

# INTERNATIONAL LEGAL STUDIES PROGRAM LAW JOURNAL

VOLUME 1, ISSUE 2

AMERICAN UNIVERSITY  
WASHINGTON COLLEGE OF LAW

## **COMMENTARY**

Globalization at the Crossroads:  
The Neoliberal Bubble Has Burst — Where Do We Go From Here?

## **FEATURED ARTICLES**

Standard of Review for Jurisprudence on Prudential Measures

Right to Food, Food Security and Accountability of International Financial Institutions

Property Right during Armed Conflict: Application of Adopting Principles of  
International Humanitarian Law by the European Court of Human Rights

## **COUNTRY - SPECIFIC ARTICLES**

The Abuse of Pardon Law in Ethiopia: The Case of Birtukan Midekssa

Government, Religion, and the Courts: a Complicated Marriage à Trois

The Demarcation Case of Raposa Serra do Sol Indigenous Land in Brazil

Employment of Foreign Citizens in Kyrgyzstan



September 15, 2009

Dear Readers:

Welcome to the second issue of the ILSP Law Journal! The Journal was founded by a group of enthusiastic LL.M. students who sought to provide a venue for LL.M. students and alumni to publish articles of interest in various areas of the international law. The International Legal Studies Program at American University Washington College of Law is one of the most prominent LL.M. programs in the United States, which is currently hosting over 160 students from fifty-eight countries. The Journal is intended to reflect the diverse interests of the LL.M. student body by addressing topical issues that are of importance to the global community.

This issue builds on the work of the first, while continuing to expand the Journal's scope and reach. The ILSP sincerely appreciates dedication and efforts of the members of the editorial board, some of whom are alumni of the LL.M. program, for making the second issue possible. I also would like to express my gratitude to the ILSP staff for their continuing assistance to the Journal.

The Journal's ultimate mission is to provide a venue for debate and discussion as well as a forum for publication. We invite you to turn the page and join in the exchange.

Best Wishes,

Padideh Ala'i  
Professor of Law  
Acting Director  
International Legal Studies Program

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INTERNATIONAL LEGAL STUDIES PROGRAM

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# LAW JOURNAL

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## CONTENTS

### COMMENTARY

- Globalization at the Crossroads:  
The Neoliberal Bubble Has Burst — Where Do We Go From Here?** 45  
*Karen A. O'Rourke*

### FEATURED ARTICLES

- Standard of Review for Jurisprudence on Prudential Measures** 49  
*Byungsik Jung*
- Right to Food, Food Security and Accountability of International Financial Institutions** 59  
*Ophelia Claude*
- Property Right during Armed Conflict: Application of Adopting Principles of  
International Humanitarian Law by the European Court of Human Rights** 69  
*Maheta M. Molango*

### COUNTRY - SPECIFIC ARTICLES

- The Abuse of Pardon Law in Ethiopia: The Case of Birtukan Midekssa** 83  
*Fitsum Alemu*
- Government, Religion, and the Courts: a Complicated *Marriage à Trois*** 87  
*Astrid Gibier*
- The Demarcation Case of Raposa Serra do Sol Indigenous Land in Brazil** 89  
*Áquila Mazzinghy Alvarenga*
- Employment of Foreign Citizens in Kyrgyzstan** 91  
*Aizhan Albanova*



# COMMENTARY

## Globalization at the Crossroads: The Neoliberal Bubble Has Burst — Where Do We Go From Here?

Karen A. O'Rourke\*

The last three decades of the 20<sup>th</sup> century witnessed many debates concerning the uneven trends of globalization and the world political economy. During the last quarter century, the neoliberal model of capitalism has been resoundingly endorsed as a foundation for global economic development. This model has dominated institutionally as the embodiment of the ideal of laissez-faire in economic policy, direct foreign investment, international trade, and foreign exchange. But with the global recession, many tenets of the neoliberal model of capitalism have apparently failed, and for the first time in perhaps fifty years, we are presented with the opportunity and challenge to create a new twenty-first century model of capitalism for internationalized markets in a global economy.

The universal claim of neoliberal capitalism as an economic theory embraced the notion that the unfettered global market should primarily remain in the hands of private actors. Adjectives describing this model of capitalism include references such as “free” markets or laissez-faire markets. Under neoliberal capitalism and its policies, nation-states were asked to link their domestic economies to the idea of “free” market efficiency so much so that most state-led economic development was deemed grossly inefficient for both the communist and the post-war capitalist world. This neoliberal methodology played out in the form of reducing both the democratic governance roles and the monitoring roles of nation-states by insisting on the mandated agenda of the privatization of public services, as well as across-the-board deregulation and liberalization of domestic trading and financial markets. The overarching idea of neoliberal models of capitalism was that the total removal of state regulations would lead to rapid global economic growth and improved living conditions for all. The notion of an improved living condition for all would automatically occur as part of a process where profits from those private sector actors in the “free” market and the benefits of the global market related to economic expansion would automatically “trickle down” to all levels of society, thus replacing any mediating or agency role

of government. The marriage of this “free” market ideal based on the concept of efficiency with a “trickle down” economic development policy created a model of capitalism that became known as “neoliberalism.”

The adoption of this 1980s, political-economy approach is most often associated with Ronald Reagan and Margaret Thatcher and is usually combined with the extended role of the International Monetary Fund (“IMF”) in regulating the global debt crisis. This model of capitalism was in sharp contrast to the post-colonialism economic development and trade models that evolved in global markets shortly after World War II economic reconstruction programs. Essentially, under the 1980s neoliberal model of capitalism, the chief leadership group who carried the banner came to be known as the “Washington Consensus,” and this group of Western policy makers continued to evolve well into the late 1990s.

Since its inception, the neoliberal model of capitalism seemed to exist in an endless bubble of market expansion, despite the growing debate about uneven global development and unfair trade practices. Many economists and policy makers argued that the “trickle down” approach was not working effectively. In addition, many argue that the neoliberal model has actually promoted the breakdown of state economies, as national capital was no longer embedded within a state’s geographic border. Multinational corporations and their financial networks control both the global organization of private exchange and the roles of global institutions, to the extent that nation-states were no longer able to direct national economies, based solely on their own domestic public policy or democratic agenda. States have increasingly become captive to a single global production system supported by what has gradually become known as “foot-loose” transnational capital. In addition, the promotion and continuation of this neoliberal model of capitalism regularly ensured the replacement of the nation-state’s historical agency role in legislating market regulation and in balancing domestic policy in support of creating a “public common good,” called civil society. In its

place, an expanded and new “free” market system within this ever-expanding neoliberal bubble of capitalism sustained globally mediated economies promoted by the private sector, which intentionally designed a system that allowed capital flows across national boundaries in deliberate defiance of State regulations.

Neoliberal models of capitalism have also routinely ensured a continuing flow of international goods, resources and services based on a precalculated formula of supply and demand, so that in the name of “global efficiency,” this model of capitalism promoted geographic relocation of production cycles to anywhere in the world, in search of the lowest possible labor costs and the highest possible reward. Supported for the last thirty years or more by neoclassical thinkers, the neoliberal model of capitalism promulgated the notion that national competitiveness had absolutely nothing to do with national prosperity. However, much of the current global recession, and certainly the economic global indicators of the last calendar quarter in 2008, suggest that many, if not all, of the underlying tenets of the highly revered neoliberal model of capitalism are failing miserably. The neoliberal bubble appears to have burst. Current economic reverberations continue to be analyzed and reported from many corners of the so-called neoliberal “free” market as the global recession deepens.

While it may seem unwise to consider developing a new model of capitalism before the eulogy for neoliberalism is resoundingly recited in all corners of the global marketplace, one only needs to read the national headlines of many global newspapers to conclude that the “less government regulation” mantra and “trickle down” economic development platform of the neoliberal model of capitalism is not the answer to the massive global recession. In fact, the unregulated global ideal touted by neoliberal laissez-faire market models may actually have been a persistent and underlying cause of the global economic downturns that most governments are now wrestling with to correct. Furthermore, the tension continues to build as private actors from within the neoliberal model of capitalism seem to consistently operate with total disdain for the roles of civil society and regulatory mechanisms (or “agency roles”) assigned to democratic governments.

Blindsided, neoliberal advocates continue to embrace an obsession for short-term material rewards based solely on greed and to create global instability through the unregulated movement of capital across state boundaries, regardless of the long-term impact on domestic or regional financial markets. Thus, as the asymmetrical impact of neoliberalism within its espoused “free” market systems appears to increase exponentially across the world, the continuing socioeconomic downturn attached to decreased worker production and increased job loss are matched, only with bank and financial institutional acquisition, collapse, or foreclosure. As governments develop new risk allocation policy and scramble to use public dollars to pick up the pieces of an unregulated

but failed global economic model dominated solely by private actors, the neoliberal ideal of “trickle down” economics is no longer operationally relevant or ethically sound.

Yet in the midst of the demise of neoliberal capitalism and its economic policies, we are quite possibly on the brink of the most exciting “qualitative shift” in debates about capitalism and global market development. This shift offers tremendous hope for the development of a more humane face of capitalism based on a planning process that addresses two major issues: (a) designing “choice sets” that move the internationalized market to finally sever its remaining ties with the neoliberal model of capitalism, and (b) constructing a more dynamic model for capitalism, one that is designed to embrace all three forms of capital—economic, human and social capital—in a more accountable and transparent internationalized market system that can support a sustainable global economy.

This qualitative shift offers tremendous opportunities and challenges for a paradigm shift. Perhaps the most significant contribution of international lawyers, policy analysts and program developers in this shift is to insistently pursue a more intentional public conversation, so that globalization programs and policy development for the twenty-first century is permanently severed from its twin of neoliberalism. This is how a more creative form of capitalism in the internationalized market will be “effectively and efficiently designed” to support a variety of concerns, including the respect for various cultural contexts and domestic market development and sustainability.

In addition, any new model for capitalism will need to support a strategy for meaningful socioeconomic development as nation-states reclaim their agency roles and begin to mediate broader, more workable visions of national, regional and continental links—links that support socioeconomic stability and simultaneously promote global institutional coherence and accountability.

This new strategy also will need to focus on the initiation and development of a sustained interdisciplinary approach, one that recognizes globalization as an evolutionary process and embraces a more systematic foundation that relies on a wide variety of modern legal, economic and social critiques—critiques such as those promulgated by modern scholars Joseph Schumpeter, Amartya Sen, and others. The need for this interdisciplinary approach was evident most recently at the London G-20 meeting in March 2009, as the unevenness of capital accumulation under the neoliberal model of capitalism has begun to push the margins of public global policy discussions. Many leaders will need to seek for new interdisciplinary definitions about the historical concepts linked to the wealth of nations, the definition of the “economic man,” and the redefinition of an expanded global economy within an internationalized marketplace. An interdisciplinary planning process will need to define a more acceptable global context and application of the classical economic theories espoused by Milton Friedman and John Maynard Keynes.

After all, immediately after World War II, it was British Delegate John Maynard Keynes who at the original Bretton Woods conferences suggested that one international currency be created and that the IMF serve as an international central bank. The idea was that the IMF could automatically recycle monies from countries with balance of payments surpluses to countries with deficits, thus ensuring global equilibrium in such a way that deficit countries would not always have to cut imports and standards of living in order to restore market balance.

