that has been made with the apartheid regime involves the treatment of Palestinians by the Israeli state. J. Dugard, Special Rapporteur, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967. Human Rights Council A/HRC/4/17, 29 January 2007.

[73] Charlesworth 2002, at 388.

4.4 Beyond the Crisis/Mundane Distinction?

This article has taken Charlesworth's critique of international law as a discipline of crisis to refer to a particular set of ideological biases, a set of sensibilities that prompts it to *see* certain phenomena, and *not see* other phenomena. Or, to put it in jurisdictional terms,[74] the fact that international law is a discipline of crisis makes for an *habitus* that considers certain issues as being within its realm of consideration, and others not. Ideological biases articulate themselves by means of commonsense demarcations that need no justification.

The objective of this article has been to challenge international migration law's ideological bias toward crisis by demonstrating its effects in the areas of refugee law and the law relating to irregular migration. In doing so, it has developed the heuristic or analytic of crisis into a crisis/mundane dichotomy. Rather than defining the notion of crisis, the article has taken it as mutually constitutive of the mundane. In other words, crisis and mundane are defined in opposition to one another. Treating crisis as a dichotomy permitted the article to identify areas of action that go unnoticed because of the bias towards crisis. Hilary Charlesworth has persuasively argued that international legal scholarship tends not to see that which is constructed as mundane. Such distinctions can, however, be inverted by problematizing the use of crisis tropes, or by means of an analysis that brings the mundane, in all of its problematic dimensions, to the foreground.

In order to demonstrate the effects of crisis-bias, the chapter first focused on international refugee law. Section 4.2 illustrated how this area of international legal scholarship tends to not see a central feature of its regime: the temporary nature of the refugee. In the long decades since its inception, this temporariness has developed into a permanent state of affairs. This transformation finds its most cogent manifestation in refugee camps that have received hundreds of thousands, and that have seen refugees grow old and be replaced by new generations born in the camps. In light of this, Sect. 4.2 proposed a different narrative about the significance of international refugee law—as not just another set of institutions and treaties trying to get recalcitrant states to do the right thing, but rather (or at least also) as a legal limbo for hundreds of thousands, if not millions, of individuals caught in the cracks of the international system. These cracks have become a juridical feature, rather than a temporary interruption of normal affairs.

Section 4.3 then turned to a phenomenon that is not considered to have much to do with international migration law at all, namely the irregular movement of people across borders. Generally speaking, international legal scholars do not see irregular migration. Rather, it is relegated, with very few exceptions, to the exclusive realm of domestic jurisdiction. The few places where international law is considered relevant by scholars and activists usually concern the more gruesome sides of national measures for migration control, such as detention and border deaths—clear crisis tropes. Moreover, most scholars do not see the fact that

[74] Dorsett and McVeigh 2012.

international law criminalizes the act of helping migrants to cross borders, i.e. smuggling, as part of a coordinated international legal struggle against irregular migration. Rather, scholarship follows the formal tag given to this international legal coordination by states, and chooses to see this as a function of the fight against organized crime. The same happens with regard to trafficking: international legal scholars highlight its explicit concern with protecting victims of trafficking, while severing its evident connection to irregular migration. Seen from the perspective of this article, however, it takes some effort *not* to see that irregular migration is intimately bound up with international law.

The deeper layer to this exclusion of irregular migration from international legal jurisdiction, however, concerns the most mundane dimension of migration control: illegality regimes. As Sect. 4.3 explained, these illegality regimes have silently been closing the net around irregular migrants, preventing them from getting jobs, paying taxes, renting a home, and other aspects of day-to-day life. Here, the language of international legal humanitarianism, the normative regime that defines whether this is a matter of international legal concern (a.k.a. human rights) falls short. One could of course argue that these situations are simply 'not covered' by human rights treaties, that there is no international legal obligation to provide access to the basic conditions of a normal life within the law that covers irregular migrants. However, the point here is that this discussion is not even taking place, since international legal obligations do not even come to mind. One reason for this silence and invisibility lies in the mundane nature of illegality regimes. Among irregular migrants, the experience of despair is a slow cancer that gently nibbles away at hope.[75] The absence of drama that is part of the politics of everyday life makes for a bad mobilizing force when it comes to arguing against illegality regimes. However, it is by no means impossible to develop a legal consciousness that rejects the self-evidence of a human rights regime that is inoperative in the face of illegality regimes. This chapter is part of a push for such consciousness, even as it is aware of the fact that it operates within that very same structure of crisis and the mundane.

In other words, it may be clear to the reader that this chapter has succumbed to the pressure of casting its selected problem, that of illegality regimes, in terms that somehow reiterate the trope of crisis by articulating the impossibility of a 'normal life', in a dramatic frame, even throwing in the kitchen sink of *apartheid*. Likewise, it may also be clear that enhancing the visibility of the plight of refugees in camps around the world appeals to a sense of crisis by using tropes, such as references to limbo and cracks, that evoke rupture and instability and by invoking the image of forgotten generations. Both of these accounts move within a discursive field structured around crisis and the mundane. The chapter moves to make

[75] Willen 2007.

the mundane visible, therefore, by reframing it as crisis. In other words, this critique articulates a political sensibility by operating in the same discursive structure that it critiques.[76]

There may not be a 'beyond' the crisis-mundane distinction, at least not for international legal scholars.[77] It may be a general condition of political dynamics to speak this way, whether nationally or internationally. It may be a requirement for any mobilization of political and legal consciousness to overcome the naturalizations of the mundane by casting that very mundane in different, more dramatic, terms. However, having done so, there may also be bite in this particular version of events. Perhaps it may even awaken in the reader a sense that though the critique is caught in the contingencies it describes, so is every other sense of international legal possibility, including the one that assumes that illegality regimes are a purely domestic affair.

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[76] Audrey Lorde's seminal 1984 essay 'The Master's Tools Will Never Dismantle the Master's House' comes to mind. Lourde 2007, at 110–114.

[77] There are other realms of legal scholarship that are not caught in epistemologies of crisis. Legal theory for one, but one could argue this of many other areas as well, such as contract/tort law, or even corporate, criminal, administrative and labor law. Perhaps, seen this way, it is one of the defining features of the international legal *habitus*. If this instant sociology is correct, then other areas of legal scholarship have different political dynamics, including political dynamics that do not rely on crisis for mobilization and engagement. However, such a question goes beyond the focus of this article.

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Chapter 5
Saving Humanity from Hell: International Criminal Law and Permanent Crisis

Edwin Bikundo

Abstract This chapter compares and contrasts temporary international criminal tribunals to the permanent International Criminal Court (ICC) referencing international criminal law's and UN Security Council's (UNSC) relationship to 'crisis'. All the situations where the UNSC has acted in international criminal justice are critical in the sense that they involve crucial decisions where members elect among distinct choices in inherently unstable situations. My argument is that crises enable a negative grounding of legal and political jurisdiction that relies on legitimation that is confirmed by judicial bodies. The analysis outlines the institutionalisation of an exceptional legal mechanism in the practice of the International Criminal Tribunal for the former Yugoslavia (ICTY), its proliferation to the International Criminal Tribunal for Rwanda (ICTR) and its normalisation in the International Criminal Court (ICC). The purpose of this analysis is neither to parse what the law is and what it should be—nor what the law does versus what it promises—, but rather to show how and why individual criminal responsibility in the absence of State intervention demonstrates a globalising political power that is conjoined to a universalising legal glory. A crisis is a liminal situation, which by its ambiguity enables that process of power being linked to glory.

Keywords Ad Hoc international criminal tribunals · Chapter VII UN charter · Crisis · International criminal court · International criminal law · United Nations security council

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Contents

The UN was not created to take mankind to heaven, but to save humanity from hell.[1]

5.1 Between Utopia and Dystopia

Crises abound in international criminal law. The ravages of the Second World War (WWII) brought forth the temporary International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East at Tokyo (IMTFE). The break-up of the former Yugoslavia necessitated the creation of the temporary International Criminal Tribunal for the former Yugoslavia (ICTY). Civil war in Rwanda brought the temporary International Criminal Tribunal for Rwanda (ICTR) in its wake. Suffice to say that each of these crises, to mention but a few, were exemplary in providing the basis for creating and extending (once novel and temporary but now increasingly commonplace and permanent) international criminal jurisdiction.

To demonstrate how crisis grounds legal and political jurisdiction it is necessary to link the UN Security Council's (UNSC) role in international criminal law to liberal democratic values, such as the rule of law. Along with this, it is required to show how those values have been extended into international criminal law through crisis. In times of crisis the gravity of situation is such that decisive action is called for and yet the correct solution does not suggest itself. In a crisis anything is possible and necessity is the most prevalent justification. A paradigmatic instance of such a crisis and the necessity-driven responses was the end of the WWII and the dilemma of how to deal with the Axis powers' war criminals.

Broadly speaking, the IMT and IMTFE prosecutions exemplified the legalisation of politics, punishing as they did what previously was a political act outside the realm of law.[2] Gerry Simpson relates how Winston Churchill for the UK initially contemplated summary execution, where Josef Stalin of the Soviet Union

[1] Dag Hammarskjöld, United Nations Secretary-General from 1953 to 1961, quoted in Weiss 2011, at 2.

[2] Simpson 2007, at 97.

favoured show trials with no possibility of acquittals.[3] Franklin Roosevelt for the USA, however, came to the view that the best way to deal with the situation was through fair trials affording due process guarantees. Antonio Cassese retells this as in principle a mainstay of democracy.[4] Carl Schmitt referred to such as inaugurating a global legal order of liberal democratic international justice.[5] Indeed, as Victoria Sentas and Jessica Whyte note, for liberal democracy the 'law remains a fundamental source of legitimation of a crisis prone system'.[6] In other words, the crisis of armed conflict enabled the extension of the liberal democratic idea of the rule of law into international affairs through international criminal law. The spectacle of a criminal trial then is more than just the trial and punishment of criminals but also the foundation for a global liberal political order.

As a result of this triumph of the liberal democratic approach to crisis in international criminal law it is this chapter's argument (gradually expounded below) that crisis in international criminal law provides a negative grounding for legal and political jurisdiction where, because nothing is ruled out, all things are possible and anything necessary is permissible simply by not or no longer being forbidden.[7] Given the UNSC's unique law-making and law-derogating role, the law, while remaining in force, is of no real significance with the key exception of its use as a mechanism for generating legitimacy that founds legality.[8] Political power and its own justification are not only ultimately unbridled but the exigencies of a given critical situation even ground negatively the legality of the decisions taken. Crisis, moreover, as will be shown following can only be temporally and geographically limited in a local context but not in a global one. Taken separately therefore the temporary international criminal tribunals are all individually limited to specific local contexts but when viewed as a whole in their totality they evince a global phenomenon. It will be argued below that in crisis ultimately it is political effectiveness that seems to be able to provide legitimacy. The political effect produced thereby positively founds both jurisdiction and legality. However, if it were only simply a matter of efficacious conduct why then is the law necessary? This chapter proposes that the law is nevertheless necessary because liberal democratic political power absolutely needs the glory of judicial acclamation for its own legitimacy as a matter of the rule of law. Political power exercised outside of or contrary to law even if effective is inglorious and thus lacks the necessary qualities to found the consensus that liberalism requires. Institutional legitimacy and efficacy as well as relationships between necessity and contingency are resolved through judicial affirmation as legal glorification of political actions that

[3] Ibid., at 112.

[4] Cassese and Gaeta 2013, at 256.

[5] Schmitt 2011, at 39.

[6] Sentas and Whyte 2009, at 9.

[7] *S.S. Lotus* (*France v Turkey*), PCIJ, 7 September 1927, at 18.

[8] Agamben 1998, at 36.

have no positive grounding other than in their own effects. This is because crisis itself cannot be a positive ground but can only be used as negative justification.

The argument proceeds through three stages. First, the argument is made that international criminal law as a discipline was historically both born of crisis and specifically designed to meet crisis. Ordinarily, crises as overwhelming emergent situations are antithetical to laws, which are the product of time and reflection. Examining international criminal law invites us to reflect on what happens when quick action is required wherever there is seemingly little time for reflection. Moreover, whenever rules are laid down in response to crisis then such rules gradually become permanent and institutionalised responses to crisis. This leads to the second point that in practice there is a discernible shift through which what were once exceptional mechanisms gradually become so frequent and familiar as to be rendered indistinguishable from normal ones. This is true in regard not just to the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) but also in relation to, for instance, the examples of the Special Court for Sierra Leone (SCSL), the Extraordinary Criminal Chambers for Cambodia (ECCC), and the Special Tribunal for Lebanon (STL).

Third, the role of the UNSC in justifying and developing international criminal justice is absolutely ambivalent in that the UNSC rhetorically and practically navigates to avoid both utopian promises and dystopian futures. This is because it is implicitly charged with arresting catastrophe in a chaotic world with the potential for oscillating towards either utopia or dystopia. Indeed, a momentary perfect balance between utopia and dystopia becomes virtually indistinguishable from either of them when viewed through the constraining keyhole of crisis. By employing its primary power to declare *official* crises, the UNSC tends to focus more on immediate ones that seem to require an element of force or coercion as opposed to *real* slow-motion on-going accompaniments to crises such as environmental degradation, trade injustices, war profiteering and the like. Liberal democracy in the form that is now global in its reach is and always will be in crisis because it constantly redirects its subject's gaze from the unsatisfactory present toward a future of unfulfilled possibilities.[9] International criminal law helps to harness this oscillation without end in the name of crisis as if acts done in response to crisis have something other than their own effectiveness as justification.

5.2 International Criminal Law: A Discipline of and for Crisis

Crisis, as far as the UNSC with international criminal law invokes it, is permanent and institutionalised. This is because during crises UNSC referrals invoke Chapter VII of the UN Charter that deals with both *actual* breaches of international peace

[9] O'Donnell 2007.

and security and *potential* threats to them.[10] Already in the first few months of 2013 the UNSC had over a dozen particular crises to deal with all over the globe.[11] Even though, semantically, a crisis is imagined as immediate, localised and temporary, from the UNSC's perspective there is generally one either actual or potential somewhere on the planet. As we shall see below, entertaining the very idea of the end of conflict and the finality of crisis with the triumph of liberal democracy resonates with the theological notion of an eschatology or end of time.[12] The UNSC is for better or worse *institutionally* charged with the primary responsibility to deal with crisis and crises that are *permanent*. Effectively, therefore, exceptional circumstances are normalised in reality, while at the same time are rhetorically maintained as exceptional.

One permanent paradox of international criminal law as a subset of international law that is brought to the fore during crises is that its legitimacy depends upon to what extent it is able to provide for justice, while its effectiveness relies on credible means for its enforcement. As Kofi Annan put it in the context of the Second Gulf War regarding the use of force to gain compliance with international law from Saddam Hussein: 'You can do a lot with diplomacy, but with diplomacy backed up by force you can get a lot more done'.[13] In this sense, the international community has itself set up a system where force is produced to 'solve' problems.[14] For international law to be effective it has to be conceived of as a set of enforceable rules. That means that international lawyers in their own way essentially minister to this mysterious conjunction of force or might and rules or right in the institution of the UNSC. That is, we are emphatically not revolutionaries, but essentially proselytize the view that the best possible order is coincident with the necessary order.[15]

Dag Hammarskjöld, quoted on the epigraph that opens this study, succinctly anchors the poles of debate examined in the chapter. The wording is expressed in an unmistakably faux-religious idiom. It defers paradise in order to postpone perdition by counselling giving up on utopia in order to escape dystopia. Most importantly, its import is to maintain the purpose of the UN in the perpetual interim, which is based on actual activity rather than any future realisation of an abstract principle. It is pragmatic not messianic, materialist rather than idealist and imagines time as cyclical and not linear. Related to these themes, as we shall see, Hilary Charlesworth's influential paper *International Law: A Discipline of Crisis* ends on a similar note:

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[10] 1945 Charter of the United Nations, 1 UNTS XVI, Article 39.

[11] United Nations, Research Guides and Resources: Security Council Meetings and Actions—2013 http://www.un.org/depts/dhl/resguide/scact2013_en.shtml. Accessed 28 October 2013.

[12] See Gray's critique of Fukuyama 2006. Gray 2007.

[13] Transcript of Press Conference by Secretary-General Kofi Annan at United Nations Headquarters, UN Press Release SG/SM/6470, 24 February 1998. www.un.org/News/Press/docs/1998/19980224.SGSM6470.html. Accessed 5 March 2013.

[14] Charlesworth 2002, at 385.

[15] Esposito 2011, at 77.

> What if we were to change the type of questions we ask? We could begin from the opposite end and examine what international law has to offer to the person who wants to pollute the environment or violate human rights. I imagine this as an international lawyer's version of C.S. Lewis' *Screwtape Letters* in which cheery letters from the Devil mock the ease of corrupting humans.[16]

That passage evokes at the very least the historically ambivalent role of lawyers who have not only set about limiting the use of power, but have concurrently facilitated, enabled, justified and maintained its use.[17] What would Mephistopheles make of international criminal law other than reading its foundational texts with an ironic inflection? Giorgio Agamben accuses lawyers for their complicit silence about the killing machine inherently tied to law that he refers to as the state of exception.[18] In their defence, some lawyers have not been silent but indeed have raised their voice in court.[19] Agamben, in turn, is accused of making a dangerous move away from understanding law in its context as an epistemic practice of practical reasoning to a kind of ontological or metaphysical presentation of law.[20]

All that notwithstanding, this chapter takes the methodological approach of looking for historical 'signatures' of concepts in Agamben's sense of the term in the practice of the UNSC. These 'signatures' will be taken as indicating where a latter-day concept refers back to that concept's presence in and persistent reference to a separate sphere of thought.[21] In the present instance, the fields sharing a history of ideas are politics, law and religion. Examples include the temporary loanwords to law from the religious lexicon, such as Hammarskjöld and Charlesworth's words above, to sharing words, such as guilt between law and religion, immunity between biology and law, the notion of 'body' between law, politics, religion and biology. This chapter only focuses on a religious signature regarding the very words and ideas used in and structuring crucial legal and political contexts. This signature has been identified and outlined as affecting not merely vocabulary, idiom and grammar but most importantly also conceptual structure, the foundational efficacy of paradoxes, and generally accepted understandings of time as duration. It is hoped that in the end this effort will open up possibilities to alternative ways of thinking about the fundamental conceptual structures of international criminal law as well as provide food for new thoughts, such as re-focussing international law on issues of structural justice and 'an international law of every day life' that needs a methodology to consider non-elite perspectives.[22] This exploration includes analysing international criminal justice interventions from the point of view of the people at the business end of

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[16] Charlesworth 2002, at 392.

[17] Koskenniemi 2009, at 17.

[18] Agamben 2005a, at opening epigraph.

[19] Schotel 2009.

[20] Ibid.

[21] Agamben 2009, at 40.

[22] Charlesworth 2002, at 390.

international criminal law. Those on whose behalf such intervention purportedly takes place at times have radically different appreciations of the relevant historical arc and its legal and political ramifications.

Martti Koskenniemi states that historical narrative as a style of legal writing liberates the political imagination to move more freely in the world of alternative choices while illuminating its false necessities and false contingencies.[23] Although legal vocabulary can seem deceptively open ended, legal practice is often quite predictable.[24] This gap between vocabulary and practice can be explained when global politics is brought to the equation. For instance, as Charlesworth observes, the legality of the NATO intervention in the then Federal Republic of Yugoslavia (FRY) was unsuccessfully brought before the International Court of Justice by the then FRY in April 1999.[25] Carla del Ponte, the then ICTY Prosecutor, considered, but ultimately dismissed, prosecutions of NATO actors over the bombing.[26] Even so, Milosevic was indicted in May 1999 by the ICTY for war crimes, surrendered to that Tribunal by the Serbian government and died during trial.[27] Antonio Cassese, justified the intervention in terms that the international rule of law should be 'sacrificed on the altar of human compassion'.[28] In general, the discursive structure of international law is for making arguments and not for arriving at conclusions.[29] It is necessarily contingent because a legal pronouncement would not be certain unless and until it is competently and officially delivered. The point is that even though good legal arguments could be made for either side in both cases the side that carried the day was the more politically powerful one.

International lawyers are preoccupied with great crises, rather than with the politics of everyday life.[30] Charlesworth's argument is that when international law rhetorically focuses on crises it is static, unproductive and severely restricts what are considered 'fundamental' questions and enquiries.[31] Crises divert attention from structural issues of global justice.[32] One aspect of this restricted approach can be seen in that the 'facts' international lawyers deal with are typically outside of their own expertise and the legal discipline does not encourage weighing up

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[23] Koskenniemi 2009, at 18.

[24] Ibid., at 9.

[25] *Case Concerning the Legality of the Use of Force* (*Yugoslavia v United States et al.*) ICJ, Request for the Indication of Provisional Measures, Order of 2 June 1999.

[26] International Criminal Tribunal for former Yugoslavia, *Final Report to the Prosecutor by the Committee established to Review the NATO Bombing; Campaign against the Federal Republic of Yugoslavia*, para 90, http://www.icty.org/sid/10052. Accessed 28 October 2013.

[27] *The Prosecutor of the Tribunal Against Slobodan Milosevic and 4 others*, Prosecutor, Indictment, Case No. IT-99-37, 22 May 1999, http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ii990524e.htm. Accessed 28 October 2013. Cited in Charlesworth 2002, at 379.

[28] Cassese 1999, at 25.

[29] Koskenniemi 2005, at 67.

[30] Charlesworth 2002, at 389.

[31] Ibid., at 377.

[32] Ibid., at 382.

competing versions of events.[33] For instance, the perspective of the third world is not as prominent as it could be. The greatest political stakes in this legal debate are whether a new generation of third world scholars can combine legal professionalism with strategic awareness of the limits and possibilities of international law.[34] As Charlesworth notes, Third World Approaches to International Law (TWAIL) rarely if ever provide alternatives to what they critique.[35] From a TWAIL perspective, the historically Christian euro-centricism of international law is not so much a criticism as a trite observation. However, its very triteness conceals the on-going sway and profound power of that unique legacy. Moreover, introducing, say, Confucian or even African ideas while in principle not precluded is exceedingly rare in practice.[36] Such scholars in any case will have to reckon though with a ready-made constricting idiom and structural bias in international institutions.[37]

As part of the idiomatic structure, numerous international law texts employ case studies of crises as a counterweight to the formalism of the study of rules.[38] The reliance on these case studies actually illustrates that UNSC action itself greatly influences the perception of what the law actually is.[39] Often in UNSC practice internal legal coherence and consistency are pitted and lose against existential problems of peace and war.[40] A case in point is the requirement under Article 27(3) of UN Charter regarding concurrent vote of permanent members, which is not really observed anymore, as abstention is not counted as a veto.[41] Given this legally unclear state of affairs, judicial authority carries with it the weighty expressive function of law where a law can have effect even outside of its direct enforcement.[42] In international criminal law the UNSC's creation of *ad hoc* international criminal tribunals as well as its referrals to the ICC under Chapter VII of the UN charter are as excellent an example of the use of crises as can be found. The courts and tribunals themselves have at best solely expressed and affirmed a negatively grounded jurisdiction only by finding as a matter of strict legality that nothing prohibits its exercise.[43] Yet, these judicial pronouncements in effect only affirm the power of the political institution that created the court itself and thus enables the court's initial acceptance of jurisdiction and subsequent provision of

[33] Ibid., at 384.

[34] Koskenniemi 2009, at 9; Marks 2009, at 17.

[35] See Charlesworth 2005, at 407.

[36] Weeramantry 2004; Cornell and Muvangua 2012.

[37] Koskenniemi 2009, at 10.

[38] Wedgwood 2000, at 377.

[39] Ibid., at 356.

[40] Koskenniemi 2009, at 8.

[41] Wedgwood 2000, at 354.

[42] Sunstein 1996.

[43] *Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 35.

legality. This judicial affirmation approving a political action that founds jurisdiction is subsequently referred to as evidence of a legally and politically efficacious decision. The legal decision demonstrably acts as an acclamation that provides glorification of an already effected political action. That legal glory is therefore only a reflection of an existing political power but that self-same power is considered not fully efficacious (because it is not yet legitimised) until it is glorified. Power thus refers to glory and glory reflects back the power. That is why the law matters to politics or, to put it another way, why power needs glory.[44] How does this legal machine that utilises false contingency and false necessity to generate glory operate?

5.3 Getting to and from 'twas never thus' to 'twas ever thus'

A major flaw of utilising crisis as a model to understand international criminal law is the repetitive rediscovery of an issue as if for the first time. Therefore analyses have little to no reference to past knowledge or present conventions.[45] That is, every set of circumstances constituting a crisis is taken to be unique—literally without precedent even when followed subsequently by similar iterations of the same mechanism. Moreover, as can be seen in the proliferation of international criminal tribunals, as explained below, those so-called exceptions frequently become the new rule.[46] The legal basis for establishing international tribunals and furnishing such with criminal jurisdiction is a case in point.

The legal basis for establishing the ICTY was written up only after the political decision to set it up had been made. In the UN Secretary-General's report that led to the establishment of the ICTY, he noted that treaty-based bodies were the *normal* way of setting up judicial bodies that would exercise international jurisdiction over individuals criminally responsible for violating international humanitarian law.[47] Such a method allowed not only for detailed and comprehensive discussion of issues regarding establishment but also enabled the full exercise of sovereign will. However, the usual way of doing things would not do in the particular situation because of the considerable amount of time it would take to debate, draft, sign and ratify such an instrument and the fact that its coming into force would by no means be a given. Such was the urgency of the situation that it even precluded the UN General Assembly's participation. The *exceptional* procedure of a Chapter VII resolution setting up a tribunal was favoured for reasons of

[44] Agamben 2011a, at 195.

[45] Charlesworth 2002, at 384.

[46] Koskenniemi 2009, at 10.

[47] UNSC, Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, paras. 18–30.

immediacy and efficiency, and justified in the *particular* circumstances of the former Yugoslavia.[48] To go the treaty route was described as too cumbersome and uncertain for the circumstances at hand. The report noted that discussions at the General Assembly and within the International Law Commission canvassing a permanent court that would have universal jurisdiction were already in the offing. A UNSC resolution under Chapter VII then was expeditious to meet this particular set of events. It was therefore intended not to legislate new law but only to provide a new mechanism for the enforcement of established law: an unprecedented tribunal applying existing law. Despite the language repeatedly emphasising the particular nature of the Yugoslavian crisis, the report noted that setting up a tribunal was itself legally justifiable both by being consistent with previous UNSC practice and as an *enforcement* measure under Chapter VII. This would as such provide it with the extraordinary effect of being immediately effective and accompanied by a binding obligation over all States to do whatever was necessary to achieve its aims.

The legal basis for establishing the ICTR only took four paragraphs to outline, whereas it had taken thirteen in the case of the ICTY.[49] The case of Rwanda followed a similar pattern to the case of the former Yugoslavia in referencing exceptional circumstances particular to it. Even if the model of setting up the ICTR drew from the experience of and closely followed the ICTY in practice, it would appear from the relevant report of the UN Secretary-General (UNSG) as if the ICTY was not for that reason to be considered a wholly adequate legal precedent. This was because Rwanda was still considered on its own particular merits the ICTY notwithstanding.[50] A significant difference was that Rwanda itself fully participated in the ICTR's establishment and so its sovereignty was not in question. Subsequent judicial decisions and state practice do appear to confirm in principle the legality of the establishment of such *ad hoc* tribunals by the UNSC.[51]

The ICC then came along and was established in a hybrid form as can be seen in Article 13 of the Rome Statute.[52] The court may exercise jurisdiction if a State Party refers a situation to the Prosecutor, if the UNSC acts under Chapter VII of the UN Charter, or if the Prosecutor initiates an investigation on his (or now her) own motion. It is therefore not only a treaty-based body following the recognised-as-normal form and process but it also institutionalises the exceptional power first seen and developed with the *ad hoc* tribunals created by UNSC resolutions under the UN Charter. This exceptional power has now been normalised in the Rome Statute and enshrined in treaty law. Furthermore, under Article 10, matters of

[48] UNSC Res. 808/1993, 22 February 1993.

[49] UNSC, Report of the Secretary-General pursuant to Paragraph 5 of UNSC Res 955 (1994), S/1995/134, 13 February 1995, paras. 6–9; UNSC, Report of the Secretary General pursuant to Paragraph 2 of UNSC Res 808 (1993), S/25704, 3 May 1993, paras. 18–30.

[50] UNSC, Report of the Secretary-General pursuant to Paragraph 5 of UNSC Res 955 (1994), S/1995/134, 13 February 1995, paras. 6–9.

[51] Cassese 2008, at 327; Zahar and Sluiter 2008, at 9.

[52] 2002 Rome Statute of the International Criminal Court, 2187 UNTS 3, Article 83(2).

jurisdiction, admissibility and applicable law do not affect existing international law nor do they create new law outside of the Statute. Effectively, that provision insulates the core portions of the Rome Statute from being invoked as authoritative on either customary or general international law.[53] This in effect means that both treaty and UNSC powers to create tribunals are concurrently inside and outside the Statute. They are, to borrow a phrase from Equity, like two streams in a river whose waters do not mix, as the cases of *ad hoc* tribunals set up after the ICC for Lebanon, Cambodia and Sierra Leone also attest. George Fletcher and David Ohlin consequently view the ICC as two courts, an independent criminal court enacted by parties to the Rome Statute and in the case of referrals by the Security Council under Article 13(b) of the Statute, an organ for restoring collective peace and security transcending 'the classic goals of criminal law to adjudicate individual guilt'.[54] Therefore, depending 'on how a case is generated, then, the ICC can be either an independent criminal court, prosecuting international criminality for its own sake, or a UN body prosecuting criminals as an instrument to advance the Council's security objectives'.[55]

By the time setting up the STL came round, a single paragraph sufficed to provide and explain its legal basis:[56] that legal basis is a treaty between the United Nations and Lebanon.[57] The STL is a *sui generis* entity being neither a subsidiary organ of the United Nations, nor part of the Lebanese judiciary.[58] In defining the legal basis the UN Secretary-General reviewed UN practice over 13 years past, which revealed three different types of founding instruments for international or internationally assisted tribunals. They were established by Security Council resolution, national statute or by agreement between the United Nations and the country directly interested in the creation of the tribunal.[59]

Bruno Simma acknowledges that in so called 'hard cases' or for our purposes in crisis situations political imperatives and morally based arguments dictate actions outside the law.[60] The UNSC Chapter VII power is inexhaustible. It uses crises as a state of exception in order to simultaneously suspend and fulfil the law.[61] Even when courts examine this power it is only confirmed in the double negative

[53] Schabas 2010, at 267.

[54] Fletcher and Ohlin 2006, at 427.

[55] Ibid.

[56] UNSC, Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, S/2006/893, 15 November 2006.

[57] Ibid.

[58] Ibid.

[59] UNSC, Report of the Secretary-General pursuant to Paragraph 6 of resolution 1644 (2005), S/2006/176, 21 March 2006.

[60] Simma 1999, at 22. Cited in Charlesworth 2002, at 381.

[61] Agamben 2005b, at 106.

(the UNSC does not not have this power to found tribunals). The suppleness of crisis is such that not even Chapter VII exhausts its fecundity in creating precedents in fact that are not precedents in law. This extract from the UK House of Lords debating the resort to force in Iraq before the Second Gulf War makes the points discussed above clear. It is grounded on a false necessity for war and relies upon decisions to be taken in light of circumstances at the time (not previously laid down rules). Further to that, all options are left open (nothing is ruled out—meaning therefore force is ruled in), while the Kosovo campaign is cited for support but emphatically not as precedent:

> Lord Bach: What I have mentioned today are, I repeat, prudent preparations: first, to put up a credible threat of force against Saddam Hussein, but also in case war is necessary – which is something that is neither imminent nor inevitable. It would be the Government's preference that there should be a second resolution, if that is necessary, before any force was used. But I have to tell the noble Lord that any decision on further action by the Security Council will be taken in the light of the circumstances at the time and that all options are open.
>
> It is important to state that it is up the Security Council to uphold its authority and to take whatever action is necessary to ensure full compliance. Historical parallels can be dangerous, but it is perhaps worth noting that the Kosovo campaign was not one that was supported by the Security Council. I think that very few Members of this House would say that that was not a campaign that deserved to succeed or that it was not in the interests of humanity.[62]

The NATO bombing campaign in the FRY reinforced the idea that collective security and the international order, at the end of the day, are based on the threat of the use of force.[63] This flight from law makes violence seem if not intuitive then inevitable. International lawyers interpret intervention as in itself almost automatically active and productive, while non-intervention is inactive and negative.[64] The only possible courses of action in the face of a crisis are to act or not to act. In this way international law steers clear of analysis of longer-term trends and structural problems.[65] Robin Cook, the then British Foreign Secretary, compared the intervention in Kosovo to the fall of the Berlin wall in 1989 marking the end of another crisis, the Cold War.[66] In his view, the Kosovo intervention appeared to violate international law because it begun without taking the matter to the UNSC under Chapter VII of the United Nations Charter. However, the United Kingdom together with the United States argued that it was consistent with the humanitarian values of the Charter and that armed intervention in another state to protect human rights was acceptable in international law regardless of national sovereignty.[67]

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[62] United Kingdom Parliament House of Lords Daily Hansard, www.publications.parliament.uk/pa/ld200203/ldhansrd/vo021218/text/21218-09.htm. Accessed 28 October 2013.

[63] Charlesworth 2002, at 390.

[64] Ibid., at 387.

[65] Ibid., at 389.

[66] Ibid., at 379.

[67] Ibid., at 378–379.