A new model of capitalism should also link the current political economy debate more closely with the historical definitions of natural law and human dignity. It should perhaps even embrace a more informed twenty-first century “look-back” at philosophers such as Adam Smith who not only developed the ideal rationale in support of the wealth of all nations but also, in a companion text on market ethics and moral sentiments, espoused a collective and supportive agency role for government oversight in the marketplace. Needless to say, efficient markets are not automatically secured with the notion of *laissez-faire* because there is no such thing as *laissez-faire*. Adam Smith actually intended that the butcher, the baker and the candlestick maker, when “effectively competing,” would automatically make for an improvement in human welfare and the common good. In other words, human capital would not always need to compete with economic capital and then wait for beneficent private actors to open the faucet for a trickle down phenomenon.

So the focus on a new model for capitalism will necessarily embrace radically inclusive public-private partnership development and will need to clearly balance both the structure of the market and the effectiveness of the competition. All forms of capitalism by their very nature are expansive and creative. And as an economic model, capitalism generally always seeks to promote competition, new methods of production, and material rewards. These characteristics are inherently good. Creation of this new paradigm requires a broad “public critique” on the role of government regulation for global marketplace activity, a new definition of laws regulating the incorporation and operation of large global networked corporations, a new ethic of agency relationships for democratic governments and for regional trade agreements, a broadly articulated accountability in the marketplace between economic capital and social capital, and finally, a new global model of stewardship for human capital.

It seems we are at the brink of a new threshold. The operation of “business as usual” is being replaced with an urgent call for accountability unseen in modern times. Not only does the United States have a new presidential agenda to correct the U.S. market recession, but we also are beginning to see a global shift that calls for more immediate accountability in marketplace planning and regulation by international global institutions, including the World Trade Organization, the

World Bank, and the IMF. Many major democratic nations are committing billion dollar, government-sponsored stimulus packages to stabilize their nations’ economies, promote or increase employment and training of workers, and offer support with more effective public monitoring for fledgling financial institutions.

These public sector stimulus packages are supported by tax dollars and are coupled with the notion that there needs to be a tangible “return” of benefit back to sustaining the public good and to supporting civil society at large. These reciprocal and transparent economic partnerships between private actors and public policy makers can continue to support the undergirding of commitments by governments as they struggle to financially salvage the global private sector gone awry. These types of reciprocal policy mandates create a much needed balance to some of the past aggressiveness by the neoliberal model of capitalism that supported an elite global private sector’s need for wealth accumulation at the expense of sustaining civil society. In addition, the notion of reciprocity and a bold new thesis about capitalism is required, so that the continued liberalization of the global economy can graciously move beyond the savage competition model attributed to the neoliberal model of capitalism and its policies—policies that resulted in continuous and well-documented cycles of poverty, inequality, and labor insecurity.

The new model of capitalism should be designed with this public critique. It also must be transparent, since economic liberalization based on normative demands and ethics will, more likely than not, continue to increase before the global recession is resolved. In these times of market transformations, history will not necessarily be made by the most powerful, because continuation of the Westernized neoliberal economic hegemony of the last thirty years may not tell us all we need to know about the margins and frontiers of freedom. The paradigm shift needed in support of the new model of capitalism captures a “representational redesign” process. That is, taking evidence that has been developed to have a particular meaning in one policy context (e.g., taking former neoliberal market policy development about capitalism,) and redirecting the debate to sustain a global economy with its internationalized markets by responsibly critiquing a wide range of “choice sets.” While capitalism as a model generally rests with the cycles of wealth accumulation, reinvestment and capital circulation, the creation of a new model of capitalism can only be embodied if we are willing to embrace the future with an even greater menu of program choices and broadly incentivized public-private partnerships.

Very shortly, legal scholars, international lawyers, and public policy participants will be called upon to critique potential allocation and efficiencies of capital markets, address prudential safeguards for credit markets, and correct the instability of deregulated financial markets. Through debating and designing effective legal systems and targeting

government market regulations, a new group of policy experts will emerge envisioning a more accountable approach in this global paradigm shift—one that can be intentionally designed to assist domestic and regional institutions and their planning bodies to permanently move away from the whims of short-term lending practices, the whispers of credit default, and the “fall out” from unsustainable global market gains. The crucible for the creation of this new model for global capitalism will gradually become the meeting place where meaningful discussions of an individual’s socioeconomic rights are not divorced from global financial planning and regulation, export market and trade development, public-sector spending priorities, and the overall management of domestic policy. In this new model of capitalism, embracing the integration of economic, social, and human capital will be embraced as a global virtue, as this model is routinely incorporated into the scope, design, implementation and enforcement of global lending practices and global trade policy.

The panic surrounding the global recession offers a unique challenge and an opportunity to initiate a public debate and focused planning process around creating and sustaining a new model of capitalism where effective competition in the global economy and the structure of the internationalized marketplace might be better integrated and intentionally designed to reincorporate some of the best principles of human dignity, decent work, equality, and democracy.

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# FEATURED ARTICLES

## Standard of Review for Jurisprudence on Prudential Measures

Byungsik Jung\*

I.	Introduction	49
II.	Good Faith Principle	50
	1. <i>Abuse of Discretion</i>	50
	2. <i>Criteria of Constraints on Discretion</i>	51
	3. <i>Application of a Good Faith Standard to Prudential Discretion</i>	51
III.	Standard of Review for Jurisprudence on Prudential Discretion	52
	1. <i>Prudential Objective</i>	52
	2. <i>Reasonable Relationship between Means and Ends</i>	53
	3. <i>Balance between Impaired Free Trade and Secured Prudential Interest</i>	54
IV.	Conclusion	55

### I. Introduction

The world is facing serious economic recession due to the financial crisis deriving from the United States in 2008. The U.S. financial supervisory authorities are now asked to strengthen prudential regulation of complex financial derivatives because loose financial supervision over financial derivatives is believed to be one of the main causes for this financial crisis. Prudential measures are financial actions that financial supervisory authorities may take for prudential reasons, such as consumer protection, soundness of financial institutions and stability of financial markets.<sup>1</sup> The financial services sector is heavily regulated by prudential measures because financial services are believed to be a very technical and sensitive area that is closely related to the integrity of the national economy.<sup>2</sup> Particularly, banks are subject to prudential regulations because of the pivotal position of banks in the financial system, especially in clearing and payment systems. The specialty of financial services caused international trade treaties to treat financial services in a different way than other services.<sup>3</sup> The General Agreement on Trade in Services (“GATS”) has a separate Annex on Financial Services and Understanding that provides special guidelines for the liberalization of financial services.<sup>4</sup> Most Free Trade Agreements (“FTAs”), including the North American Free Trade Agreement (“NAFTA”),

have independent chapters on financial services. For example, Chapter 14 of NAFTA prescribes cross-border trade and investment in financial services.<sup>5</sup> Furthermore, the technical sensitivity of financial services requires prudential supervision by a national financial authority, because a national financial authority is believed to have greater knowledge and expertise in domestic financial markets.<sup>6</sup> For this reason, the GATS Annex on Financial Services 2(a) prescribes “prudential carve-outs,” which give a host state wide discretion in regulating financial services for prudential reasons, such as consumer protection, soundness of financial institutions and stability of financial markets.<sup>7</sup> However, prudential measures can be used as non-tariff barriers if a clear standard of review for jurisprudence on prudential carve-outs is not established.<sup>8</sup> A non-tariff barrier in financial services can be a law, a regulation, an administrative rule, or a standard/requirement with the force and effect of law, other than a tax or duty, whose direct or indirect effect is to restrain or prohibit the entry of foreign financial services.<sup>9</sup> For example, a host state can require a foreign branch to have a certain amount of capital for the soundness of the branch. However, this capital requirement for the establishment of a branch may be considered a non-tariff barrier, because a branch, in general, conducts business based on the capital of a parent financial institution of a home state and thus does not need independent capital.

In order to draw a line between prudential measures qualifying as prudential carve-outs and trade barriers not falling within prudential carve-out exceptions, we need a standard of review for jurisprudence on prudential measures. A standard of review will be helpful in resolving disputes regarding prudential measures. As of now, a consensus on this issue has yet to be reached, but prudential measures are still subject to dispute settlement under the WTO.<sup>10</sup> Lazaros E. Panourgias argued that a prudential exception should be held up to a mere rationality test. He viewed that a prudential measure at issue does not have to be the least-restrictive measure. However, he insisted that application of the less-restrictive alternative test may be possible if objective factors sufficiently establish that the potential measure at issue is being used to avoid commitments of obligations under the GATS.<sup>11</sup> According to Panourgias, a host state's entry requirement is inconsistent with the GATS only if an alternative measure is less trade-restrictive and if the regulatory cost in opting for the less trade-restrictive alternative is not disproportionate to the trade benefits.<sup>12</sup>

Sydney J. Key viewed prudential measures as not subject to the least-restrictive principle, but prudential measures can be challenged under the anti-abuse of the prudential carve-out provision of the GATS.<sup>13</sup> Neither Panourgias nor Key, however, suggested detailed criteria for the identification of abuse of prudential discretion. The definition of prudential measures, the scope of prudential carve-outs, and the abuse of prudential discretion have not been tested under WTO jurisprudence.<sup>14</sup> The recent *Firemen* case at the International Center for Settlement of Investment Disputes ("ICSID") provided the tribunal with the chance to review a prudential measure where the complainant insisted that a prudential measure harmed the interest of a foreign investor.<sup>15</sup> However, the tribunal did not rule on the prudential measure on the grounds that no expropriation existed.<sup>16</sup> Due to the lack of cases on prudential measures, there are few scholars who specifically focus on jurisprudence on prudential measures. However, it is likely that the number of disputes on prudential measures will increase in the near future as cross-border trade and investment in financial services increase.<sup>17</sup> Some experts insist that certain functions of banks, such as being a backup source of liquidity, are no longer unique so that heavy banking regulations should, therefore, be deregulated.<sup>18</sup> This challenge against the belief in the specialty of financial services will also increase the number of disputes on prudential measures as parties can expect tribunals to grant less deference toward a state agency's determination.

The prudential carve-out provision of the GATS Annex on Financial Services 2(a) clearly states that a national authority has prudential discretion as long as the discretion is not abused. In other words, the sole ground of violation of the prudential carve-out provision is the abuse of discretion.

GATS Annex on Financial Services 2 (Domestic Regulation) (a):

Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform to provisions of the Agreement, *they shall not be used as measures of avoiding the Member's commitments or obligations under the Agreement* (emphasis added)

Therefore, understanding the standard of review on the abuse of discretion is a prerequisite to establish a standard of review on prudential discretion. There are various standards of review on the abuse of discretion, such as that of "good-faith" in administrative laws, "margin of appreciation" conducted by the European Court of Human Rights ("ECHR"), "proportionality" adopted by the European Court of Justice ("ECJ"), "state of necessity" in international investment laws, and a "necessity test" found in GATT Article XX and GATS Article XIV. Each standard of review, being applied in different subject matters, is conducted by a different tribunal. This paper will focus on a good faith principle and suggest that a good faith principle can be a standard of review for jurisprudence on prudential discretion. Furthermore, the paper will highlight the elements of prudential discretion that prudential measures should meet for not being abused. Particularly, this paper will prove that the least-restrictive principle does not apply to prudential discretion.

## II. Good Faith Principle

### 1. Abuse of Discretion

Discretion is the reasonable exercise of a power or a right. Discretion means the power to make a choice. A state exercises its discretion whenever the state is free to make a choice among possible options.<sup>19</sup> The exercise of discretion must be conducted in a good faith manner, because the right of every state under international laws is subject to the *pacta sunt servanda* rule.<sup>20</sup> *Pacta sunt servanda* means "every treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>21</sup> A good-faith principle requires that every right be exercised reasonably and fairly.<sup>22</sup> The exercise of discretion in an arbitrary, vague, or fanciful manner is an abuse of discretion.<sup>23</sup> According to the definition in Black's Law Dictionary, an arbitrary decision is one that "depends on individual discretion and is founded on prejudice or preference rather than on reason or fact."<sup>24</sup> If the exercise of discretion is arbitrary, capricious, or unreasonable, the discretion power is abused.<sup>25</sup> Arbitrariness has been described as "a willful disregard of due process of law, an act which shocks, or at least surprises,

a sense of judicial propriety.”<sup>26</sup> The expression of “arbitrary and capricious” is used as a synonym for “unreasonableness.”<sup>27</sup> The meaning of the two expressions is one and the same, because the key point is whether discretionary power has been abused.<sup>28</sup> Therefore, the words “unreasonable,” “not in good faith,” and “arbitrary” are variations on the term “abusive.”

The greatest injustice in the exercise of governmental power is likely to occur when government officers act with unreviewed discretionary power without the kind of procedural protection that the court customarily provides.<sup>29</sup> Therefore, those areas where decisions depend more upon discretion than upon rules and principles and where formal hearings and judicial review are mostly irrelevant are the areas that tend to be the most deficient in delivering justice to individuals in legal and governmental systems.<sup>30</sup>

Therefore, transparency is a key procedural discipline in preventing the abuse of discretion. Transparency in the implementation of measures requires the following: (i) reasonable notice before implementation; (ii) public availability to service suppliers making it easy to find and easy to read; (iii) specification of reasonable time periods for responding to applicants; (iv) information provided as to why an application was denied; and (v) information provided on procedures for review of administrative decisions.<sup>31</sup> Along these lines, Article III of the GATS requires a WTO-member country to publish all relevant measures affecting trade in services as well as to respond to all requests by any other WTO-member country.<sup>32</sup> In the same context, NAFTA Article 1411 also requires a host state to provide, in advance to all interested persons, all relevant measures in order to allow interested parties to make comments on the measures.<sup>33</sup>

## *2. Criteria of Constraints on Discretion*

The exercise of discretion is within the scope of judicial review.<sup>34</sup> Article 10(3) of the Federal Administrative Procedure Act of 1946 requires the court to set aside decisions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.<sup>35</sup> Tribunals check the following elements in determining whether there has been an abuse of discretion.

First, grounds for the exercise of discretion should be “for legitimate reasons.”<sup>36</sup> If the grounds are improper, the exercise of discretion is “in bad faith.”<sup>37</sup> Therefore, any exercise of a right for the purpose of evading either a rule of law or a contractual obligation constitutes an abuse of the right and shall be prohibited by law.<sup>38</sup> For example, the Home Secretary used his power of discretion to revoke a license under the Wireless Telegraphy Act of 1949 in order to impose a higher license fee.<sup>39</sup> The Court of Appeal held that it was a clear abuse of power, because the Home Secretary revoked the license without good reason.<sup>40</sup>

Second, there should be a reasonable relationship between

legitimate aims and legitimate means. If a rational relationship between the aims and the means is lacking, this may indicate an evidence of protective application, and thus, may suggest an abusive exercise of discretion right.<sup>41</sup> For example, it is unreasonable for a public authority to require a hotel to buy beer from the city as a condition for the hotel to receive a license, because the authority took into account an irrelevant element.<sup>42</sup>

Third, there should be a balance between the public interest secured by a legitimate purpose and the interest impaired by the exercise of discretion.<sup>43</sup> In other words, the discretionary power must be exercised in conformity with the spirit of the law and with regard to interests of others.<sup>44</sup> The rational basis of a good faith approach requires the national authority to check whether there was a threat to national security or public order that is sufficient to justify the measure taken.<sup>45</sup>

## *3. Application of a Good Faith Standard to Prudential Discretion*

A good faith standard can be applicable to prudential discretion, because prudential measures are conducted by the discretion of a national financial supervisory authority. Prudential issues require highly complex and technical knowledge of, and expertise in, circumstances and conditions that judicial organs in general do not appreciate.<sup>46</sup> Prudential discretion should be granted with wide deference from tribunals, because a national financial supervisory authority has expertise on domestic financial issues and is in a better position to know surrounding facts than international tribunals do.<sup>47</sup> Prudential regulations should also meet a good faith standard, because the laws of a state are presumed to meet the requirements of international laws, and a fundamental principle of international law is the good faith standard.<sup>48</sup> It is generally accepted that the GATS did not intend to authorize unreasonable action; instead, they are considered *ultra vires* and void.<sup>49</sup> In fact, the prudential carve-out provision of the GATS Annex on Financial Services 2(a) clearly states that prudential measures shall not be used as a means to avoid obligations and commitments of the GATS. The exercise of discretion to avoid obligations and commitments is a clear abuse of discretion.<sup>50</sup> Therefore, prudential measures must be taken for the purpose of prudential reasons, such as consumer protection, soundness of financial institution, and stability of financial markets. There must be a reasonable relationship between the measure taken for prudential reasons and the prudential purposes.<sup>51</sup> There must also be a balance between the impaired free trade and the secured sovereign right of a state to regulate for the prudential purpose.<sup>52</sup>

Some scholars argue that the U.S. *Chevron* reasoning cannot be sustained in the context of WTO panel proceedings because of the following reasons: (i) The traditional deference under U.S. administrative law is not transferable to the WTO

panel system, because the panels have built up expertise; (ii) Article 17.6(ii) of the Anti-Dumping (“AD”) Agreement directs WTO panels to clarify the AD Agreement “in accordance with customary rule of interpretation of public international law.” Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”) aim to resolve any lack of clarity in order to arrive at one single interpretation; (iii) Article 17.6(ii) of the AD agreement uses the word “permissible,” which may be interpreted differently from the term “reasonable” as construed under the U.S. law.<sup>53</sup>

However, the U.S. *Chevron* doctrine does apply to the carve-out provision of the GATS because of the following reasons. First, the panels need to rely on the determination of a host state in order to decide whether a measure at issue falls within the prudential carve-out provision, because the provision itself does not define the meaning of a prudential measure. Instead, the provision provides non-exhaustive lists of prudential reasons: consumer protection, soundness of financial institution, and stability of financial markets. An additional list of prudential reasons may be provided by a national authority rather than by the panels, because each country needs different prudential measure to address its individual circumstance. Second, the panels do not have sufficient expertise to determine what a prudential reason is, because there has yet to be a single case on prudential measures under the WTO Dispute Settlement Bodies (“DSB”). Even though the DSB would be able to select financial experts as panelists, the financial experts cannot be in a better position than a national financial authority in determining whether a measure at issue is a prudential measure or not.<sup>54</sup> Third, with regard to a single interpretation of WTO laws, Articles 31 and 32 of the VCLT do not prevent the panels from relying on a national authority’s interpretation of prudential reasons. Moreover, Article 17.6(ii) of AD agreement<sup>55</sup> even manifests the necessity of the panels’ deference to a national authority’s interpretation. In fact, WTO panels and the Appellate Body have applied the general principle of international law, including the principle of good faith to a national authority’s interpretation.<sup>56</sup>

### III. Standard of Review for Jurisprudence on Prudential Discretion

The sole standard of review for prudential discretion is a good faith principle, because a national financial authority deserves a wide latitude of discretion when it comes to prudential measures. Such latitude is appropriate, because: (1) a national financial authority has direct knowledge of its society’s needs, which puts it, in principle, in a better position than international tribunals to appreciate what is “in the public interest”<sup>57</sup>; (ii) prudential issues require highly complex and technical knowledge of, and expertise in, circumstances and conditions that tribunals in general do not sufficiently

appreciate<sup>58</sup>; (iii) a lack of consensus among states tends to strengthen the tribunals’ deference to a national financial supervisory authority.

Under a good faith principle, prudential discretion must meet the following criteria: (i) a measure at issue must be taken for a substantial prudential objective; (ii) there must be reasonable relationship between a measure at issue and the prudential objective; (iii) there must be a balance between the infringed right of a foreign financial supplier and the secured prudential interest. This balance test does not necessarily require a least-restrictive measure, since prudential discretion is not subject to the least-restrictive principle.

#### 1. Prudential Objective

There should be a measure for prudential objectives. Prudential measures include the following objectives: (i) to protect investors to help build their confidence in the market; (ii) to ensure that the market is fair, efficient, and transparent; (iii) to reduce system risk; (iv) to protect financial services businesses from malpractice (e.g., money laundering); and (v) to maintain the consumer’s confidence in the financial system.<sup>59</sup> If the objective of the measure is, for example, solely for the prevention of entry of foreign financial suppliers, the measure does not qualify as a prudential carve-out. A measure is arbitrary only when the measure has no objective and no reasonable justification of its failure to pursue a legitimate aim.<sup>60</sup> In other words, if a national authority acts upon an irrelevant motive, it is unreasonable, and thus, is an abuse of discretion. The prudential carve-out provision of the GATS requires a prudential objective when it states clearly that a prudential measure is a measure taken “for” prudential reasons. In order to interpret the meaning of “for,” we have to look to the ordinary meaning of the word “for” in context and in light of the object and purpose of the GATS Annex on Financial Services 2(a), in accordance with Article 31(1) of the VCLT.<sup>61</sup>

The word “for” means “with the object or purpose of” or “in order to obtain.”<sup>62</sup> It is unreasonable to suppose that the word “for” has the same meaning as the word “necessary” as it appears in the GATS Article XIV, because the terms and their contexts are different.<sup>63</sup> The word “for” is a subjective expression whereas the word “necessary” is an objective expression.<sup>64</sup> The term “necessary” refers to a range of degrees of necessity between “indispensable” and “making a contribution to.”<sup>65</sup> Whether a measure is “indispensable” or “making a contribution to” the ends is assessed objectively by third parties. However, the terms “with object or purpose of” and “in order to obtain” focuses on the subjective intention of a national authority. It does not take into account whether a measure meets or is likely to meet the end to be pursued. The purpose of the national authority is critical in determining whether a measure is prudential or not.<sup>66</sup> The subjectivity of the term “for” is supported by use of the term “reasons” in the

expression “for prudential reasons.”