Here crisis enabled sovereignty, a key principle of international law to be trumped by humanitarian principles.

Opposed to this position, Simon Chesterman and Michael Byers pointed out that the NATO bombing was a regression by centuries to when military force was the default tool of powerful states and the less powerful sought protection in alliances rather than liberal democratic multilateral institutions or international law.[68] Similarly, the report of the Independent International Commission on Kosovo concluded that the NATO intervention breached international law because it was not authorised by the UN Security Council, still, it was morally and politically legitimate as a response to serious human rights violations.[69] These legal arguments did not carry the day in the face of NATO opposition. International relations scholars appear less exercised taking a position on the NATO campaign, perhaps because it is more easily interpreted in the paradigm of power politics than in the international lawyers' world of objective legal principles that are justified by reference to the rule of law.[70]

5.4 UNSC as a Force Arresting Catastrophe

The essential connection between the UNSC's power to regulate international violence and its ability to set up criminal tribunals was first judicially confirmed in the *Prosecutor v Tadić* case in 1995.[71] This nexus subsequently found its way into the Rome Statute. As mentioned earlier, Article 13 of the Rome Statute codifies three separate modes for exercising jurisdiction. A referral by the UNSC, however, is conceptually a very different proposition in that the power therein flows from UNSC action that was not explicitly provided for in the UN Charter. As explained above, in the *Tadić* case the ICTY affirmed the legality of its own establishment by the UNSC.[72] That court said that 'neither the text nor the spirit of the [United Nations] Charter conceives of the UNSC as *legibus solutus* (unbound by law)'. Yet, the court essentially recognised a power of the UNSC that did not proceed from anything more than the acts of the UNSC itself. However, as the court pointed out, because that power was not limitless or subject to no review, the power had to comply with the conditions of its exercise which in this case were the restoration and maintenance of international peace and security. The inherent

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[68] Chesterman and Byers, 1999. Cited in Charlesworth 2002, at 380.

[69] Independent International Commission on Kosovo 2000, at 288–289; House of Commons Foreign Affairs Select Committee, Fourth Report, 23 May 2000, www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmfaff/28/2802.htm. Accessed 28/10/2013 Both cited in Charlesworth 2002, at 380–81.

[70] Charlesworth 2002, at 381.

[71] *Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, paras. 26–28.

[72] Ibid.

jurisdiction of the court to decide was described as inversely proportional to the textual discretion of the UNSC to act. In other words, the UNSC could act to give jurisdiction to the ICTY only insofar as doing so was not inconsistent with the Council's mandate. Further, the court clarified that the Charter conceived of the Council as having specific powers (not absolute fiat), which could not exceed those of the UN itself in its jurisdiction and its internal divisions of power.

The power of the UNSC to invoke Chapter VII powers to initiate or stop an investigation by the ICC as enshrined in Articles 13 and 16 of the Rome Statute thus historically originated from UNSC Resolution 808 of 1993 as affirmed by the ICTY. José Alvarez unfavourably compares the decision of the STL's Appellate Chambers in the case of *Ayyash and others*, to the ICTY's *Tadić* judgment. In the *Ayyash* case, as it was in the *Tadić* case, the defence fundamentally challenged the jurisdiction and legality of the Tribunal. It, however, met with different results at the appellate stage where that Tribunal found that it did not have the power to engage in 'judicial review' over the UNSC.[73] Alvarez criticises this STL Appeal Chamber's finding as affirming that the UNSC is unbound by law.[74] The thing to note, though, is that regardless of the opposed finding the effect of both *Tadić* and *Ayyash* is that the UNSC gets its way and that the accused is subject to trial. In terms of legal glorification the opposed findings by the STL and ICTY reveal that judicial pronouncements notwithstanding, the effectiveness of political actions remains.

It is interesting that when the ICTY needed to explain and justify the then novel idea that the UNSC could indeed create an international tribunal, it reached for the obscure phrase to state that the Security Council is a creature of law, not a lawless entity. Thanos Zartaloudis traced how the expression '*legibus solutus*' was transferred from imperial Rome to medieval ecclesiastical authorities and even onward to the notion of 'the people' as a politically legitimising entity.[75] Kenneth Pennington, in turn, provided four different but related meanings for *legibus solutus*.[76] First is the prince's authority to change, derogate, or dispense from positive law. Second is the prince's immunity from prosecution. Third is the prince's authority to transgress or dispense from the normal rules governing the legal system. Fourth is the prince's power to transgress the rights of the subject.

This taxonomy seems to indicate that the ICTY in *Tadić* only referenced the third meaning regarding the transgression of or dispensation from the normal rules governing the legal system. So the ICTY were saying the UNSC was not *legibus solutus* in the sense that it did not have the authority to transgress the system's normal legal rules even though it left unsaid that the UNSC was *legibus solutus* in

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[73] *Ayyash and others*, Appeals Chamber, Decision on the Defence Appeals Against the Trial Chamber's 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal', Case No STL-11-O1/PT/AC/AR90.1, 24 October 2012, paras. 32–50.

[74] Alvarez 2013, at 301.

[75] Zartaloudis 2010.

[76] Pennington 1993, at 90–91.

at least the first sense by not being explicitly excluded from setting up novel international criminal tribunals and *therefore* able to do so. The UN Charter along with the Nuremberg and the Far East trials brought forth the international community as a legal concept that placed the leaders of all human communities under the rule of international law.[77] Therefore, in their wake any authority should theoretically never be above the law in the sense of acting completely outside of and with no reference to the law. The point is that the UNSC is not absolved of legal obligations.[78] Setting up criminal tribunals is part of its power, even though that is in tension with its primarily police functions.[79] This is the only legally defensible position because a legal system is the weaving of legal rules to legally regulated institutions, leaving no power in the state or in society that is *de legibus solutus*.[80] That is, all powers are subject to the legal authority of other powers and nobody is supposed to be above or beyond the rules. How can the rules address imminent or actual crises or catastrophes when these by their nature seem to resist the application of ordinary rules or regimes of law? How do we extend the rule of law to cover crisis through international criminal law?

Hammarskjöld's crucial words quoted above were not only expressed in a Christian idiom but sit squarely within a framework with Christian antecedents. Secularisation is intrinsic to Christianity.[81] As the religion of secularisation, it is 'no longer, but still, religion'.[82] The Peace of Augsburg in 1555 inaugurated the modern European settlement between politics and religion that was reinforced and augmented with the Westphalian Peace of 1648.[83] It is easy to forget Westphalia's secularised religious power turning the earlier logic in its head. Instead of religious leaders choosing temporal rulers, temporal rulers chose the religion for their realms. The notion that now political rulers could choose the faith of their realms, and not religious leaders choosing political leaders, *cuius regio, eius religio,* led to 'a Christian and Universal Peace'.[84] Modern politics was rendered possible because it acquired formerly religious power. Even while liberal politics disarticulates religious authority *de facto*, if not *de jure*, liberal peace is derivative of as well as parodies a transcendent sovereignty.[85] Thus imperial theology feeds 'on the remnants of eschatological history and their abandoned meanings'.[86] Speaking with reference to these abandoned meanings George Steiner stated that when belief in neither Heaven nor Hell exists, Hell nevertheless proves easier to recreate, thus there is currently an

[77] Tomuschat 2006, at 830.
[78] Gill 1995, at 48.
[79] Simma et al. 2012, at 1320.
[80] O'Donnell 2004, at 37.
[81] Esposito 2011, at 60.
[82] Ibid., at 71.
[83] Fletcher 2004, at 59.
[84] Wright 1961, at 21.
[85] Fletcher 2004, at 59.
[86] Hell 2009, at 311.

extinct theology at work, whose death has produced its parody where 'the concentration and death camps of the twentieth century are Hell made immanent'.[87] This hell is directly resonant with Hammarskjöld's quote at the beginning of this piece as well as with the atrocities that gave rise to international criminal law.

According to Agamben there is more at stake here than meets the eye because every power that thinks of itself as destined to block or delay catastrophe may be considered a secularisation of the '*Katechon*'.[88] The Katechon is a biblical idea of something restraining hell, while perpetually postponing heaven. This is specifically from 2 Thessalonians 2:6-7 where Paul states in an eschatological context that Christians must not behave as if the apocalypse would happen tomorrow, since the revelation of the Antichrist is conditional upon the removal of something or someone that restrains him—that restraint being the Katechon. The Katechon therefore prevents the eschatological crisis of the end of the world but by so doing also prevents the apocalypse where Christ reveals himself.

According to Paul Fletcher, imperial political theology utilises the metaphysics of crisis and, given its necessary temporality, its mood is unequivocally imperative.[89] Chapter VII resolutions are in the imperative mood, which is to say in the form of a commandment. For further understanding the rhetoric used by the UNSC, Aristotle's classification can be relied on. He classified rhetoric in three ways: political, which looks to the future and is hortatory; law that looks at the past in making judgments; and ceremony focuses on the present.[90] In a somewhat different manner, Giorgio Agamben traces two ontologies relevant to this discussion. First is the assertion, which is in the indicative mood and second is the commandment in the imperative mood. One refers to 'is', the other to 'be'. One belongs to science and philosophy, the other to politics, law, religion and magic.[91] The UNSC is definitely political in its rhetoric and in that regard brings into being legal jurisdiction merely by the power of pronunciation.

Martti Koskenniemi notes in passing the ambivalence of the Katechon, while coincidentally at the same time identifying Carl Schmitt as the most acerbic critic of liberal universal humanitarianism.[92] Schmitt utilises this idea of what or who restrains to describe the contemporary as caught between the in-between times. Just as UNSC actions are.[93] Schmitt then recasts history as a long interim and not a long march toward some imagined goal.[94] For Agamben, the Katechon defers the end of days from becoming concrete.[95] This neutralises the very idea of salvation

[87] Steiner 1971, at 54.
[88] Agamben 2005b, at 110.
[89] Fletcher 2004, at 59.
[90] Aristotle 1984, at 32.
[91] Agamben 2011c, from 14:10.
[92] Koskenniemi 2007, at 422–423.
[93] Schmitt 2003, at 59–60.
[94] Schmitt 2008.
[95] Agamben 2011b, at 7–8.

in history of any sort (including through international criminal law). As per Agamben with specific application to international criminal law, Walter Benjamin's definition of guilt as an originally juridical concept that was transferred to the religious sphere supports Schmitt's thesis that the concept of guilt is *not an essence but an operation*.[96] For Benjamin, law is a residue of demonic existence, while Schmitt asserts that the basis of guilt is not the freedom of the ethical human but only the controlling force of a sovereign power that only slows the Antichrist.[97] For Schmitt therefore the notion of guilt, which is central to international criminal law, is linked to the Katechon and refers to an operation of law rather than an intrinsic objective quality. It is the result of an *official* act rather than the status of any *real* being.

According to Charlesworth a crisis allows us to factor out ambiguities and complex contexts in the area of collective security.[98] This by default 'means that little attention is paid to the role that non-state actors, such as multinational corporations, and the international monetary institutions play in generating insecurity'.[99] That reinforces 'the idea that collective security and the international order, at the end of the day, are based on the threat of the use of force'.[100] For Paolo Virno, the ambivalence of the Katechon is accompanied by oscillation and makes up cultural apocalypses such as we see conjured up to justify actions undertaken in response to crisis.[101] Roberto Esposito expounds further on this ambivalence of the Katechon as the positive of a negative: the Katechon restrains evil by holding it within itself, confronts evil from within by hosting it, defers evil but does not eradicate it because eradicating evil would be to eliminate itself.[102] It delays the explosion of evil at the price of preventing the victory of good.[103] The constitutive juridical principle of the Katechon opposes the absence of law by taking it up inside itself and giving it form, rule and norm.[104] It nurtures and is nurtured by iniquity, opposing by preserving and confronting by incorporating.[105] It fulfils the law not through obedient action but in the form of potential action.[106] The Katechon imposes the norm on both messianic and satanic anomie.[107] It can be any institution that guarantees order such as any State, or the Church or even be the

[96] Agamben 1998, at 28.
[97] Ibid.
[98] Charlesworth 2002, at 390.
[99] Ibid.
[100] Ibid.
[101] Virno 2008, at 52.
[102] Esposito 2011, at 63.
[103] Ibid.
[104] Ibid.
[105] Ibid., at 64.
[106] Ibid., at 65.
[107] Ibid.

point of intersection between politics and law and religion.[108] It is expressible as a structural analogy and may even function as a religious legitimation of power. The sovereign State, which the UNSC imitates, now and then 'needs a sacred core around which to establish its legitimacy in a way that goes beyond its historical origin and prolongs its life over time.'[109] The UNSC reprises the Katechon function in that they are both made immortal by the infinite mortality of sacrificed subjects under their jurisdiction.[110] The UNSC plays the role of Katechon during crisis to restrain total breakdown, and crisis itself is actually or potentially (which is really the same thing) permanent.

Virno is of the view that because the Katechon impedes the coming of the Antichrist, yet this coming is a condition for the redemption promised by the Messiah, then the Katechon also impedes the redemption.[111] Institutionally, the Katechon adapts itself best to the permanent state of exception in the boundary between legal and factual questions.[112] The ambivalence of the infinite regress by which questions of fact can always be seen in questions of law and vice versa is restrained (but not removed) by the Katechon.[113] Virno notes the ambivalence of critical situations where loss offers the only possibility of redemption, where crisis offers no remedy apart for what the danger itself describes and prescribes.[114] Culturally, apocalypse is the ritualistic accompaniment of the state of exception where crisis implies the suspension of ordinary law.[115] This provides an environment where a normative proposition is simultaneously an instrument of control and a phenomenon to be controlled, the unit of measurement and the reality to be measured.[116] Virno further locates the Katechon in verbal language as 'the maximum source of danger' as well as 'the authentic arresting force'.[117] Language therefore has a dual structure especially in the context of constructing the apocalypse where the crisis is also a renewal for humanity.[118] Language brings forth the danger and is also the force that restrains it.[119]

Who could be a more exemplary Katechon than the referee of the football match that took place between the SS and inmates during a break from work at Auschwitz?[120] Presumably despite the sheer horror of the camp, he was

[108] Ibid.
[109] Ibid., at 68.
[110] Ibid., at 71.
[111] Virno 2008, at 60.
[112] Ibid., at 62.
[113] Ibid., at 64.
[114] Ibid., at 52.
[115] Ibid., at 54.
[116] Ibid., at 55.
[117] Ibid., at 64.
[118] Ibid.
[119] Ibid.
[120] Levi 1988, at 54–55.

scrupulously fair in ensuring the ball did not go out of bounds nor was played by hand, and was equally ready to issue red and yellow cards to either side. Is the referee like Faust or like Mephistopheles? Agamben says that this moment of normalcy is the true horror of the camp and if we do not succeed in understanding and stopping the match then all hope is lost.[121] The match is never over but continues regardless of time and place.[122] Therefore, while seemingly neutral, ambivalent and ambiguous the Katechon is on balance necessarily tolerant of evil and is therefore to be resisted.

5.5 Conclusion: Real Versus Official Crises

On the back of the preceding discussion we can make at least three provisional conclusions to help us drive to a final conclusion. First, international criminal law is both made in and made for crisis; second, it is designed to address brief moments in time that are in reality of perpetual continuation, and third, the UNSC has the central role in responding to crisis by ambivalently restraining catastrophe. Setting up tribunals itself or setting in motion the machinery of international criminal justice such as the ICC is one of the tools at its disposal. Essentially, the UNSC administers the international order through, among others, international criminal justice. Even the relatively independent treaty-based ICC is coupled to the UNSC by the referral and deferral powers of the UNSC under Articles 13 and 16 respectively of the Rome Statue. International justice depends as much on matters of administration as on questions of law.[123] This administrative managerial approach is mostly about actor's interests, so the formal aspects of legality such as hard and fast rules are viewed unfavourably as obstacles.[124] The task at hand for many lawyers, according to Koskenniemi, remains 'how to smooth the prince's path'.[125] According to him, this approach conceals a normativity privileging values and actors occupying dominant positions in international institutions without any critical stance.[126] The notion of management of crisis is therefore key and the law is only a handmaiden to this. In Agamben's terms, we should focus more on the police and less on law, less on sovereignty and more on government.[127]

[121] Agamben 2000, at 26.
[122] Ibid.
[123] Fletcher and Ohlin 2006, at 427.
[124] Koskenniemi 2009, at 15.
[125] Ibid., at 16.
[126] Ibid.
[127] Agamben 2011b, at 276.

By focusing on how the response to crisis is governed and administered we can see through the analysis above that it is only by the UNSC considering a particular situation as critical that it becomes officially so. Not as a matter of essence but one of operation. This separates the subject of the action from the action itself. In international criminal law crisis is not an essence but an operation likewise and by extension guilt is not an essence but an operation. The action is effective regardless of the morality of the actor or the factual basis of the situation.[128] The efficacy of official UNSC actions under crisis is indifferent to its morality because morality is not what effects its actions. Only its official status as being primarily responsible for keeping the peace brings efficacy to its acts. Moral principles are consequently only reached for to provide rhetorical legitimation.

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[128] Agamben 2013, at 40.

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Chapter 6
Warming to Crisis: The Climate Change Law of Unintended Opportunity

Tomer Broude

Abstract Global warming is perhaps the ultimate crisis for humanity. But is it a crisis for international law? How has crisis framing and rhetoric influenced the development of international climate change law? Elements of a 'crisis model' can be identified in international responses to climate change, but they have transcended it and are evolving in much more complex and textured ways. On the one hand, the continuous pressure for urgent and exceptional action at the multilateral level has led to acrimony between states, indifference and denial among important constituencies, and ultimately to weak arrangements within conventional intergovernmental models. This has produced an impression of constant failure, which in itself poses a challenge to the normative capacity of traditional international law-making. On the other hand, crisis framing has been a catalyst for developments in international law in unintended ways. It has legitimated 'bottom-up' approaches and sub-global and unilateral action, as well as localized legal responses. It has led to sophisticated yet plausible reconciliations between climate concerns and international trade. It has promoted reconsiderations of hard policy choices, such as between mitigation and adaptation. International law's climate change agenda has broadened, not narrowed, and it has shown a considerable capacity to innovate and develop, presenting new opportunities for international law's functions and modalities.

Keywords Climate change · Environment · Kyoto protocol · UNFCCC · Mitigation · Adaptation · Crisis · International law · WTO

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Along with danger, crisis is represented by opportunity.[1]

6.1 Introduction

There are at least two interlocking questions to be asked with respect to the systemic role of crisis in the development of international law, as far as climate change is concerned. The first question is essentially exogenous to international law. To what extent has the overarching rhetorical framing of global warming as an environmental, humanitarian, economic and social crisis of historical dimensions, impacted upon the evolution of international climate change law? The second is endogenous to international law. Has the 'crisis model'[2] of discourse relating to global warming itself revealed a crisis within international law?

[1] J.F. Kennedy, Convocation of United Negro College Fund, Indianapolis, Indiana (12 April 1959), draft 2, http://www.jfklibrary.org/Asset-Viewer/To6xnVCeNUSecmWECy7Fpw.aspx. Accessed 6 May 2013. Similar language was used by Al Gore with respect to climate change at his Nobel Peace Prize acceptance speech. A. Gore, Nobel Lecture, Oslo City Hall (10 December 2007), http://www.nobelprize.org/nobel_prizes/peace/laureates/2007/gore-lecture_en.html. Acce ssed 6 May 2013.

[2] Charlesworth 2002. See in more detail Sect. 6.2.1 *infra*.

But is global warming at all a 'crisis', and more pointedly, is it a crisis relative to international law? In Sect. 6.2 below I will discuss the concept of crisis and its applicability to the challenges of climate change. Subsequently, in Sect. 6.3 I will provide a concise survey of the tenor and volume of crisis parlance in the area of climate change policy, to establish that a framing of crisis has been prevalent, including among international lawyers, albeit in varying dimensions. Has this crisis formulation done a disservice to solutions to the problems of global warming through international law? How has it affected the development of international law relating to climate change? These are questions dealt with in Sects. 6.4 and 6.5, in which I discuss a selection of ways in which the framing of global warming as a crisis in need of urgent international attention has influenced important dimensions of negotiations and legal debate.

My general argument is that although elements of the 'crisis model' can be identified in the development of international legal responses to climate change, such responses have transcended it and are evolving in much more complex and textured ways and directions. With reference to the general problem posed by the editors of this volume of the NYIL—'International Law and Crisis: Decoy or Catalyst?'—crisis framing has indeed created diversions and contributed to failures of traditional models of international law-making, but has also catalyzed the development of multi-level and multi-polar responses that provide greater opportunities not only for climate solutions but also for international law as a system. Section 6.6 concludes.

One general caveat is obligatory here. This essay has been designed as a series of critical observations on ways in which crisis framing has interacted with the development of international law with respect to global warming. While it builds on the wealth of literature that critiques the weakness of international responses to climate change, it does not aim in any way to conduct substantive prescriptive analysis of the field. It is much more a reflection on the idea of crisis in international law than a contribution to climate change law.

6.2 Crisis? What Crisis?[3]

6.2.1 Reflecting on Crisis and its Models

Climate change provides us with a unique context in which to examine the systemic role of crisis in the development of international law. Or does it? Is it at all a 'crisis', and if so, in what ways and in which dimensions? The question is not raised here out of any degree of climate scepticism with regard to the veracity or severity of the very

[3] With apologies to *Supertramp*, and their 1975 album of that name, the cover of which showed a cocktail sipping vacationer oblivious to the industrial devastation and environmental degradation surrounding him.

real problems raised by global warming, but more with respect to the meaning and appropriateness of the term 'crisis'. Climate change hardly seems to conform to the type of phenomenon that Hilary Charlesworth must have been thinking about when she wrote, not without some sarcasm, that 'international lawyers revel in a good crisis'.[4] The challenge of climate change, however calamitous, is clearly very different from the Kosovo crisis that was Charlesworth's case-study of choice in her 2002 article, in which she developed the idea of a 'crisis model' in international law. That episode was much more a classical tight spot in international relations, the culmination of pent up pressures and regional tensions on the European periphery that led to an armed intervention—in that case by the North Atlantic Treaty Organization (NATO). Situations such as those are first and foremost political crises of a conflictual nature, in which a tense *status quo* is broken by irregular yet decisive and deliberate action taken by states, or other actors who have the capacity to make such decisions and to take such action. It is the exceptionality and immediacy (real or perceived) and violence (actual or threatened) of such occurrences that present international lawyers with normative challenges. Were the actions that instigated the crisis (or the actions taken in response to the crisis, depending on one's perspective) a violation of international law, or were they a contribution to the development of new rules and disciplines? Did those actions demonstrate the weakness of international law or its flexibility?

Moreover, the term 'crisis' makes one think first of pointed instances of urgency, in which fork-in-the-road, zero-sum type choices must be made. The etymology of the word in English is instructive: '"crisis" is derived from the Greek *Kríno*, *Krísis* (to decide) and refers to a moment of decisive intervention, a moment of transformation, a moment of rupture'.[5] These are situations that bring the international community to the brink of a disaster of order—sometimes beyond—as well as to the precipice of illegality. This type of situation is yet another reflection of the inherent indeterminacy of the field of international law and the Koskenniemian tension between apology and utopia,[6] and also of the insecurities and inferiority complexes of the discipline.[7] In the wake of an event like the NATO intervention over Kosovo, international law appears to be a discipline *in* crisis, uncertain of its content, uncertain of its effect.

Such crises are less uncommon than their supposed exceptionality would indicate, however. The questions raised with respect to the Kosovo crisis are not entirely different from the international law anxieties raised by the Cuban missile crisis in a Cold War context more than thirty-five years earlier,[8] or by the

[4] Charlesworth 2002, at 382.

[5] Hay 1995.

[6] Koskenniemi 2005.

[7] See Klabbers 2005, at 41. 'The international lawyer grows up – academically, that is – with a serious inferiority complex: international law is often said to be neither law (and thus inferior to domestic law) nor influential (and thus inferior to the policy sciences).'

[8] Piper 1975.

Manchurian and Abyssinian crisis of the 1930s, for that matter.[9] Indeed, it is the Sisyphean repetition of the Kosovo-like, 'limited' crisis scenario, and the rhetorical, formal and informal debates that accompany it (akin to what David Kennedy has called 'a sort of disciplinary hamster wheel')[10]—that turn international law, per Charlesworth, into a discipline *of* crisis, in which the 'crisis model' thrives. This is in fact not uncharacteristic of all historical crises, or as Régis Debray wrote, '[c]rises look utterly paradoxical to anyone who does not understand how their inevitable recurrence brings to light the concealed paradoxes of history itself.'[11]

6.2.2 Climate Change: A Different Kind of Crisis?

On the backdrop of this characterization of crisis in general and with respect to international law in particular—the exceptional, immediate, conflictual, and transformative, yet at the same time regular, repeated and ultimately absorbable—, climate change seems to present a very different situation. Global warming is a long-term problem and process, less clearly an event or decisive 'moment'.[12] The determination of its very existence has required scientific detection, analysis and deliberation,[13] and many important details—such as the rate at which temperatures are rising—remain uncertain. Potentially disastrous, it is prospective and impending, even though its harmful effects are already apparent,[14] but not necessarily cognitively available to most ordinary people, or qualified decision-makers for that matter. Even among the scientifically educated, differences of opinion and impression persist regarding the severity of the issue, hinting at the underlying political tensions.[15] Climate change is by now almost universally accepted as a result of human activity, but no one claims that it is a deliberate or premeditated policy outcome. To be sure, we all contribute to the problem through the externalities of our modern activities, and powerful actors do have a strong

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[9] The analogy here drawn in the broadest of senses, given the significant differences between the law and institutions involved. For a comparison between the League of Nations and the United Nations involvement in crises see Grigorescu 2005.

[10] Kennedy 2000, at 407.

[11] Debray 1973, at 99.

[12] However, the process may have its defining moments or 'tipping points', such as CO2 concentrations crossing 400 parts per million (ppm), as depicted by Ralph Keeling, a leading researcher in the field. 'I think it will be a point that some people will look back on and say, "Oh I remember when it crossed 400 back in the day". S. Murphy 2013, Greenhouse Gas Levels Approach 'Worrisome' Milestone, *KPBS*, 24 April 2013, http://www.kpbs.org/news/2013/apr/24/greenhouse-gas-levels-near-worrisome-milestone/. Accessed 6 May 2013.

[13] See Weart 2008.

[14] See, e.g., data and testimonials in Global Humanitarian Forum Human Impact Report, Climate Change: The Anatomy of a Silent Crisis, 2009, http://www.ghf-ge.org/human-impact-report.pdf. Accessed 6 May 2013.

[15] Kahan et al. 2012, at 732–735.

interest in avoiding the costly measures that its mitigation requires. It is, for example, still a valid observation that 'when the centrality of fossil fuels in producing global warming is combined with the centrality of fossil energy in industrial economies, it becomes clear that the fundamental interests of major sectors of those economies are threatened by proposals to limit greenhouse gas emissions.'[16] The phenomenon might even have its windfall beneficiaries, such as the wine industry in England.[17] But while different actors support different policies, it can hardly be said that there is anyone who is 'pro-global warming' in the same way that one might be in favour of military crackdown or opposed to it as a matter of principle, let alone in favour of one of the parties to a dispute.

More importantly, from a general legal viewpoint, when the issue of global warming arose as an issue of international policy it was not a problem already regulated, as such, by international law, beyond the most general principles of an emerging global environmental law.[18] Climate change, therefore, has not, *a priori*, constituted a challenge to the normative force and functioning of existing structures of substantive law, but rather a test to the prescriptive, formative effectiveness of international law-making. This is very much the position of international environmental law more generally, as 'a system of law that is grappling with common interest problems in a world in which there are strong divides, especially between developing and developed states, and in which the decision-making processes and procedures of global institutions reflect the legacy of colonialism.'[19]

The challenges of climate change are considerable, but the questions they raise are ultimately very different from those posed by Kosovo-like crises: can new international law be designed in ways that will enable humanity to respond to the risks and threats associated with global warming? Can international law be harnessed to overcome the conflicting interests of governments and other significant stakeholders? Climate change is formally recognized as an issue of 'common concern' to the international community,[20] climate change mitigation deemed 'a quintessential global public good'[21] that presents itself to many—again, like much of the environmental field—as an almost prototypical collective action problem. A typical statement is that '[t]he challenge of mobilizing the global community to reduce GHG [Greenhouse Gases] emissions represents a *classic tragedy of the commons,* a problem that occurs when a shared or "open access" resource (e.g.,

[16] Newell and Paterson 1998.

[17] Tate 2001. See more in depth Ruhl 2012.

[18] See, generally, Hey 2009. Even a principle such as 'Common but Differentiated Responsibilities' (CDR) in addressing environmental degradation, as well as several other important principles of international environmental law, found there first major universal expression in the Rio Declaration of 1992. Compare with a pre-Rio legal analysis by Edith Brown Weiss (Weiss 1989), which resorts to very abstract discussion of intergenerational fairness and prescriptive flexibility.

[19] Hey 2009, at 4.

[20] UNGA Res. 43/53, 6 December 1988.

[21] Bodansky 2012, at 655.

the atmosphere) is readily and freely available for unsustainable exploitation'[22]—begging a multilateral solution under what international relations theorists would label as a 'neoliberal institutionalist' approach.[23] And yet this theoretical neatness belies the actual complexities of the problem. Such solutions fail to arise and in that respect international law apparently fails to deliver. 'Never before in human history have governments been able to cooperate successfully in such a complex and uncertain scheme that will require constant and swift modification as science progresses and experience accumulates to reveal unforeseen problems.'[24]

6.2.3 Crisis, Failure and the Birth of the New

Thus, to conclude this section, it appears that we need to be very cautious in approaching climate change as a crisis *relative* to international law. If one adopts a broad and inclusive—albeit superficial—concept of crisis as simple 'un-ness', a term that applies to 'situations that are unwanted, unexpected, unprecedented, and almost unmanageable and that cause widespread disbelief and uncertainty',[25] global warming is certainly a crisis. In this respect it can be conceived of as a crisis for humanity, a crisis for capitalism, and a crisis for industrial models of development that are so strongly tied to carbon fuels. But it is a crisis for the international legal system only if one perceives as a crisis the supposed failure(s) of conventional international law, with all its underlying prescriptive mechanisms and strengths, to respond, to address, to innovate and to provide solutions in the face of such an overwhelming and intractable problem. Indeed, some see it this way: 'climate change showcases the normative threat to a fundamental precept of international law. It challenges the international process underlying climate change negotiations.'[26]

Here too, we must be careful and terminologically discriminate about the meaning of crisis. To Antonio Gramsci, 'crisis consists precisely in the fact that the old is dying and the new cannot be born.'[27] In climate change *law*, when thought of in the conventional sense, from a traditional perspective we might see much more of the latter than the former. The old remains healthy and intact (though largely irrelevant), but the new at first blush seems to remain frustratingly unborn, for a variety of political but also objective reasons. Such a prolonged, even entrenched, inability to develop in response to a critical problem—to the extent

[22] See Schenck 2008 (emphasis in original).

[23] See, generally, Paterson 1996, at Ch. 6.

[24] Posner and Sykes 2013, at 232.

[25] Boin 2004, at 167. See also Hewitt 1983.

[26] Badrinarayan 2011, at 456.

[27] Gramsci 1992, at Vol. II, Notebook 3, §34, at 32–33. Gramsci was writing on the historical 'crisis of authority'.

that it exists—is not necessarily a crisis, looking more like a 'perpetual crisis … exposed as a contradiction in terms … one that does not directly threaten the stability of the system, one that does not result in decisive intervention or, presumably, the need for decisive intervention.'[28] Would a failure of international law to respond effectively to climate change concerns create a threat to the stability of international law writ large? Or would it not be a failure at all, deriving more from the traits of the intractable problem of global warming than from the character of international law?

Surely international law, in the traditional sense, cannot provide solutions for all global problems; and furthermore, simple failure is not always crisis. More importantly, however, it is far from obvious that new international law—in new forms, with new dimensions—is not being born in response to climate change. Let us now take a step back and consider the crisis framing of climate change *vis-à-vis* international law.

6.3 The Construction of Climate Crisis Framing and its Rhetoric

6.3.1 The Roots of Climate Crisis Framing

Despite the distinctions above, there can be little doubt that deliberations and negotiations over legal responses to global warming have been continuously conducted in a rhetorical environment of crisis. The language of calamity, urgency, decision and intervention has pervaded discussions of climate change for more than three decades. It emerged very early on. Although speculation about climate change (including global cooling) and awareness to it have been documented in the 19th century and the first half of the 20th century,[29] 1975, as a year, provides a reasonable benchmark for concrete scientific knowledge about global warming.[30] The First World Climate Conference was held in February, 1979, in Geneva, under the auspices of the World Meteorological Organization (WMO).[31] In the same year, a National Academy of Sciences report noted that '[a] wait-and-see policy may mean waiting until it is too late.'[32] Grave concerns were also expressed at a 1985 conference of the United Nations (UN) Environment Programme (UNEP), the WMO and International Council for Science (ICS) in

[28] Hay 1995, at 63.

[29] For an excellent historiography of climate knowledge, see Edwards 2010.

[30] Manabe and Wetherald 1975.

[31] For more detailed histories of climate change policy, see Schenk 2008, at 322–327; Gupta 2010.

[32] National Academy of Sciences 1979.