GATS Annex on Financial Services 2 (Domestic Regulation)(a) provides:

Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures *for prudential reasons*, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform to provisions of the Agreement, they shall not be used as measures of avoiding the Member’s commitments or obligations under the Agreement (emphasis added)

The word “reason” ordinarily means “motive for an action.”<sup>67</sup> “Motive” also has a subjective meaning. The combination of the words “purpose” and “motive” strengthens the fact that prudential measures rely on a national authority’s policy objective.<sup>68</sup> The preamble of the GATS also recognizes the right of a Member to introduce new regulations in order to meet national policy objectives.<sup>69</sup> Historically, the prudential carve-out provision was created to secure the discretion of national financial regulators, and thus, the WTO DSB was expected to grant a wider deference to the subjective determinations of a national financial authority.<sup>70</sup> Therefore, a restriction on a new banking license, for example, may have prudential connotations so long as the national authority is seeking to prevent excessive competition in the financial sector in order to reduce systemic risk. However, the restriction may not qualify as a prudential measure if its objective is to solely restrict entry of foreign financial suppliers.

A problem arises when a measure has both a prudential objective and a trade restrictive objective. The national authority’s objective does not have to be “purely” prudential because the national authority can pursue multiple policy objectives with a single measure. For example, a commercial presence requirement is used not only for financial supervision but also for tax purposes.<sup>71</sup> The existence of foreign financial suppliers’ subsidiaries or branches in a host state makes it easier for a national authority to supervise or tax them than when a cross-border trade is conducted via the Internet without commercial presence in a host state. In sum, a national authority’s action will be lawful as long as prudential motives behind the act at issue are dominant, even though some incidental advantage may be gained from some irrelevant motives.<sup>72</sup>

However, a prudential objective cannot be a “supplementary” one; otherwise, most non-tariff barriers, including quantitative market access limitations and discriminative measures, can be justified as prudential carve-outs, which would effectively invalidate the GATS. Therefore, prudential objective of a policy should be at least a “substantial”

one. Under this substantial criterion, when a foreign investor’s license is rebuked on both prudential and non-prudential grounds, as long as the prudential purpose is a substantial one, the non-prudential grounds will not vitiate that rebuke.<sup>73</sup> The decision as to whether the prudential objective is substantial or supplementary relies on the individual facts and circumstances of each case.

## 2. Reasonable Relationship between Means and Ends

There must be reasonable relationship between a measure taken for prudential reasons and the prudential objective. If a measure at issue is not reasonably related to the prudential objective, exercise of the measure is an abuse of prudential discretion.<sup>74</sup> The relationship between the means and the ends should be close and genuine.<sup>75</sup> A national financial authority may grant a license to a foreign financial supplier based on whatever conditions the national authority believes to be necessary. However, such conditions are invalid unless they are “fairly and reasonably” related to the prudential objective.<sup>76</sup> If a financial supervisory authority considers elements that even a reasonable person could not expect to be within the discretionary power of the authority, the measure cannot be prudential because the authority’s discretion is unreasonable.<sup>77</sup> In other words, taking an irrelevant consideration into account indicates a lack of good faith.<sup>78</sup> For example, the Federal Reserve may consider the following relevant elements in approving the opening of a branch or agency by a foreign bank in the U.S.:

- (i) Whether the home country allows the proposed establishment of an agency in the U.S.;
- (ii) Whether managerial human resources of the applicant foreign bank are capable in engaging international banking;
- (iii) Whether the foreign bank has given the Federal Reserve adequate information;
- (iv) What the *relative* size of the foreign bank is in its home country.<sup>79</sup>

Furthermore, the Federal Reserve may consider another element to be subject to its approval as it deems necessary.<sup>80</sup> However, the Federal Reserve cannot require irrelevant conditions. For example, if the Federal Reserve requires a foreign branch to employ a U.S. citizen as the senior manager of the branch as a condition of receiving a license, this requirement would not qualify as prudential measure, because the U.S. citizenship requirement is not reasonably related to the soundness of the foreign branch. It is not the citizenship but the capability of the senior managers that is related to the soundness of a financial institution. For this reason, NAFTA Article 1408 (Senior Management and Boards of Directors) prevents citizenship requirement for senior managerial and other essential personnel.<sup>81</sup>

A measure at issue is deemed to have a reasonable relationship with a prudential objective if the measure itself has the typical prudential characteristics, such as consumer protection, safety and soundness of financial institutions, and stability of financial markets. International standards, such as the BIS ratio,<sup>82</sup> are believed to be reasonably related to prudential reasons, since the BIS ratio was made for the soundness of financial institutions. In the same context, existence of equivalent measures in other states may enhance the legitimacy of a prudential measure that is otherwise impugned.<sup>83</sup> For this reason, if a home state does not adopt the Basel accords,<sup>84</sup> a host state may legitimately discriminate against the establishment of a branch by the bank of the home state, because the host state may have a reasonable concern with the soundness of the foreign parent bank.<sup>85</sup>

A measure taken by a host state might not be a prudential measure because of the lack of a reasonable relationship. For example, lending requirements to a certain sector or geographical area are, arguably, not reasonably related to a prudential objective.<sup>86</sup> The rationale of this lending requirement derives from the concept that credit markets are local in nature.<sup>87</sup> Since banks use money from these areas, these banks should also be required to lend and invest in these areas instead of funneling the money out.<sup>88</sup> However, credit markets today are no longer local, but have become, instead, inter-local, thanks to the development of transportation and communication.<sup>89</sup> Furthermore, social welfare is not the banking sector's obligation; it is the government's responsibility to assist less competitive sectors and geographical areas. Therefore, the lending source for local areas should be the tax revenue of the nation rather than the money of depositors. For this reason, it is understandable why there is no international standard on lending requirements.

### *3. Balance between Impaired Free Trade and Secured Prudential Interest*

There must be a balance between the infringement of free trade and the national interest that is secured by exercise of prudential measure.<sup>90</sup> The GATS preamble paragraph four requires a balance between the increase of free trade and the sovereign right of a nation to regulate for legitimate purposes.<sup>91</sup> The WTO panels' general objective is to find a balance between the Members' interests in protecting their sovereignty and the general interest in free trade. International standards, such as the Basel accords, provide a yardstick for the adequacy or excessiveness of national prudential regulations.<sup>92</sup> Some scholars argue that the international standard for capital requirements would be a least trade restrictive alternative, as the international standards would equally address the relevant financial stability concerns of a host regulator.<sup>93</sup> In other words, the host country's extra capital requirements, more than that of any international standard, would be in contravention of

the GATS principles because the extra capital requirement would be more trade restrictive than necessary.<sup>94</sup>

However, existence of a relevant international standard does not necessarily mean that the international standard is a least-restrictive alternative; a balance test must be administered that would take into account the host state's circumstances. For example, extra capital requirements that exceed international standard requirements can be reasonable in a host state where deposit insurance is not established, because sufficient capital requirements can substitute for absence of deposit insurance.

Furthermore, a least-restrictive principle is not applicable to prudential discretion because of the following reasons. First of all, the prudential carve-out provision of the GATS does not contain the word "necessary" from which a least-restrictive principle derives. Without exception, all provisions of the GATS that are subject to a least-restrictive principle contain the word "necessary." For example, GATS Article VI (Domestic Regulation)<sup>95</sup> requires a least-restrictive principle when it states that domestic regulations "shall not be more burdensome than necessary." Domestic regulations are standards or criteria for the authorization, licensing or certification of services suppliers.<sup>96</sup> Under a least-restrictive principle, domestic regulations must not have a less restrictive alternative to achieve the same objective.<sup>97</sup>

The GATS Article XII (Restrictions to Safeguard the Balance of Payments) also requires a least-restrictive principle by prescribing that restrictions on trade in services, including payments or transfers for transactions, shall avoid unnecessary damage and shall not exceed necessary restrictions.<sup>98</sup>

GATS Article XII, which derives from the self-preservation principle of customary international law — the basis for the state of necessity defense of International Law Commission (ILC) Article 25 and Non Precluded Measure of BITs — is also subject to a least-restrictive principle.<sup>99</sup>

The GATS Article XIV (General Exceptions) incorporates a least-restrictive principle as one of two prongs of its necessity test in which a measure at issue must be necessary to achieve legitimate objectives.<sup>100</sup>

On the other hand, Lazaros E Panourgias believes that the word "reasonable" is related to the least-restrictive principle.<sup>101</sup> He argues that application of the least-restrictive principle to prudential measures is likely to be more applicable under NAFTA, because Article 1410(1) required that prudential measures be "reasonable."<sup>102</sup> However, it should be noted that it is the word "necessary" — not "reasonable" — that indicates a least-restrictive principle. The word "reasonable" is just another way of expressing "a good-faith principle," because a good-faith principle requires a reasonable relationship between the ends and the means. For this reason, both prudential carve-out provisions under Article 1410 of NAFTA and the GATS Annex on Financial Services 2(a) are the same, even though Article 1410 of NAFTA contains the additional term "reasonable" in its measure. Therefore, the prudential

exceptions under NAFTA are also not subject to a least-restrictive principle, because NAFTA Article 1410(1) does not contain the word “necessary.”

#### IV. Conclusion

The financial crisis triggered financial supervisory authorities to increase regulation regarding financial derivatives. The U.S. authorities declared to tighten regulation on exotic financial instruments. The Europeans are pushing for the establishment of a single European clearing house for credit derivatives. The Basel Committee on Banking Supervision plans to increase capital reserve requirements and demand better disclosure on complex securities. In introducing new regulation pertaining to derivatives, financial authorities can use considerable discretion because of their expertise and specialty of financial services. However, it does not necessarily mean that the prudential discretion is not subject to judicial review. A good-faith test still applies to the prudential discretion. New financial derivative regulation should substantially aim at consumer protection, the soundness of financial institutions, or the stability of financial markets. Regulation of complex derivatives must be reasonably related to prudential objectives. The consensus that credit derivatives are at the heart of financial crisis would be good evidence for the existence of a reasonable relationship between the regulation of financial derivatives and the stability of financial markets. Additionally, there must be a fair balance between the infringed free trade and the secured prudential objectives. However, the financial derivatives measure does not have to be the least-restrictive measure, because prudential discretion is not subject to necessity test.

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2 WTO Background note by the Secretariat, *Financial Services*, S/C/W/72, at 9 (Dec. 2, 1998 WTO).

3 Regarding specialty of financial services, see Corrigan, *Are Banks Special?*, Federal Reserve Bank of Minneapolis 1982 Annual Report.

4 See General Agreement on Trade in Services, available at [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm).

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10 Wendy Dobson and Pierre Jacquet, *Financial Services Liberalization in the WTO*, 76-77 (Peterson Institute 1998).

11 Panourgias, *supra* note 1, at 80.

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15 Fireman’s fund insurance company v. the United Mexican States, ICSID case No. ARB(AF)/02/01.

16 *Id.*

17 C. Christopher Parlin, *Current Developments Regarding the WTO Financial Services Agreement*, at 9, available at <http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/parlin.pdf>.

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24 CMS Gas Transmission Company v. Argentine Republic (Case ARB/01/8), Award, para 291, May 12, 2005.

25 Wade and Forsyth, *supra* note 23, at 391-92.

26 LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/01, para 157, Oct. 3, 2006; ICSID review-*Foreign Investment Law Journal* 203, 242.

27 Wade and Forsyth, *supra* note 23, at 391-92.

28 *Id.*

29 Kenneth Culp Davis, *supra* note 19, at 3.

30 *Id.*

31 An Introduction about The General Agreement on Trade in Services, at 18, March 29, 2006, available at [http://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/serv_e.htm).

32 See GATS Article III (Transparency).

33 See NAFTA Article 1411. (Transparency).

34 Wade and Forsyth, *supra* note 23, at 392

35 *Id.*

36 *Id.* at 439.

37 *Id.*

38 Anglo-Norwegian Fisheries case, ICJ report 116, at 142 (1951).

39 Congreve v. Secretary of State for the Home Office Q.B. 629 (1976).

40 *Id.*

41 U.S.-Taxes on Automobiles, WTO Panel report, para 7.148, WTO Appellate Body Report, para 72.

42 R.V. Birmingham Licensing Planning Committee ex P. Kennedy 2 Q.B. 140 (1972).

43 See Bhala, *supra* note 9, at 256.

44 B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 122 (Grotius Cambridge, 1987).

45 William W. Burke-White and Andreas Vonstaden, *Investment Protection in Extraordinary Times: the Interpretation and Application of Non-Precluded Measures Provision in Bilateral Investment Treaties*, 52-53 (University of Pennsylvania Law School 2007), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1156&context=upenn\\_wps](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1156&context=upenn_wps).

46 Sporrong and Lonroth v. Sweden, European Court of Human Rights, 23 Sep. 1982, A52, para. 69.

47 Oesch, *supra* note 6, at 234; See Argentine Republic, ICSID case, No. ARB/02/8, Award, para 273 (Feb 6, 2007); S.D Mayers, Inc. c. Canada, UNCITRAL/NAFTA Arbitration, partial award of 13 November 2000, at 263; Jahn and others v. Germany, Judgement, Strasbourg, 30 June, 2005, at 91 (2005).

48 Alwyn V. Freeman, *International Responsibility of State for Denial of Justice*, 74 (Longmans, Green & Co. 1970)

49 Wade and Forsyth, *supra* note 25, at 381.

50 Anglo-Norwegian Fisheries case (1951), ICJ report 116,

at 142.

51 WTO Appellate Body report, *United States-import prohibition of certain shrimp and shrimp products*, WT/DS58/AB/R, at 35, Oct. 12 1998.

52 See Bhala, *supra* note 9, at 256.

53 *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 843 (1984); see also Oesch, *supra* note 6, at 174.

54 The GATS Annex on Financial Services provide:

Dispute Settlement Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service under dispute.

55 Article 17.6 of the Agreement on Implementation of Article VI of the GATT (Anti-dumping) provide:

In examining the matter referred to in paragraph 5:

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

56 US-Shrimps, WTO Appellate Body Report, WT/DS58/AB/R, para. 158, Oct. 12, 1998; US-Foreign sales corporations, WTO Appellate Body Report, WT/DS108/AB/R, para. 166, Feb. 24, 2000.

57 James and others v. UK, European Court of Human Rights, A98, para 46, Feb. 21, 1986.

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59 Kenneth Kaoma Mwenda, *Legal Aspect of Financial Services Regulation and the Concept of a Unified Regulator*, 3 (World Bank 2006), available at [http://siteresources.worldbank.org/INTAFRISUMAFTPS/Resources/Legal\\_Aspects\\_of\\_Financial\\_Sces\\_Regulations.pdf](http://siteresources.worldbank.org/INTAFRISUMAFTPS/Resources/Legal_Aspects_of_Financial_Sces_Regulations.pdf).

60 See Rasmussen v. Denmark, European Court of Human Rights, A87, Nov. 28 1984.

61 WTO Appellate Body Report, *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS/161/AB/R, WT/SD169/AB/R, at 48, Dec. 11, 2000.

62 See American Heritage dictionary.

63 See WTO Appellate Body Report, *United States-Gasoline*, at 17-18, Apr. 29, 1996. In this case, the Appellate Body viewed that each paragraph of GATT Article XX has a different degree of connection between the measures and the state policy sought to be realized because each paragraph uses different terms: "necessary" in paragraphs (a), (b) and (d); "essential" in paragraph (j); "relating to" in paragraphs (c), (e) and (g); "for the protection of" in paragraph (f); "in pursuance of" in paragraph (h); and "involving" in paragraph (i).

64 U.S.-Shrimp case, *supra* note 51, at 49-50.

65 *Id.*

66 Key, *supra* note 7, at 2 (stating, “[a]n allegedly prudential measure that violates a country’s obligations or commitments under the GATS might be challenged on the grounds that “its purpose” is really trade restrictive rather than prudential.” (emphasis added)

67 See American heritage dictionary.

68 Kern Alexander, *The World Trade Organization and Financial Stability: The Balance between Liberalization and Regulation in the GATS*, 25 (Cambridge University 2003) available at <http://www-cfap.jbs.cam.ac.uk/publications/files/CERFWP5.pdf> (stating that compared with other general exceptions in the GATS which have an objective necessity standard, the prudential carve-out is flexible and, to some extent, subjective).

69 See Preamble of GATS, available at [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm), (Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives).

70 Sydney J. Key, *Trade liberalization and prudential regulation: the international framework for financial services*, 75 *International Affairs* 61, 67 (1999).

71 Developing countries are reluctant to open cross-border financial trades because of the concern that cross-border trade might replace foreign branches or subsidiaries in their territories which are important tax resources for developing countries.

72 Wade and Forsyth, *supra* note 23, at 436.

73 Hanks v. Minister of Housing and Local Government, 1 Q.B. 999 (1963).

74 See Rasmussen v. Denmark, European Court of Human Rights, A87, Nov. 28 1984.

75 U.S.-Shrimp, WTO Appellate Body Report, WT/DS58/AB/R, at 35, Oct. 12, 1998.

76 See Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government, Q.B. 544, at 572 (1958) (affirmed in 1960, AC 260).

77 Jurgen Schwarze, *European Administrative Law*, 680 (Boyron 1992).

78 *Cannock Chase DC v. Kelly*, 36 P&CR 219 (Cal. Ct. App. 1978).

79 Bhala, *supra* note 9, at 145-152.; 12 U.S.C. Section 3105 (d)(3)(A)-(D), Regulation K, 12 C.F.R. Section 211. 25(c)(2) (i)-(vi).

80 12 U.S.C. § 3105(c)(5).

81 NAFTA Article 1408 provides: “1. No Party may require financial institutions of another Party to engage individuals of any particular nationality as senior managerial or other essential personnel.”

82 BIS ratio gives an indication of the solvency of a bank. It gives the ration between the risk-bearing capital and the risk-weighted assets.

83 See Yutaka Arai-Takahashi, *The Margin of Appreciation*

*Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, 215 (Intersentia 2002).

84 Refers to banking supervisions, laws and regulations.

85 Panourgias, *supra* note 1, at 93.

86 WTO Background note by the Secretariat, *Financial Services*, S/C/W/72, at 11 (2 December 1998) (stating that “Non-prudential regulatory measures such as lending requirements to certain sectors or geographical regions, restrictions on interest rates or fees and commissions, and requirements to provide certain services may exist”).

87 Macey, *supra* note 18, at. 193-194.

88 *Id.*

89 *Id.*

90 Oesch, *supra* note 6, at 31.

91 See Bhala, *supra* note 9, at 256.

92 Panourgias, *supra* note 1, at 214.

93 *Id.* at 67.

94 *Id.*

95 GATS Article VI (Domestic Regulation) provide:

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) *not more burdensome than necessary* to ensure the quality of the service; (emphasis added)

96 See the GATS Article VI (Domestic regulation) 1.

97 WTO Council for Trade in Services, *Article VI:4 of the GATS*, *supra* note 289, at 6. Secretariat distinguished the necessity test of Article XIV (general exception) from the necessity test of Article VI (domestic regulation) in terms that domestic measure should be non discriminatory and the list of policy objectives in domestic measures are non exhaustive one. However, it viewed that both Article VI and XIV require “legitimate objective” and “no effective alternative means.”

98 GATS Article XII (Restrictions to Safeguard the Balance of Payments) provide:

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments

of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

2. The restrictions referred to in paragraph 1:

- (a) shall not discriminate among Members;
- (b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
- (c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;
- (d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;

99 ILC Article 25 states:

1. Necessity may not be invoked by a state as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that state unless the act: (a) is the only means for the state to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole.

Article XI of the U.S.-Argentina BIT provides:

“This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”

100 GATS Article XIV (General Exceptions) states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures;

necessary to protect public morals or to maintain public order;

necessary to protect human, animal or plant life or health;

necessary to secure compliance with laws or regulations...

101 Panourgias, *supra* note 1, at 80.

102 *Id.*

# Right to Food, Food Security and Accountability of International Financial Institutions

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I.	Introduction	59
II.	Right to Food and Food Security	60
A.	<i>The Right to Food</i>	60
1.	<i>The Right to Food under International Human Rights Law</i>	60
2.	<i>The Normative Content of the Right to Food</i>	60
B.	<i>A Right to Food Security</i>	60
1.	<i>What Is Food Security?</i>	60
2.	<i>Food Security and the Right to Food</i>	61
3.	<i>The Right-Based Approach to Food Security</i>	61
4.	<i>Food Security and Food Sovereignty</i>	61
III.	Impact of IFIs on Food Security	62
A.	<i>The Premises of the World Bank and IMF</i>	62
B.	<i>The Structural Adjustment Programs</i>	62
1.	<i>Background of the Structural Adjustment Programs</i>	62
2.	<i>Failure of Structural Adjustment to Alleviate Poverty and Hunger</i>	62
C.	<i>Toward a New Path?</i>	63
IV.	International Responsibilities and Accountability of the IMF and the World Bank	63
A.	<i>Responsibilities under International Law</i>	63
B.	<i>International Responsibility of the IMF and World Bank with Respect to the Right to Food</i>	63
1.	<i>Direct Effect of the Right to Food: Custom</i>	64
2.	<i>Indirect Effect: Accountability via State Members</i>	64
V.	Conclusion	65

## I. Introduction

On World Food Day—May 22, 2008—the United Nation Special Rapporteur on the Right to Food delivered an alarming message.<sup>1</sup> The price of food was causing a crisis; it was driving one hundred million more people into extreme poverty. Today, 925 million people go hungry<sup>2</sup> due to the soaring prices of food commodities, which rose fifty two percent between 2007 and 2008. Additionally, fertilizer prices have nearly doubled over the past year.<sup>3</sup> Hunger is not rooted in the scarcity of food production but rather in the “lack of purchasing power for those in need.”<sup>4</sup> As Olivier De Schutter underscores, “The violation on a daily basis of the right to food for hundreds of millions of people worldwide has its roots in an outdated and inadequate production system, rather than an actual quantity of food available.”<sup>5</sup>

The financial crisis brings an even darker future for the fight against hunger. During the thirty-fourth session of the Food and Agriculture Organization’s (“FAO”) Committee on World Food Security, Director General Jacques Diouf warned against the temptation for states to move toward protectionism and away from commitments to international development aid.<sup>6</sup>

Classical economic theory predicts that trade liberalization is an effective tool to enhance development. This prediction rests on the idea that economic growth is not a zero-sum game (i.e., economic growth in one country does not result in economic shrinkage in another). Thus, classical economic theory suggests that the most efficient way to increase food production is to concentrate it in certain regions in order to maximize productivity.<sup>7</sup> However, this “trickle down paradigm” is flawed. In reality, the trickle down effect only takes place between countries at roughly equal stages of economic development.<sup>8</sup>

Most importantly, trade barriers distort the market: free trade has never been truly free.<sup>9</sup> Rich countries, through their control of International Financial Institutions (“IFI”), have pushed developing countries to liberalize trade;<sup>10</sup> however, rich countries have continued to subsidize their own agricultural commodities, thereby restricting developing countries from accessing their markets.<sup>11</sup> This has eroded food production in developing countries, and they have become dependant on rich countries for basic food commodities.<sup>12</sup> Lobbyists on the international trading scene have further exacerbated inequalities between poor and rich countries.<sup>13</sup>

The Special Rapporteur on the Right to Food has

underpinned the relevance of the right-based approach to food.<sup>14</sup> The added value of this approach is that it introduces the notion of responsibility for violations of the right to food.<sup>15</sup>

This article posits that the dependence of developed countries on food imports and aid from rich countries violates the right of individuals, not only the right to food but the emerging rights to food security and food sovereignty. This paper will subsequently demonstrate how IFIs both endorsed and actively participated in flawed and unfair trade liberalization that exacerbated hunger and poverty in developing countries. Finally, upholding the right-based approach, this paper will discuss the right to food and international law.