Villach, Austria.[33] In 1988, at a scientific conference in Toronto, hundreds of scientists enumerated the risks of global warming and cautioned that 'if rapid action is not taken now by the countries of the world, these problems will become progressively more serious, more difficult to reverse, and more costly to address.'[34] In the same year, the UN, indeed, took action by creating the Intergovernmental Panel on Climate Change (IPCC) to provide 'an independent assessment of climate change for governments.'[35] The IPCC's first report, issued in 1990, prompted the UN to create the UN Framework Convention on Climate Change (UNFCCC), which was opened for signature at the 1992 Rio Earth Summit.[36]

6.3.2 Climate Crisis Framing in Negotiations

Thus, it would seem that early warnings gave rise to swift international legal action, but just as this response was almost immediately considered insufficient (and still is, with respect to the Kyoto Protocol[37] that entered into force only in 2005, and post-Kyoto developments), so has the crisis framing persisted. Over the next twenty years, multilateral bodies, national governments, academics, and non-governmental organizations have continued to express concern about the looming crisis of climate change. The UNFCCC has held annual Conferences of the Parties (COPs) since 1995.[38] The rhetoric in these meetings is often quite dramatic, even when they fail to produce commensurate concrete results. In 2010, for example, the Cancun Agreements arising from COP 16 included recognition 'that climate change represents an urgent and potentially irreversible threat to human societies and the planet, and thus requires to be urgently addressed by all Parties.'[39] The report from COP 17 in Durban, South Africa pointed out the inadequacy of current efforts by noting the 'significant gap between the aggregate effect of Parties'

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[33] World Meteorological Organization, International Collaborations and Partnerships on Climate Change, http://www.wmo.int/pages/themes/climate/international_background.php. Accessed 6 May 2013.

[34] World Conference on *The Changing Atmosphere: Implications for Global Security*, Conference Statement, 1988, http://www.cmos.ca/ChangingAtmosphere1988e.pdf. Accessed 6 May 2013 (hereinafter 1988 Conference Statement).

[35] Moomaw 2013, at 106.

[36] 1992 United Nations Framework Convention on Climate Change (UNFCCC), 1771 UNTS 107.

[37] 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 37 ILM 22.

[38] See Schenk 2008, at 325–26.

[39] UNFCCC COP-16, Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, Dec.1/CP.16, U.N. Doc. FCCC/CP/2010/7/Add.1, 10 December 2010.

mitigation pledges' and the aggregate emissions reductions necessary to stay within the 2 or 1.5 degree Celsius maximum temperature increases.[40]

In his address to the Opening Ceremony of COP 18 in 2012 at Doha, Qatar, Vuk Jeremić, President of the UN General Assembly for its 67th Session, described climate change as a threat 'rivaled in its cataclysmic effects only by thermonuclear conflict'[41]—closely echoing the findings of the 1988 Conference Statement issued almost a quarter of a century earlier, whereby 'humanity is conducting an unintended, uncontrolled, globally pervasive experiment whose ultimate consequences could be second only to a global nuclear war.'[42] Jeremić also warned that '[t]he window of opportunity to prevent the effects of climate change from spiraling out of our control is closing.'[43]

Many national governments, and multilateral organizations besides the UN, have conducted research on climate change and spoken about its risks. The US Global Change Research Program published its Second National Climate Assessment in 2009, noting the harmful effects of climate change on water resources, crop and livestock production, coastal areas, human health, and more.[44] In a pre-COP 18 meeting in 2012, Prime Minister Kim Hwang-Sik of South Korea described his country's efforts to pursue green growth while noting that climate change 'is posing serious threats'.[45] The European Union has a European Commissioner for Climate Action, Connie Hedegaard, who contrasted climate change to recent economic concerns by saying 'we can bail out banks. We can bail out states. But no one can bail out the climate, if we don't get our act together.'[46] A report organized by the Organization for Security and Co-operation in Europe noted that, 'as Central Asia is warming faster than the global average … action has to be taken in the coming decade starting now.'[47] These are all examples of the language of crisis employed by climate negotiators, reflexively perhaps, or for negotiation purposes, but with little consideration for its effects on the content and structure of international law.

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[40] UNFCCC COP-17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, Dec.1/CP.17, U.N. Doc. FCCC/CP/2011/9/Add.1, 11 December 2011.

[41] V. Jeremić, Address by President of the United Nations General Assembly to the Opening Ceremony of the High-Level Segment of COP18/CMP8/, 4 December 2012, http://unfccc.int/files/meetings/doha_nov_2012/statements/application/pdf/04122012_cop18_hls_president_un_general_assembly.pdf. Accessed 6 May 2013 (hereinafter 2012 Jeremić Statement).

[42] 1988 Conference Statement.

[43] See 2012 Jeremić Statement.

[44] U.S. Global Change Research Program 2009.

[45] H. Kim, Keynote Speech by Prime Minister, Republic of Korea for the Seoul Pre-COP 18, 22 October 2012. http://unfccc.int/files/meetings/doha_nov_2012/application/pdf/pre_cop_opening_remarks_prime-minister_rep_of_korea.pdf. Accessed 6 May 2013.

[46] C. Hedegaard, Statement at Opening Ceremony of the High-Level Segment of COP18/CMP8, 4 December 2012. http://ec.europa.eu/commission_2010-2014/hedegaard/headlines/news/2012-12-04_01_en.htm. Accessed 6 May 2013.

[47] Maas et al. 2011, at 1.

6.3.3 Climate Crisis Framing in Academia and Civil Society

Scholars and academics have also continuously stressed the need for immediate action, utilizing the language of crisis. A 2009 conference organized by the International Alliance of Research Universities, to update the UNFCCC on research since the 2007 IPCC Assessment Report,[48] chose 'inaction is inexcusable' as one of its key messages.[49] A policy brief prepared for the 2012 Rio + 20 conference quotes the International Council for Science statement in 2010 that '[t]here is clear scientific evidence that humanity has reached a point in history at which a prerequisite for development and human well-being—the continued functioning of the Earth System as we know it—is at risk.'[50] Social scientists have engaged in the rhetoric of crisis as well. Economist Nicholas Stern, who published a report about the economic consequences of climate change in 2006, said in a 2013 interview at the World Economic Forum that he had 'underestimated the risks' in his previous report and that 'these risks for many people are existential.'[51]

Some of the most impassioned pleas about climate change have come from non-governmental organizations (NGOs). As the Doha COP came to a close in 2012, six major NGOs issued a statement, joined by the Commissioner of Climate Change of the Philippines, Chair of the African Group of Negotiators, and Chair of the Least Developed Countries Group with language as blunt as follows: '[p]eople are dying because of climate change.'[52] Concern about climate change has permeated popular culture as well, through the actions of NGOs and former US Vice President Al Gore's 2006 film, *An Inconvenient Truth*, which tellingly had the subtitle of *The Crisis of Global Warming*.[53] Al Gore and the IPCC shared the Nobel Peace Prize in 2007. In the press release explaining its decision, the Norwegian Nobel Committee wrote that it 'is seeking to contribute to a sharper focus on the processes and decisions that appear to be necessary to protect the

[48] See Intergovernmental Panel on Climate Change 2007. This IPCC report is considered to be a defining moment in the achievement of scientific consensus regarding global warming and its anthropogenic causes.

[49] Richardson et al. 2009.

[50] International Geosphere-Biosphere Programme, Rio + 20 Policy Brief #5—Planet Under Pressure, 26–29 March 2012, http://www.planetunderpressure2012.net/pdf/policy_interconissues.pdf. Accessed 6 May 2013.

[51] H. Stewart and L. Elliott, Nicholas Stern: 'I got it wrong on climate change—it's far, far worse', *Guardian*, 26 January 2013, http://www.guardian.co.uk/environment/2013/jan/27/nicholas-stern-climate-change-davos. Accessed 6 May 2013.

[52] Oxfam, Leading NGOs Make Emergency Appeal as Doha Talks are on the Brink of Disaster, 7 December 2012, http://www.oxfam.org/en/grow/pressroom/pressrelease/2012-12-07/leading-ngos-make-emergency-appeal-doha-talks-are-brink-disaster. Accessed 6 May 2013.

[53] An Inconvenient Truth: A Global Warming (2006) Paramount Pictures.

world's future climate, and thereby to reduce the threat to the security of mankind. Action is necessary now, before climate change moves beyond man's control.'[54]

6.3.4 Climate Crisis Framing and Lawyers

All of these actors influence the dynamics of law-making and the content of the law. What about lawyers themselves? When writing about climate change, lawyers in general and international lawyers as no exception do not shy from the language of crisis. For example, one American legal practitioner framed an article on regional responses to climate change in the most dramatic of crisis terms, referring to 'harms of unprecedented magnitude', listing mass extinctions of native species, death and destruction of inhabitants of polar ice caps, coastline flooding, followed by 'global mass starvation, global mass migration, economic disruption, political disruption, political unrest, revolt, and war'—doomsday terms that ultimately add nothing to the legal and institutional analysis that follows.[55] Another environmental law professor devoted roughly half of a law review article on a 'legal, political and moral frame' for global warming to descriptions of climate change's anticipated calamitous effects, repeatedly emphasizing the urgency of action that is needed at 'this pivotal moment in human history' (again, using language that has little to contribute to the analysis that follows).[56]

Much of this rhetoric belabours the point and further blurs lines between policy, advocacy and legal analysis and critique. It does not seem to be the role of lawyers, *qua* lawyers, or even of legal academics, to make such statements. To be sure, the majority of environmental legal scholarship avoids this trap, but this does not mean that a mentality of crisis does not colour their approaches.

Very differently, some international legal scholars have reflected not upon the climate change problem itself, but upon crises in international law that may be associated with global warming. Deepa Badrinarayan has recognized 'legitimacy' and 'normative' climate crises.[57] Hari Osofsky has written of crisis in the international climate change regime, albeit for different reasons, identifying a less problematic 'crisis' in the inability of many states to meet their Kyoto Protocol commitments, and a more challenging crisis in the shift from the traditional mode of international negotiation to normative interaction between geographical subunits of states, such as regions or states.[58]

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[54] Nobelprize.org, The Nobel Peace Prize for 2007, http://www.nobelprize.org/nobel_prizes/peace/laureates/2007/press.html. Accessed 6 May 2013.

[55] See Olmsted 2008, at 133–134.

[56] Wood 2007.

[57] See Badrinarayan 2011, at 22.

[58] See Osofsky 2011. Generally, this observation correlates with what I identify as opportunities for international law; it is, in fact, the birth of new mode of international law that negate the idea of crisis. See Sect. 6.6.

Both of these types of lawyers' discourse—climate change as a crisis, climate change as implying crisis in international law—suggest that global warming dominates 'the imagination of international lawyers'[59] much like a Kosovo-like crisis, even if it should not qualify as one for the reasons explained above.

What emerges, therefore, from this survey, is a continuous political and rhetorical environment of crisis, in which international law processes have been operating for the last three decades. The vernacular of crisis—'we have reached a point of decision', 'things cannot continue as they have been', 'intervention is critical', 'the time is now', 'the door is closing' etc.,—has been employed by almost every conceivable party (except the few who deny the problem's very existence), repetitively, *ad nauseum*. This is not to say that the warnings are incorrect, but have they been useful? Because at the same time, the effectiveness of international law in providing solutions for the problems of climate change has been harshly taken to task. This is a gap that requires further examination, as far as crisis—more than climate change policy—is concerned. How has the 'crisis model' affected international legal responses? And does it represent a systemic crisis for international law's capacity to address international problems of the highest degree?

Charlesworth, in her 'crisis model', outlined certain 'technical' and 'ethical' limitations or drawbacks to international law's focus on crisis. Discussing the applicability of these limitations to the legal discourse on climate change, albeit loosely, may lead to some interesting observations, or at least hypotheses, regarding the impact of crisis framing on the development of international law in this field.

6.4 The 'Technical Limitations' of Climate Crisis Framing

6.4.1 International Lawyers and the Scientific Debate

A first alleged limitation of international law's 'crisis' model is the overt assumption by lawyers that the factual elements of a crisis are undisputed, when in actuality, numerous such aspects are contested and negotiable. Charlesworth exposed this contestedness with respect to the Kosovo crisis.[60] Issues of global warming have, of course, been factually contested and negotiated among scientists for decades. Overwhelming professional and political efforts at building and substantiating scientific consensus on the scope of climate change and the role of human activity in its propagation peaked with the 2007 IPCC Report, which determined that 'warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures,

[59] See Charlesworth 2002, at 382.

[60] Ibid., at 382.

widespread melting of snow and ice, and rising global average sea level' and that 'most of the observed increase in globally-averaged temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic GHG concentrations.'[61] Nevertheless, dissent, denial and scepticism persist even in expert communities, often due to political bias, special interests and lifestyle concerns,[62] allegedly propped up by funding from fossil fuel sources.[63]

How have international lawyers functioned in these conditions of scientific contestation and public scepticism? Early in the day, lawyers were concerned about scientific uncertainty, advocating flexible international legal approaches that could take it into account.[64] And yet in reviewing the outpouring of legal literature over the last decades, one detects a far-reaching and overwhelming adoption by lawyers of the factual elements of climate change crisis, early on aligning with climate change believers and activists. Even before the 2007 IPCC Report, -so in subsequent years. A 2008 legal article begins by almost triumphantly stating that 'there is no doubt that global warming and climate change exist. It is also certain that global warming is the result of humanity polluting the atmosphere with so-called greenhouse gases … It is also without doubt that global warming poses a threat to the well-being of all living creatures.'[65] This example might be exceptionally explicit, but most legal analyses start from similar premises; indeed, it is difficult to think of an example of legal writing that is actually based on climate denial.

One might therefore surmise that international lawyers have, in this respect, behaved towards the challenges of climate change in accordance with the 'crisis model', adopting the dominant depiction of the facts despite factual uncertainty and dissent. With the benefit of hindsight, the scientific state of the art would seem to vindicate this choice as the correct one, but one can still be critical of it to the extent that it was ultimately 'an act of political interpretation',[66] like choices of narrative in a Kosovo-type crisis. International lawyers may have been right, betting on the winning horse as it were, but from where did they derive the confidence in issues that transcend their discipline, if not from the environment of crisis?

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[61] Intergovernmental Panel on Climate Change 2007, at 5 and 10, respectively.

[62] See Lefsrud and Meyer 2012. This recent study is based on survey responses of 1077 professional engineers and geoscientists associated with the petroleum industry in Alberta. Though virtually all agreed that climate is changing, views on the causes of the change where highly diverse. See also Whitmarsh 2011. This study finds that sceptical public attitudes are correlated with political and environmental values, rather than by education or knowledge.

[63] See S. Goldenberg, Secret Funding Helped Build Vast Network of Climate Denial Thinktanks, *Guardian*, 14 February 2013, http://www.guardian.co.uk/environment/2013/feb/14/funding-climate-change-denial-thinktanks-network. Accessed 6 May 2013.

[64] Weiss 1989, at 345–351.

[65] See Olmsted 2008, at 55.

[66] See Charlesworth 2002, at 382.

There is, however, a supplementary explanation for this choice, because it reflects to some extent the proactive structure of the international legal profession, as well as its vested interests. A jurist who disbelieves climate change or is agnostic about it, would generally oppose international climate change regulation, but could not base this opposition on any meaningful legal grounds. In contrast, an international lawyer who accepts global warming as fact and embraces it as crisis can proceed to discussing the design and effectiveness of international treaties or particular climate-change combating measures. It is the choice to believe that has made lawyers relevant within their discipline as well as outside of it. Moreover, it provides international law and international lawyers with the opportunity of creativity and innovation; hardly a Gramscian crisis, let alone a crisis in Charlesworth's model.

6.4.2 *Analytic Progress Despite Crisis Framing: The Micro and Macro*

A second 'technical' limitation or drawback that Charlesworth identified in the 'crisis model' of international law is what she called the 'lack of analytical progress', in which international lawyers 'rediscover an issue constantly',[67] making little reference to prior iterations of similar problems. It is on this point that once again we see how climate change as 'crisis' is different from the Kosovo-type 'international incident', *inter alia* because it is in the nature of a continuing process.[68] At the micro level, lawyers, just like other commentators, may indeed almost journalistically write and report on every UNFCC COP, counting the gains and assessing the failures[69] (each of which might be called a 'crisis' in itself), but it would be wrong to say that lessons are not learned along each step of the way. At the macro level, one might be critical of climate change lawyers because they have not carried over enough of the lessons learned in other environmental areas, such as biodiversity, another 'crisis' in which strong advocacy has produced international treaties that fail to deliver results.[70] However, this can only be partially correct, as environmentalists and lawyers are aware of the similarities, differences, and indeed strong interactions between climate change and biodiversity[71] and other environmental and non-environmental problems.

Considering the rudimentary level of international normativity that related to climate change when it became an issue of concern, international legal scholars and practitioners have displayed an outstanding capacity to think both rigorously

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[67] Ibid., at 384.

[68] See Sect. 6.1.

[69] See, e.g., Bodansky 2010.

[70] For an account of the historical development of global biodiversity from colonial times until the present, see Adam (forthcoming, 2014).

[71] See Hodas 2008.

and innovatively, together with counterparts from other disciplines, towards solutions of unprecedented sophistication. Perhaps this is because of the enormity of the challenge, because it is a complex process, not a mere event—and despite the perpetual framing of global warming as crisis.

6.4.3 Thickness, Depth and the Overreach of Crisis Framing

It would similarly be difficult to accuse international climate change lawyers of 'thin description' or 'big picture shallowness', Charlesworth's third 'technical' limitation of the 'crisis model'. Despite the surrounding rhetoric of crisis, climate change is an emerging field of international law addressing a broad range of environmental, social, economic and legal problems. International lawyers in this field do not focus on 'a single event or series of events … often miss[ing] the big picture'.[72] The 'crisis model' does not seem to apply here, as the recognition of the complex challenges posed by climate change both retains strong links to the overall environmental context, and opens the floor to debates on 'details', rather than foreclosing it.

In one respect the rhetorical environment of crisis in which international lawyers operate in the area of climate change, and in which they are themselves sometimes complicit, might have contributed to a lack of 'big picture' vision in the development of international law, as it stands today. I refer to the failure to mobilize governments (and those who elect them) to make significant and effective international commitments to mitigate global warming, particularly through emission reductions. This assertion is counterintuitive, even paradoxical. The rhetoric of climate crisis ostensibly aims at—or should have the effect of—capturing the imaginations of constituencies and provoking them to take urgent action. But crisis framing, even if justified by facts and accompanied by knowledge, can create indifference, even denial. Thus, a study of American risk perceptions related to global warming found that while the American public in general is well informed about global warming and considers it to be a serious problem, the majority 'does not currently consider climate change an imminent or high-priority danger. Instead, most Americans currently believe that the impacts of climate change will have moderate severity and will most likely impact geographically and temporally distant people and places or nonhuman nature.'[73] Another cross-nation study of public perceptions in forty-seven states surprisingly found that 'people from countries relatively more exposed to climate-related natural disasters are less concerned about global warming'.[74] Media experts have criticized the counterproductive effects of alarmist messages, as 'climate porn',

[72] See Charlesworth 2002, at 384.

[73] See Leiserowitz 2005.

[74] See Kvaløy et al. 2012.

which conveys that 'the scale of the problem as it is shown excludes the possibility of real action or agency by the reader or viewer. It contains an implicit counsel of despair—"the problem is just too big for us to take on".'[75] Fearful images of climate change have been shown to be counterproductive in encouraging action, whereas non-threatening imagery can be more effective.[76]

Could something similar be going on at the international level of law and negotiations, with governments and officials perpetually reminded—for more than three decades—of the urgent need to take international action in the face of crisis, simply overwhelmed by the challenge, and developing denial mechanisms that reduce the willingness to take effective concerted action? Has crisis-talk over-reached itself in its goals of stoking international legal and regulatory action? This is of course merely a hypothesis, but a tantalizing one, as it would suggest that (successful) crisis framing is less constructive for effective international law than more mundane constructions—crisis as decoy rather than catalyst for international legal development. However, attributing the difficulties in achieving progress on emission commitments within the UNFCCC process to the 'crisis model' would disregard the actual political economy issues that make progress arduous, if not impossible.[77] Moreover, while these difficulties are certainly in the international public spotlight, focusing on them would in itself be a 'thin' description of international legal efforts in response to climate change, that are much more diverse and complex, involving actions and debate in areas of trade, investment, energy, migration, health and more; the birth of new responses is not immediate, but it is taking shape.

Overall, then, with respect to the 'technical limitations' imposed by the 'crisis model' it appears that the crisis framing of global warming has not led international law into Kosovo-like traps. Indeed, the possibility that crisis framing has not led to such unintended consequences and opportunities, leads us into a discussion of the more substantive aspects of the development of international climate change law and policy, within the frame of what Charlesworth calls the 'ethical limitations' of the crisis model, that supposedly 'divert attention from structural issues of global justice'.[78]

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[75] See G. Ereaut and N. Segnit, Warm Words: How are We Telling the Climate Change Story and Can We Tell it Better? August 2006, at 7, http://www.ippr.org/images/media/files/publication/2011/05/warm_words_1529.pdf. Accessed 6 May 2013.

[76] See O'Neill and Cole 2009. See also Moser and Dilling 2010.

[77] Mattoo and Subramanian sum up these reasons, at the international level, quite nicely. 'International negotiations on climate change have been dogged by mutual recriminations between rich and poor countries, constricted by zero-sum arithmetic of a shrinking global carbon budget, and overtaken by shifts in economic and hence bargaining power between industrialized and developing countries.' Mattoo and Subramanian 2013, at 2.

[78] Charlesworth 2002, at 382.

6.5 The 'Ethical Limitations' of Climate Crisis Framing

6.5.1 An Increasingly Broad, Not Narrow, Climate Agenda for International Law

Charlesworth argued that the 'crisis model' of international law promotes a narrow agenda, presenting the task (and here one might ask if it is only the task of international lawyers?) of 'a straightforward if agonizing, choice between two competing principles', as exemplified by the Kosovo debate regarding the conflict between the prohibition on the use of force, on one hand, and the protection of human rights, on the other.[79] Climate change, with its overarching crisis framing, has presented international lawyers with multiple temptations for narrowing the legal agenda in analogous ways. Nevertheless, these have been foregone, and the international legal agenda relating to climate is anything but narrow. Two examples stand out, although they are hardly exclusive. The first is the tension between international trade liberalization and climate change measures. The second is the relationship between the paths of climate change mitigation and climate change adaptation under international law.

Trade rules, particularly those of the World Trade Organization (WTO), on one hand, and climate change measures, whether of a unilateral nature or internationally sanctioned (e.g., under the Kyoto Protocol) might be seen to be in conflict. Superficially, they can be depicted as if in a stand-off as dramatic and crisis-prone as the use of force and human rights in Kosovo: should the various restrictions and prohibitions under the rules-based WTO be upheld and respected, or should the fate of the planet and the values of sustainable development take precedence? The 'crisis-model' narrative in this respect would be as follows. In substance and practice, a chief obstacle to collective action through binding and effective emission reduction commitments under the UNFCCC system has been trade-related—the concern that the costs imposed on industries due to climate mitigation policies will be detrimental to their international economic competitiveness.[80] Moreover, it is argued that this harm would not contribute to climate-change mitigation due to 'carbon leakage', as the production-related emissions simply shift from one jurisdiction to another, along with jobs and profits.[81] In the absence of a comprehensive agreement, more proactive mitigating states must protect their own interests as well as the effectiveness of mitigation efforts.

Thus the specter of imposition of process-based or otherwise carbon content-linked 'border tax adjustments' (or BTAs) is raised. Such measures might be WTO inconsistent, and trade disputes would ostensibly force the WTO into a kind of crisis, as panels and the Appellate Body (AB) would (so the story goes) inevitably

[79] Ibid., at 386.

[80] Pauwelyn 2012.

[81] See Low et al. 2011.

have to uphold trade rules at the expense of climate change mitigation efforts. Hence, warnings are issued that unilateral climate change measures are wasteful, ineffective and damaging to international trade.[82] Even in the multilateral context, rules on selectivity in emissions trading under the Kyoto Protocol (or similarly designed successor arrangements) might also run afoul of WTO rules,[83] accentuating the crisis as one of fragmentation in international law.[84]

As noted above,[85] it is beyond the scope and purpose of this article to consider the substance of international climate change law; hence, no analysis of the trade/climate relationship will be proffered here. However, even without doing so, it is clear that a much more nuanced engagement between international trade law and climate change has emerged, to the point of setting aside the 'crisis model'.

First, with respect to BTAs themselves, as well as other related 'unilateral' measures, significant attention has been devoted by scholars and policymakers to consideration of ways in which BTAs could be designed to conform with trade rules, without sacrificing their effectiveness.[86] In other words, conflict might arise, but it is neither inherent nor inevitable, and should not present a 'crisis', but rather part of the process of development of international law in contested circumstances.

Second, more generally with respect to the relations between the WTO and multilateral climate change measures, including the UNFCC regime, many in-depth studies have concluded that conflict is only one dimension of the relationship. Thus, it has been noted that 'the missions and objectives of the two regimes are largely compatible, and their operations are potentially mutually reinforcing in several respects', and indeed that 'the relative newness of the climate regime creates opportunities for institutional adaptation, as compared with the constraints of tradition in the trade-investment regime.'[87] In a break with prior institutional wisdom, whereby reconciliation of trade and environmental issues require negotiation, the newly selected WTO Director-General, Brazilian Roberto Azevedo, has publically opined that existing trade rules might be sufficient to address the complexities of climate change.[88]

Third, the international trade agenda regarding climate change is much wider than might have been thought. Thus, disputes have already arisen regarding local content requirements in feed-in tariff programs regarding alternative energy

[82] James 2009.

[83] See Voigt 2008.

[84] Van Asselt et al. 2008.

[85] Section 6.1.

[86] See, e.g., Genasci 2008; Horn and Mavroidis 2011 (the latter contribution suggests BTAs can be WTO-consistent, but might not be effective).

[87] Brewer 2002, at 1–2. See also Messerlin 2010.

[88] International Centre for Trade and Sustainable Development. Climate Change, Energy Access, and Security, http://ictsd.org/publications/latest-pubs/dg2013/climate-change-energy-access-and-security/. Accessed 6 May 2013.

sources aimed at climate change mitigation, and definitions of subsidies in the WTO context have been flexibly interpreted in ways that divert onward collision.[89] Various forums have floated ideas of a sustainable energy trade agreement for promoting low-carbon growth,[90] and even the WTO has recently overcome traditional apprehensions by placing energy on its plate.[91]

This is hardly a narrowing of the agenda in 'crisis' mode, but rather a serious and constructive broadening of the range of issues and interactions in which international law can contribute to responses to global warming.

Another potential binary choice in international climate change law and policy (to be only briefly noted here) can be found in the mitigation versus adaptation debate. In the past, this discussion was clearly coloured by crisis framing, and efforts at mitigation were considered by many to be mutually exclusive to adaptation. Thus, adaptation was paid only lip service. J.B. Ruhl explains that at least in the United States—but this is an indication of the international level as well—climate change adaptation policies were not discussed in any depth in the 1990s, mainly for fear that the promise of adaptation would detract from the sense of urgency that was required in order to effectively muster governmental resolve need for mitigation policies.[92] However, Ruhl, like many others, also describes a growing understanding that the two avenues should be pursued in parallel. More formally, adaptation is increasingly placed upon international negotiation agendas, such as a preparatory brief for the Rio + 20 conference that mentions the need for adaptation, because complete mitigation of climate change is no longer possible.[93] The differential adaptation responsibilities of economies at different stages of development are seriously discussed by lawyers.[94] Calls are issued for a UNFCCC protocol or other legal arrangement on adaptation.[95] Mitigation through emission regulation is no longer the only focal point. Adaptation is an increasing concern for international lawyers.

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[89] World Trade Organization, DS412, DS426: Canada—Certain Measures Affecting the Renewable Energy Generation Sector, 6 May 2013, http://www.wto.org/english/news_e/news13_e/412_426abr_e.htm. Accessed 6 May 2013.

[90] International Centre for Trade and Sustainable Development, Fostering Low Carbon Growth: The Case for a Sustainable Energy Trade Agreement, November 2011, http://ictsd.org/i/publications/117557/?view=document. Accessed 6 May 2013.

[91] World Trade Organization, Workshop on the Role of Intergovernmental Agreements in Energy Policy, 29 April 2013, http://www.wto.org/english/tratop_e/envir_e/wksp_envir_apr13_e/wksp_envir_apr13_e.htm. Accessed 6 May 2013.

[92] Ruhl 2010, at 367–369. See also Schipper and Burton 2009.

[93] International Centre for Trade and Sustainable Development, Climate Change, Energy Access, and Security, 2012, at 7, http://ictsd.org/publications/latest-pubs/dg2013/climate-change-energy-access-and-security/. Accessed 10 May 2013.

[94] Farber 2013a.

[95] Puthucherill 2012.

Again, despite the crisis framing, the agenda for international law is not narrowed, but broadened, and new opportunities for contributions of international law are apparent.

6.5.2 Which 'Heroic Mission'? What Silences?

Two additional dimensions of Charlesworth's 'crisis model' of international law beg combined discussion in the context of international lawyers' involvement with global warming. The first is the idea that crisis framing encourages international lawyers to cast themselves 'grandly in an heroic mould', as 'tough humanitarians capable of pragmatic yet principled responses to restore freedom and order'.[96] The second is that crisis framing diverts our attention from 'the politics of everyday life' to a preoccupation with 'the public realm of war and conflict and violence', at the expense of more silent 'longer-term trends and structural trends' such as gender, development, health and the 'perspectives of non-elite groups'.[97]

When read against the backdrop of climate change, these contentions become somewhat perplexing. Of course lawyers who research, write, advocate and negotiate climate change are passionate about the global environment. As we have seen above,[98] it is this fervency that has served to connect international lawyers to the scientific knowledge of global warming, from an early stage. This does not necessarily derive from crisis, or crisis-framing, but from the obvious importance and complexity of the issues. Should climate change lawyers at the international level be more technocratic, less absorbed in the overarching problematique of the field? Moreover, global warming is in itself a long-term trend, and its underlying political issues—primarily the balance of economic development between established, developed countries, on one hand, and emerging, developing countries, on the other hand—are significant structural realities in international affairs. In true crisis framing mode, Kofi Annan has said that 'the deathly silence of this crisis is a major impediment for international action to end it',[99] but all the issues that Charlesworth complained as being sidelined to the periphery of international legal attention due to the 'crisis model'—sustainable development, health, underprivileged and vulnerable groups such as poor coastal residents—actually lie very near the core of climate change law. To be sure, gender issues and specifically the effects of climate change and climate change policies upon women has not been

[96] Charlesworth 2002, at 387–388.

[97] Ibid., at 388–391.

[98] Section 6.4.1.

[99] See Global Humanitarian Forum Human Impact Report, Climate Change: The Anatomy of a Silent Crisis, 2009, http://www.ghf-ge.org/human-impact-report.pdf. Accessed 6 May 2013.

sufficiently taken into account in international negotiations,[100] but this is at least in part because 'it is fair to say that academics, gender and development practitioners, and women's rights advocates are still only starting to grapple with [climate change's] many gender dimensions',[101] thus not particularly a problem of international law.

Moreover, had the Kosovo-style crisis model fully applied to international legal responses to climate change, one might have expected international law to succumb to the temptation of 'securitization'—a focus on war and conflict. Climate crisis framing has contained elements of such a trend since its earliest days—the 1988 Conference Statement in Toronto did not hesitate to pronounce that 'humanity is conducting an unintended, uncontrolled, globally pervasive experiment whose ultimate consequences could be second only to a global nuclear war'.[102] Commentators have noted elements of securitization and militarization in international relations scholarship's approaches to the threats of climate change.[103] Politicians have argued that global warming should be recast as a security issue in order to gain support for GHG emission reductions.[104] Not unrelatedly, the apocalypse of global water wars is regularly raised by media and civil society,[105] and climate refugees are depicted as security threats on the backdrop of potential 'climate conflict', in ways that to some critics threaten to distort climate policy.[106] Nevertheless, while these issues and security dimensions are incorporated into the discourse, they do not appear to have hijacked the work of the international climate change law community, despite the 'crisis model'.

6.5.3 *The Unrestricted Substance of International Climate Change Law: From Multilateralism to Multilevel Engagement*

The final 'ethical limitation' posed by the 'crisis model' of international law, according to Charlesworth, is its supposed effect of restricting the substantive principles of international law, for example, through confining the responsibility

[100] See Skutsch 2002. Gender dimensions of climate change may stem, inter alia, from the centrality of women as primary providers, and users of energy in developing country households and elsewhere, implicating both a relative responsibility for emissions and a vulnerability to change.

[101] See Terry 2009.

[102] 1988 Conference Statement.

[103] Ahmed 2011.

[104] A. Doyle, Climate Change Called Security Issue like Cold War, *Reuters*, 21 August 2007, http://www.reuters.com/article/2007/08/21/us-climate-security-idUSL213921720070821. Accessed 6 May 2013.

[105] Katz 2011.

[106] Hartmann 2010.

for maintaining security to state actors, while ignoring the contributions of non-state actors to insecurity.[107] If applied to climate change, one might construct a similar narrative, in particular with respect to state-led multilateralism and its perceived failure.