## II. Right to Food and Food Security

### A. *The Right to Food*

#### 1. *The Right to Food under International Human Rights Law*

The concept of the right to food is longstanding. Indeed, both Articles 55 and 56 of the U.N. Charter state that all Member States “take joint and separate action” in cooperation with the U.N. to achieve higher standards of living, economic progress, and development.<sup>16</sup> Additionally, the Universal Declaration on Human Rights states that “everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food”<sup>17</sup> This broad approach toward the right to food clearly puts it beyond a right to merely be free from hunger.<sup>18</sup>

The right was subsequently codified<sup>19</sup> in 1966 in the International Covenant on Economic, Social and Cultural Rights (“Covenant”).<sup>20</sup> Article 11 encompasses a right to adequate food<sup>21</sup> and a right to be free from hunger.<sup>22</sup> The Committee’s General Comment 12 affirms that a minimum core obligation is “to take the necessary action to mitigate and alleviate hunger as provided in the second paragraph.”<sup>23</sup> In other words, the right to be free from hunger constitutes a core obligation that states must respect “even in times of natural or other disaster.”<sup>24</sup>

The right to adequate food is a relative standard while the right to be free from hunger is absolute.<sup>25</sup> The latter is the only absolute right in the Covenant; in addition, it is the only right for which the Covenant twice mentions international cooperation to achieve it.<sup>26</sup> A debate exists on whether the central position of the right to food in the Covenant grants it certain characteristics that pertain to jus cogens norms that bind states to recognize this right, regardless of their ratification of the Covenant.<sup>27</sup> Article 11 suggests that the right to be free from hunger opens the path to its recognition as a customary international law.<sup>28</sup> Other regional human rights instruments include the right to food, such as the Inter-American Convention on Economic, Social and Cultural Rights<sup>29</sup> and the Arabic Charter.<sup>30</sup> Article 16 of the African Charter

on Human and People’s Rights has also been interpreted to include the right to food.<sup>31</sup>

### 2. *The Normative Content of the Right to Food*

The Committee on Economic Social and Cultural Rights in the General Comment 12 developed the normative content of Article 11,<sup>32</sup> which emphasizes that the right to food encompasses both food availability (in quantity and quality) and accessibility.<sup>33</sup> Accessibility includes physical accessibility and economic accessibility.<sup>34</sup> Article 11 obligates states “to take steps to achieve progressively the full realization of the right to adequate food.” A state is also under the imperative obligation to “ensure that everyone under its jurisdiction accesses the minimum essential food” to free himself/herself from hunger.<sup>35</sup> Member States must “respect” the right to access adequate food,<sup>36</sup> “protect” their populations from impingement of access to food, and “fulfill” their obligation in providing such an access when access to food is made impossible.<sup>37</sup>

### B. *A Right to Food Security*

#### 1. *What Is Food Security?*

Although “ensuring humanity’s freedom from hunger” has been a basic purpose of the U.N. Food and Agriculture Organization (“FAO”), the concept of food security as such has appeared in international discussions only since the 1970s, after a rash of famines and problems with international grain shortage.<sup>38</sup> Nonetheless, the concept has undergone tremendous development that culminated in the World Food Summit in Rome in 1996. In fact, the Rome Declaration on World Food Security defined food security, stating “[f]ood security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and preferences for an active and healthy life.”<sup>39</sup> Thus, the pillars of food security are: availability, stability of supply, access and utilization.<sup>40</sup>

The Declaration of the High Level Conference of World Food Security in Rome on June 5, 2008 reiterated the drive toward achieving food security, stipulating that states “will strive to ensure that food, agricultural trade and overall trade policies are conducive to fostering food security for all.”<sup>41</sup> Note that these declarations have no normative value as such, and therefore, are only evidence of some aspiration on the part of states. In that respect, food security is more generally perceived as “a definition of a goal,” whereas the right to food “focuses on the obligations of states and on allowing people who are negatively affected to use legal remedies to get their right implemented.”<sup>42</sup> In other words, it does not create a right on its own.

## 2. Food Security and the Right to Food

The concept of food security may nonetheless draw normative enforceability from the right to food. Indeed, terms related to food security permeate throughout Article 11 of the International Covenant as well as General Comment 12. Article 11 sets out states' obligation to "improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge ... in such a way to achieve the most efficient development and utilization of natural resources."<sup>43</sup> It further provides that a state should take measures "to ensure an equitable distribution of world food supplies."<sup>44</sup> The General Comment 12 also emphasizes that accessibility to food should be secured "in ways that are sustainable"<sup>45</sup> and that sustainability is "intrinsically linked to the notion of adequate food or food security."<sup>46</sup> The Committee also stresses that "the obligation to fulfill means that State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security."<sup>47</sup> Most significantly, the General Comment indicates that "the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement."<sup>48</sup> The notions of physical and economic access echo the definition of food security from the Rome Declaration on World Food Security.<sup>49</sup>

Therefore, the General Comment makes it clear that "the right to food is not simply the right to be fed, but the right to feed oneself."<sup>50</sup> Moreover, "the concept of the right to food encompasses all the elements of food security and grounds them in human rights, and the obligation and accountability of states to ensure this right."<sup>51</sup> Thus, disputing that food security has become a core element to achieve the right to food is difficult. Indeed, in his recommendations to India, the Special Rapporteur on the Right to Food specifically discussed how India should conduct food security programs in order to comply with its obligations.<sup>52</sup> States must undertake policies and programs to achieve food security as part of their obligation to "fulfill" the right to food of their populations, and more precisely, to facilitate this obligation.

## 3. The Right-Based Approach to Food Security

In 2004, the Committee on World Food Security adopted the Voluntary Guidelines, which took a right-based approach toward food security.<sup>53</sup> It emphasized that food security is "an outcome of the realization of existing rights,"<sup>54</sup> such as the right to transparent and accountable government, the right to participate in public affairs, freedom of expression, and most importantly, the right to food. This approach underscores the "universal, inter-dependant, indivisible and inter-related" nature of human rights, including civil and political, economic,

social, and cultural rights. This approach suggests that the right to food may also be a way of achieving food security, which implies that the concept of food security has two aspects. As a core element of the right to food, food security holds a normative value, while the Voluntary Guidelines describe it as an aspiration that may be achieved by enforcing the right to food. In either case, both concepts are interrelated.

## 4. Food Security and Food Sovereignty

IFIs imposed commercial liberalization on developing countries. The concept of food sovereignty emerged in reaction to the persistence of hunger that commercial liberalization created.<sup>55</sup> NGOs such as Via Campesina first outlined this process, and the Special Rapporteur on the Right to Food later endorsed their interpretation:

Food sovereignty is the right of the peoples to define their own food and agriculture; to protect and regulate domestic agriculture production and trade in order to achieve sustainable development objectives; to determine the extent to which they want to be self-reliant; [and] to restrict dumping of products in their markets"<sup>56</sup>

It defines "food sovereignty" as the primacy of the right of people and communities to food and food production above trade concerns.<sup>57</sup> This focus on the local community opposes the globalization process and modern model of development.<sup>58</sup> The 2007 Declaration of Nyéléni on Food Sovereignty also emphasizes "healthy and culturally appropriate food produced through ecologically sound and sustainable methods."<sup>59</sup>

The proponents of food sovereignty consider it a political aspiration for fighting against unfair trade liberalism.<sup>60</sup> However, the Nyéléni Declaration ("Declaration") promoted "a world where food sovereignty is considered a basic human right."<sup>61</sup> Although the Declaration did not create a new right as such, examining to what extent principles of food sovereignty pertain to the scope of the right to food is worthwhile. For example, would a right to food sovereignty be a right to not only to feed oneself, but also to choose how to feed oneself?

Food sovereignty does not focus on the amount of food people are able to access but rather how people access it.<sup>62</sup> It also promotes a form of access that respects human dignity.<sup>63</sup> In that respect, food sovereignty parallels the principle of "strengthening people's access to and utilization of resources and means to ensure their livelihood" from General Comment 12.

Instead of extending the scope of the right to food, food sovereignty provides an alternative way to achieve access to food, namely through participation of local communities. Additionally, the General Comment states that when implementing the right to food at the national level, "the formulation and implementation of national strategies for

the right to food requires full compliance with the principle of accountability, transparency, people's participation, decentralization.<sup>64</sup> It further indicates that "appropriate institutional mechanism should be devised to secure a representative process towards the formulation of a strategy, drawing on all available domestic expertise relevant to food and nutrition."<sup>65</sup> In other words, the Committee stresses the paramount importance of including local communities in decision-making. This approach agrees with the concept of food sovereignty and the idea that people should oversee their own food and agriculture.

The Special Rapporteur on the Right to Food has said that the time has come to look at "alternatives that may better ensure the right to food" and that "food sovereignty offers an alternative vision that puts food security first and treats trade as a means to an end, rather than as an end in itself."<sup>66</sup> He has further contended that if "trade rules threaten the right to food, then those trade rules should be challenged on the basis of human rights law" and "the right to food therefore provides an important legal basis for the fight for food sovereignty."<sup>67</sup> Consequently, food sovereignty is undeniably in line with the concept of food security, which the normative scope of the right to food contains.

Notwithstanding the many declarations and instrument underpinning the paramount place of food security in fighting hunger, the current world food crisis demonstrates that these good intentions have yielded few real improvements. The failure of states in fulfilling their obligation to alleviate hunger undeniably amounts to a violation of the right to food. The Special Rapporteur on the Right to Food underscored that "the profound internal contradictions within the international community" hinders the realization of the right to food.<sup>68</sup> On the one hand, United Nations agencies emphasize social justice and promote the right to food, while on the other hand, international institutions such as the World Trade Organization ("WTO"), the World Bank ("WB") and the International Monetary Fund ("IMF") refuse to recognize the mere existence of a human right to food and impose on the most vulnerable states principles of trade liberalization, "a model which in many cases produces greater inequalities."<sup>69</sup>

### III. Impact of IFIs on Food Security

#### A. *The Premises of the World Bank and IMF*

The Bretton Woods Conference in July 1944 established the World Bank and the IMF.<sup>70</sup> The original purpose of the World Bank was to establish the reconstruction of Europe after World War II and "to encourage the development of productive facilities and resources in less developed countries."<sup>71</sup> Meanwhile, the IMF's function was to "promote international monetary co-operation through permanent institutions."<sup>72</sup> Both institutions gained great importance after

the first oil shock of 1973 that forced developing countries to acquire foreign debts.<sup>73</sup> Since then, the World Bank and IMF have been criticized for their structural adjustment programs and policies that have negatively affected economic and social rights of developing countries, including the right to food.

#### B. *The Structural Adjustment Programs*

##### 1. *Background of the Structural Adjustment Programs*

The IMF and World Bank introduced the Structural Adjustment Lending Program in the 1980s.<sup>74</sup> Countries could borrow money if they agreed to undergo extensive economic reforms.<sup>75</sup> These reforms reflected the neoliberal agenda of the time: privatization, abolition of subsidies, devaluation of overvalued currencies, price deregulation, liberalization of investment markets, tax cuts, strict control of labor, reduction of public expenditures, and downsizing government.<sup>76</sup> Rhetorically, these conditions were focused on the need of developing countries to implement a "package of market-oriented structural adjustments that were said to mimic those in developed countries."<sup>77</sup> The World Bank justified these conditions as a path toward sustainable growth, even if these conditions might bring short-term microeconomic crisis.<sup>78</sup>

##### 2. *Failure of Structural Adjustment to Alleviate Poverty and Hunger*

Numerous studies have demonstrated that "conditionality" is not effective in alleviating poverty and hunger,<sup>79</sup> as it tends to improve the balance of payments but may have a negative impact on growth and income distribution.<sup>80</sup> The Special Rapporteur on the right to food reached the same conclusion after his two missions to Niger, where he found that the current crisis was the result of both unfavorable economic trends and structural shortcomings.<sup>81</sup> The Special Rapporteur emphasized that "the market-based paradigm of development largely imposed by the IMF and the World Bank has been harmful to food security for the most vulnerable."<sup>82</sup> He further elaborated that "privatization of Government support services ... had limited access to essential extension services, exacerbating food insecurity amongst small-scale farmers and pastoralists."<sup>83</sup> Thus, the IMF and World Bank's trend to impose "self-destructive interventionist policies" upon developing countries was "inherently opposed to policy interventions aimed at achieving social equity."<sup>84</sup>

Conditionality failed to take into account several factors that led to the impoverishment of developing countries. First, the unbalanced liberalization produced "balance of payments pressures widening trade deficits across much of the developing world."<sup>85</sup> Second, trade negotiations are inherently unequal, as developing countries do not have much bargaining power and accept the conditions without asking anything in

return.<sup>86</sup> Third, conditionality created a “one system, two rules” approach whereby, unlike developing countries, rich countries were not keen on liberalizing their markets and did not have to do so.<sup>87</sup> Consequently, the industrialized world’s trade barriers reduced the income of developing countries by about twice as much as they received in aid.<sup>88</sup> Finally, there was a distortion between the poverty reduction programs of the IMF and World Bank, and the obvious disregard of the institutions for consequences of such programs on poor people’s lives.<sup>89</sup> For instance, the reforms that the IMF and World Bank imposed are “very often poorly planned and sequenced, without attention to insuring that inputs remain accessible and affordable to farmers.”<sup>90</sup> Consequently, the structural adjustment programs had crippling effects on many poor countries, making them increasingly dependant on rich countries,<sup>91</sup> which ultimately led to greater impoverishment and marginalization of local communities.<sup>92</sup>

### *C. Toward a New Path?*

In November 1999, in response to growing criticism of the Structural Adjustment Program of the IMF and World Bank, the IMF closed down the Enhanced Structural Adjustment Facility and replaced it with the Poverty Reduction Growth Facility (PRGF), with the objective of making poverty reduction a cornerstone of its lending.<sup>93</sup> In the same vein, in 2007, the World Bank announced plans to reduce interest rates on its loans and relabeled its structural adjustment loans as “anti-poverty loans” and “development policy support” loans.<sup>94</sup> But those changes have appeared to be largely cosmetic.<sup>95</sup> In reality a report by the European Network on Debt and Development stated that unlike the IMF’s assertion that the Washington Consensus no longer influenced its conditionality, the Fund continues to make heavy use of highly sensitive conditions, such as privatization and trade liberalization.<sup>96</sup> The charge lies in the fact that these conditions are now non-binding, but usually perceived as required by loan recipients.<sup>97</sup> Similarly, a United Nations Development Program (UNPD) review concluded that the macroeconomic prescriptions from the Poverty Reduction Strategy Papers<sup>98</sup> were largely similar to earlier stabilization policies emphasizing liberalization.<sup>99</sup> Despite the weakening influence of both institutions, due to their loss of legitimacy after the Argentine crisis, many small indebted countries in Africa are still heavily dependant on IMF and World Bank loans and subject to their strictures.<sup>100</sup> The flaws of IMF and World Bank policies once again appeared when Malawi reacted to a crisis in its domestic corn crop and impending famine by reinstating fertilizer subsidies that the World Bank had pressed to slash. As a result, now Malawi is not only feeding its own population but also exporting hundred-thousands of tons of corn to Zimbabwe.<sup>101</sup> In light of the constant and continuous crippling effect of IMF and World Bank policies on impoverished countries, a growing

concern has emerged within civil society as well as the United Nations for rendering these institutions accountable for their policies.<sup>102</sup>

## **IV. International Responsibilities and Accountability of the IMF and the World Bank**

### *A. Responsibilities under International Law*

The Secretary General of the U.N. has stated, “[t]here is no question today that international organizations such as the World Bank and the IMF have legal personality under international law.”<sup>103</sup> The corollary of the international personality is the ability to engage in international wrongful acts.<sup>104</sup> On this sole basis, the Special Rapporteur on the Right to Food asserted that the IMF and World Bank were under the obligation to respect, protect and support the right to food.<sup>105</sup> Alternatively, the IMF and World Bank have denied existence of such obligations, arguing that their mandate and Articles of Agreement with the U.N. exempted them from enforcing human rights. They assert that their limited functional international personality prevents them from being responsible for matters that fall outside their mandate.<sup>106</sup>

In response to these arguments, commentators have argued that, although Bretton Woods created the IMF and World Bank independently from the U.N., since they are now U.N. agencies, the objectives of the U.N. Charter and its human rights obligations should bind them.<sup>107</sup> Additionally, a literal interpretation of the World Bank Articles that excludes “political concerns” is inconsistent with international law as “the Bank does not operate in a legal vacuum” and its Articles are not above international law.<sup>108</sup> This contention is in line with the International Court of Justice’s position regarding interpretation of international treaties and agreements.<sup>109</sup>

Moreover, the fact that activities of the IMF and World Bank directly and indirectly implicate a wide range of human rights issues suggests that their duties should address such issues.<sup>110</sup> In fact, nothing in the Articles of these two institutions prevents them from taking human rights issues into consideration.<sup>111</sup> Therefore, under norms of international law, there is no excuse for these institutions to resist integration of human rights considerations into their activities.

### *B. International Responsibility of the IMF and World Bank with Respect to the Right to Food*

The fact that the Bretton Woods institutions must respect human rights under international law does not ipso facto mean that they may be held responsible for violations of the right to food. The International Covenant on Economic, Social and Cultural Rights (“Covenant”) binds neither the IMF nor the World Bank, given that the Covenant applies only to states.<sup>112</sup> Finally, Article 24 of the Covenant states, “nothing

in the present Covenant shall be interpreted as impairing the provisions of the constitutions of the specialized agencies which define the respective responsibilities of the specialized agencies in regard to the matters dealt with in the present Covenant,” which may be interpreted to exclude applicability of the Covenant to the IMF and World Bank.<sup>113</sup> Admittedly, the IMF and World Bank may be nonetheless bound by the right to food via the U.N. Charter, but these obligations are arguably too vague to create any real binding obligations.<sup>114</sup> Overall, most commentators agree that the Covenant is not directly applicable to the IMF and World Bank, unless it reflects customary international law.<sup>115</sup>

### *1. Direct Effect of the Right to Food: Custom*

The right to food will be directly binding on the IMF and World Bank if it pertains to customary international law. The Universal Declaration of Human Rights in its entirety has become customary international law, and its reference to the right to food gives this right a customary character.<sup>116</sup> Authors like Kearns even went as far as considering the right to food a peremptory norm of *jus cogens* because of “the multiple international documents that explicitly and implicitly grant the right to food and accepting this right as a norm of international law.”<sup>117</sup> However, according to Smita Narula, “the conclusion that the right to food is a norm of customary international law solely by virtue of its inclusion in the UDHR is misguided” as it “essentially ignores historical developments and contemporary articulations of customary human rights law.”<sup>118</sup> Instead, she argues that there are sufficient state practice and *opinio juris* today to demonstrate existence of the right to food as a customary international law.<sup>119</sup> At the very least, the right to be free from hunger has undeniably acquired the status of customary international law,<sup>120</sup> since in addition to being present in many international instruments, the Covenant clearly states that the right to be free from hunger is absolute and fundamental.<sup>121</sup>

Furthermore, the Millennium Goals support the fundamental and absolute nature of the right to food.<sup>122</sup> The Goals aim to halve world poverty and hunger by 2015. Consequently, the IMF and World Bank have the direct “minimum obligation to refrain from promoting policies or projects that negatively impact the right to food” (obligation to respect) as well as having positive obligations to “protect” this right by ensuring that partners do not violate the right to food in implementation of common projects and to support governments in the “fulfillment” of the right to food.<sup>123</sup> By the same token, the Committee on Economic Social and Cultural Rights started infusing the idea that the IMF and World Bank should directly enhance the respect of economic, social and cultural rights, which include the right to food.<sup>124</sup>

### *2. Indirect Effect: Accountability via State Members*

Most of the member states to the IMF and World Bank are parties to the Covenant, and eschewing their international human rights obligation due to IMF and World Bank programs would be contradictory. The Tilburg Guiding Principles clearly indicate that because “the World Bank and IMF are governed by their members states, when representatives determine the policies of the two IFIs, they are bound by their state’s international obligations.”<sup>125</sup> In other words, when the IMF or World Bank disregards or violates the human rights of its member states, it reflects the failure of these members to abide by their own human rights obligations.<sup>126</sup>

The European Court of Human Rights has repeatedly held that the human rights responsibilities of member states continue even after the transfer of competences to international organizations.<sup>127</sup> Most importantly, “under the equivalent protection doctrine, state responsibility for state acts within IFI organs would require them to ensure that decisions . . . offer protection that is comparable to the human rights standards by which a given member state is bound.”<sup>128</sup> Thus, a state may be held responsible for acts of international organizations to which it is a party, notwithstanding the fact that the violations are not occurring within its jurisdiction. This analysis is in line with the concept of extraterritorial obligations as developed by the Committee on Economic, Social and Cultural Rights.