As already described, climate change is considered a paradigmatic collective action challenge, or as the 1988 Conference Statement put it, 'no country can tackle this problem in isolation'.[108] This focus on states' cooperation within multilateral frameworks has had a profound impact on the design of the UNFCCC process and assessments of its effectiveness. Despite the rhetoric of crisis, the UNFCCC regime has arguably had only modest success to date—a chief failure being the absence of significant players such as the United States from the Kyoto Protocol, with its 'top down' architecture of establishing firm commitments to certain policies and measures.[109] States that have adhered to the Kyoto Protocol face difficulties in meeting their commitments.[110] Looking ahead, the COP 18 meeting in Doha confirmed the group's 2011 agreement to negotiate, by 2015, a treaty that will enter into force in 2020,[111] but doubts abound, despite the opinion of the IPCC whereby 'the scientific consensus *requires* major emissions reductions to begin by 2015, or it will be impossible to stay within the target two degree limit.'[112] There are multiple possible explanations for this failure: countries are concerned about an inequitable allocation of costs and fear that others will free-ride off their efforts;[113] they are hesitant to make current sacrifices for uncertain future gains;[114] and as already noted, the complexity of climate science means that their citizens may not be convinced of the seriousness of the problem.[115] Moreover, it may be the case that high expectations have been set for this multilateral process, and that these expectations spur a vicious cycle that 'paint[s] international agreements as perpetual failures, providing ammunition for the interests that oppose any form of international environmental regulation.'[116]

Here one might detect shades of the 'restricted substance' complaint *vis-à-vis* international law: it has focused on state responsibilities and commitments in top-down, multilateral processes that are rife with political economy problems that prevent success. However, this would be a very thin reading of international law's engagement with climate change, which has significantly relaxed the multilateral,

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[107] Charlesworth 2002, at 390.

[108] 1988 Conference Statement.

[109] See Bodansky 2011.

[110] See also Schenck 2008, at 333. Even nations that did sign on to the Kyoto Protocol and support it have had trouble meeting their obligations.

[111] Moomaw 2013, at 111.

[112] Ibid., at 112.

[113] Schenck 2008, at 328.

[114] Ibid., at 346.

[115] Ibid., at 337.

[116] Vihma and Van Asselt 2012, at 3.

all-or-nothing framework. It is increasingly thought that 'successful international action will depend on the ability to require common action even in the absence of consensus among states.'[117] In recent years, international negotiation outcomes such as the Copenhagen Accord have encouraged greater 'bottom up' approaches that allow parties to define their commitments and actions unilaterally.[118] There is certainly still an important role for the UN in such a system, as an 'orchestrator' of public and private actors,[119] but within a more flexible and multidimensional framework. Earlier near-heretic queries asking 'what's so bad about unilateral action to protect the environment?'[120] have been revived and put into action. Although conventional wisdom has held that governments would be unwilling to take unilateral action on climate change without comprehensive international agreement, many states unilaterally passed climate change-related legislation in 2012.[121] Significant mitigation actions are taken at the sub-global and indeed sub-national levels (such as cities), making climate change no more only an 'international' problem with multilateral solutions, although not detached from the international level, but rather as part of transnational legal process.[122] Ideas of multilevel climate governance,[123] 'minilateralism'[124] and 'multiscalar' governance[125] are openly discussed as augmentations and substitutes to the traditional multilateral prototype.

The restrictedness of the 'crisis model' seems to have been broken with respect to climate change. Indeed, these developments pose a challenge to outdated Westphalian constructions of international law, but rather than crisis, it appears that they present significant opportunities for the development of international law.

6.6 Conclusion: Crisis and the Opportunities of International Law

Almost two decades ago, Colin Hay wrote that

> '[c]risis', whether environmental or ecological, ecosystemic or ecoregional, is perhaps the most ubiquitous concept deployed within the burgeoning environmental and ecological literature. Despite, or perhaps because of, this pervasiveness, it remains one of the most

[117] Bodansky 1999, at 607.

[118] Bodansky 2011.

[119] Vihma and Van Asselt 2012, at 8.

[120] Bodansky 2000.

[121] Climate Change Laws: Beginning at Home, The Economist, 19 January 2013, http://www.economist.com/news/international/21569691-domestic-laws-not-global-treaty-are-way-fight-global-warming-beginning-home. Accessed 6 May 2013.

[122] See Osofsky 2009; Farber 2013b.

[123] Rabe 2007.

[124] Eckersley 2012.

[125] Osofsky 2010.

> illusive, vague, imprecise, malleable, open-ended and generally unspecified concepts within both the theoreticians' and the ecologists' armoury. Indeed, the more one ponders this, the more it seems likely that the term's ubiquity derives precisely from its notorious imprecision.[126]

Nevertheless, the framing of global warming as global environmental crisis has, without doubt, had significant and complex effects on the development of international legal responses to climate change, and therefore on the characterization of contemporary international law.

The Kosovo-type 'crisis model' has not crystallized, however, in either its technical or ethical limitations; indeed, international law on climate change has eschewed many of the temptations that the 'crisis model' would have created. Elements of a 'crisis model' can be identified in international responses to global warming, but they have transcended it and are evolving in much more complex and textured ways.

On the one hand, as we have seen, crisis has served as a diversion and a decoy. The continuous pressure exerted for urgent and exceptional action at the multilateral level has led to acrimony between states, indifference and denial among important constituencies, and ultimately to weak arrangements within conventional intergovernmental models. Evidently, even a successful construction of crisis is not sufficient to overcome psychological and political barriers to cooperation. This, in turn, has led to an impression of constant failure which in itself poses a challenge, though not a crisis, to the normative and prescriptive capacity of traditional international law-making.

On the other hand, crisis framing has proved to be a catalyst, but in unintended ways. Over time, it has legitimated sub-global and unilateral action, as well as localized legal responses. It has led to sophisticated yet plausible reconciliations between climate concerns and other areas of international law, such as (primarily) international trade. It has promoted reconsiderations of initial choices—that were themselves taken on the backdrop of crisis framing—such as between mitigation and adaptation.

Thus, we see an almost dialectical reversal of the Gramscian depiction of historical crisis.[127] The old has not yet died—indeed, it is still necessary however ineffective it might be when taken on its own—but the new is being born, slowly and not without pain. The emergent outcome will be a multi-dimensional, multipolar international law that interacts with law, both hard and soft, at multiple levels. These are the crisis opportunities of international law, and they are not limited to climate change; just as crisis is ubiquitous, so is opportunity.

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[126] Hay 1996.

[127] Gramsci 1992.

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Chapter 7
Between Crisis and Complacency: Seeking Commitment in International Environmental Law

Karin Mickelson

Abstract Crisis has played a significant role in international environmental law since its inception. To some extent the field as a whole might be characterized as a 'discipline of crisis', since it functions as a counterbalance to unbridled pollution and resource depletion. On the other hand, there have been ongoing attempts to move away from a reactive focus on crisis and to conceptualize international environmental law as part of a broader societal shift toward sustainability. The dilemma that faces the discipline is that in the absence of a sense of crisis, we are unsure of how to generate the commitment that will be required to undertake fundamental changes to the *status quo*.

Keywords International environmental law · Crisis · Sustainability · Climate change · Ozone depletion · North–South relations

Contents

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7.1 Introduction

Invocations of crisis, if not full blown catastrophe, have loomed over the field of international environmental law and policy since its inception. To some extent the field as a whole might be characterized as a 'discipline of crisis', to use Hilary Charlesworth's thought-provoking term,[1] since its very *raison d'être* was, and to a considerable extent continues to be, to function as a counterbalance to unbridled pollution and resource depletion. On the other hand, there has also been consistent and ongoing pressure to move beyond the short-term and reactive approach that a crisis mentality often entails, and to conceptualise international environmental law as one of the underpinnings of a broader societal shift toward sustainability.

However, the discipline faces a fundamental dilemma with regard to crisis. While recognising its limitations, international environmental lawyers fear that in the absence of a sense of crisis, we are doomed to complacency in the face of ongoing and worsening environmental degradation. A commonly held view seems to be that environmental concerns such as climate change, biodiversity loss, or desertification, all of which might be said to meet the criteria to constitute crises by most definitions, nonetheless lack the drama of the so-called 'hole in the pole' that supposedly galvanised the international community to undertake meaningful action on ozone depletion. It may well be that scholars in many fields of international law lament the lack of a sense of crisis to heighten the awareness of the distinctive challenges they perceive. In the case of international environmental law, however, the stakes may be exceptionally high. The image of a frog sitting in a pot of water that is slowly but surely coming to a boil encapsulates the fears of many working in this field: that unless and until we can ensure sustained attention, concern and the political will to take action, humanity is doomed to environmental collapse, taking many of the species and ecosystems of the planet down along with us.

This raises a number of questions. Do we need crisis—or at least a perception of crisis—in order to react in a meaningful and far-reaching way? If so, is international environmental law a 'discipline in search of a crisis' rather than a 'discipline of crisis'? And in the absence of crisis, how can we generate the sense of commitment that will be required to make the fundamental changes that will ensure long-term sustainability?

[1] Charlesworth 2002.

In this chapter, I explore the role that crisis played in the origins of international environmental law and policy, and show how the field has attempted to move beyond its initial preoccupation with crisis by focusing on the linkage between environment and development. Next, I consider whether, despite these attempts to shift the focus, a perception of crisis has played an essential role in galvanizing international action on particular environmental issues, and whether a lack of a sense of crisis has in turn stymied attempts to address other, equally compelling problems. Finally, I consider the relationship of crisis to the commitment that is necessary in order to address the pressing environmental challenges currently facing the international community.

7.2 Crisis in International Environmental Law and Policy

7.2.1 The Use (and Abuse) of Crisis in Environmentalism

Professor Charlesworth identified a number of pitfalls of a disciplinary focus on crisis, arguing that it is both technically and substantively limited.[2] She did not devote attention to the potential benefit of crisis in catalysing action, perhaps because this might be said to lie outside the disciplinary boundaries of international law itself. After all, one could argue that *why* states act is by and large the question that preoccupies international relations scholars; international lawyers tend to be more concerned with *how* they act. International environmental lawyers, however, cannot afford to draw a neat distinction between 'why' and 'how'; the answer to the former sometimes dramatically constrains the latter. And so we often find ourselves circling back to the question of what motivates state (and non-state) action on environmental concerns, seeking to understand both the limitations of those motivations and how they might be entrenched and expanded.

From that perspective, a sense of crisis can have significant advantages. It can make a problem seem more immediate and real, and highlight the dangers of maintaining the *status quo*. As Killingsworth and Palmer point out, invoking a sense of environmental crisis can be used 'to win the hearts and minds of the general public at crucial historical periods in which the need is perceived to extend and broaden commitments to … environmental movements.'[3] Environmentalism in its early days was certainly well aware of this potential and often presented environmental problems as actual or looming crises. One notable example was Rachel Carson's *Silent Spring*, published in the early 1960s and often cited as a critical milestone in the emergence of environmentalism in North America.[4]

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[2] Ibid., at 382.

[3] Killingsworth and Palmer 1996, at 22.

[4] Carson 1962. For an insightful appraisal of Carson's impact, see e.g. Killingsworth and Palmer 1996, at 27–32.

While Carson engaged in a thorough and thoughtful evaluation of the dangers of DDT (organochlorine insecticide), it is doubtful whether the book would have had anywhere near the same impact on the public were it not for the stark image of a world devoid of bird song evoked by the book's title.[5] The fledgling environmental movement also drew significant support and inspiration from anti-nuclear activism, which made the possibility of catastrophic harm central to its public message. And as the decade wore on, disasters such as the Torrey Canyon oil spill in 1967 underscored the vulnerability of nature to anthropogenic disaster.

A sense of crisis had a direct impact on the evolution of international environmental law as a distinct subdiscipline of international law, a development that is often traced to this time period, during the process leading up to and following the United Nations Conference on the Human Environment held in Stockholm in 1972. That Conference, the first global gathering on the environment, was marked by the sense of an urgent need to respond to the emerging challenges posed by both pollution and resource depletion. When the UN General Assembly decided to convene the conference, it noted that 'the relationship between man and his environment is undergoing profound changes in the wake of modern scientific and technological developments', and emphasized its awareness that 'these developments, while offering unprecedented opportunities to change and shape the environment of man to meet his needs and aspirations, also involve grave dangers if not properly controlled.'[6] The Stockholm Declaration that was one of the main outcomes of the Conference was more pointed:

> A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well being depend.[7]

While presenting environmental problems as crises contributed to the emergence of broad-based environmental awareness and concern, and to global responses, there are drawbacks to this approach that were also apparent from those same early years of the environmental movement. Perhaps the most significant problem with the language of crisis is that it often leads to a limited focus on particular aspects of a complex problem, which can both eclipse other aspects of the problem and lead to a narrow understanding of how best to address it. This is consistent with what Professor Charlesworth terms 'thin description': her suggestion that a focus on crises 'leads us to concentrate on a single event or series of

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[5] And elaborated upon in Carson's 'A Fable for Tomorrow'; see Killingsworth and Palmer 1996, at 29–30. It is doubtless true that Carson's far-reaching claims regarding the impact of DDT also accounted for some of the extremely hostile reception that her work received in some quarters, but that reaction may itself have played a useful role in focusing public attention and concern on the hazards associated with widespread and intensive pesticide use.

[6] UNGA Res. 2398 (XXIII), 3 December 1968.

[7] Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), Report of the United Nations Conference on the Human Environment, 21st plenary meeting, A/CONF.48/14/Rev.1, 16 June 1972, preambular para. 6.

events and often to miss the larger picture.'[8] More importantly, however, it dovetails closely with her concern that a focus on crises 'diverts attention from structural issues of global justice.'[9] In the environmental context, this translates into the danger of assuming that the particularly 'environmental' aspects of a problem can be isolated from a broader set of social, political and economic considerations. In fact, from the early days of international environmental law and policy, there have been significant—and often deeply contentious—debates regarding the proper relationship between 'strictly environmental' concerns and concerns about social justice and human development. Debates between the global North and global South have often run along these lines, and these have frequently extended beyond the inter-state arena to encompass civil society and scholars.

7.2.2 Differing Perspectives on Environmental Crisis

These contrasting perspectives are illustrated by the work of two groups of researchers examining the future prospects of humanity in the late 1960s and early 1970s. The first was the well-known world model developed by a research group based at the Massachusetts Institute of Technology (MIT) and sponsored by the Club of Rome as part of its ambitious 'Project on the Predicament of Mankind'. Starting around 1970, the MIT group's 'World 3' model began to be discussed at meetings organized around the world. The title of the first report, *The Limits to Growth*, published in 1972, summed up its warning: 'If the present growth trends in world population, industrialization, pollution, food production, and resource depletion continue unchanged, the limits to growth on this planet will be reached sometime within the next one hundred years.'[10] As a necessary response to the urgency of the crisis facing the international community, the report's radical proposals called for an end to economic growth, as well as worldwide population stabilization. Despite its bleak analysis of human prospects if prevailing trends were to continue unchecked, the report was nevertheless optimistic about the possibilities of establishing a state of 'global equilibrium', in which the basic needs of all people on earth could be satisfied through redistribution.

When an early version of the model upon which the report was based was presented in Rio de Janeiro in 1970, a group of Latin American researchers in attendance decided that an alternative model was essential. The Fundación Bariloche, a research institute based in Bariloche, Argentina, took on this task. If the Club of Rome project was premised upon the notion of presenting an objective set of projections based on the continuation of present trends, the Latin American World Model was 'explicitly normative,' as its final report, published in 1974,

[8] Charlesworth 2002, at 384.

[9] Ibid., at 382.

[10] Meadows et al. 1972, at 23.

makes clear that '[i]t is not an attempt to discover what will happen if present trends continue but tries to indicate a way of reaching a final goal, the goal of a world liberated from underdevelopment and misery.'[11]

The authors' fundamental critique of other models is that they err in perceiving the major problems facing international society as physical rather than socio-political:

> These problems are based on the uneven distribution of power, both between nations and within nations. The result is oppression and alienation, largely founded on exploitation. The deterioration of the physical environment is not an inevitable consequence of human progress, but the result of social organizations based largely on destructive values.[12]

The authors point out that while some models predict catastrophe on a world scale in the future, catastrophic conditions 'are already a reality for the majority of mankind … To correct this situation must be the top priority of any vision of the world and its future.'[13] And while *Limits* seems to assume the need to stabilize first, and redistribute later, the Latin American model insists on the need to begin by ensuring an acceptable standard of living for all:

> Any policy of protection of the environment, including a reduction in the consumption of natural resources, will be difficult to implement effectively on a world scale until each and every human being has attained an acceptable standard of living. It would be absurd to ask the people of the vast, poor regions of the world—most of whom exist at or near subsistence levels—to worry about the distant future, given their present meagre levels of consumption.[14]

A comparison of World 3 and the Latin American World Model reveals the extent to which there have always been striking differences of perception regarding both the nature of environmental crisis, and how that crisis ought to be addressed.[15] While it would be misleading to simply equate the Latin American World Model with the 'Southern' point of view,[16] its emphasis on the interconnections between environmental and human well-being has been a distinguishing feature of the approach taken by many Southern commentators since the early days of international environmental law and policy. For example, many accounts of the Stockholm Conference on the Human Environment have focused on the tension

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[11] Herrera et al. 1976, at 7.

[12] Ibid., at 7–8.

[13] Ibid., at 24.

[14] Ibid., at 24–25.

[15] Unfortunately, they did not reach the same audience. Despite the many criticisms aimed at the MIT model, commentators generally agree that it succeeded in raising public awareness and concern regarding human impacts on the global environment. In contrast, the Latin American World Model never achieved a similar level of public exposure, although it was discussed within the United Nations system and in a number of developing countries. See Gallopin 2001, at 83.

[16] As Gilberto Gallopin puts it, the LAWM was 'a response from the South (I would like, but it would be perhaps presumptuous, to call it "by the South")'. Gallopin 2001, at 79.

between the First World and the Third World with regard to whether and how environmental concerns were relevant to developing countries. Scholars have traced the ways in which forging some consensus regarding the relationship between environment and development was an important part of the preparatory process for the Conference, and was woven into the Stockholm Declaration on the Human Environment and other conference outcomes.[17] This relationship had clear and important implications for how to understand the 'crisis' facing the international community. Indira Gandhi's statement at the Conference is often quoted as a reflection of Third World views on environmental issues at the time, and one passage in which she sums up the challenges facing the international community reflects both her acceptance of the urgency of the problem and her sense of the type of response that might be required:

> It is clear that the environmental crisis which is confronting the world will profoundly alter the future destiny of our planet. No one among us, whatever our status, strength or circumstance, can remain unaffected. The process of change challenges present international policies. Will the growing awareness of 'one earth' and 'one environment' guide us to the concept of 'one humanity'? Will there be a more equitable sharing of environmental costs and greater international interest in the accelerated progress of the less developed world? Or will it remain confined to a narrow concern, based on exclusive self-sufficiency?[18]

The invitation to view the environmental crisis as an opportunity to affirm human solidarity may not have been completely embraced by those present at the Stockholm Conference,[19] but it left an indelible mark on the Conference outcomes. From the outset, the interface between environmental and developmental concerns was an important element of the emerging field of international environmental law.[20] However, it took more than a decade for that interface to be understood as the conceptual core of the discipline.

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[17] See e.g. the discussion of the Founex Meeting on Environment and Development in Mickelson 2000, at 60–63.

[18] Gandhi 1972, at 37.

[19] It was certainly consistent with the view expressed by other developing country spokespersons at the Conference, some of whom had very specific suggestions for how the linkage between environmental and social concerns might be woven into the fabric of international policy. The chair of the delegation from the Philippines, for example, took the opportunity to raise the issue of human settlements in view of the experience of mass migration from rural to urban regions. She expressed the view that the Environment Fund that was being debated at the Conference should include a human settlements component, pointing out that 'a major goal should be rural renewal and regeneration, the establishment of new "growth poles" around adequate human settlements sustained by carefully planned, environmentally acceptable industries and enriched by systematically fostered educational, health and cultural facilities.' Benitez 1972, at 56.

[20] For example, 'Environment and Development' was identified by the United Nations Environment Programme (UNEP) Governing Council as a subject of high priority at its very first session in 1973.

7.2.3 From Crisis to Sustainability

The linkage between environment and development achieved visibility and heightened conceptual importance in the 1980s through the work of the World Commission on Environment and Development (chaired by Gro Harlem Brundtland of Norway, and often referred to as the Brundtland Commission), which was established in 1983 and presented its report, entitled *Our Common Future*, in 1987.[21] The Commission was established as part of the process to develop an 'Environmental Perspective to the Year 2000 and Beyond', the overall purpose of which was not only to 'propose long-term environmental strategies for achieving sustainable development' but also to

> help to define shared perceptions of long-term environmental issues and of the appropriate efforts needed to deal successfully with the problems of protecting and enhancing the environment, a long-term agenda for action during the coming decades, and aspirational goals for the world community.[22]

The Commission's mandate, then, went beyond the formulation of technical proposals; it was also designed to engage in an in-depth examination of the relationship between environment and development, and to help forge a common understanding of how to move beyond the limitations of the prevailing model.

The Commission engaged in extensive consultations, holding public hearings around the world. What emerged from that process was a clear sense of the shortcomings of mainstream understandings of both environmental and developmental policy. With regard to the former, the Commission noted that environmental policies in most countries 'are directed at the symptoms of harmful growth', and that while such approaches may be necessary, they are not sufficient:

> [O]ur environmental management practices have focused largely upon after-the-fact repair of damage: reforestation, reclaiming desert lands, rebuilding urban environments, restoring natural habitats, and rehabilitating wild lands. The ability to anticipate and prevent environmental damage will require that the ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, and other dimensions.[23]

The Commission was no less critical of the prevailing approach to development, pointing out that 'many present development trends leave increasing numbers of people poor and vulnerable, while at the same time degrading the environment', and asking '[h]ow can such development serve next century's world of twice as many people relying on the same environment?'[24] This in turn led the Commission to a new and broader understanding of development:

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[21] World Commission on Environment and Development 1987.

[22] UNGA Res. 38/161, 19 December 1983.

[23] World Commission on Environment and Development 1987, at 39.

[24] Ibid., at 4.

> We came to see it not in its restricted context of economic growth in developing countries. We came to see that a new development path was required, one that sustained human progress not just in a few places for a few years, but for the entire planet into the distant future. Thus 'sustainable development' becomes a goal not just for the 'developing' nations, but for industrial ones as well.[25]

This passage is worth emphasising because it highlights the fact that what is now at least to some extent taken for granted—that sustainability is a goal for all human societies—was then perceived (or at least characterized) as somehow novel.[26] In particular, the notion that the global North also needed to incorporate notions of sustainability into its economic and political decision-making was presented as an important aspect of the Commission's recommendations.[27]

The Commission's proposals were intended to move beyond 'crisis' or reactive thinking, and to formulate forward-looking and proactive approaches. Jim MacNeill, Secretary General of the Commission, recently noted, '[i]n 1972, we all, in effect, took a huge aspirin to treat the symptoms of our environmental headaches (and feel better, at least temporarily), but we did nothing to address the causes of our multiple and growing environmental maladies.'[28] Picking up on MacNeill's metaphor, one might say that the Commission was entrusted with the task of diagnosing those underlying causes, but was also expected to provide a far-reaching plan of treatment. Many observers were harshly critical of the Commission's report, and the extent to which mainstream understandings of economic growth and prosperity remained deeply embedded within its recommendations.[29] However, in its own understated fashion, the Commission seems to have been attempting to point to the need to rethink development from the ground up. Certainly its proposals, which emphasized the need for environmental considerations to be seen as integral aspects of policy formulation at all levels, but also demanded an overarching commitment to equity both to future generations and to the present, were intended to foster a widespread shift in perception of how human societies should interact with the natural world, and with each other.

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[25] Ibid.

[26] For an overview of the various meanings of sustainable development and sustainability more generally, see Mebratu 1998.

[27] While the sense of novelty may appear somewhat surprising given the discourse around the 'limits to growth' discussed previously, it is the framing of the issue in terms of 'development' that might account for the Commission's view that this was an innovative proposal.

[28] MacNeill 2013.

[29] For a discussion of some of the main criticisms, but also a balanced but sympathetic assessment of the Commission's impact, see Sneddon et al. 2006.

7.3 Crisis and Specific International Environmental Regimes

While one might trace a shift in international environmental law and policy from a discourse of crisis to one of sustainability at the high-level of conferences and commissions, the bread and butter of the discipline consists of its efforts to address specific environmental challenges. It is at this level that the importance of a perception of crisis in drawing attention to particular problems and galvanizing international action may be most apparent. The question that arises is whether the construction of particular issues as 'crises' has in fact been necessary to provide the impetus for the development of meaningful responses and far-reaching change.

7.3.1 The Case of Ozone

The issue of ozone depletion is often characterized as one that benefited from a moment of crisis to drive the adoption of stringent targets for the elimination of ozone-depleting substances, although international cooperation on ozone predated those targets by several years. Scientific concerns regarding the ozone layer were already being voiced by the early 1970s, and the theory that chlorofluorocarbons (CFCs) might be damaging the ozone layer was proposed in 1974.[30] By the latter part of that decade, the Nordic countries, the United States and Canada had all imposed bans on the use of CFCs in nonessential aerosols, and discussions were taking place in the European Community about reducing aerosol use. Multilateral efforts to address the ozone problem were undertaken under the auspices of UNEP beginning in 1977, and in 1981 the UNEP Governing Council decided that a treaty on the protection of the ozone layer should be adopted; the Vienna Convention for the Protection of the Ozone Layer was concluded a few years later on March 22, 1985.[31]

At the time of the conclusion of the Vienna Convention, despite the concerns that had resulted in domestic measures and multilateral initiatives, the ozone problem was not yet seen as a crisis. The Convention itself was largely an agreement to cooperate; it committed its parties individually to a series of mostly procedural obligations, and collectively to monitor the situation with a view to taking further measures as required. While attempts had been made to reach agreement on control measures for ozone-depleting substances, these had been unsuccessful. The parties to the Convention made a commitment to continue negotiations on a protocol, but there seems to have been an assumption that this might be a drawn-out process of seeking and establishing consensus. This sense of relative complacency ended with the publication in May 1985 of British research

[30] Molina and Rowland 1974.

[31] 1985 Vienna Convention for the Protection of the Ozone Layer, 1513 UNTS 293.

data indicating the existence of what came to be known as the 'hole in the pole', a significant seasonal thinning of the ozone layer over Antarctica. The Montreal Protocol on Substances That Deplete the Ozone Layer was adopted only thirty months after the conclusion of the Convention,[32] and the two instruments entered into force a few months apart.[33]

While the 'hole in the pole' had a galvanizing effect on public opinion, and in particular helped sway the opinion of certain European states that had been resistant to the establishment of a mandatory phase-out, the relatively quick transition from convention to protocol benefited from a negotiating framework that had already existed prior to the crisis stage being reached. By the time the Montreal Protocol was adopted, there had been almost a decade of international policy discussion and several more years of domestic regulatory efforts. Betsill and Pielke argue that '[i]t is questionable whether the ozone hole discovery would have led to cooperation in the absence of the existing policy process',[34] and point out that such cooperation could have been achieved even without the discovery. Their view is supported by the fact that Jutta Brunnée's important early study of the ozone regime, published in 1988, contained only one mention of the 'ozone hole', in the context of the scientific background to the problem.[35]

To a large extent, of course, it is pointless to speculate about the role that the perception of crisis played; the ozone regime developed as it did in the context of a particular set of scientific, political, economic and social factors, each of which was distinctive in and of itself, and the combination of which was unique. The fact remains, however, that there appears to be a fairly widespread sense—even if it is often simply assumed, and perhaps therefore also unexamined—that a perceived 'crisis' was critical to the success of the Montreal Protocol negotiations, and to the ozone regime more generally. Thus, comparisons to other environmental issue areas seem to be unavoidable, in part because of the perception that the ozone regime is the great success story of multilateral environmental diplomacy.

7.3.2 The Contrast with Climate Change and Other Environmental Problems

Comparisons between the ozone and climate change regimes, in particular, have been widespread, but a few salient features relevant to the 'crisis' aspect (or lack thereof) can be highlighted. Like ozone, climate change had a long history of scientific concern followed by international policy engagement. Scientific

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[32] 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, 1522 UNTS 3.

[33] The Protocol was adopted on 16 September 1987; entry into force was on 22 September 1988 for the Convention, and on 1 January 1989 for the Protocol.

[34] Betsill and Pielke 1998, at 164.

[35] Brunnée 1988, at 42.

consensus about the problem could be said to have coalesced by the mid-1980s.[36] By 1988, the multi-stakeholder Conference on the Changing Atmosphere, sponsored by the Canadian government, was calling for a 20 % reduction in carbon dioxide emissions and the negotiation of a comprehensive treaty to protect the atmosphere, warning that '[h]umanity is conducting an unintended, uncontrolled, globally pervasive experiment whose ultimate consequences could be second only to a global nuclear war.'[37] That same year, considering in part the 'urgent need to evaluate to what extent a climatic change can be delayed by appropriate national/international actions',[38] the Intergovernmental Panel on Climate Change (IPCC) was established in order to assess the scientific, technical and socio-economic aspects of climate change and to formulate 'realistic response strategies.'[39]

Support for the negotiation of a treaty addressing climate change continued to be voiced in various fora during the late 1980s. This gained momentum from the release of the IPCC's First Assessment Report in 1990. The Report recommended 'a programme for the development and implementation of global, comprehensive and phased action for the resolution of the global warming problem under a flexible and progressive approach.'[40] Noting that the types of measures it was discussing would 'require a high degree of international co-operation with due respect for national sovereignty of states',[41] the IPCC also stated its view that '[t]he international negotiations on a framework convention should start as quickly as possible after presentation of this Report.'[42] The UN General Assembly established an Intergovernmental Negotiating Committee in December of 1990, indicating that the negotiations should conclude in time for the convention to be opened for signature at the United Nations Conference on Environment and Development (UNCED) scheduled to be held in June 1992.[43] The negotiations were thus conducted under considerable time pressure, and the United Nations Framework Convention on Climate Change (UNFCCC) was adopted less than a month before the Conference.[44]

Up to this point, the broad outline of the story bears some similarity to that of the ozone regime. The story from then on, however, is a very different one. Whereas in the case of ozone there was a rapid progression from convention to protocol, the climate change process proved to be a long, drawn-out affair that seemed to involve endless debate and entrenched negotiating positions. It took

[36] See Bodansky 1993, at 458–460.

[37] Quoted in ibid., at 462.

[38] World Meteorological Organization Executive Council, Intergovernmental Panel on Climate Change, Res. 4 (EC-XL), 1988.

[39] Ibid.

[40] IPCC 1990, at 56.

[41] Ibid., at 60.

[42] Ibid.

[43] UNGA Res. 45/212, 21 December 1990.

[44] 1992 United Nations Framework Convention on Climate Change, 1771 UNTS 107.

more than five years for the Kyoto Protocol to be concluded in 1997,[45] and even then, a number of contentious issues remained to be worked out before its entry into force. Consensus on those issues was not achieved until 2001, and it took almost four more years for the Protocol to enter into force in 2005. In 2013, more than twenty years after the adoption of the UNFCCC, and despite the fact that there have been significant advances in scientific understanding of the nature and extent of the problem, climate change remains mired in controversy.

There have been a host of reasons advanced for why climate change has proven to be such an intractable problem: the fact that emissions come from such a wide range of sources; the close links between greenhouse gas emissions and economic activity; and the lack of consensus between South and North (and within both South and North), to name just a few. Whether one significant factor has been a lack of perception of a 'crisis' is difficult to assess. If that is the case, it is certainly not due to a shortage of attempts to convey the magnitude of the problem on the part of environmental organizations, the scientific community, and many governments, particularly those of small island states, for all of whom a 'climate crisis' is all too real.

While climate change is the environmental regime that is most frequently (and unfavourably) compared with the successful efforts to control ozone depleting substances, international responses to other environmental problems have experienced similar obstacles. Consider the two other 'Rio Conventions' emerging from the UNCED process, the Convention on Biological Diversity[46] and the United Nations Convention to Combat Desertification (UNCCD).[47] Loss of biological diversity and desertification have been characterized by experts and activists as matters of pressing concern, and both have been the subject of prolonged efforts to address them.[48] Both regimes have struggled to solve the

[45] 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 2303 UNTS 148.

[46] 1992 Convention on Biological Diversity, 1760 UNTS 79.

[47] 1994 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification (UNCCD), Particularly in Africa, 1954 UNTS 3.

[48] Concerns about extinction and endangerment of species are of long-standing, and gave rise to some of the early precursors of international environmental agreements. Examples include a 1902 convention 'for the protection of birds useful to agriculture' and a 1911 treaty protecting fur seals. While the earliest agreements tended to be fairly narrow in scope, often focusing on particular species, an awareness of the need to protect ecosystems was well-established by the time of the Stockholm Conference. For example, the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat was adopted in 1971, and proposals for an agreement of this kind had first been raised in the early 1960s. Principle 4 of the Stockholm Declaration on the Human Environment affirmed humanity's 'special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat', and in 1973, the first session of the UNEP Governing Council identified the 'conservation of nature, wildlife and genetic resources' as a priority area. As public awareness of the loss of biological diversity increased during the 1970s and 1980s, particularly in relation to the massive loss of species in tropical rainforests due to deforestation, activists began to call for an international instrument dealing broadly with biodiversity conservation. In 1988, UNEP set up an Ad Hoc Working Group of Experts on

environmental problems they were designed to address. They have also had the added disadvantage of being less high profile than climate change (or ozone depletion before it), and in fact each may have suffered from having been overshadowed by these other issues.

Desertification is a problem around the globe; recent reports indicate that 168 out of the 194 states parties to the Convention are affected by it.[49] Yet it was far from easy to achieve consensus on the need for an international instrument to address the issue. The African states, for which this has always been an issue of particular concern, had to lobby strenuously for an international convention dealing with the issue during the lead-up to the 1982 United Nations Conference on Environment and Development. In the process, they found themselves having to overcome resistance not only from the global North, but also from their fellow developing countries.[50] While a commitment to negotiate such an agreement was one of the outcomes of the UNCED process, and the resulting Convention has been lauded for its innovative approach to community participation in anti-desertification efforts, the issue has remained somewhat at the margins of international environmental law and policy.[51] In 2012, the UNCCD Secretariat lamented that

> the global community's awareness on land degradation and desertification has lagged in comparison with its awareness on climate change and biodiversity loss; the significance of land and soil to humanity remains obscure to many. As a result, the risk to livelihoods deriving from land and soil degradation does not receive the attention it deserves.[52]

With regard to biological diversity, our present era is notable, both because there is a greater rate of species loss than at any other time in recorded human history and because much if not all of that loss is attributable to human activity. Despite the Convention on Biological Diversity, and the host of other international agreements dealing with various aspects of biodiversity conservation, little progress has been made in slowing the rate of loss. In April 2002, the parties to the Convention committed themselves to achieve by 2010 'a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a

(Footnote 48 continued)
Biological Diversity to explore the need for 'an umbrella convention to rationalise current activities in this field', and following on the recommendations of that group, established a follow-up working group to prepare such an instrument. The Convention on Biological Diversity was adopted just weeks before the 1992 United Nations Conference on Environment and Development and, like the UNFCCC, was opened for signature at the Conference. Similarly, international concerns about desertification, and land degradation more generally, go back at least to the period leading up to the Stockholm Conference. A United Nations Conference on Desertification was held in 1977, and adopted a Plan of Action to Combat Desertification (PACD). According to Adil Najam, who has written some of the most insightful analysis of international negotiations on desertification, 'chronic disinterest by the rest of the world, institutional turf battles, and a failure to raise funds for required action doomed the PACD.' Najam 2004, at 130.

[49] UNCCD 2013.

[50] See generally Najam 2004; Kjellén 2003.

[51] Conliffe 2011, at 44.

[52] UNCCD Secretariat 2012, at 11.

contribution to poverty alleviation and to the benefit of all life on Earth.'[53] The 2010 Global Biodiversity Outlook 3 concluded that this target was not met,[54] and went on to caution:

> The pressures driving the loss of biodiversity show few signs of easing, and in some cases are escalating. The consequences of current trends are much worse than previously thought, and place in doubt the continued provision of vital ecosystem services. The poor stand to suffer disproportionately from potentially catastrophic changes to ecosystems in coming decades, but ultimately all societies stand to lose.[55]

In a message included in the report, Achim Steiner, the Executive Director of UNEP, noted, '[t]he arrogance of humanity is that somehow we imagine we can get by without biodiversity or that it is somehow peripheral: the truth is we need it more than ever on a planet of six billion heading to over nine billion people by 2050.'[56]

7.3.3 Accounting for the Difference: Downs and the Issue Attention Cycle

If in fact climate change, biodiversity loss, desertification and a host of other environmental issues do constitute 'crises' in the sense that they are important problems that demand an urgent response, the lack of significant progress may be due at least in part to the unsuitability of crisis discourse to many environmental problems. As noted previously, a sense of crisis can help trigger a perception of the urgent and imperative need to respond to a particular issue. However, the language of crisis, and the desire for dramatic responses that it almost invariably elicits, may be ill-suited to chronic, complex problems that do not lend themselves to simple or quick remedies.

This problem was highlighted by Anthony Downs in an influential article published in 1972. Downs argued that '[p]ublic perception of most 'crises' in American domestic life does not reflect changes in real conditions as much as it reflects the operation of a systematic cycle of heightening public interest and then increasing boredom with major issues.'[57] Downs went on to identify a series of stages in what he called the 'issue attention cycle.'[58] The first is the 'pre-problem stage', during which there is limited public awareness of a particular issue (in other words, it is not yet seen as a pressing social problem), although there may be pockets of awareness amongst experts or those most impacted by the issue. Following that, there are the stages of 'alarmed discovery and euphoric enthusiasm',

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[53] Strategic Plan for the Convention on Biological Diversity, COP 6 Decision VI/26, para. 11.

[54] Secretariat of the Convention on Biological Diversity 2010, at 9.

[55] Ibid., at 15.

[56] Ibid., at 6.

[57] Downs 1972, at 39.

[58] Ibid., at 39–40.

'realizing the cost of significant progress', and 'gradual decline of intense public interest', ending with the 'post-problem stage' described by Downs as a 'twilight realm of lesser attention or spasmodic recurrences of interest'.[59]

Downs ascribes an important role to the public's desire for straightforward and relatively painless solutions. 'Euphoric enthusiasm', for example, refers to the view that society has the ability 'to "solve this problem" or "do something effective" within a relatively short time. (…) The implication is that every obstacle can be eliminated and every problem solved *without any fundamental reordering in society itself*.'[60] The 'realizing the cost' stage is characterized by the understanding that not only will solving the problem require significant resources, but it will also require that certain social groups give up advantages that they have become accustomed to enjoying. As Downs puts it, '[t]he public thus begins to realize that part of the problem results from arrangements that are providing significant benefits to someone—often to millions.'[61] He describes the 'decline of interest' stage as follows:

> As more and more people realize how difficult, and how costly to themselves, a solution to the problem would be, three reactions set in. Some people just get discouraged. Others feel positively threatened by thinking about the problem, so they suppress such thoughts. Still others become bored by the issue. Most people experience some combination of these feelings.[62]

Downs draws attention to the transitory nature of public engagement with many critical issues of social policy, and forty years after its original publication, this continues to resonate. Although his focus was on American public opinion and policy formation, many of the insights are relevant to the field of international law and policy as well.[63] For the purposes of the present discussion, what is particularly important about Downs' analysis is that it highlights the risk inherent in presenting an environmental problem as a crisis, with the resulting expectation that there will be a rapid and effective response that will 'solve' the crisis and the ensuing disillusionment when it becomes clear that solutions are far more complicated and costly than may initially have been assumed.

In making the point that Downs' insights into the issue attention cycle may provide at least a partial explanation of the ongoing difficulties in tackling environmental concerns such as climate change, desertification and biodiversity loss, it is not necessary to assume that international action on ozone depleting substances was easy to achieve, or that the ozone problem itself was readily solved by straightforward technological solutions. However, I would argue that it was a problem which was less intertwined with wider economic, social and political

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[59] Ibid., at 40.

[60] Ibid., at 39.

[61] Ibid., at 40.

[62] Ibid.

[63] It should be noted, however, that some have questioned the extent to which Downs' analysis applies outside of the U.S. context. See e.g. Brossard et al. 2004.

issues than the others mentioned above. The fact is that the problem of ozone layer depletion *could* be addressed 'without any fundamental reordering in society itself',[64] and as a result, 'euphoric enthusiasm' may not have been an unreasonable response to the 'ozone crisis'. In contrast, the other environmental issues that have been mentioned here represent exceptionally complex, and in fact interconnected, problems that require long-term and far-reaching responses. And if Downs was accurate in his assessment, crisis thinking lends itself poorly to these types of problems, and an alternative way of approaching them is essential.

7.4 Crisis and Commitment

The discussion above reveals that an awareness of the limitations of a focus on crisis in the environmental context goes back for decades. In more recent years, international law's 'obsession with crises'[65] has been the subject of trenchant critique by Professor Charlesworth and others. Yet many international environmental lawyers worry about the absence of a sense of crisis—not because we are unaware of its constraints, but because we wonder how to generate and maintain a sense of commitment to address complex, long-term environmental challenges in the absence of either an actual 'crisis' or a widespread acceptance that such a crisis exists. Some commentators even wonder whether we need a more dramatic moment of truth to galvanize the public. Jim MacNeill has lamented the fact that recent developments such as the loss of Arctic ice cover have not brought citizens to the streets to demand action, and has speculated:

> If the public cannot be aroused, we may simply have to wait until Mother Nature suffers a massive heart attack, the equivalent of a climate 9/11. Public awareness and fear may then bring people by the millions into the streets and thereby empower our leaders to finally stand up and override the powerful coalitions blocking action and actually implement measures to curb the growth of fossil-fuel production and consumption.[66]

If there are still those who seek to capitalize on crisis, however, there are many others who reject the crisis model out of hand. For some, it is because of the sense of helplessness it evokes. Writing in relation to climate change, for example, Mike Hulme is sharply critical of those who invoke spectres of a 'climate apocalypse':

> What does the myth of climatic Apocalypse do to audiences around the world? It undoubtedly lends a sense of danger, fear and urgency to discourses around climate change captured in claims such as we only have ten years to 'reduce emissions' or to 'save the climate'. Yet the counterintuitive outcome of such language is that it frequently leads to disempowerment, apathy and scepticism among its audience.[67]

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[64] Downs 1972, at 39.

[65] Charlesworth 2002, at 384.

[66] MacNeill 2013.

[67] Hulme 2009, at 347–348.

A similar view is expressed by Thomas Princen, who bluntly states: 'a gloom-and-doom approach does not work.'[68] Princen emphasises the need to present 'images of the possible', pointing out how desperately these are needed by those who become aware of the environmental challenges facing us all:

> [P]eople discover that the planet is in serious jeopardy and that life as we know it, especially in the affluent North, will be changing, and changing dramatically. They strain to see into that future. Yet all they see are (1) extensions of the present, only greened up and made more efficient; or (2) collapse scenarios, courtesy of Hollywood, gloom-and-doom scientists, environmentalists, and some prominent writers.[69]

As an alternative to a disciplinary focus on crisis, Professor Charlesworth proposed that we turn our attention to theorizing an 'international law of everyday life'.[70] Somewhat along that vein, scholars such as Princen and Hulme suggest that we need to start approaching environmental challenges such as climate change as broad, long-term projects in collective redefinition. 'Rather than placing ourselves in a "fight against climate change"', Hulme argues, 'we need a more constructive and imaginative engagement with the idea of climate change.'[71] While not taking issue with the premise that what may be required is a fundamental rethinking of how we engage with these issues, however, it is hard to share what appears to be Hulme's almost cheerful assessment of the opportunity that climate change presents for this to occur. And with the benefit of hindsight, we can see that there have been calls in the past, from the Fundación Bariloche, the Brundtland Commission, and so many others, to redefine our relationship with the world around us. Most of those calls remain unanswered; many have simply been forgotten. In the meantime, environmental degradation continues to occur, and complacency or outright apathy seems to be the norm.

In terms that recall the range of reactions that Downs viewed as characteristic of the 'decline of interest' stage in the issue-attention cycle, James Gustave Speth more recently categorized the responses he has observed to the magnitude of environmental problems as follows:

> *Resignation*. All is lost.
> *Divine Providence*. It's in God's hands.
> *Denial*. What problem?
> *Paralysis*. It's too overwhelming.
> *Muddling through*. It's all going to be all right, somehow.
> *Deflection*. It's not my problem.
> *Solutionist*. Answers can and must be found.[72]

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[68] Princen 2010, at 180.
[69] Ibid., at viii.
[70] Charlesworth 2002, at 391.
[71] Hulme 2009, at 361.
[72] Speth 2008, at 42.

Speth's satirical taxonomy would be amusing if it were not so distressingly accurate. And what is striking is how many of these categories involve an acknowledgement of the problem, followed in short order by a mental manoeuvre that enables the individual or group in question to avoid taking action.

Not surprisingly, Speth counts himself as a 'solutionist'. As he describes this stance, '[w]e have not denied the problems nor assumed they will be solved merely because we've solved other problems. We are not resigned to their great force, nor are we paralyzed by them.'[73] The 'solutionist' category is also the one in which international environmental lawyers are most likely to locate themselves. Yet if we were honest, many of us would have to admit that we often find ourselves occupying one of the other categories for brief (and sometimes not so brief) periods of time. For the truth is that for many environmentalists (and I think it is fair to assume that most if not all international environmental lawyers would consider themselves as such) the sense of crisis is frequently overwhelming. It is hard not to have a sense of 'gloom-and-doom', urgency or even terror in the face of a never-ending stream of statistics about loss after loss: of ice cover, species, and productive soil among many others. And it is frustrating in the extreme to witness widespread complacency, and to feel that environmental concerns are still frequently dismissed as extremist or alarmist. Writing in 1999, Donella Meadows, the lead author of *The Limits to Growth*, talked about the way in which she and her co-authors were compared by some to Chicken Little, 'the sincere but silly forecaster of hysterical nonsense'.[74] Alluding to the different myths or literary allusions that could be drawn on, she indicated a preference for the boy who cried wolf, since 'at least there was a real wolf.'[75] She went on to state:

> But the legendary prophet with whom I most feel a connection is Cassandra, to whom the god Apollo gave the ability to foresee the future, and then, after she displeased him, the terrible curse that no one would ever believe her. That story gives me shudders.[76]

Here, Meadows captures a fear shared by many environmentalists: to be doomed to speak the truth but have those warnings ignored.

In the face of this fear, environmentalists try to reassure themselves that life will endure, that no matter what changes occur, the potential for humans to fundamentally alter planetary systems remains limited. They acknowledge that dystopian images of a future world of urban and industrial blight may lie as much in the realm of science fiction as more bucolic visions of a planet in ecological equilibrium, and that the probable outcome is most likely somewhere in between those two extremes. Above all, they keep in mind that a sense of hopelessness can all too easily become an excuse for inaction. As environmental historian Joachim Radkau reminds us, '[w]e still have much to lose—we should never forget that in

[73] Ibid., at 42.

[74] Meadows 1999, at 106.

[75] Ibid.

[76] Ibid.

the face of all the pessimism about the environment.'[77] And Meadows also has some comfort to offer in this regard, pointing out the paradox inherent in attempting to predict the future:

> If people had believed her, then Cassandra WOULDN'T have been able to foretell the future, because action would have been taken to avoid foreseen disasters. The Cassandra legend must be one of the earliest recorded human recognitions that there is a basic contradiction between prediction and choice. A predictable world has no room for choice; a choosable world is not predictable.[78]

In the end, it may well be that commitment, that delicate balancing act between optimism and despair, rests on no more solid a foundation than one simple conviction: that we still live in a choosable world.

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Chapter 8
The WTO and the Doha Negotiation in Crisis?

Alexia Herwig

Abstract Is the World Trade Organization (WTO) in a legitimacy crisis and might the protracted Doha negotiations be evidence of it? This article understands the notion of 'legitimacy crisis' as a severe threat to an institution's viability due to fundamental shifts in the legitimising ideas underlying the institution, an external threat to its values or its ability to fulfil its functions. It contends that the WTO is not yet definitely in a legitimacy crisis because the Doha negotiations still reveal the commitment of the WTO members to the values and legitimising ideas of the WTO. Perception of a legitimacy crisis fuels the negotiation of free trade agreements (FTAs) amongst key WTO members, which could be used to advance the Doha negotiations, force developing countries into agreement and shape the outcome of the negotiations in favour of developed countries. Such an outcome, this chapter cautions, could be the real onset of a legitimacy crisis if developing countries gain very little from a Doha agreement. To prevent a crisis and move the negotiations forward this chapter suggests that the different trade-related development needs of developing countries need to be assessed more seriously and developing countries need to be enabled to address serious adverse consequences linked to any trade liberalisation they undertake.

Keywords WTO · Legitimacy crisis · Doha Development Agenda · Non-agricultural market access · Agriculture · Free Trade Agreements · Development

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Contents

8.1 Introduction

This chapter assesses whether or not the multilateral trade liberalisation regime is currently subject to a legitimacy crisis. In the Doha Development Agenda (DDA), members of the World Trade Organization (WTO) have agreed to place developing countries' needs and interests at the heart of the work programme.[1] This pledge suggests that existing WTO rules have reflected the needs and aspirations of developing countries insufficiently and raises the question of whether the WTO and the laws it administers resulting from the Uruguay Round are already subject to a legitimacy crisis. Moreover, the DDA negotiations are long and protracted and have fallen short of the initially high ambitions for significant new trade liberalisation. The possibility of failure of the negotiations or an agreement with very limited contributions to development would be evidence of a legitimacy crisis. Several commentators on the WTO and on the DDA negotiations for further trade liberalisation diagnose a crisis or investigate whether the term 'crisis' appropriately describes and explains the state of the DDA negotiations.[2] This makes it worthwhile to examine in this chapter whether or not the WTO and DDA negotiations are in the objective state of a normative legitimacy crisis and which legal developments may be fuelled by the perception of a legitimacy crisis.[3]

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[1] WTO Ministerial Declaration, WT/MIN(01)/DEC/1, 14 November 2001, Preamble (hereinafter Doha Ministerial Declaration).

[2] Baldwin and Evenett 2009; Chorev and Babb 2009; Hoekman 2003; Schwab 2011; Wilkinson 2001.

[3] I use the terms objective normative legitimacy and perceived legitimacy to distinguish between, on the one hand, a prescriptive evaluation of the WTO against the set of benchmarks one has reason to accept as the best indicators of the legitimacy of a legal-political system and, on the other hand, the legitimacy beliefs key actors and observers of the system hold, respectively. Empirically existing legitimacy beliefs of actors do not necessarily coincide with the most plausible indicators of legitimacy. Therefore, an organisation or legal system can be in an objective normative legitimacy crisis even though it is widely supported by actors' legitimacy beliefs and, vice versa, perceived, empirical legitimacy can be low while normative legitimacy can be high.

The chapter first defines the notion of a 'crisis'. It then examines whether the law and institution of the WTO as it stands after the Uruguay Round is in a legitimacy crisis. It acknowledges several structural problems with the legitimacy of the WTO but submits that one cannot yet diagnose a crisis. Next, the chapter considers whether evidence of a legitimacy crisis can be found in the protracted DDA negotiations. It suggests that the reason why the negotiations have stalled is a concern with finding a reciprocal and mutually advantageous balance of concessions and that this concern is consistent with the values and symbolic frameworks legitimising the WTO. This chapter contends that the difficulty to differentiate between developing countries on the basis of their levels of development cannot be seen as an unexpected threat to the legitimacy of the WTO because it predates the DDA negotiations. Nevertheless, the perception of deadlock and a legitimacy crisis of the DDA negotiations by negotiators and academic observers may be useful to explain the move towards bilateral and plurilateral free trade agreements (FTAs). While FTAs are by no means new phenomena, the speed with which new negotiations are opened and the fact that they involve the big developed countries and key emerging economies is new. FTAs shrink what is on the table in the Doha negotiation, divide the developing country negotiation coalitions and create an incentive for developing countries to agree on the Doha package now. One possibility is that the negotiations conclude with a limited Doha deal offering little to developing countries. The chapter cautions that a limited deal may be the real onset of a legitimacy crisis of the WTO because it will provide conclusive evidence of the inability of the institution to live up to the pro-development aspirations forming part of its legitimacy basis and to solve the problem of developing countries' limited participation in multilateral trade. Another possible outcome could be that developing countries need to agree to open their markets, which could be inappropriate for their capacity to participate successfully in the multilateral trading system, might be perceived by developing countries as rules being forced on them, and would be equally damaging to the legitimacy of the WTO. To avert a legitimacy crisis, this article suggests that WTO members need to research and agree on the differentiation of developing countries and facilitate their market opening through trade-emergency assistance funds and possibly, experiments with reversible market opening commitments.

8.2 The Notion of Crisis

For the purpose of this article, I will use the definition of crisis by Boin but adapt it to the WTO context. He defines 'crisis' as a breakdown of familiar symbolic frameworks, which legitimise the pre-existing socio-political order, or as a severe and largely unexpected threat to values of the system or the functioning of life sustaining systems making it necessary to adopt urgent decisions.[4] Note that

[4] Boin and McConnell 2007, at 50–59; Boin A et al. 2005.

Boin's definition of crisis leaves open the reason for the breakdown of the familiar symbolic frameworks. The reasons could thus be an endogenous change or new events or advances in knowledge, which call into question the appropriateness of previous normative expectations about action. Law is one form of socio-political order. To be able to command and coerce us authoritatively, that is, to be legitimate, law needs to give expression to normative values (output legitimacy) and be generated through a decision-making procedure with those whose interests are affected being able equally to shape the content of legal norms so that they equally reflect their interests (input legitimacy).[5] These normative values can include equal respect for our core human interests as embodied in human rights. Where the law just solves coordination problems, the justification for its coercive force can stem from the fact that it realises greater pareto-optimal efficiency. Where these symbolic frameworks change fundamentally, law is in a legitimacy crisis. To coerce us authoritatively, law also needs to be effective in realising the normative values that underlie it. From this perspective, the inability of law to fulfil its functions of contributing to the realisation of these values is a threat to the legitimate authority of law.

As far as positive law is concerned, the Preamble to the Marrakesh Agreement Establishing the World Trade Organization gives expression to some goals that one can plausibly interpret as expressing the need to protect core human interests. Accordingly, they can be qualified as normative values because they recognise that trade liberalisation should benefit individuals.[6] Pursuant to the preamble, trade and economic relations should be conducted with a view to raising standards of living, ensuring full employment, a steadily growing volume of real income and effective demand, and ensure optimal utilization of the world's resources in accordance with the principle of sustainable development. The Preamble also recognises the need for positive efforts to ensure that developing countries share in the growth of international trade commensurate with their development needs. The instruments for contributing to these goals are reciprocal and mutually advantageous arrangements for trade liberalisation. This expresses the idea that WTO law should be based on an exchange of commitments at roughly equal levels (the idea of reciprocity). In other words, all WTO members should agree to opening their own economies rather than only passively reaping the benefits of market opening by others. At the same time, any arrangement should be to their own advantage and to the advantage of everyone else (the idea of mutual advantage). The idea of reciprocal, mutually beneficial arrangements reflects the core value of equality as promoted by input legitimacy.

Based on the definition of crisis for the purposes of this chapter, the WTO could be in a legitimacy crisis if the understanding of the normative values expressed in

[5] The term 'output legitimacy' refers to the results of authoritative norm-setting processes being acceptable on substantive grounds. The term 'input legitimacy' refers to the process through which law is made.

[6] Preamble of the 1994 Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 154.

the Preamble changes so much that the old symbolic frameworks as expressed in the Preamble have effectively broken down. The WTO could also be in a legitimacy crisis if symbolic frameworks remain constant, but actual, unexpected events (e.g. legal practice or the conduct of negotiations) put those values under threat because the events no longer contribute to realising these values. Finally, the WTO might be in a legitimacy crisis because it is not sufficiently well-equipped to ensure the realisation of its core normative values towards all its legal subjects.

8.3 The WTO in Crisis?

8.3.1 Development of the Doha Negotiations

In 1999, the WTO members tried to launch a new Round of multilateral trade negotiations in Seattle. Due to disagreement over what to include in the negotiation agenda, the Ministerial Conference failed to start a new Round.[7] Negotiation about the linkage of WTO law to environmental protection and workers' rights and the so-called Singapore issues (development of new WTO disciplines relating to competition policy, investment protection, trade facilitation and government procurement) were contentious amongst WTO members.[8] The Ministerial Conference was also accompanied by widespread citizen protests against the WTO and its alleged neo-liberal focus. It took until the next Ministerial meeting in Doha in 2001 for WTO members to agree on a negotiation agenda. It was decided to remove the contentious Singapore issues from the agenda until positive consensus to resume them was present. Similarly, the issue of the relationship between workers' rights and WTO law was also eliminated.[9] WTO members decided to give the Round a strong development focus and to ensure that developing countries would benefit from the content of the Round, and thus entitled it 'the Doha Development Agenda'.[10] Negotiations on liberalisation of agricultural trade, tariff peaks and special and differential treatment (SDT)[11] featured prominently amongst

[7] WTO Briefing Note, 3 December—The Final Day and What Happens Next, 3 December 1999, http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/resum03_e.htm. Accessed 26 November 2013.

[8] WTO Briefing Note, Ministers Consider New and Revised Texts, 2 December 1999, http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/resum02_e.htm. Accessed 26 November 2013; WTO Briefing Note, Ministers Start Negotiating Seattle Declaration, 1 December 1999, http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/resum01_e.htm. Accessed 26 November 2013.

[9] Doha Ministerial Declaration, paras. 20, 23, 26 and 27.

[10] Ibid., Recitals 2 and 3 and paras. 12–14, 16, 42–44.

[11] SDT provisions are special accommodations for developing and least-developed WTO members, allowing them to maintain higher tariffs and other restrictive regulations of commerce, longer transition periods for compliance with WTO obligations and giving them enhanced but discretionary market access through lower tariff rates for exports to the preference-granting

the topics and hopes were high that the development aspirations of the Round could be realised. Other important trade-creating topics in the negotiations were non-agricultural market access (or 'NAMA', in essence tariffs), services,[12] intellectual property protection,[13] rules on trade remedies and reform of the dispute settlement understanding.[14]

In spite of the agreement on the DDA, successive Ministerial Conferences have remained deadlocked in disagreement or achieved little progress, and the prospects of concluding the negotiations in the near future looked bleak. The 2003 Cancún Ministerial Conference ended in disagreement over whether to launch negotiations on the Singapore issues, and developing countries were angered at being sidelined in the negotiations through various tactics.[15] A Secretariat proposal on how to proceed with the negotiations, the so-called July 2004 package, breathed new life into the negotiations,[16] and the 2005 Hong Kong Ministerial Conference relaunched the negotiations through an end-date for agricultural export subsides, an agreement on duty-free and quota-free market access for least developed countries, a phase out of cotton subsidies and some progress on deadlines for modalities in NAMA and agriculture.[17] However, the attempt to come to agreement on modalities in the July 2008 package failed.[18] Similarly, the two subsequent Ministerial Conferences in Geneva in 2009 and 2011, even though a framework for

(Footnote 11 continued)
member than the most-favoured nation tariff rate the grantee has agreed to apply to all other WTO members.

[12] The General Agreement on Trade in Services (GATS) creates an in-built agenda, meaning that future negotiations on services would be automatic in its Article XIX. 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 1 B General Agreement on Trade in Services, 1869 UNTS 183.

[13] In particular, how to ensure access to medicines and generics notwithstanding patent protection of the relevant drug for developing countries without manufacturing capacity of their own and the question of the extension of protection afforded for geographical indications (e.g. Parma ham) other than alcoholic beverages. If a geographical indication has received IP-right protection, products produced outside the geographic indication may not use the appellation.

[14] Doha Ministerial Declaration, paras. 15–19, 28–30.

[15] WTO Summary, Day 5: Conference Ends without Success, 14 September 2003, http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm. Accessed 26 November 2013; Wilkinson and Lee 2007, at 5.

[16] WTO, Text of the 'July Package'—the General Council's Post-Cancún Decision, 2 August 2004, http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm. Accessed 26 November 2013.

[17] WTO, Doha Work Programme, Ministerial Declaration, WT/MIN(05)/DEC, 18 December 2005 (hereinafter Hong Kong Ministerial Declaration); WTO Summary, Ministers Agree on Declaration that 'Puts Round back on Track, 18 December 2005, http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_18dec_e.htm. Accessed 26 November 2013.

[18] WTO, Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Report by the Chairman, Report by the Chairman, Ambassador Don Stephenson to the Trade Negotiations Committee, JOB(08)/96, 12 August 2008; WTO, Committee on Agriculture, Report to the Trade Negotiations Committee by the Chairman of the Special Session of the Committee on Agriculture, Ambassador Crawford Falconer, JOB(08)/95, 11 August 2008.

modalities was set by then, also failed to achieve a breakthrough in the negotiations.[19] The Bali Ministerial Conference in December 2013 finally produced a limited agreement.[20]

This section investigates whether the diagnosis of a crisis is objectively correct and how widespread talk about crisis, even if there is none objectively, shapes the development of trade liberalisation law.

8.3.2 The WTO in a Legitimacy Crisis?

Against the backdrop of civil society protests against the WTO, Esty's 2002 article detects a legitimacy crisis of the WTO concerning input, output and systemic legitimacy.[21] Regarding output legitimacy, he argues that the WTO should show more sensitivity towards the goals of poverty alleviation, environmental protection and public health.[22] These goals fit under the core WTO values of promoting human economic welfare, sustainable development and ensuring mutually

[19] WTO, Eighth Ministerial Conference, Chairman's Concluding Statement, WT/MIN(11)/11, 17 December 2011.

[20] Compared to the initial ambition of the Doha Development Agenda, the Doha-related results of the Bali conference are notable for what was *not* decided. There is no agreement on domestic agricultural support, agricultural and non-agricultural tariff reduction, services, TRIPS or DSU reform. On agricultural export subsidies, WTO members commit to continue the progress toward the elimination of all export subsidies and equivalent measures but there are no deadlines and no modalities, except for the commitment that real amounts of export subsidies and equivalent measures should be significantly below bound rates and not be increased. Cotton subsidies have to be eliminated. Stockpiling for food-shortages is allowed and tariff quotas are subjected to the import licensing agreement. Developed countries grant least-developed countries (LDCs) duty free and quota free market access on at least 97 % of tariff lines and preference-granting countries endeavour so simplify preferential rule of origin for LDCs but there are no precise, binding commitments. The Council for Trade in Services is instructed to work towards a list of service sectors and modes of supply for preferential access of LDC service suppliers on a request-offer basis. WTO members have also agreed to a monitoring mechanism of special and differential treatment (SDT) provisions with the ability to recommend the start of re-negotiations of provisions and make substantive recommendations for implementation and produced a detailed agreement on trade facilitation. The really significant trade-generation will arise from the trade facilitation agreement. The significance of the export subsidy commitment depends on the willingness of panels and the Appellate Body to interpret the term 'significant' maximally. The SDT monitoring mechanism is helpful in terms of generating knowledge on how trade can advance development. These reforms are no doubt positive but they remain far below what should have been achieved to enable developing countries to derive greater benefits from participation in the multilateral trading system. Overall, the Bali results confirm the hypothesis that FTAs have had the effect of forcing developing countries to agree to a deal with insignificant development benefits. Bali Ministerial Declaration and Decisions, 7 December 2013, https://mc9.wto.org/draft-bali-ministerial-declaration. Accessed 10 December 2013.

[21] Esty 2002.

[22] Ibid., at 10.

beneficial trade liberalisation. Esty's claim is that the post-Uruguay Round WTO insufficiently achieves these core values. Regarding input legitimacy, he contends that the club model of negotiation and technocratic legitimacy is unsustainable, and there is a need for more political integration and responsiveness to public concerns.[23] In other words, Esty finds it problematic that the affected interests are not equally represented in WTO rule-making. In his view, greater involvement of NGOs would provide trade policy-makers with a broader range of viewpoints and information as well as enable the WTO to reflect popular will and well-reasoned outcomes.[24] Regarding systemic legitimacy, Esty suggests that the WTO should 'trim its sails and reserve its strength for core trade liberalization activities' and, where possible, redirect 'trade and …' disputes to more competent organizations.[25] Similarly, Esty would like to see more vertical and horizontal checks and balances from states and other international organizations.[26] However, he also maintains that the WTO needs to take more account of other values such as environmental protection, human rights and others.[27] Remarkably, some inconsistency can be detected between the two last-mentioned arguments, making this part of the critique somewhat incogent.

Esty does not explain whether his concern is with the normative legitimacy of the WTO (how the WTO ought to function) or with its perceived legitimacy (how those affected by the decision-making of the WTO think it ought to function so that they accept its authority as legitimate).[28] The civil society protests during the Seattle Ministerial and the walk-out of developing countries at the Cancún Ministerial are signs that the perceived legitimacy of the WTO is under challenge. However, when it comes to its day-to-day workings, the WTO is still navigating in relatively quiet waters. There is no 'civil disobedience' in the form of non-implementation of dispute settlement reports or autonomous sanctioning by WTO members, and the adoption of reports is usually not accompanied by significant civil society protest. Evidence suggests that even the financial and economic crises have not led to an increase in protectionist, WTO-inconsistent trade barriers.[29] When the present reactions are compared with how the contracting parties behaved during the GATT years, we can conclude that the authority of trade liberalisation law has never been beyond dispute. During the GATT years, the contracting parties, including developed ones, disrespected the rulings of GATT panel reports, and some states took law enforcement into their own hands, for instance, in the

[23] Ibid., at 11–15.

[24] Ibid., at 17.

[25] Ibid., at 17.

[26] Ibid., at 18–9.

[27] Ibid., at 18.

[28] For instance, references to protests against the WTO in Esty's article seem to reflect a concern with perceived legitimacy, while the rest of the article clearly provides an independent analysis of the normative legitimacy of the WTO. Esty 2002, at 7–9 and 19.

[29] Hoekman 2010, at 507; Ruddy 2010, at 483–489.

form of US Section 301 that allowed the US unilaterally to determine a violation of GATT and to impose sanctions. In light of the GATT's legitimacy challenges, some form of discontent seems to be the rule rather than the exception.

As regards normative legitimacy, I agree that there are structural legitimacy problems of the WTO and that reform is needed, although not necessarily along the lines suggested by Esty.[30] The WTO shares the problems of developing countries' limited ability to shape rules and civil society's limited role in law-making with the rest of international law. Even so, these legitimacy problems do not lead to a complete breakdown of sovereign equality of states and consent as the symbolic frameworks which legitimised international law. There is simply no other legal political order that could feasibly replace states as the units in which democratic will-formation, redistributive politics, the provision of public goods and the protection of human rights predominantly take place. For this reason, the input legitimacy of international law will always be based on a strong decision-making role for states. Furthermore, increased NGO involvement is not a silver bullet when it comes to normative legitimacy of international organizations. There are concerns about internal will-formation and representativeness of NGOs (given that they depend on donations from their members), the lack of civil society development in developing countries (as it hinders placing development interests on the agenda) and the thorny question of what decision-making capacity NGOs ought to be given at the negotiating table. Giving more voice to civil society risks exacerbating the *de facto* limited ability of developing countries to participate in the negotiations, which has hampered them to obtain agreement on liberalisation in areas that are or should be of key interest to them (agricultural products, movement of persons, NAMA). No doubt, the WTO has to address legitimacy problems. The question is whether either the diagnosis of a legitimacy crisis due to the failure of the WTO to realise its core normative value of promoting economic welfare interests of people in developing countries or an abandonment of these values by the WTO members is warranted.

With the DDA, the WTO members expressed the ambition to take greater account of the policies Esty would like the WTO to be more sensitive to, including in particular development-related interests.[31] Until it is clear that the DDA negotiations evidence an endogenous abandonment by WTO members of the core normative values of the WTO, a severe, unexpected threat to them or a failure to

[30] Hüller and I have suggested that in order to enhance its procedural and substantive legitimacy, the WTO needs to address certain 'structural problems', *inter alia* the centrality of consensus decision-making, which structurally privileges the status quo, and the exclusion of developing countries from substantively fully equal participation through substantive protections of their interests. Herwig and Hüller 2008, at 225–230.

[31] In the DDA, WTO members set out to liberalise agricultural trade, reduce tariffs of developed and developing countries, to clarify the relationship between WTO law and multilateral environmental agreements and in the course of the negotiations, they also managed to enhance access to affordable generic medicines notwithstanding the protection of intellectual property rights in the TRIPS Agreement.

deliver on their development and other non-trade policy aspirations, it is premature to argue that the WTO as it stands after the Uruguay Round is in a legitimacy crisis. Whether there is evidence of a legitimacy crisis in the DDA negotiations will be assessed in Sect. 8.3.3.

8.3.3 The DDA Negotiations as the Locus of a Legitimacy Crisis?

Are the DDA negotiations the real locus of a legitimacy crisis? The DDA negotiations are certainly not going well and might even fail. This section will first consider whether the delay of the negotiations is evidence of a legitimacy crisis in the sense of it being unexpected or revealing a breakdown of the WTO's legitimising frameworks. It then considers whether the need for a more differentiated approach to developing countries is evidence of the legitimacy crisis and finally whether or not the substance of the negotiations indicates that developed country WTO members have abandoned their commitment to make positive efforts to ensure the integration of developing countries into the multilateral trading system.

8.3.3.1 Is the WTO in a Legitimacy Crisis Because the Protracted Negotiations are a Severe, Unexpected Threat to the Values of the WTO or Because the Normative Commitment to a Reciprocal, Mutually Advantageous Balance of Concessions Has Changed?

Wilkinson and Lee point out that while the GATT managed eight negotiating rounds successfully, the WTO has so far failed with its first one.[32] Are the protracted negotiations of 12, perhaps soon 13, years evidence that the WTO is in a legitimacy crisis because an unexpected change in the conduct of negotiations prevents agreement and impedes the possibility for reform of the WTO to improve realisation of its core normative values? When one considers that the GATT started off with a failed negotiation to create an International Trade Organization (ITO), the current stagnation in the negotiation looks less unexpected. Negotiations for the ITO were ambitious: the plan had been to give the ITO broad capacity over restrictive business practices, investment, services trade, commodity agreements and employment. When the US withdrew its support for the ITO, it became clear that the project would be abandoned. The DDA negotiations are also ambitious because they aim at extending the already ambitious deal that was negotiated during the Uruguay Round, which took eight years to complete. As a result of the Uruguay Round, the dispute settlement system was made compulsory

[32] Wilkinson and Lee 2007, at 22.

and dispute settlement reports are adopted unless all WTO members agree not to adopt the report. Moreover, WTO law increased in scope (services, TRIPS, SPS Agreement) and detail (consider only the detailed rules in the TRIPS and SPS Agreement), which together have increased the level of accountability with regard to trade and trade-affecting policies.

In fact, of the eight successful negotiating round Wilkinson and Lee mention, seven were conducted within the framework of the pre-1994 GATT with diplomatic dispute settlement, independent law enforcement by the GATT contracting parties, plurilateral agreements and less detailed rules.[33] The statistics on prior negotiating history indicate that smooth negotiations on rules of trade liberalisation are preconditioned by negotiations being about plurilateral, less detailed rules with many escape routes and relatively lax enforcement. If one looks more narrowly at the two prior attempts to negotiate broad, detailed rules with binding enforcement (the ITO and Uruguay Round), the statistics suggest a 1:2 chance of failure. Based on this narrower sample, it becomes difficult to argue that the stalled negotiations are an *unexpected* threat to the values of the WTO.

Further, in what sense might events pose a threat to the values of the WTO? I suggest in the following analysis that what goes on (or what does not go on) in the DDA negotiations and beyond can still be understood as the research for a reciprocal arrangement on trade liberalisation on the basis of self-interest. Winham suggests that the lack of progress is due to three factors: a shrinking negotiation agenda, an early focus on the key divisive issues and numbers, and inconsistency between the goals of the DDA and the means used to achieve it.[34] While the first two factors simply refer to bad negotiation management on the part of the WTO members and Secretariat, the last factor might suggest that negotiations on the basis of self-interest in search for reciprocal, mutually advantageous arrangements no longer contribute to realising the normative values and human interests expressed in the Preamble to the Marrakesh Agreement.

As regards the agenda, Winham observes that in this Round the agenda has shrunk due to the exclusion of most of the Singapore issues (except for trade facilitation), while in previous Rounds, the agenda expanded.[35] The Singapore issues were of key interest to the developed countries. As a result of their exclusion, the limited commitments in TRIPS and the services and trade facilitation gains being contingent on how much liberalisation this Round can achieve, the negotiations have pitted the NAMA issues against agricultural trade liberalisation. The Hong Kong Ministerial Declaration commits WTO members to pursue a high level of market access for developing countries in NAMA and agriculture.[36] Achieving a high level of market access for developing countries requires liberalisation commitments from developed countries. To make these liberalisation

[33] The eighth is the Uruguay Round.

[34] Winham 2007, at 233, 235–236.

[35] Ibid., at 235.

[36] Hong Kong Ministerial Declaration, para. 24.

commitments defensible towards their domestic constituencies, developed countries also have to demand liberalisation commitments from developing countries.[37] More concretely, developed countries demanded reductions commitments from developing countries whose applied tariffs are still high[38] in return for their expected concessions in agricultural liberalisation and enhanced NAMA access by developed countries. The Hong Kong Ministerial Declaration commitment to seek a high level of market access for developing country makes it impossible to pursue one of the issues (NAMA or agriculture) with less ambition in return for dropping some demands on developing countries to open their markets.

Because the EU and the US gain little from the negotiation partners in agriculture, it has been in their interest to hold off on making concession on agriculture for as long as possible in order to be able to extract the maximum concessions from developing countries on NAMA.[39] For developing countries interested in agricultural liberalisation, the situation has been the reverse. It has been in their interest not to make concessions on NAMA before being sure that their demands on agriculture are met.[40] Concerns with reciprocity in liberalisation commitments explain why the negotiations on NAMA and agriculture, and thus the overall negotiations, have been so protracted.[41]

The withholding of concessions has been exacerbated by an early focus on modalities, i.e. the formula for cutting tariffs in the July 2004 package,[42] and on determining reduction commitments in agriculture as a priority rather than continuing with a series of bilateral requests and offers and negotiating all topics. The focus on formulas for tariff cuts has the disadvantage that it makes negotiations very transparent because anyone can easily see where perceived gains and losses lie, whereas with negotiations on qualitative obligations, such as national treatment or disciplines on domestic regulation, it is less clear *ab initio* who the perceived 'winners' and 'losers' are.[43] A further disadvantage of negotiations on modalities compared to bilateral requests and offers is that the concern with reciprocity changes from one between two parties to one across the different negotiating coalitions. This adds a dimension of symmetry to reciprocity concerns: not only must concessions be of roughly equal value but they must be divided in a

[37] Ibid.

[38] Import substitution policies sought to replace purchase of imports with purchase of domestic products by applying high tariffs to imports. The idea was that this would give the domestic industry a leg up and promote broader economic development.

[39] Winham 2007, at 233, 235.

[40] Lee and Wilkinson 2007, at 10.

[41] Similarly, Schwab 2011, at 105, 117.

[42] Formula-based negotiations mean that several or even all tariff lines will be subject to the same liberalisation commitment. For instance, linear cuts across all tariff lines would simply reduce all tariffs by a given amount no matter the prior level of tariff binding. The Swiss formula foresees steeper cuts in tariffs for tariff lines subject to a higher tariff than for lines subject to a low tariff.

[43] Winham 2007, at 242.

roughly symmetrical way across the negotiating coalitions[44] because it is transparent how much *all* the WTO members have conceded and demanded. In order to establish that different tariff cuts by different WTO members are reciprocal, one would need to show that the different levels are substantively equal to another because of WTO members' different stage of development. However, WTO members have not so far agreed on how to categorise developing WTO members based on different development needs, while the divergence between low-growth, low-income developing country members, middle-income members and big emerging economy players (Brazil, China, India) makes it questionable to apply the same requirements to them simply in virtue of their status of developing countries.

Although a framework for modalities has been agreed in 2008, the extent of liberalisation in agriculture and NAMA has been lower than what was hoped for: most of the commitments are foreseen with exceptions which are still contentious and, because the DDA issues are negotiated as a package, nothing is agreed on until everything is agreed on. Export subsidies would be eliminated altogether, which represents an important achievement. The EU, US and Japan would have to cut non-export contingent subsidies to their domestic producers by approximately 3/4 over five years and could maintain subsidies decoupled from production in the blue box.[45] On tariffs, developed countries would apply a minimum average tariff cut of 45 % and developed countries a cut of 2/3 but exemptions to reduction commitments apply in the form of the right to exempt 'sensitive' products and the automatic safeguard mechanism and continuation of the Special Agricultural Safeguard Mechanism.[46] The effect of an automatic safeguard would be that successful liberalisation reflected in higher imports could automatically be taken back without having to show injury. Schwab argues this would allow emerging economies, like India and China, a significant measure of protection of their domestic agricultural markets.[47] The WTO's Unofficial Guide to the Modalities observes that the exemptions can lead to a situation where the formula-based reduction in tariffs does not apply to a developing country at all.[48]

On NAMA, a Swiss formula has been agreed that would foresee steeper cuts for higher tariffs and result in maximum bound tariffs of 8 % for developed countries and between 11 and 15 % for developing countries, the latter of which could also

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[44] Dirk de Bièvre brought this to my attention.

[45] An overview of the agriculture negotiations and modalities is in WTO, Unofficial Guide to the Revised Draft Modalities—Agriculture, 6 December 2008 (hereinafter Unofficial Guide to Revised Draft Modalities), http://www.wto.org/english/tratop_e/agric_e/ag_modals_dec08_e.pdf. Accessed 26 November 2013.

[46] WTO, An Unofficial Guide to Agricultural Safeguards: GATT, Old Agricultural (SSG) and New Mechanism (SSM), 5 August 2008, http://www.wto.org/english/tratop_e/agric_e/ssm_explained_4aug08_e.pdf. Accessed 26 November 2013; WTO, Committee on Agriculture, Revised Draft Modalities for Agriculture, TN/AG/W/4/Rev.4, 6 December 2008, paras. 126–127.

[47] Schwab 2011, at 110.

[48] Unofficial Guide to Revised Draft Modalities.

exempt certain tariff lines.[49] However, as Schwab points out, with the flexibilities many emerging economies, except China and South Africa, would end up making no cuts to their applied rates.[50] Due to a perception of insufficient market opening from the NAMA formula, developed countries have pushed for further liberalisation in sectoral negotiations.[51] These negotiations would essentially be negotiations for a plurilateral agreement. While they are officially voluntary, developed countries condition their acceptance of the NAMA modalities on emerging economies participating in the sectoral ones. Their argument is that they will lose all negotiating leverage in the future if they commit to low tariffs of less than 3 % while emerging economies are permitted to use flexibilities to avoid the formula and apply high tariffs of 11–15 %. Thus, the real area of disagreement has shifted to the sectoral negotiations and one can again see the search for reciprocity in concessions at play here.

A further reason why finding an acceptable level of concessions has been rendered difficult is that developing countries enjoying preferential market access have no interest in seeing their preference eroded through MFN tariff liberalisation, while in agriculture, net-food importing countries have been concerned that an end to export subsidies would result in increases in food prices.[52] In other words, further multilateral trade liberalisation is to the disadvantage of some WTO members, putting the ideal of mutually advantageous arrangements through self-interested negotiations at risk.

My analysis so far suggests that WTO members remain committed to the core WTO idea of seeking reciprocal, mutually beneficial trade liberalisation from each other. In this sense, there is no legitimacy crisis due to an endogenous breakdown of key symbolic frameworks which legitimised the WTO. However, finding a reciprocal, mutually beneficial deal has been rendered more difficult due to the focus on numerical obligations with high transparency in the value of concessions, the need for a criterion taking account of different levels of development and the fact that multilateral trade liberalisation can entail losses for net-food importing and preference-receiving developing countries. These are exogenous challenges to the ability of the WTO to live up to its core legitimising idea of finding an equally advantageous deal. The severity of the challenges stemming from the focus on numerical obligations and the losses from multilateral trade liberalisation is explained by the absence of a sound approach to distinguishing the trade-related development needs of different developing countries. The question thus arises whether the need for differentiation amongst developing countries is a severe,

[49] For an overview of the NAMA negotiations and modalities, see WTO, The December 2008 NAMA Modalities Text Made Simple, http://www.wto.org/english/tratop_e/markacc_e/guide_dec08_e.htm. Accessed 26 November 2013.

[50] Schwab 2011, at 109–110.

[51] Ibid.; WTO, Trade Negotiation Committee, Report by the Director-General on his Consultations on NAMA Sectoral Negotiations, TN/C/14, 21 April 2011.

[52] Ibid., at 6.

unexpected threat to the values of the WTO. It is to this question that the next section turns.

8.3.3.2 Is the Need for a More Differentiated Approach to Trade-led Development an Unexpected, Severe Threat to the Core Values of the WTO?

Commentators have suggested that the focus on development in the Doha Round is responsible for the onset of problems in the negotiation. According to their position, the development goals have created unrealistic expectations on the part of developing countries about what the WTO, being an instrument for trade liberalisation, can achieve.[53] There is some truth to this view. Development is broader than market access and comprises general institution-building, law reform, social change, post-conflict resolution and other aims, which have not been within the realm of the WTO and it is therefore not equipped to address these issues. Moreover, in negotiations, every country seeks to advance its own interests and does not act altruistically in advancing the interests of other countries. And the fact of the matter still is that developed countries have many options for liberalising trade with willing partners, while most developing countries have fewer.

Even if it is true that the term development goes beyond what the institution of the WTO and negotiations can achieve, much of what is genuinely at stake in terms of pro-development issues is genuinely connected to the trade liberalisation mandate of the WTO. This is certainly true for agricultural trade, market access into developed countries and to some extent also market access into developing countries. Besides, the Preamble of the Marrakesh Agreement explicitly recognises that the WTO should pursue development-related goals of sustainable development, increased standards of living, full employment, a growth in income and demand and undertake positive efforts to enable developing countries and LDCs to share in the growth of world trade. In this sense, development has already been part of the WTO before the DDA.

However, uncertainty about how best to proceed to attain development-related goals predates the DDA negotiations. Mavroidis suggests that in the Doha Round, the opportunity was missed to clarify several pre-existing development-related questions, amongst them the issue of whether trade-led development is good for developing countries, how to balance preference erosion against MFN tariff liberalisation and the evaluation of special and differential treatment.[54] The import-substitution policy that was promulgated as *the* development policy in the 1960s and 1970s has been called into question by its absence of success. Although Asian countries in particular have been successful with export-led growth and the autonomous development of their economies, their path is unlikely to be a

[53] Mavroidis 2011, at 378 ff; Winham 2007, at 236–238.

[54] Mavroidis 2011, at 370.

blueprint for the development of other WTO members, plagued by inefficient institutions, corruption, lower labour productivity and skills level and an absence of domestic capital and firms that could absorb a potential labour force. The influx of imports and foreign direct investment could provide a useful stimulus to these economies, but the right dosage for each country remains uncertain. Trade-related development needs of developing countries necessarily differ because there will likely never be complete liberalisation of all factors of production, including labour and because developing countries and LDCs themselves are too heterogeneous. In conclusion, there is need for knowledge and agreement on what trade-related development paths should best look like for the different countries.

Is this need for knowledge an unexpected external threat to the values of the WTO? It is true that WTO members such as China, Brazil and India developed into emerging economies capable of exporting and making demands in negotiations relatively recently. However, heterogeneity of developing countries and differentiation among developing countries as a function of their different trade, financial and developmental needs has been on the table implicitly when the GATT contracting parties first agreed to the Generalised System of Preference through the Enabling Clause in 1979 and explicitly when the Appellate Body decided in *EC—Tariff Preferences* that preference-granting countries were allowed to condition preferences provided the conditions addressed a real trade, financial or development need and all similarly-situated countries with respect to the need were treated equally.[55] WTO members have never elaborated what these needs were and by how much they differed even though the *EC—Tariff Preferences* report requires this from preference-granting WTO members. It should thus not come unexpectedly that this lack of knowledge about how to deal with different trade-related development needs would take centre-stage in a Round that attempts a more comprehensive approach towards trade-related development.

Summing up, although the absence of more differentiated knowledge on how trade benefits development is a severe threat to the values of the WTO because it concerns its key legitimacy problem, it is not an unexpected threat and in this sense, one cannot speak of a crisis. Because the origin of the stalled negotiations goes back much longer, an emergency response as might be taken in case of an acute crisis due to unexpected events is not appropriate. Should it become clear that the WTO members are unable to tackle the question of the different trade-related development needs of developing countries, one would have to conclude that the WTO has failed to deliver on some of its core legitimising ideas, namely to make positive efforts towards the integration of developing countries into the multilateral trading system and enhance economic welfare-related human interests in developing countries.

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[55] WTO, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, L/4903, Decision of 28 November 1979; *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, Report of the Appellate Body, WT/DS246/AB/R, 20 April 2004, paras. 162–165.

8.3.3.3 Have Developed Countries Abandoned Making Positive Efforts to Ensure Developing Countries Share in the Growth of International Trade Commensurate with Their Development Needs?

In terms of positive efforts by WTO members to ensure developing countries and LDCs share in the growth of international trade, four efforts of the DDA negotiations need to be mentioned. First, developed countries have offered duty- and quota-free (DFQF) access on 97 % of their tariff lines for the benefit of LDCs.[56] Since a lot of least-developed countries export only a few products, the possibility of exclusion of up to 3 % of tariff lines from free access potentially reduces the value of the commitment for them,[57] but this of course depends on whether developed countries avail themselves of this possibility.

Second, as MFN tariffs get reduced through multilateral or bilateral free trade agreements, existing tariff preferences for developing countries will see their margin eroded. To tackle the problem of erosion of non-reciprocal preferences on products of vital export interest to developing countries, developed countries would not need to make cuts in MFN tariffs for which preferences were granted as quickly as for the other tariff.[58] It is thus envisaged that preferences would eventually be terminated. Evidence suggests that tariff preferences under the Generalised System of Preferences have not contributed to development, rather they have maintained recipients in a state of dependency.[59] In this sense, the delayed erosion of preferences might not be a bad thing for developing countries in the long run.

Third, the WTO members launched the Aid for Trade Initiative at the Hong Kong Ministerial Conference in 2005 to build trade-related capacity in developing countries. The Aid for Trade Initiative contributes to building capacity in developing countries to benefit from trade but it suffers from some limitations. Namely, demand far outstrips supply of aid, aid to build sustainable trade capacity is often likely to show results only after a few years, and highly visible infrastructure projects, to which a big part of the Aid for Trade financing is directed, are unlikely to show durable results in very underdeveloped countries unless they are accompanied by aid to establish the general socio-economic conditions that enable their full utilisation, including for export purposes.[60] Such a more general development agenda is, however, beyond the mandate of the WTO. The Aid for Trade financing also contains aid for adjustment assistance, the purpose of which is to contribute to the costs of transitioning to a more open economy, which may arise

[56] Hoekman 2010, at 516.

[57] Ibid.; Lee and Wilkinson 2007, at 11.

[58] WTO, Negotiating Group on Market Access, Fourth Revision of Draft Modalities for Non-Agricultural Market Access, TN/MA/W/103/Rev.3, 6 December 2008.

[59] Mavroidis 2011, at 372–374.

[60] Ibid., at 374–375 ff.

in the form of preference erosion, declining terms of trade or fiscal revenue. Adjustment assistance is one of the pillars of the initiative; the others are training on trade policy and regulation, infrastructure development and capacity building in production. Remarkably, adjustment assistance aid is only 1/4 of the combined aid for infrastructure and production capacity building. This shows that developed countries are more willing to give aid from which they can obtain immediate economic returns in terms of facilitating the placing on the market of their exports or obtaining quality inputs from developing countries.

Fourth, the elimination of subsidies for cotton producers that the US has committed to is largely symbolic politics because the US already has to reduce its WTO-inconsistent cotton subsidies following an adverse ruling by the panel and Appellate Body.[61]

Looking at the substance of the positive efforts, the assessment is mixed. On tariffs, the approach is inconsistent. On the one hand, the DFQF initiative continues with non-reciprocal preferences while phased-in preference erosion towards existing recipients of preferences under the GSP is envisaged as a result of MFN tariff reductions. But this raises at least two questions. First, whether some existing small economy recipients of preferences with inherently poor economic diversification do not need to be shielded from competitive fluctuations in some way; and second, whether DFQF treatment will set LDCs on a path towards autonomous development given the doubts about the effectiveness of the GSP to do so. In conclusion, DFQF, the approach to preference erosion and the Aid for Trade initiative have considerable shortcomings. Nevertheless, the efforts do not evidence an absence of positive efforts by developed countries for developing and least-developed countries to benefit from the growth in trade. They seem simply limited by the institutional capacity and the uncertainty as to the best way to achieve this.

8.4 Consequences of a Perceived Legitimacy Crisis for the Development of Multilateral Trade Liberalisation Law

I have suggested that the protracted DDA negotiations are evidence of the continued commitment of WTO members to seek reciprocal arrangements to their mutual advantage, the attainment of which is rendered difficult by the considerable heterogeneity amongst developing countries. As argued, such heterogeneity calls for knowledge and agreement on what a fair commitment-level is, given their different trade, financial and development needs. I have also suggested that this need for knowledge and agreement on how to differentiate among developing

[61] *United States—Subsidies on Upland Cotton*, Report of the Appellate Body, WT/DS267/AB/R, Report of the Panel, WT/DS267/P/R, 21 March 2005.

countries is not new so there is a severe but no unexpected threat to the WTO and in this sense there is no legitimacy crisis, rather we are faced with an old problem. Until it is clear that the WTO members have failed in their Doha ambitions, it is premature to speak of an objective legitimacy crisis. However, perceptions of academics and negotiators of the DDA negotiations and the WTO being in crisis may serve the developed countries because where negotiations are seen to be in crisis, or where the consensus around trade liberalisation is seen to have broken down, extra-ordinary measures in the form of recourse to bilateral or regional preferential free trade agreements seems (more) justified.

The EU and the US are particularly active in negotiating bilateral and regional FTAs since the DDA was launched. They have each taken major initiatives at liberalisation amongst key developed and emerging economies—just recently in the form of the EU-US Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TTP), the EU-Canada Comprehensive Economic and Trade Agreement and EU bilateral talks with Japan, India and possibly soon China.[62] The US is negotiating the plurilateral Trans-Pacific Partnership (TPP) with Australia, Brunei Darussalam, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam—lately Japan also joining the negotiations. The negotiations of the Comprehensive Economic and Trade Agreement between the EU and Canada have achieved a breakthrough, leaving only small details to be worked out.

While the attempt at negotiating a transatlantic free trade agreement between the EU and the US is not new, the timing of re-starting these negotiations, what is on their agenda and the commitment with which they are pursued suggest that they are linked to the stalemate in the DDA negotiations. Moreover, despite contentious issues between the two trading partners over the status of audiovisual services, the access of genetically modified foods and feeds and the revelation of widespread US intelligence gathering in Europe, the parties have so far managed to keep the negotiations going.

In addition to the FTAs already mentioned, the EU is also negotiating with Thailand, Singapore, Malaysia, Vietnam, Morocco and Mercosur, while the conclusion of the EU-Ukraine FTA now looks uncertain. The EU has also concluded FTAs with Moldavia, Armenia, Georgia, six Central American countries, Colombia, Peru and Korea and Economic Partnership Agreements with several ACP developing countries. The Commission also has a mandate to negotiate an investment agreement with China and FTAs with Tunisia, Egypt and Jordan and has an active interest in the negotiation of a plurilateral agreement on trade in services. The US has FTAs in place with Australia, Bahrain, Chile, seven Central American countries, Korea, Morocco, Oman, Colombia, Peru and Singapore, all of them concluded after the launch of the Doha Round.

[62] For an overview of the FTAs the EU has finished, see European Commission, Memo. The EU's Bilateral Trade and Investment Agreements—Where Are We?, 1 August 2013, http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150129.doc.pdf. Accessed 22 October 2013.

Many of the EU's FTAs are so-called 'deep and comprehensive agreements', that is, they include negotiations in the Singapore issues as well as tariffs, IP, services and regulatory policies and the negotiations are between the old Quad (EU, Canada, Japan, US). The US' FTAs, for their part, liberalise tariffs but also services, procurement and contain investment protection provisions and a commitment to respect basic labour rights. According to Mavroidis, the developing country parties to FTAs have signed up to rules that are the subject of contentious negotiation in the DDA or even go beyond the DDA.[63] In other words, the Quad that had been shaping the Uruguay Round negotiations is negotiating for trade liberalisation on the terms which they had initially sought for the multilateral negotiations and they are meeting their objectives of market access in the sectoral negotiations through FTAs. This approach suggests that the DDA negotiations as they currently stand do not offer enough realistic gains for the Quad.

A possible future scenario could be that the development of trade liberalisation takes place only through preferential trade agreements while the DDA negotiations are cancelled and the WTO continues to administer the agreements concluded in the Uruguay Round. If WTO members abandon the attempt to negotiate new multilateral trade liberalisation rules altogether, and for good, one would indeed have to speak of a legitimacy crisis because the WTO would have then failed to tackle one of its most severe legitimacy problems: the unfairness of substantive rules and procedures towards developing countries. Another, probably more realistic scenario could be that developed countries negotiate preferential trade agreements as a strategic move in the DDA negotiations either to force closure on a deal that does not require significant pro-development commitments of developed countries or to impose their maximal demands for trade liberalisation on developing countries.

If the old Quad countries negotiate on trade liberalisation of interest to each other in the multilateral negotiation rounds, the other WTO members, and in particular smaller developing countries, obtain some power to delay the formation of agreement between the main developed country players by withholding their consent. This delaying power also gives the smaller, developing WTO members some negotiating leverage, which they would not enjoy if they had to negotiate bilaterally with the EU, the US and other developed economies (and for which there might not be any interest from the EU and the US in the first place). Since the EU and the US are also interested in obtaining trade liberalisation commitments from developing countries (even if these are of lesser interest to them than mutual market access), it is reasonable for them to continue with multilateral negotiations as long as the cost of negotiations and delay remains small enough. Consider though, that for both the EU and the US, the cost of delay is significant. The US had bilateral trade deficits with several trading partners and can finance its public

[63] Mavroidis 2011, at 376.

debt through the influx of investment or US exports,[64] while the EU has much to gain from speedy trade liberalisation given the low value of the Euro following the financial crisis.

So the move towards a bilateral trade agreement between the EU and the US may be an attempt to reap the fruits of trade liberalisation now and shape the ongoing DDA negotiations in favour of the EU and the US because they continue to be interested in multilateral trade liberalisation. If a preferential trade agreement were to be signed between the EU and the US, the value of what is on the table in the DDA negotiation for these two countries would be reduced by that much. Two trajectories are then possible. Under the first trajectory, the reduced value of the DDA negotiation package could be used by the EU and the US to block demands from developing countries for agricultural trade liberalisation and NAMA of interest to developing countries. Developing countries and emerging economies must be aware of this threat and have every interest in getting the Doha deal closed by making more concessions before the EU and the US have concluded their TTIP. The EU's and the US' negotiation of preferential trade agreements with developing countries fits into the negotiation strategy of trying to secure more favourable outcomes for the former. The prospect for developing countries of a preferential agreement with the EU and the US allows both to make side-payments to developing countries on something of interest to the latter in return for the country breaking away from the coalitions of developing countries in the DDA negotiation on matters that the EU and the US wish to block.[65] Other reasons for the increase and the deep and comprehensive nature of North–South FTAs have also been suggested, namely the partners are interested in obtaining the competitive advantage of early market entry from liberalising investment and services certain sectors can offer and in obtaining a more advantageous tariff than the MFN rate that other supplying countries have to use.[66] Manger argues that the conclusion of one North–South PTA triggers defensive FTAs from interested countries left out of the deal.[67] His analysis, however, neglects the effect North–North FTAs have on the competition and 'prices' (in terms of trade and investment concessions) for new FTAs and multilateral negotiations. What seems certain is that the developing countries left behind without immediate prospects for FTAs have every interest to become more conciliatory in the DDA negotiation while their various coalitions are still strong.

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[64] Scott suggests that the trade deficit explains the US' tough stance in the negotiations before the 2008 financial crisis. Scott 2007, at 111–117. Ismail affirms that the EU and the US have continued to be protectionist after the financial crisis. Ismail 2009, at 581, 587–589. For evidence of the impact of the financial crisis on reducing trade flows, see George et al. 2010.

[65] Clapp mentions the example of Colombia, Peru, Guatemala and El Salvador leaving the G20 following pressure from the US to leave the group or forfeit the bilateral trade liberalisation. Clapp 2007, at 45. Taylor also suggests that the EU used preferential access to divide developing countries. See also Taylor 2007, at 159.

[66] Manger 2009, at 15–19, 39–51.

[67] Ibid., at 55–61.

Reducing what is at stake for the EU and the US in the DDA negotiation through an FTA between themselves, and weakening developing country coalitions through North–South FTAs might result in that any final deal that can realistically be agreed on by the EU and the US will not meet the initial demands and aspirations of developing countries very much. The developing countries would then be stuck with a half-baked deal for several more years that they have not wanted despite the initially promising ambitions of the Round. The deal would evidence that the development-related concerns of the WTO expressed in the Marrakesh Agreement serving as the legitimating symbolic frameworks have broken down. If WTO members no longer internalise these frameworks, both the perceived but also the normative legitimacy of the WTO would be in crisis because the ideal fails to be supported by legitimacy beliefs that reinforce it.

The second possible trajectory consists in developed countries reducing items of negotiation under the DDA so much through conclusion of FTAs covering services, IP and sectorals that any concessions on agriculture require similarly ambitious concessions by developing countries on NAMA to preserve some form of substantial reciprocity. This may be good for development if it targets the right developing countries but bad if it fails to differentiate their treatment as a function of different development needs. If developing countries were pushed into high levels of trade liberalisation that are inappropriate for them, one would have to conclude that the positive law emanating from a DDA deal is not able to fulfil the core function of promoting trade-related development and human economic welfare interests mentioned in the Preamble to the Marrakesh Agreement. Forcing the hand of developing countries to agree to a DDA deal with deep liberalisation, even if in their long-term interests, comes at a political cost of having overridden their independent choices. This political cost could threaten the input legitimacy of the WTO, which is based on the idea that self-interested negotiations by all WTO members with consensus as a decision-rule will eventually produce reciprocal and mutually advantageous trade liberalisation.

8.5 Conclusion: How to Avert a Crisis?

It has been suggested that the negotiations of FTAs could become the onset of a legitimacy crisis because they could either force developing countries to agree on a deal with relatively unambitious pro-development commitments from developed countries or lead developed countries to impose maximal, but possibly unsuitable, trade liberalisation demands on developing countries. The question then becomes what ought to be done to avert a crisis? I have suggested that the reasons for the difficulty in the DDA negotiations lie in the fact that WTO members are searching for reciprocity and trade policies with development benefits. However, the meaning of these concepts remains unclear in the world of today with considerable heterogeneity of developing countries. Non-reciprocal trade liberalisation by developed countries only is no longer an option with some developing countries

such as China, India and Brazil having reaped significant gains from trade. At the same time, the DDA commitment to place development concerns at the heart of the negotiations requires that the differences between developing countries as to their capacity to benefit from integration into international trade is taken seriously. A real solution to the lack of progress must thus enable resolving concerns about reciprocity, symmetry across the different WTO member groups and the extent to which rules are to the advantage of individual WTO members. Several bad strategic choices were made in the negotiations that have made it difficult to find a reciprocal, mutually advantageous agreement, such as the exclusion of the Singapore issues, the decision to pursue the contentious issues of NAMA and agriculture as a priority and the focus on modalities. Turning the clock back and starting all over, for instance with bilateral requests and offers, is impossible. The genie is out of the bottle and WTO members know all too well what their counterparts are seeking and willing to offer in terms of market access and reductions in subsidies.

The only way to move the DDA negotiations forward, to break the perception of deadlock and crisis *and* to address the structural legitimacy problems of the WTO in a bid to avert the manifestation of a real normative and perceived legitimacy crisis is that WTO members resolve the question of how to differentiate between developing countries on the basis of their trade, economic and financial needs, which is raised by the Appellate Body's decision in *EC—Tariff Preferences.*[68] Resolving the issue of differentiation would achieve two things. First, it would help to show whether proposed rules are consistent with the pledge of WTO members to undertake positive measures to ensure that developing countries and LDCs share in the growth of world trade. Second, it would also allow to judge whether formally different commitments of WTO members are substantively equivalent because they are based on the different capacity of a WTO member to benefit from trade liberalisation. In other words, differentiation would go some way towards resolving the reciprocity and symmetry concerns that have slowed down the DDA negotiations. The systematic monitoring of the effectiveness of aid flows for trade capacity-building undertaken in the context of the Aid for Trade Initiative led by the WTO and the review of the effectiveness of Special and Differential Treatment provisions helps to generate data. Nevertheless, further studies, in particular by independent expert groups, may be needed in this regard.

Some uncertainty over trade-related development paths and the capacity of developing countries to derive sustainable benefits from trade liberalisation they undertake is likely to remain. Since some developing countries will be particularly vulnerable to fluctuations in prices, trade flows or the consequences of mistaken forecasts of their ability to benefit from trade liberalisation they undertake, WTO law needs a principle of benefit-and-burden sharing. The Aid for Trade initiative includes this principle in the form of adjustment assistance but a greater aid budget

[68] See discussion in Sect. 7.3.3 above.

for this component would be desirable, also so as to ensure that the investments in infrastructure and production capacity-building do not go to waste.

In addition to these measures, a sort of controlled experiment, especially for the sectorals, with time-bound trade liberalisation that reverts to the *status quo ante* after a certain time has elapsed may also be needed in order to enable developing countries to enter the path of more market opening.

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Chapter 9
The EU in Crisis: Crisis Discourse as a Technique of Government

Jessica C. Lawrence

Abstract This chapter argues that it is illuminating to read 'crisis' not as a fact, but as a political discourse that functions as a 'technique of government'. Drawing examples from the context of the EU's contemporary policy responses to the financial crisis, it illustrates how experts produce knowledge about 'crises', and how the discourse of crisis is operationalized as a tool for giving effect to governmental ambitions. This reading of crisis as a technique of government raises three inter-related challenges to the implied assumptions of the crisis narrative. First, it puts into question the idea that crises are 'uncommon' or 'special' events, and instead argues that the discourse of crisis is commonplace in the EU, and acts as a normative assertion about the *status quo*. Second, it undermines the simplistic logic of cause and effect by emphasizing the production of truth that lies at the heart of crisis discourse and how these truths shape expectations and policy proposals. Third, this reading complicates the idea that crises are 'game changing' moments of social or political shift, arguing rather that their political effects remain uncertain and tied up with the success of particular forms of knowledge.

Keywords EU · Crisis · Discourse · Governance · Finance · Eurozone

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Contents

> *Europe will be forged in crisis, and will be the sum of the solutions adopted for those crises.*[1]

9.1 Introduction

The European Union's (EU) regulatory responses to the global financial crisis of 2007–2009 and the ongoing eurozone, banking, sovereign debt, and competitiveness crises have generated a large and fascinating literature.[2] Over the past five years, scholars of European legal, economic and political studies have produced thousands of pages of analysis attempting to unravel the causes of these crises and proposing regulatory and institutional changes that would prevent similar effects in the future. The 'problems' and 'solutions' that these works identify vary in their focus from the personal to the institutional; from the exceptional to the ordinary; and from the global to the local. What they generally share, however, is a sense that the crisis has demonstrated a failure of the system, and that 'something should be done' to correct it.

In response, the EU and its Member States have leapt into action, debating, proposing, and adopting a large number of detailed rules (many of which are still being developed at the time of writing) and several major structural initiatives.[3]

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[1] Monnet 1976, at 488.

[2] See e.g. Borger 2013; Chiti and Teixeira 2013; De Ville and Orbie 2011; Habermas 2012; Lapavitsas et al. 2012; Overbeek 2012; Ruffert 2011; Schmidt 2013; Wigger and Buch-Hanen 2013.

[3] For example, the establishment of the European Financial Stability Facility (EFSF) and European Financial Stabilization Mechanism (EFSM); the establishment of the European Stability Mechanism (ESM); the adoption of the Treaty on Stability, Coordination and Governance in the EMU (TSCG); and the adoption of the Six-Pack reforms to the Stability and Growth Pact. Conclusions of the Council—Economic and Financial Affairs of 9–10 May 2010, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/114324.pdf. Accessed 7 October 2013; European Council, Council Regulation No. 407/2010 of 11 May 2010 establishing a European Financial Stabilization Mechanism, OJ 2010 L 118/1; Treaty Establishing the European Stability Mechanism (ESM), 1 February 2012, OJ 2011 L 91/1; Treaty on Stability,

Some of these measures go far beyond what was thought to be politically possible merely a decade ago.[4] Others reinforce and extend existing policies, strengthening pre-crisis attitudes toward economic regulation. Meanwhile, a number of legislative areas—including some that seem close to the epicentre of the economic storm, such as competition, trade, and the free movement of capital—remain unaddressed by post-crisis reforms.[5]

It is commonly understood that crises create political opportunity. The declaration of a 'crisis' evokes an atmosphere of threat or uncertainty that can unsettle the social and political status quo, implying a 'dislocation' of previous social and political discourses.[6] This unsettling can be traumatic and destructive, in the sense that it undermines existing social constructs, shakes confidence in leaders and regulators, and exposes weaknesses and failures of the system. But it can also, and perhaps more importantly, be productive.

Crises can provide space for the emergence or ascendance of particular ideas, rules, and institutions. This is because crisis implies a time apart—a moment of intense difficulty or danger. The discourse of crisis calls out for action, for a response, for a solution. Indeed, this political valence is already present in its

(Footnote 3 continued)
Coordination and Governance in the Economic and Monetary Union, 2 March 2012; Regulation 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ 2011 L 306/1; Regulation 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ 2011 L306/8; Regulation 1175/2011 of the European Parliament and of the Council, of 16 November 2011, amending Council Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ 2011 L 306/12; Regulation 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ 2011 L 306/25; Council Regulation 1177/2011 of 8 November 2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 2011 L 306/22.

[4] Chiti and Teixeira, for example, argue that the balance of power in Europe is shifting as European policy-makers have gradually set aside the 'Union method' of EU action in favour of intergovernmental instruments, the increasing use of 'partly internal, partly external' measures, and the transformation of the EMU from a 'community of mutual benefits' to a 'community of benefits and risk-sharing'. Chiti and Teixeira 2013. Another example is the revision of Article 136 TFEU to permit the establishment of a mechanism to safeguard the stability of the eurozone. European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU), OJ 2011 L91/1. Additionally, the reinterpretation of the 'no-bailout' principle of Article 125 TFEU by the CJEU in the *Pringle* case ran counter to prior expectations. Case C-370/12, *Thomas Pringle v. Government of Ireland,* judgment of 27 November 2012 (not yet reported). On the Court's 'strained reasoning' in attempting to reconcile the ESM with Article 125, see Borger 2013.

[5] See De Ville and Orbie 2011; Lesage and Vermeiren 2011; Wigger and Buch-Hansen 2013.

[6] 'Dislocation' is used here in the sense of Laclau, to refer to the process by which discursive structures are revealed as contingent. Laclau 1990, at 39–44.

Greek root as the word for 'decision'. To speak of a crisis, then, is to evoke a moment in which decisions must be made; a moment of political opportunity.

The political possibilities inherent in crisis have certainly not been lost on political strategists—as former White House chief of staff and current Mayor of Chicago Rahm Emanuel famously quipped, '[n]ever allow a crisis to go to waste'.[7] Or, as European Commissioner for Internal Market and Services Charlie McCreevy noted in 2008, the global financial crisis meant that EU regulators had 'a window of opportunity that must not be missed'.[8]

The politically productive space of crisis is not, however, simply an objective or determinate effect of particular events. It is, rather, a discursive construction—a narrative that describes a set of facts, ordering them to produce a representation of crisis. The events that precipitate the use of crisis discourse can be large or small, systemic or focused, many or few. What links them together is the narrative of crisis itself. In other words, crises are *constructed*, not *revealed*.[9]

This chapter takes up this idea of crisis as a political discourse, drawing examples from the context of the EU. It will begin by examining the idea that crisis is usefully seen as a 'technique of government' in the Foucauldian sense (Sect. 9.2). This approach is helpful, as it permits a focus on the ways in which knowledge about 'crises' is produced, and how the discourse of crisis is operationalized as a tool for giving effect to governmental ambitions. Reading crisis as a technique of government raises three inter-related challenges to the implied assumptions of the crisis narrative. First, it puts into question the idea that crises are 'uncommon' or 'special' events (Sect. 9.3). Second, it undermines the simplistic logic of cause and effect by emphasizing the production of truth that lies at the heart of crisis discourse (Sect. 9.4). Third, this reading complicates the idea that crises are 'game changing' moments of social or political change (Sect. 9.5).

9.2 Crisis as a Technique of Government

In his recently translated lectures on governmentality, Michel Foucault argues that one of the characteristics of contemporary society is that it has embraced a new form of individual subjectivity.[10] Neoliberalism, he argues, calls on every

[7] J Zeleny, Obama Weighs Quick Undoing of Bush Policy, *The New York Times*, 9 November 2008, http://www.nytimes.com/2008/11/10/us/politics/10obama.html?pagewanted=all&_r=0. Accessed 26 October 2013.

[8] McCreevy 2008.

[9] This is in no way intended to imply that crises are 'fake' or 'made up' for political gain, or anything of the sort. Rather, I mean to suggest that *events*—even catastrophic ones—only become *crises* through the operation of discourse.

[10] Though Foucault has been dead for 30 years, a number of transcripts of his lectures from the late 1970s and early 1980s have only recently been released in English. The publication of these works (which due to his early death Foucault was never able to collect into a monograph) has spurred a new surge of interest in Foucault's later work on governmentality, biopolitics, and subjectivity.

individual to be an 'entrepreneur of himself', balancing costs and benefits to maximize personal satisfaction.[11] This 'entrepreneur of himself' pursues his interests by investing in his own human capital—enhancing physical capacities, mental skills, family bonds, and so on by devoting scarce time and resources.[12] Individuals acting in pursuit of their own interests are called upon to 'live dangerously', and to take risks in pursuit of greater satisfaction.[13] This risk-seeking behaviour produces what Foucault called a 'consciousness of crisis' that sees everywhere the 'economic cost of the exercise of freedom'.[14] As a result, these entrepreneurial subjects look to government to manage their choices at the margins, altering incentives and disincentives to shift the legal 'rules of the game' and protect against significant social disruptions.[15]

In contemporary society, then, 'crisis' is a technique of government (one of many), defining the reasons why and the limits within which government can and should intervene to alter the 'rules of the game'. Techniques or technologies of government, in Foucauldian terms, are the 'complex of mundane programmes, calculations, techniques, apparatuses, documents and procedures through which authorities seek to embody and give effect to governmental ambitions'.[16] They are the mechanisms, procedures, instruments, and tactics through which governing is accomplished. These techniques are not neutral, but act as a condition of government, opening up certain possibilities for action and limiting others. Government, in this sense, is tracked into particular pathways by the technologies that it employs.

Techniques of government are also linked to what Mitchell Dean calls the 'fields of visibility of government': the way that they make certain objects visible while hiding or obscuring others.[17] In this vein, Dianne Otto has argued that the technique of 'crisis' is strongly correlated with the rise of expert rule. As she writes, the 'sense of cataclysm' generated by our perception that we are 'more or less permanently suspended in states of crisis' has 'generated a mantra of speedy diagnosis and robust response, crafted by technocratic and military experts'.[18] Crisis discourse aligns the field of visibility of government with the field of visibility of the expert, directing governmental focus toward quickly identifying causes and effects, and rapidly designing appropriate interventions.

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[11] Foucault 2008, at 226. The 'entrepreneur of oneself' is not the only subjectivity available in the political milieu of contemporary neoliberalism. However, its prominence is demonstrated by the popularity things like behavioral economics and self-improvement.

[12] Ibid., at 229.

[13] Ibid., at 66.

[14] Ibid., at 68. Nicholas J. Kiersey has written in several instances about the contemporary relevance of the 'consciousness of crisis', including in the context of the financial crisis. Kiersey 2011.

[15] Foucault 2008, at 260.

[16] Rose and Miller 1992, at 175.

[17] Dean 2009, at 41.

[18] Otto 2011, at 76.

The employment of crisis as a technique of government is not, therefore, politically neutral. Instead, it tends to empower the expert, the short-term, and the top-down, at the expense of the inclusive, the democratic, and the mundane.[19] The knowledge that is produced as a part of crisis discourse will help to construct the dividing line between government and subject, which in turn will structure the path of future governmental behaviour.

At the same time, however, the use of crisis discourse will not necessarily lead to any particular regulatory outcome in a given context. Crisis discourse, as a technique of government, is an instrument that can be used to expand, justify, or contract the perceived limits of the realm of governmental activity. It can permit governmental intervention or abstention to ensure security, allowing the entrepreneurial game to continue, even in the absence of democratic legitimation.[20] No wonder, then, that crisis is such a useful political tool—it is a ubiquitous feature of social life that can be deployed at any time to produce expert knowledge about the appropriate realm of governmental activity.

This reading does not intend to suggest that crisis discourse is mobilized solely as a rational strategic intervention. Indeed, one important insight of the Foucauldian paradigm is that the neoliberal subject sees his or her world as potentially full of 'real' crisis points. It also does not mean to imply that the use of crisis discourse is 'all bad' or that crises do not 'really exist'. The set of events, observations, individuals, or institutions defined as being in 'crisis' might have very real material consequences that affect the lives of many. However, so can other events, observations, individuals, or institutions that are *not* defined as being in 'crisis'. The point is that while we tend to think of 'crisis' as a neutral description of an exceptional pre-existing situation, it is in fact a politically charged discursive construction of events that functions as a technique for affirming or altering our understanding of how government can and should operate.

This reading shifts our attention away from attempting to understand the causes of, nature of, or solutions to a particular crisis, and toward an investigation of how crisis discourse functions from the perspective of governmental behaviour. Using examples drawn from the contemporary EU response to the financial crisis, the remainder of this paper will highlight three shifts in focus suggested by the reading of crisis as a technique of government: (1) a move to seeing crisis as a common element of contemporary politics; (2) an emphasis on the links between crisis discourse and the production of truth; and (3) an understanding of crisis as a disruption that leads to political opportunity, but not necessarily a particular political outcome.

[19] Ibid.

[20] Habermas 1975.

9.3 The Unexceptional Crisis

Reading crisis as a technique of government implies a number of interesting challenges to the familiar notion of crisis. To begin with, it calls into question the notion that crises are 'uncommon' or 'special' events. Instead, it highlights the commonality of crisis, demonstrating how crises are in fact quite common occurrences in political discourse.[21] This section will briefly expand on this claim, providing some examples of the frequency with which the idea of crisis appears in discussions of EU law and policy.

In her 2008 article 'International Law: A Discipline of Crisis', Hilary Charlesworth argues that crises 'dominate the imagination of international lawyers'.[22] This observation would seem to hold true—at least to some degree—in the EU context, as well. Far from being uncommon or unique events, crises seem to pop up frequently in the EU. Indeed, it is almost difficult to identify a period of EU history when the EU or its predecessors were *not* in the midst of one crisis or another. With regard to the recent past, a brief search of the literature from the year 2000 to the present reveals numerous examples of the use of crisis discourse in EU legal literature. The last decade and a half have seen discussions of crises ranging from the domains of agriculture to immigration, external enlargement to internal legitimacy, and the constitutional to the mundane. To name just a few examples:

- the 'BSE crisis' or 'mad cow crisis', which shifted the EU's approach to food safety regulation;[23]
- the 'steel crisis' relating to the Commission's ongoing responses to the overproduction of steel in previous decades;[24]
- the EU 'enlargement crisis' triggered by problems relating to eastern enlargement;[25]
- the EU 'carrot crisis' in the incentive-based West Balkan and Eastern Partnership programmes;[26]
- the EU 'legitimacy crisis'[27] related to the perceived 'democratic deficit' in European-level decision making;
- a series of 'refugee crises' relating to Kosovo, Iraq, Syria, and global migration flows,[28] among others;

[21] For an alternative reading of crisis as 'politics as usual' that proceeds from a neo-Gramscian, rather than Foucauldian, perspective, see Henderson 2013.

[22] Charlesworth 2008, at 382.

[23] Freeman 2002; Vincent 2004; Vos 2000.

[24] Conrad 2003.

[25] Vobruba et al. 2003.

[26] Ágh 2010.

[27] Van Apeldoorn 2009.

[28] Baines 2004.

- the 'constitutional crisis' after the defeat of the constitutional referendum in France and the Netherlands;[29]
- the 'global financial crisis' and its various EU components, including the 'Eurozone crisis', the 'sovereign debt crisis', the 'banking crisis', and the 'growth and competitiveness crisis'.[30]

The point that stands out from this cursory investigation is that crises are surprisingly unexceptional in the EU political arena. Rather than being a politics out of the ordinary, crises are, in some sense, politics as usual. Though the events that make up a *particular* crisis may be more or less exceptional in their breadth, scope, and disruptive potential, the *discourse* of crisis appears as a part of the *status quo* of EU government—and indeed, of contemporary government in general.

The idea that crisis has become an unexceptional state in modern society is not a novel one. A number of scholars have noted the way in which contemporary government is suffused with the discourse of crisis, or some variant thereof. Ulrich Beck, for example, has popularized the idea that modernity is characterized by the production of risk, which systematically accompanies the social production of wealth.[31] While not synonymous, the concepts of risk and crisis are intimately related—particularly as Beck defines them.[32] Italian philosopher Giorgio Agamben has also suggested that crises are not in fact exceptional events, but rather are ubiquitous in modern society. In his words, the 'state of exception' prompted by crisis or emergency is now the 'dominant paradigm of government'.[33] The governmental technique of emergency enables law to extend its control of 'life itself' by colonising modern politics.

The thread that connects these accounts is the idea that crisis is not, in fact, an aberrant state of affairs, but rather a common feature of contemporary law and politics. Indeed, it is not only common, but also an integral part of modernity, with its emphasis on entrepreneurship and risk. As a technique of government, crisis discourse is not simply a way of identifying a deviation from the norm, but is rather a way of talking about *what the norm should be*. This is an essential point. Reading crisis in this way reveals that labelling a given event or set of events a 'crisis' is, at its heart, a normative assessment that is about defining the *status quo*.

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[29] Best 2005.

[30] Chiti and Teixeira 2013; De Ville and Orbie 2011; Habermas 2012; Lapavitsas et al. 2012; Overbeek 2012; Ruffert 2011; Schmidt 2013; Wigger and Buch-Hansen 2013.

[31] Beck 1992, at 19.

[32] Beck himself argues that while 'normally people speak of "crisis"', he prefers the term 'risk', which 'goes beyond' the term crisis because: (1) the notion of crisis blurs the distinction between anticipated and actual crises; (2) the term 'crisis' falsely implies the possibility of revision to a pre-crisis state; and (3) the term 'crisis' implies an exceptional, rather than a permanent state. Beck 2013, at 6.

[33] Agamben 2005, at 2.

9.4 Crisis and the Production of Truth

A second important challenge that reading crisis as a technique of government raises regards the relationship between crisis and the production of truth. As we have seen, crises are not simply 'discovered', but constructed actively through discourse. Because of this, the process of defining their 'causes' and 'effects', their temporal beginnings and ends, and their range of influence is fraught with political significance. Different articulations of crisis produce different 'truths' about what happened, why, and what should be done about it. In addition, diagnosing the causes and effects of crisis allows expert commentators to express alternative truths about the *status quo*, that is, the 'normal' state to which society, economy, and politics should revert.[34] These truths, in turn, lead to different governmental interventions into the legal 'rules of the game' that alter the incentives for individual behaviour.

In her article on international law as a discipline of crisis, Hilary Charlesworth laments the way that 'truth' is produced during moments of crisis. She makes the claim that approaching international law through the lens of crisis is limiting in a technical sense, because it 'rests on a truncated and selective understanding of events'.[35] In particular, she argues, first, that the 'crisis model of international law' falsely 'assumes that the elements of the crisis are uncontroversial'[36] rather than accepting that the 'facts' of the event are generally inaccurate or partial, and that 'the way we report and emphasise them is an act of political interpretation'.[37] Second, it 'leads us to rediscover an issue constantly and to analyse it without building on past scholarship'.[38] And third, it 'leads us to concentrate on a single event or series of events and often to miss the larger picture'.[39] While it is important to emphasise that all knowledge—not only that produced during moments of crisis—is partial and heavily implicated in power relations, it is also interesting to briefly make note of the way in which crisis discourse acts as a mechanism of knowledge production. With respect to the current EU economic crises, the 'truth' has been a central and overt battleground. Contests among experts over defining the 'causes', 'effects', and temporal boundaries of the crisis have led to the formation of competing narratives, and thus different ideas about what regulatory changes should be made, and what should remain untouched.

The proposed 'causes' for different aspects of the financial crisis have ranged from banks to bailouts, from profligate Member States to predatory lending. To begin with the biggest example, the global financial crisis in general, and its EU manifestations in particular, have spurred the re-emergence of the grand debate

[34] Otto 2011.

[35] Charlesworth 2008, at 382.

[36] Ibid.

[37] Ibid., at 384.

[38] Ibid.

[39] Ibid.

between capitalist and communitarian visions of economic organization. In many places in the EU, this crisis has led to the development of a mass movement that perceives its causes as rooted in the failure of the capitalist financial system, with its boom-and-bust cycles and promotion of speculation. This group has been loudly opposed by an alternative narrative that places the blame for the current troubles on 'bad apples' who took advantage of weak regulation and low interest rates, and a subsequent failure of investor confidence.[40] Each of these truths produces additional knowledge about the correct responses to the crisis—where and how regulators should intervene (austerity programs? embedding the economy in the social?), and what the proper limits of individual, corporate and state behaviour should be.

In addition to these grand debates, knowledge about how society works and how government can and should act is also produced on a much more micro level. In 2008, for example, EU Commissioner for Internal Market and Services Charlie McCreevy opposed EU Parliament proposals to regulate hedge funds, saying: 'One thing I believe we can agree on is that they were not the cause of the current turmoil.'[41] Because they are not the source of the crisis, the argument goes, they should be free to continue 'business as usual'.

Not only causes and effects, but also the boundaries of the crisis have been subject to revision at different stages over the last several years. In the second half of 2009, for example, many in Europe thought the financial crisis was coming to a close as financial markets calmed—particularly the Commission, whose 'unwaveringly optimistic view about the crisis's duration' led it to set several 2010 deadlines for the expiration of emergency measures.[42] Though this optimism was quickly set aside in the spring of 2010, when Greece's financial situation became front page news, it has resurfaced several times in subsequent years.

The discursive construction of the crisis as a short-term bump in the economic road has had real effects on the form of regulatory intervention. Henk Overbeek, for example, demonstrates how regulators have responded to this short-term crisis by 'muddling through', rather than addressing its structural roots.[43] This behaviour has compounded certain crisis-related economic problems. The Commission and the European Central Bank (ECB), for example, have openly admitted that the current sovereign debt crisis was in part caused by the massive amounts of state aid granted to financial institutions in the early days of the crisis.[44]

As can be seen from these few brief examples, the discourse of crisis is a technique of government because it permits the development of different truths about the relationship between individuals and society, about the causes and effects

[40] See, e.g., A Very Short History of the Crisis, *The Economist*, 12 November 2011, http://www.economist.com/node/21536871. Accessed 7 October 2013.

[41] McCreevy 2008.

[42] Wigger and Buch-Hansen 2013, at 15.

[43] Overbeek 2012.

[44] European Commission 2011, at 81.

of particular organizing logics, and about the appropriate scope of regulatory activity. It is a site of governmental production—a place where political discourses are molded and knowledge, meaning, and political opportunity are created.

Reading crisis discourse as a technique of government prompts a focus on these pathways of knowledge creation and their relationships with various individual subjectivities and governmental rationalities. It also, as will be argued in Sect. 9.5, emphasises that the relationship between techniques of government and political outcomes is uncertain at best.

9.5 The Uncertain Effects of Crisis

The EU financial and economic crisis prompted many scholars—particularly those who located its origins in structural or systemic decay—to prophecy great changes in the regulatory landscape. For some, this would mean a shift away from the neoliberalism and deregulation that had characterized the EU economy over the last several decades, and toward a more communitarian or socially embedded economy.[45] For others, it would mean a break from the current pattern of gradual and moderate gains in EU authority, either in the form of a massive movement toward centralization or a massive movement toward decentralization, and perhaps even the breakup of the eurozone, or the EU itself.[46]

Whether fortunately or unfortunately, neither the collapse of the EU nor the end of neoliberalism or capitalism has manifested. However, the wildly differing predictions regarding the outcome of the crisis are a useful demonstration of the third point raised by the Foucauldian reading described in Sect. 9.2: while crises may be techniques of government, they—like any tools—can be used to many different effects.

The political outcomes of crisis episodes can be extremely difficult to predict. Some individuals and institutions may be brought down by crisis, while others may weather the storm, or even emerge as symbolic heroes. Explanations of how and why crises lead to these different responses vary greatly. Arjen Boin, Paul 't Hart & Allan McConnell, for example, have suggested that the difference between these outcomes may be explained by 'frame contest' between actors that seek to exploit the space of opportunity created by the crisis.[47] Walter Mattli and Ngaire Woods argue that the explanation may be more institutional, as

> the set of ideas most likely to triumph after a crisis is not only that which best expresses the interests of powerful entrepreneurs and permits a coalition to form, but that which fits most easily into existing and not discredited institutions and mechanisms, representing the smallest step into the unknown.[48]

[45] See, e.g., Altvater 2009, at 75; Habermas 2012.

[46] See, e.g., Eichengreen 2010; Kupchan 2012.

[47] Boin et al. 2008, at 82.

[48] Mattli and Woods 2009, at 39.

Critical political economists, by contrast, focus on the real material phenomena of the economic structure, and argue that the results of crises reflect economic power balances, not simply social construction or institutional integrity.[49]

The study of crisis dynamics is a fascinating one. While a discussion of the factors that may contribute to regulatory change is beyond the scope of this paper, this section seeks to make one small point regarding crisis dynamics: that seeing crises as techniques of government points us toward understanding them not as 'game changers', but rather as opportunities for asserting or resisting particular forms of governmental activity. The narratives that come to dominate the discourse regarding the causes, effects, and boundaries of a crisis (as discussed in Sect. 9.4) will help to define the 'truth' about the role of government in shaping the lives of its subjects, and will thus constitute the regulatory interventions or abstentions that come in its wake. However, it is never certain what the political effects of particular crisis constellations will be.

The EU's responses to the global financial crisis (and its various European components) have ranged from creating new institutions, to tightening surveillance, to doing nothing at all. Interestingly, however, they have been by and large directed toward implementing ordo-liberal principles of 'sound money' and 'stable finance' at the EU level, and belt-tightening and structural reform at the Member State level.[50] In other words, the hegemonic discourse of neoliberalism seems to have remained fairly undamaged.

One place where the EU's regulatory response to the global financial crisis and its associated European components has led to change is in the area of the Economic and Monetary Union (EMU). The EU has undertaken both institutional and regulatory reforms for the purpose of ensuring greater fiscal stability. Coordination and centralization have been the name of the game here, leading to increased EU regulatory power over the European economy.

From an institutional perspective, the supranational management of the European economy has gained a new set of institutional players: the temporary European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF) in 2010,[51] and the permanent European Stability Mechanism (ESM) in 2012.[52] The ESM, though it exists as an additional

[49] Wigger and Buch-Hansen 2013, at 4–5.

[50] Schmidt 2013, at 3.

[51] The EFSM and EFSF will eventually cease operations. However, as of this writing they continue to manage their existing commitments with regard to Greece, Portugal, and Ireland. Conclusions of the Council—Economic and Financial Affairs of 9–10 May 2010, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/114324.pdf. Accessed 7 October 2013; European Council, Council Regulation No. 407/2010 of 11 May 2010 establishing a European Financial Stabilization Mechanism, OJ 2010 L 118/1.

[52] Treaty Establishing the European Stability Mechanism (ESM), 1 Feb. 2012, OJ 2011 L 91/1. The ESM aims to safeguard financial stability in the eurozone by granting conditional financial assistance to Member States under certain circumstances. The ESM, which entered into force in October 2012, will gradually replace the EFSF.

intergovernmental agreement outside the EU framework, will coordinate on crisis management with the ECB.

The demand for stabilization of the European economy in general, and the eurozone in particular, has also led EU regulators to take measures to ensure fiscal discipline and impose stricter surveillance of Member State economic policies. EU leaders have pledged financial support in the trillions of euros to ailing economies such as Greece, Ireland and Portugal, but only at the price of dramatic budget cuts, emergency revenue measures, and economic surveillance by the EU and IMF. Reforms such as the 'Six-Pack' measures amending the Stability and Growth Pack,[53] the Treaty on Stability, Coordination and Governance in the EMU (also known as the 'fiscal compact'),[54] and the 'Two-Pack' measures[55] have created a stronger framework for fiscal governance and surveillance within the EU. In a nutshell, the past few years have seen the piecemeal development of a 'Fiscal Stability Union' in the eurozone.

In addition, the EU has developed a new financial supervision architecture consisting of four new European supervisory authorities: the European Banking Authority (EBA); the European Securities and Markets Authority (ESMA); the European Insurance and Occupational Pensions Authority (EIOPA); and the European Systemic Risk Board (ESRB). Together, these institutions will attempt to monitor the stability and risk of their various financial sectors, including by conducting Europe-wide 'stress tests' to assess the strength and resilience of financial institutions.

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[53] The 'Six-Pack' measures, which entered into force in December 2011, reinforced the Stability and Growth Pack by adding new economic and fiscal surveillance rules, and introducing a Macroeconomic Imbalances Procedure. Regulation 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ 2011 L 306/1; Regulation 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ 2011 L306/8; Regulation 1175/2011 of the European Parliament and of the Council, of 16 November 2011, amending Council Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ 2011 L 306/12; Regulation 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ 2011 L 306/25; Council Regulation 1177/2011 of 8 November 2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 2011 L 306/22.

[54] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012. The fiscal compact, which entered into force on 1 January 2013, seeks to strengthen fiscal discipline in the eurozone via the 'automatic correction mechanism' and the 'balanced budget rule'.

[55] The 'Two-Pack', which entered into force on 30 May 2013, provides for additional budgetary surveillance in the euro area. Regulation 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of member states in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ 2013 L 140/1; Regulation 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the member states in the euro area, OJ 2013 L 140/11.

Meanwhile, other policy areas have avoided drastic changes. Plans for an EU-wide financial transactions tax, which at one point seemed fairly robust, have had to be significantly curtailed, and still await approval.[56] Similarly, calls to reduce the scope of the eurozone by removing struggling southern economies from the common currency have largely fallen by the wayside.

Ferdi de Ville and Jan Orbie have convincingly demonstrated that the EU's trade policy response to the global financial and economic crisis has reinforced, rather than delegitimized, the neoliberal trade paradigm presented in the 2006 Global Europe Strategy.[57] Rather than taking a protectionist stance in the wake of the crisis, as predicted by many commentators, the European Commission worked to expand the EU's conclusion of free trade agreements as part of the 'solution'. The Commission's framing of the crisis, de Ville and Orbie argue, centred around three related points:

> (i) a downplaying of the nature of the crisis to a crisis in the financial subsystem of global capitalism; (ii) an emphasis on the danger of protectionism that would worsen the crisis and lead to a 1930s 'Great Depression' scenario; and (iii) advocation for further trade liberalization as a contribution to European and global recovery.[58]

Angela Wigger and Hubert Buch-Hansen, similarly, have noted that despite predictions of a radical break with neoliberal-style competition regulation, no such shift occurred in the wake of the financial crisis.[59] Changes seemed likely early on, when Member States began handing out national rescue packages to save failing financial institutions without the approval of the Commission. However, this flexibility in permitting state aid has been restricted to the area of finance, and the competition picture has since returned to a focus on free markets, unlimited economic growth, and rigorous competition.[60] The lack of a paradigm shift in the area of competition regulation is, Wigger and Buch-Hansen argue, related to the construction of the crisis as temporally limited (as discussed in the previous section).[61]

As these examples demonstrate, far from being automatic 'game changers', crises are uncertain events that can just as easily lead to reinforcement of the *status quo* as to structural change. Crises are not objectively discoverable events—they are discursive constructions that act as opportunities for the production of truth. As such, they are a technique that can expand, reinforce, or contract the bounds of governmental activity in keeping with the forms of knowledge that come to define them.

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[56] For updates on the current status of the proposed financial transactions tax, see the European Commission's website. European Commission, Taxation of the Financial Sector, http://ec.europa.eu/taxation_customs/taxation/other_taxes/financial_sector/index_en.htm. Accessed 28 December 2013.

[57] De Ville and Orbie 2011, at 1.

[58] Ibid., at 1.

[59] Wigger and Buch-Hansen 2013, at 1.

[60] Ibid., at 15.

[61] Ibid., at 16.

9.6 Conclusion: Crisis Discourse as a Technique of EU Government

The central thesis of this chapter has been that crisis is not an empirically discoverable event, but a discourse that acts as a technique of government in contemporary society. Drawing examples from the context of the EU's recent series of economic and financial crises, it has attempted to show how this reading raises a number of challenges to the standard discussion of crises and their effects. First, it argued that in this reading 'crises' are not exceptional, but rather a common discourse whose frequency is a side effect of the neoliberal emphasis on entrepreneurialism and risk. Second, it noted that reading crisis as a technique of government refocuses attention away from diagnoses of cause and effect, and toward the ways in which crisis discourse allows actors to make truth claims and produce knowledge about the way that government can and should act with respect to its subjects. Third, it sought to demonstrate that crises are not necessarily points of change, but rather function as opportunities for the articulation of political discourse. As such, they may result equally in extending, reinforcing, or shifting the *status quo ante*.

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Part II
Dutch Practice in International Law

Chapter 10
The Thin Line Between Deference and Indifference: The Supreme Court of The Netherlands and the Iranian Sanctions Case

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Abstract In December 2012, the Supreme Court of The Netherlands ruled that The Netherlands had discriminated against a number of scholars with Iranian as well as Dutch nationality. They were prohibited from participating in specialised nuclear education by a regulation that was adopted by the Dutch government in order to comply with a United Nations Security Council (UNSC) resolution. One of the questions that arose during the proceedings, was the relationship between conflicting international obligations of the Dutch state, especially in view of the priority rule of Article 103 of the UN Charter. The Supreme Court of The Netherlands took a rather dualist view, considering that Dutch courts could fully review national measures implementing UNSC-imposed obligations for compatibility with fundamental rights. This view conforms to earlier jurisprudence of the European Court of Justice and the European Court of Human Rights in the *Kadi* and *Nada* cases, respectively. The main argument of the article is that the Supreme Court has too easily followed the rulings of both European courts, without developing its own, independent reasoning. This is surprising, because the approach taken by the Supreme Court would not seem to be the most obvious one, given the monist tradition of the Dutch constitutional order. In a time when the influence of international courts on the Dutch legal order is a sensitive topic of public debate, this is an unfortunate omission.

Keywords Sanctions · Non-discrimination · Conflicts of obligations · Dualism · Monism · Article 103 UN Charter

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Contents

10.1 Introduction

One of the resurfacing topics in international legal discourse is the relationship between the UN legal framework and regional or national law, particularly in case of conflicting obligations. Landmark cases such as the *Kadi I* judgment of the European Court of Justice[1] (ECJ) and the *Nada* judgment of the European Court of Human Rights[2] (ECtHR) have spurred a debate amongst scholars and practitioners regarding the question how states (or an organization of states such as the European Union) should deal with conflicting rules originating from different legal regimes. A similar question recently came to the fore in a case before the Dutch courts regarding UNSC-imposed sanctions against Iran.[3] In this case, the Dutch courts reprimanded the state for discriminating by forbidding specialised training to Iranian nationals, in line with a UNSC resolution.[4] The case is relevant from a number of perspectives. Apart from its importance as a confirmation of the seriousness of discrimination based on nationality, it can be seen as a clear statement that the national security interest does not provide an excuse for the government to override rights and interests of individuals as it sees fit. The case makes clear that the government is obliged to craft its actions in such a way that the negative impact on individuals is minimized, especially when the impact is seemingly discriminatory. In a time when fundamental rights are increasingly under pressure because of far-reaching antiterrorism and security measures taken by states, such clear message is very welcome. Be this as it may, this article focuses in particular on the public law aspect of the case, i.e. the question how to deal with conflicting international obligations of the state in the national legal order. The reasoning of the Supreme Court of The Netherlands on this particular aspect is very interesting, especially when considered in the light of the relevant jurisprudence of the ECJ and ECtHR. In order to put the Dutch Iranian sanctions case into context, the

[1] Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (*Kadi I*) [2008] ECR I-06351.

[2] *Nada v. Switzerland*, ECtHR, No. 10593/08, 12 September 2012.

[3] Supreme Court of The Netherlands, 14 December 2012, Case No. 11/03521.

[4] UNSC Res. 1737, 6 December 2006.

article will first briefly sketch the relevant case-law of the ECJ and the ECHR, after which it will discuss the reasoning of the Supreme Court of The Netherlands.

10.2 The European Debate: *Kadi* versus *Nada*

Much has been written already about the *Kadi I* judgment of the ECJ and the *Nada* judgment of the ECtHR, involving claims that economic sanctions taken by states in conformity with UNSC-resolutions were violating European norms of fundamental rights.[5] Even though scholars differ as to the precise implications of these judgments, it is uncontested that both courts took diverging approaches to a similar question, namely how to relate the UN legal order, ruled by the UN Charter, to the European legal orders, ruled by EU law and the European Convention on Human Rights (ECHR), in case of conflicting obligations. Besides its legal implications the question is practically relevant because of the widely perceived inadequacy of the UN-system regarding accountability and the protection of fundamental rights when it comes to UNSC-imposed sanctions. In view of the extensive literature on both cases, it suffices for the purpose of the present article to briefly explain the different approaches of both courts, and the reasoning they employed.

10.2.1 The Kadi*-Approach of the ECJ: Moderated Dualism*

The *Kadi I* case evolved around EU financial sanctions (a freeze of funds and assets) against individuals who had been designated by the UNSC as persons suspected of supporting terrorism. EU member states were obliged under Chapter VII of the UN Charter to freeze the assets of these persons and to prohibit all economic dealings with them. This was effectuated at the EU-level through Regulation (EC) No 881/2002.[6] A number of the individuals who had been listed by the EU through this regulation, amongst whom Mr. Kadi, claimed that their listing was unlawful, as their right to property as well as their due process rights had been violated, stating that they had no real possibility to refute the allegations that had prompted their listing. The main subject of debate in the case was,

[5] See, inter alia, de Búrca 2010; Kokott and Sobotta 2012; Posch 2009; Tzanou 2009; de Wet 2013.

[6] Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban (OJ 2002 L 139, 9). One could wonder whether the EU was even competent to regulate the matter instead of individual member states, a question which was indeed put forward by the applicants in the first *Kadi* case. The ECJ employed quite complex reasoning in order to conclude that the EU was competent to take such action. For more detail see Tzanou 2009, at 165–136.

however, not the alleged infringement of the fundamental rights of the applicants, but rather the question whether the ECJ was at all competent to scrutinize the listing of the applicants. The Council of the EU suggested that the listing of the applicants, as it put into effect resolutions adopted by the UNSC pursuant to Chapter VII of the Charter of the United Nations, in principle escaped all review by the Community judicature and for that reason enjoyed immunity from jurisdiction. Whereas the Court of First Instance partly followed this reasoning, the ECJ dismissed it, and ruled that:

> the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, *in principle the full review*, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.[7]

The ECJ then discussed the merits of the case and finally concluded that the applicants' right to a fair hearing as well as their right to property were patently not respected, as the applicants had not had any opportunity to learn about or refute the allegations made against them. It thus annulled the listing of both applicants.[8]

The ECJ's decision has by some been qualified as displaying a dualist approach, making a clear distinction between the EU legal order and the international legal order, and considering itself to be competent to fully examine measures that have been taken to effectuate an obligation stemming from the 'external' legal order of the United Nations Charter.[9] The wording of the judgment does seem to point in this direction. However, when considering the whole of the ECJ's reasoning, one sees that it did not apply a rigidly dualist approach and left some room for interpretation as regards the strictness of the divide between the European legal order and the international legal order. Thus, in its argumentation leading up to the decision that it was competent to examine the listing of both applicants, the ECJ took time to emphasise the connection between international law and EU law, affirming that the European Union must act in accordance with international law. The Court furthermore alluded to the possibility that it might in the future change its approach, if and when the UN system provides a sufficient level of protection of fundamental rights of persons designated by the UNSC.[10] Be this as it may, the

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[7] Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (*Kadi I*) [2008] ECR I-06351, para. 326 (emphasis added).

[8] Ibid., paras. 334–371.

[9] De Búrca 2010, at 23; Kokott and Sobotta 2012, at 1017–1019. See also Tzanou 2009, at 147, who points out that the ECJ does not apply a strictly dualist approach.

[10] See *Kadi I*, paras. 319–322. 'According to the Commission, so long as under that system of sanctions the individuals or entities concerned have an acceptable opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, the Court must not intervene in any way whatsoever. In this connection it may be observed, first of all, that if in fact, as a result of the Security Council's adoption of various resolutions, amendments have

ECJ clearly went in the direction of dualist thinking, considering itself to be competent to review a measure that was giving effect to a UNSC decision for compatibility with EU law. This UNSC decision, by the way, did not give states nor the EU any margin of discretion: on the basis of the UN Charter they were simply obliged to freeze the assets and funds of the applicants.

This decision was basically confirmed in the second *Kadi* judgment.[11] In this case, Mr Kadi complained of the way in which the Council of the EU had tried to comply with the ruling in *Kadi I.* It had done so by passing on to the applicant the limited amount of information the Council had received from the UNSC in order to justify his designation, which still did not give the applicant any real possibility to refute the allegations against him. The ECJ therefore concluded that

> none of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.[12]

As a consequence, the ECJ annulled the EU sanctions against the applicant.[13] Moreover, in this second ruling, the ECJ made very clear that it applies a strict level of scrutiny when examining economic sanctions against individuals, even if they stem from a UNSC resolution.[14]

(Footnote 10 continued)
been made to the system of restrictive measures set up by the United Nations with regard both to entry in the summary list and to removal from it [see, in particular, Resolutions 1730 (2006) of 19 December 2006, and 1735 (2006) of 22 December 2006], those amendments were made after the contested regulation had been adopted so that, in principle, they cannot be taken into consideration in these appeals. In any event, the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction within the internal legal order of the Community. Indeed, such immunity, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC Treaty, appears unjustified, *for clearly that re-examination procedure does not offer the guarantees of judicial protection*.' (emphasis added) See also paragraphs 133 and 134 of the second *Kadi* judgment—to be discussed below—which apply the same logic. See furthermore Kokott and Sobotta 2012, at 1019.

[11] Joined Cases C0584/10 P, C0593/10 P and C-595/10 P, *European Commission and Others v Yassin Abdullah Kadi (Kadi II)* [2013] ECR 00000, in particular paras. 65–68.

[12] Ibid., para. 163.

[13] Ibid., para. 164.

[14] See ibid., para. 130. 'Having regard to the preventive nature of the restrictive measures at issue, if, in the course of its review of the lawfulness of the contested decision, as defined in paragraphs 117–129 of this judgment, the Courts of the European Union consider that, at the very least, one of the reasons mentioned in the summary provided by the Sanctions Committee is sufficiently detailed and specific, that it is substantiated and that it constitutes in itself sufficient basis to support that decision, the fact that the same cannot be said of other such reasons cannot justify the annulment of that decision. In the absence of one such reason, the Courts of the European Union will annul the contested decision.'

10.2.2 *The* Nada*-Approach of the ECtHR: Moderated Monism*

Similarly to the *Kadi I* case, the *Nada* case involved an individual challenging economic sanctions (a financial freeze and visa restrictions) imposed on him by the Swiss government on the basis of a UNSC decision to designate him as a person suspected of supporting terrorism. As the applicant lived in a small Italian enclave in Switzerland, his freedom of movement was severely limited. This impacted, *inter alia*, on his medical situation, as he could not travel to get specialised medical treatment. Moreover, the sanctions prevented him from seeing his friends and family. He claimed that this infringed his fundamental rights, among which the right to respect for his private life and the right to an effective remedy as enshrined in Articles 8 and 13 of the ECHR, and presented his case to the ECtHR. The main argument of Switzerland was that the ECtHR could not review the measure complained of, as it was based on an obligation of the state imposed by the UNSC. The ECtHR dismissed this argument, however, and agreed with the applicant's submissions for the greater part, concluding that there had been a breach of his rights under the ECHR.[15]

In its reasoning the ECtHR was careful to point out that it reviewed the state's action to the extent that it had acted within its margin of discretion afforded to it by the relevant UNSC resolution.[16] Thus, in its examination, the ECtHR focused on the more peripheral aspects of the listing that could not directly be retraced to the UNSC resolution: the fact that Switzerland had not timely communicated to the Sanctions Committee its findings that the allegations against the applicant were unfounded, and that it had not done enough to ensure that the applicant could fully benefit from the exemption possibilities provided by the UN sanctions regime. The ECtHR then concluded that

> That finding *dispenses the Court from determining the question*, raised by the respondent and intervening Governments, *of the hierarchy between the obligations of the States Parties* to the Convention under that instrument, on the one hand, and those arising from the United Nations Charter, on the other. In the Court's view, the important point was that the respondent Government have failed to show that they attempted, as far as possible, *to harmonise the obligations that they regarded as divergent*.[17]

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[15] *Nada v. Switzerland*, ECtHR, No. 10593/08, 12 September 2012.

[16] See ibid., para. 175. 'The Court must therefore first examine those resolutions in order to determine whether they left States any freedom in their implementation and, in particular, whether they allowed the authorities to take into account the very specific nature of the applicant's situation and therefore to meet the requirements of Article 8 of the Convention'. After having looked at the precise wording and the objectives of the particular UNSC Resolution, the ECtHR concluded in paragraph 180 that: 'the Court finds that Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UN Security Council.'

[17] Ibid., para. 197 (emphases added).

It thus simply dodged the question whether it could review the (implemented) provisions of a UNSC Resolution for compatibility with the ECHR. When subsequently dealing with the question whether the right to an effective remedy had been infringed because the applicant could not challenge his listing before the national courts, the ECtHR did seem to suggest, however, that national courts were competent to go further and to fully examine national measures taken in order to implement a UNSC imposed listing, explicitly referring to the ECJ's reasoning in *Kadi I* to this effect:

> The Court would further refer to the finding of the CJEC that 'it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations' (see the Kadi judgment of the CJEC, § 299, see paragraph 86 above). The Court is of the opinion that the same reasoning must be applied, mutatis mutandis, to the present case, more specifically to the review by the Swiss authorities of the conformity of the Taliban Ordinance with the Convention. It further finds that there was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions.[18]

This latter step is interesting, as the Court's prior reasoning in the judgment, as well as previous case-law of the ECtHR, clearly seems to suggest that the Court itself will refrain from examining measures taken by states in order to comply with their obligations under the UN Charter.[19] Should this consideration be interpreted as meaning that the ECtHR considers that national courts have a greater responsibility in examining measures flowing from UNSC-imposed obligations than the ECtHR itself? In any case, the ECtHR's approach has been interpreted by scholars as applying a more monist approach than that of the ECJ, expressing the view that the ECHR forms integral part of the international legal order and that it should be interpreted as much as possible in line with the provisions and requirements of international law, amongst which UNSC resolutions.[20] The ECtHR has not yet dared to clearly decide on its competence to review provisions of UNSC-measures that do not leave states with any discretion. The ECtHR thus has taken a less drastic and more reconciling approach than the ECJ, which is understandable, seeing that the ECtHR has (quite rightly) never considered the ECHR to set in place an autonomous legal order, as has done by the ECJ. To the contrary, the

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[18] *Kadi I*, para. 212.

[19] See *Behrami v. France, Saramati v. France, Germany and Norway*, ECtHR, No 71412 and 78166/01, 2 May 2007. In this case the ECtHR refrained from scrutinizing state action in the context of the states' participation in a UNSC-sponsored Peacekeeping Mission, as it attributed the state's action to the UN, which enjoyed immunity. On this case see de Búrca 2010, at 12–17. In *Nada*, the ECtHR refers to *Behrami,* and explains why the facts before it differ from that case: see paragraph 212.

[20] De Wet 2013, at 16–24. See also de Bùrca 2010, at 12–17, who concludes the same from the *Behrami* case.

ECtHR has always emphasised its subsidiary role as regards the protection of the fundamental rights enshrined in the ECHR: this is first and foremost a task for national courts.[21]

10.3 *Kadi* and *Nada* Merged: Position of the Supreme Court of The Netherlands

In 2010, a question similar to the ones raised in the *Kadi I* and *Nada* cases came to the fore in a case presented to the Dutch courts. It revolved around Dutch measures taken as a consequence of economic sanctions adopted by the UNSC against Iran in order to prevent this country from acquiring nuclear military capabilities. One of these measures was targeted at the transfer of relevant technical and scientific knowledge to Iranian nationals. The relevant SC resolution

> calls upon all States to exercise vigilance and prevent specialized teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran's proliferation sensitive nuclear activities and development of nuclear weapon delivery systems.[22]

In line with this UNSC resolution the Council of the European Union adopted a common position, providing that:

> Member States shall, in accordance with their national legislation, take the necessary measures to prevent specialised teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran's proliferation sensitive nuclear activities and development of nuclear weapon delivery systems.[23]

As this particular subject matter fell within the Member States' competence, it was up to the individual Member States to take national action. The Dutch government did this by inserting the following provision in the national Iran Sanctions Regulation (ISR):[24]

> 1. It is prohibited to grant access to Iranian citizens to the locations and databases mentioned in the Annex to this regulation.
> 2. It is prohibited to provide specialized training or education to Iranian citizens that could contribute to Iran's proliferation sensitive nuclear activities and development of nuclear

[21] Henrard 2008, at 112.

[22] UNSC Res. 1737, 6 December 2006, para. 17.

[23] Common Position 2007/140/CFSP.

[24] Regeling van de Minister van Buitenlandse Zaken in overeenstemming met de Minister van Onderwijs, Cultuur en Wetenschap van 23 juni 2008, nr. DJZ/BR/0588-08, tot wijziging van de Sanctieregeling Iran 2007 met het oog op invoering van een verbod tot verstrekking van kennis aan Iraanse onderdanen die bijdraagt aan proliferatiegevoelige activiteiten van Iran en aan de ontwikkeling van systemen voor de overbrenging van kernwapens, *Staatscourant*, 1 July 2008, No. 124.

> weapon delivery systems, without or in violation of an exemption provided by the Minister of Education, Culture and Science. This prohibition does not extend to bachelor courses, as defined in the Law on higher education and scientific research.[25]

The Annex to this Regulation contained a limitative enumeration of the locations and specialised courses to which this prohibition applied.

The quoted provision, Article 2a of the ISR, was highly contested from the start and was immediately challenged by a number of Dutch nuclear scholars who happened to have both the Dutch and the Iranian nationality. Apart from the fact that the provision made it more difficult for them to carry out their scientific work, they were deeply offended by the stigmatising effect of the provision. According to them, it violated their right not to be discriminated against, as laid down, *inter alia*, in Article 1 of the Dutch Constitution, Article 26 of the International Convenant on Civil and Political Rights (ICCPR), Article 1 of Protocol 12 to the ECHR and Article 12 of the Treaty of the European Union (TEU). They required nullification of the provision on the basis of the tort provision of the Dutch Civil Code.

The state argued that Article 2a of the ISR was not against the law, because the state was obliged by UNSC Resolution 1737 to make this particular distinction between Iranian nationals and other persons. According to the state, it had to abide by the rule contained in Article 103 of the UN Charter, which gives priority to UNSC resolutions over other international obligations. This provision reads as follows: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

In the first instance the Hague District Court awarded the applicants' claim and declared Article 2a of the ISR to be invalid because it discriminated against persons with Iranian nationality.[26] The Court began its ruling by stating as a general rule that the mere fact that the state has entered into an international obligation does not prevent Dutch courts from determining whether the state's actions in line with that obligation are in violation of another international obligation. This would be different, according to the Court, if there were a clear hierarchy between the conflicting obligations. In the present case, the Court agreed with the state that such hierarchy was present, in view of the priority rule of Article 103 of the UN Charter.

However, according to the Court, the state's defense would only succeed if UNSC Resolution 1737 actually obliged the state to take exactly the type of action as laid down in Article 2a of the ISR. Only then there would indeed be a conflict of obligations. This, however, was not the case. Contrary to what the state had claimed, the District Court considered that the resolution left enough room for states to implement it in a non-discriminatory way. It subsequently applied the usual model of review for discrimination cases in Dutch antidiscrimination law: it determined that a distinction based on nationality was established and this

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[25] Iran Sanctions Regulation, Article 2a (translation by the author).

[26] District Court of The Hague, 3 February 2010, Case No. 334949/HA ZA 09-1192.

distinction was not objectively justified, exactly because there were other, less discriminatory ways of ensuring that no sensitive knowledge that could benefit the Iranian nuclear program was transferred. Other European states had, for example, used their visa regimes for screening Iranians in order to prevent the transfer of knowledge envisaged by paragraph 17 of UNSC Resolution 1737. Another option would have been to impose general screening of all students applying for courses deemed sensitive from a non-proliferation perspective.

The state lodged an appeal against the judgment of the District Court, and at the same time slightly altered Article 2a of the ISR in an attempt to meet the objections of the District Court: the first paragraph of the article, containing the prohibition for Iranian nationals to enter certain locations, was deleted. Moreover, a new paragraph was inserted, which explained in which cases an exemption to an Iranian person wanting to follow specialised training in the field of nuclear science would be refused. This paragraph reads as follows:

> An exemption will be refused if the Minister of Education, Culture and Science considers the risk that providing the particular training or education to the Iranian person to whom the exemption would apply will contribute to Iran's proliferation sensitive nuclear activities and development of nuclear weapon delivery systems, unacceptably high.[27]

The Hague Court of Appeal was not impressed by these amendments and followed the reasoning of the District Court as regards the substance of the case.[28] It agreed with the District Court that UNSC Resolution 1737 left enough room for states to implement the obligation to prevent the transfer of specialised knowledge to Iran in a non-discriminatory way. It also agreed that Article 2a of the ISR, even in its altered form, constituted discrimination based on nationality and therefore was invalid. Even so, the Court of Appeal found it necessary to make clear that it did not agree with the District Court as regards the question whether it would have come to the same finding if UNSC Resolution 1737 had not left states with any margin of appreciation. According to the Court of Appeal, even if Resolution 1737 imposed an obligation to distinguish between persons with Iranian nationality and other persons in the way that the state had done, the Court would still be competent to scrutinise Article 2a of the ISR in the light of the requirements of fundamental rights as enshrined in the ECHR and EU law, in view of the ECJ's ruling in the *Kadi I* ruling of the ECJ.

The state lodged an appeal before the Supreme Court of The Netherlands, claiming that the Court of Appeal had ignored the fact that the state was obliged by UNSC Resolution 1737 to make a distinction between Iranian nationals and other persons, and that this Resolution trumped other international obligations of the state on the basis of Article 103 of the UN Charter.

The Supreme Court dismissed the appeal and confirmed the reasoning of the Court of Appeal and the District Court, according to which UNSC Resolution 1737 did not require states to discriminate against Iranian nationals and Article 2a of the

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[27] Article 2a(1) of ISR.

[28] The Hague Court of Appeal, 26 April 2011, Case No. 200.063.360/01.

ISR constituted discrimination based on nationality.[29] The Supreme Court furthermore afforded attention to the debate between the District Court and the Court of Appeal on the question whether the hierarchy in international law, with Article 103 of the UN Charter determining that UNSC Resolutions override other treaty obligations, prevents courts from scrutinising state action that implements a UNSC-imposed obligation for conformity with fundamental rights.

In paragraphs 3.6.1–3.6.4 the Supreme Court elaborated its opinion on the matter. It started by referring to Article 94 of the Dutch Constitution, which provides that '[s]tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.' The Supreme Court then affirmed that UNSC Resolution 1737 is binding for the state, imposing obligations under Chapter VII of the UN Charter, and that Article 103 of the UN Charter establishes that UN obligations should get priority over other international obligations. According to the Supreme Court, however, the UN Charter did not prescribe the way in which states should implement UNSC resolutions, which meant that they were allowed to opt for a mode of implementation that suited their national legal order. This meant, according to the Supreme Court, that The Netherlands should take into account its international obligations, especially those related to fundamental rights, when implementing UNSC resolutions. The Supreme Court then referred to the *Kadi I* ruling of the ECJ, saying that

> the Court should in principle review the manner in which the state has implemented Resolution 1737 fully in the light of the fundamental rights that are part of the general principles of community law (compare the European Court of Justice 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, paragraphs 285–326).[30]

The Supreme Court subsequently referred to the *Nada* judgment of the ECtHR, saying that: '[i]n this context … it should be established that the state has done everything in order to harmonize the obligations it regards as being in conflict with each other (compare most recently the ECtHR 12 September 2012, case *Nada* v. *Switzerland*, No. 10583/08, paragraphs 163–199)'.

The case was well received by Dutch human rights lawyers and has led the state to change the ISR, which now determines that all persons who want to follow specialised education or training in the field of nuclear science should obtain an exemption from the Minister of Education, Culture and Science.[31]

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[29] Supreme Court of The Netherlands, 14 December 2012, Case No. 11/03521.

[30] Ibid., paras. 3.6.1–3.6.4.

[31] Regeling van de Minister van Buitenlandse Zaken in overeenstemming met de Minister van Onderwijs, Cultuur en Wetenschap van 28 oktober 2013, nr. Minbuza-2013.295689, tot wijziging van de Sanctieregeling Iran 2012 in verband met een uitbreiding van de groep personen die over een ontheffing dient te beschikken, *Staatscourant*, 1 November 2013, No. 30733.

10.4 The Supreme Court of The Netherlands as Subsidiary of the European Courts?

It is interesting to note that all three national courts took some time to reflect on the question how to deal with conflicting international state obligations, even though this was not strictly necessary. After all, all three also found that UNSC Resolution 1737 gave the state a sufficiently broad margin of discretion to both implement the provision regarding prohibiting specialised training to Iranians and to act in accordance with its obligation not to discriminate. Strictly speaking, therefore, there was no conflict of obligations and the courts did not have to contemplate the relationship between UNSC-imposed obligations and obligations stemming from fundamental rights. Still, they chose to go into the matter. The remainder of the present article will mainly focus on the Dutch Supreme Court's reasoning that has been described above, as Dutch courts are expected to follow it.

Remarkably, the Supreme Court's reasoning takes both the *Kadi I* judgment of the ECJ and the *Nada* judgment of the ECtHR together and concludes from them that (1), in line with *Kadi I*, Dutch courts are competent to examine whether the state has respected fundamental rights in implementing a UNSC-prescribed measure and (2), in line with *Nada*, this implies that they should decide whether the state had done everything possible to avoid a conflict of international obligations. Admittedly, the Supreme Court did not spell out what it would do in case such avoidance of conflict is not possible, but the reference to *Kadi I* and its assertion that Dutch courts are competent to scrutinise acts implementing UNSC-imposed obligations, without qualifying this competence at all, clearly suggests that the Supreme Court was referring to the 'full review' as accepted by the ECJ in *Kadi I*. In so doing, moreover, it casually reconciled the approaches of the ECJ and ECtHR. After all, it interpreted the 'full review' mentioned by the ECJ in *Kadi I* as implying the requirement to harmonise diverging international obligations as much as possible, as it was put forward by the ECtHR in *Nada*. Perhaps in this sense the Supreme Court finished the line of thought started by the ECtHR on the roles of national courts in the 'effective remedy'-part of the *Nada* judgment. This in itself is not surprising and might even be laudable: the Supreme Court takes both courts seriously and opts for an interpretation that combines their approaches.

However, in other respects the Supreme Court's approach raises serious questions. It is interesting, to say the least, that the Supreme Court opts for taking full scrutiny of the way in which UNSC-prescribed obligations are implemented as a starting point, regardless of the fact that Article 103 of the UN Charter determines that UNSC resolutions trump other international obligations. This is remarkable because Dutch public law applies a (moderated) monist approach as regards the relationship between national and international law. The Dutch legal order and the international legal order are considered to be connected and, with some qualifications that will not be discussed further here, international rules such as laid down in treaties are automatically effective in the national legal order, with no need for a 'transformative' act of the government or parliament. Thus, there is

no divide between the national legal order and the international legal order, and Dutch courts are expected to apply provisions of international law.[32]

Even in the case at hand this monist perspective of the Dutch constitutional order is clearly visible, given the fact that all three Dutch courts in their judgments directly apply the provisions of, *inter alia*, the ICCPR and the ECHR, without needing a Dutch legal act that transforms these provisions into national law. Add to this the fact that the Supreme Court in its judgment mentioned the priority rule of Article 103 of the UN Charter, and one would expect the Supreme Court to make clear that this priority rule, which after all should be considered to be part of the national legal order, was applicable and that it would therefore have to respect the provisions of a UNSC resolution. Such statement would not necessarily mean that acts implementing UNSC resolutions escaped all review, as there would still be options open to the Court to say something about the compatibility of the UNSC Resolution's provisions with fundamental rights. The Supreme Court could, for instance, have opted for a systemic and type of interpretation, applying an assumption that the UN Charter could never have been intended to give the UNSC the power to override fundamental rights and that UNSC resolutions should be interpreted in line with the requirements of international human rights standards. Another option would have been to make clear that the Court would strictly review a measure implementing a UNSC resolution to the extent that the resolution gave states a margin of discretion, as the District Court had done. In this way, the Court would have acted more in line with the Dutch monist tradition, without compromising its responsibility to make its own assessment as to the requirements of the law in the case at hand. However, the Supreme Court simply stated that full review of an act giving effect to a UNSC-imposed obligation was called for, without discussing how this related to the priority rule of Article 103 of the UN Charter. This somewhat surprising move would seem to call for a clear explanation.

This brings us to the second remarkable aspect of the Supreme Court's reasoning: it appears that the Court did not argue its own opinion on the matter, but as a motivation simply referred to the rulings of both the ECJ and the ECtHR, as if these provided enough explanation by themselves. Did the Supreme Court mean to say that the ECJ's and the ECtHR's decisions are determinative for the way Dutch courts should deal with the question of conflicting international obligations of the Dutch state? This seems rather far-fetched. The case neither involved the application of EU law—despite the implication of Common Position 2007/140/CFSP—, nor did it essentially involve the application of the ECHR—even though the applicants partly based their application on ECHR provisions. In essence, the case concerned an implementing act of the Dutch state in accordance with an

[32] The particular Dutch system is slightly complicated as the Constitution makes a distinction between provisions that are deemed to be sufficiently clear to be applicable directly in the national order and provisions that need further implementation by the Dutch government. See for an excellent explanation of the relevant provisions Vlemminx and Meuwese (online source), who make clear that, despite this complexity, the Dutch Constitution's approach still clearly is a monist one. See also van der Pot et al. 2006, at 697–702.

international obligation, which was challenged on the basis of (international) fundamental rights, all of which formed part of the Dutch legal order. Thus, the *Kadi I* and *Nada* judgments could certainly provide inspiration to the Supreme Court, but they could by all means not be considered to be constitutive reasons for the Supreme Court's approach: the ECJ and the ECtHR are not competent to decide over matters of Dutch public law. It was up to the Supreme Court to explain why full review of implementing acts of the Dutch state in accordance with a UNSC resolution was called for by the Dutch public legal order. However, the Supreme Court did not provide any other reasons than the *Kadi I* and *Nada* rulings. The inevitable conclusion seems to be that the Supreme Court has done exactly that which it has reproached the state for in this particular case: blindly following an international institution while disregarding its own responsibility.

The Supreme Court's approach in the Iranian sanctions case can probably be related to the broader context of a generally compliant attitude of Dutch courts towards international and European courts. On the whole, they take good notice of and follow the judgments of the ECJ and the ECtHR.[33] This is perhaps an expression of the favorable culture regarding international law and international legal institutions in The Netherlands, which is inter alia visible in the Constitution, of which Article 90 provides that the government should promote the international legal order.[34] The Supreme Court's compliant attitude furthermore probably has to do with the fact that Dutch courts have had little chance to develop their own constitutional fundamental rights jurisprudence, as the Constitution does not allow them to rule on the constitutionality of laws adopted by Parliament.[35] The Constitution does, however, allow them to decide on the compatibility of laws with international obligations, including international human rights obligations. Thus, Dutch courts have a natural tendency to look at the jurisprudence of the international supervisory bodies in matters of human rights, which has most likely reinforced the rather docile attitude of Dutch courts regarding the jurisprudence of the ECJ and the ECtHR.

Nevertheless, it is disconcerting that the Supreme Court did not even seem to feel the need to take an independently argued stance on an important question of public law. Especially because the approach it opted for was not the most obvious one, given the Dutch monist tradition. As the supreme domestic judicial authority the Supreme Court has the responsibility to apply the law in a way that fits the national legal context and that resounds with national societal developments. Just as it had pointed out to the Dutch government, the mere fact that an international body takes a particular position does not mean that national institutions should unquestioningly abide by such view. To the contrary, maintaining a healthy habit of critically reviewing the jurisprudence of international courts would only seem to add to the quality of jurisprudence, both national and international. For instance,

[33] Efthymiou and De Wit 2013, at 81–83.

[34] See also Van der Pot, Elzinga and De Lange 2006, at 719–722.

[35] Article 120 of the Constitution provides that '[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.'

the renowned 'Solange'-jurisprudence of the German Bundesverfassungsgericht has only reinforced the fundamental rights protection system of the EU, as it forced the ECJ to take seriously the human rights obligations of member states.[36]

Interestingly, the high degree of influence of international courts in the domestic legal order is increasingly under pressure in the public debate in The Netherlands. Certain scholars and politicians have recently put forward proposals to alter the Constitution in order to limit this influence.[37] The Supreme Court's deferring attitude in the Iranian sanctions case would seem to add weight to their position. Of course it is difficult to estimate the extent of a potential problem from one incidence where the Supreme Court too easily copies from European jurisprudence in matters of domestic public law. More research would be needed to determine whether there is a serious lack of ownership among Dutch courts regarding matters that have linkages with international legal orders such as the EU and the ECHR. However, the Iranian sanctions case does call for vigilance and shows that there is a thin line between judicial deference and judicial indifference.

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[36] For an explanation of the 'Solange'-jurisprudence, see de Búrca 2010, at 42–44.

[37] Efthymiou and de Wit 2013, at 84–88.

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