General Comment 12 indicates clearly that states must fulfill their obligations with respect to the right to food in the domestic sphere, as well as when “entering into agreements with other States or with International Organizations.”<sup>129</sup> Additionally, the Committee emphasizes that in order to comply with their obligations, states “should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries.” This is another indicia that states have human rights obligations beyond their borders and population. The former Rapporteur on the Right to Food, Jean Ziegler,<sup>130</sup> expanded the notion of extraterritorial obligations, emphasizing that human rights obligations cannot simply stop at territorial borders.<sup>131</sup>

The Covenant does not contain any territorial or jurisdictional limitations.<sup>132</sup> The notion of extraterritorial obligations may be interpreted in either a restrictive or a broad way.<sup>133</sup> According to the restrictive interpretation, a state must respect its human rights obligations. The Committee in its General Comment 31 (which indicates that “a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”) seems to support this interpretation.<sup>134</sup>

In several instances, the European Court on Human Rights found that the determinative criteria to establishing extra-territorial obligations were the “effective control.”<sup>135</sup> However,

such an interpretation extensively limits the extraterritorial obligations, and such situations of “effective control” usually arise during armed conflicts.<sup>136</sup> Consequently, such an interpretation is not appropriate in cases of violation of the right to food, since “the majority of extraterritorial violations of the right to food under globalization are committed outside these limited scenarios.”<sup>137</sup>

Conversely, Jean Ziegler suggests that extraterritorial obligations may be premised on the obligation of international cooperation that Article 2(1) and Article 11 of the Covenant enshrine.<sup>138</sup> The General Comment 12 demonstrates that the obligation of international cooperation includes state obligations to “take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.”<sup>139</sup> Therefore, the general obligation to cooperate broadens the territorial applicability of the right to food.

The corollary of finding member states accountable for IMF and/or World Bank policies that violate human rights obligations of member states indicates that these two organizations should not undermine a state’s duty to fulfill its international obligations nor facilitate or assist violations of a state’s obligations.<sup>140</sup> In that respect, the draft articles on International Responsibility of International Organization are relevant and emphasize that international organizations may be held directly accountable for directing or controlling,<sup>141</sup> coercing<sup>142</sup> and adopting a decision binding on their member states that will result in an internationally wrongful acts.<sup>143</sup> Thus, the IMF and World Bank must ensure that their “policies and operations account for and respect the obligations of [their] Members under ratified human rights conventions, regional as well as universal, and other sources of law binding on them.”<sup>144</sup>

## V. Conclusion

Economic, social, and cultural rights have benefited from great normative developments and are now encompassing well-defined rights that should be used to tackle the unprecedented food crisis. In that regard, the right to food—which comprises an obligation to food security, and to a certain extent, food sovereignty—has become a tool to hold the responsible to account. However, IFIs still operate as if they are in a vacuum and promote policies that cause impoverishment of poor communities. But the obligation to halt hunger has become more than a mere aspiration; it is now part of customary international law and is therefore binding on the IMF and World Bank. Furthermore, these institutions are inheriting from their states parties extraterritorial obligations to “respect,” “protect,” and “fulfill” the right to food and must act accordingly.

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**Property Right during Armed Conflict:  
Application of Adopting Principles of International Humanitarian Law  
by the European Court of Human Rights**

Maheta M. Molango\*

I.	Introduction	69
II.	The Interplay between IHL and Human Rights Law	70
III.	Position of the European Commission and European Court of Human Rights	70
	A. <i>Application of IHL at the European Court of Human Rights</i>	71
	B. <i>Contribution of the Inter-American Commission of Human Rights</i>	72
IV.	The Right of Property in the European System of Human Rights	72
	A. <i>Provisions of Article 1 of Additional Protocol I</i>	72
	B. <i>Article 1 of ECHR Protocol and Its Relationship with Article 15 ECHR</i>	73
V.	The Right of Property under International Humanitarian Law	73
	A. <i>Military Occupation</i>	74
	B. <i>Non-International Armed Conflicts</i>	74
VI.	Challenges of Applying IHL by the ECtHR	75
	A. <i>Differences and Complements of IHL and International Human Rights</i>	75
	B. <i>Main Obstacles in the Application of IHL</i>	76
VII.	Conclusion	76

### I. Introduction

The proliferation of non-international armed conflicts over the last three decades has drawn the attention of scholars and commentators on the complex interrelationship between international humanitarian law (“IHL” or “laws of war”) and human rights law. The European Court of Human Rights (“European Court” or “ECtHR”) has been reluctant to apply IHL provisions to situations where arguably it should, or even has, used the laws of war as authoritative guidance. The decisions of the ECtHR in the cases of prolonged states of emergency (such as in southeastern Turkey or Chechnya) have illustrated the flaws of its position regarding the application of IHL principles.<sup>1</sup>

Although IHL and human rights law may at times have reached similar conclusions based on a different reasoning, it is crucial to establish a clear distinction between these two sets of norms and to determine when, how and under what conditions they should apply. The most obvious point of friction is the right to life, where the application of IHL or human rights law may substantially alter the outcome of decisions. However, controversy is not limited to this concrete right.

This paper analyzes property rights during armed conflicts, particularly ECtHR’s approach in addressing alleged violations of property rights and its reliance on the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention” or “ECHR”). The paper first discusses the interplay between IHL and human rights law, providing a brief background and introduction to the basic concepts. Then, it discusses positions adopted by the ECtHR and the European Commission of Human Rights<sup>2</sup> with regard to the application of IHL in a selection of cases involving the United Kingdom, Turkey and Russia. The third part of the paper discusses the regulation of property rights under the European Convention and its relationship with Article 15 and Article 60 of the ECHR. The fourth part of the paper dwells upon property rights provisions existing under the laws of war. In particular, it focuses on property rights during military occupations and the relationship between military and civilian objectives. The fifth part focuses on the advantages and possible dangers in the application of IHL provisions by human rights bodies during armed conflicts. The paper concludes with some recommendations.

## II. The Interplay between IHL and Human Rights Law

International humanitarian law and international human rights law have long been considered two strictly separate and distinct bodies of law.<sup>3</sup> The two sets of rules were considered mutually exclusive, fundamentally due to the fact that they followed a different historical evolution and responded to different motivations.<sup>4</sup> International human rights law protects individuals from possible abuse of power of the State, thus setting forth a number of limitations for the latter vis-à-vis the persons under its control. International humanitarian law, however, regulates conduct of parties to an armed conflict, restricting the methods and means of warfare.<sup>5</sup> Note, in this respect, that the Universal Declaration of Human Rights of 1948 and the 1949 Geneva Conventions<sup>6</sup> were drafted and signed during the same period without taking each other into consideration.<sup>7</sup> Despite their different historical background, some links were established between the two.<sup>8</sup> In the Geneva Convention of 1949, there is a tendency to consider the provisions not only as obligations of the Contracting Parties, but as individual rights of every person during an armed conflict.<sup>9</sup> On the other side, human rights conventions integrated derogation clauses, allowing states to abrogate certain provisions in exceptional circumstances such as situations of war or public emergencies threatening the life of the nation.<sup>10</sup>

It was not until the Teheran International Conference on Human Rights (“Conference”) that the United Nations expressly recognized the application of human rights law in armed conflicts.<sup>11</sup> The Conference was followed by General Assembly Resolution 2444 and two reports from the secretary general that concluded human rights law ensures a more comprehensive protection than the existing laws of war.<sup>12</sup> Moreover, human rights law influenced drafting of the two 1977 Additional Protocols to the Geneva Conventions.<sup>13</sup> In that respect, it is fairly easy to detect how several provisions of the two protocols bear a striking similarity with the guarantees established under the International Covenant on Civil and Political Rights.<sup>14</sup> In the same vein, the International Court of Justice (“ICJ”) confirmed application of human rights law in situations of armed conflicts in its *Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons* of 1996:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict

which is designated to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>15</sup>

The ICJ’s *Nuclear Weapons* opinion gave rise to interpretations, according to which international humanitarian law should be the applicable law in situations of armed conflict instead of human rights law—although the latter was not totally excluded.<sup>16</sup> In a more recent *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ made it clear that human rights law may not be automatically set aside during armed conflicts and may even be directly applicable depending on the circumstances.<sup>17</sup> The Court elaborated:

More generally, the Court considers that the protection offered by human rights conventions *does not cease in case of armed conflict*, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: *some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law*. In order to answer the question put to it, the Court will have to take into consideration both branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.<sup>18</sup> (emphasis added)

This opinion clarifies applicability of IHL during armed conflict without totally excluding international human rights law. Thus, the debate now seems focused on establishing the detail of interactions between IHL and international human rights law.<sup>19</sup>

## III. Position of the European Commission and European Court of Human Rights

When an international institution is created within the framework of a concrete treaty, it usually sustains its competence within the limited rights and obligations set forth under the respective treaty.<sup>20</sup> This is clearly the position adopted by the ECtHR. It is a human rights body, which applies international human rights law. Even though, it is easy to detect application of IHL in some of ECtHR’s decisions,<sup>21</sup> as a general rule it has resolutely avoided applying IHL standards to the claims raised before it.

### A. Application of IHL at the European Court of Human Rights

The first case in which the ECtHR had to deal with a possible concurrence of IHL norms and human rights law was the occupation of Northern Cyprus by Turkish forces in 1974. The occupation gave rise to the first state complaint brought to the ECtHR, along with a number of individual complaints, where violations of the right to peaceful enjoyment of one's property were alleged. In *Loizidou v. Turkey*, the complainant was alleging her denial of access to several of her plots of land following the Turkish invasion.<sup>22</sup> The complainant alleged violation of Article 1 of Protocol 1 to the European Convention (peaceful use of complainant's property).<sup>23</sup> Regardless of apparent military occupation, the ECtHR did not apply the IHL principles.<sup>24</sup> This is surprising, because the Court expressed in its judgment the importance of construing its rulings in accordance with the principles of the Vienna Convention on the Law of Treaties and in particular Article 31(3)(c) of the said treaty, which sets forth that "any relevant rules of international law applicable in the relations between the parties" has to be taken into consideration.<sup>25</sup>

Later on, the ECtHR was called upon in several situations of internal armed conflicts and military occupation to determine whether possible violations of the European Convention had occurred. Nevertheless, it limited its findings to alleged infringements of human rights provisions without discussing possible violations of IHL.<sup>26</sup> This led to the application of the same set of rules to situations ranging from mere law enforcement cases to situations of acute violence involving armed groups who probably met the high threshold established under Additional Protocol II.<sup>27</sup> The following cases illustrate how the ECtHR has addressed the hostilities in different cases:

The decision in *McCann and Others v. United Kingdom* involved a joint operation by the Gibraltar police and British military forces aimed at preventing a car bomb attack that three IRA members would have allegedly carried out.<sup>28</sup> The soldiers erroneously believed that the terrorists would have activated the bomb using a push-button remote device.<sup>29</sup> Contrary to their fears, no weapons or detonating devices were ever discovered.<sup>30</sup> The ECtHR found that the State had violated the men's right to life, as the planning of the operation permitted the individuals to enter Gibraltar and allowed military personnel to kill them.<sup>31</sup>

As mentioned earlier, the ECtHR has occasionally used IHL principles as interpretative tools in order to address specific situations.<sup>32</sup> For instance, southeastern Turkey—the Kurdish part of the country—has witnessed a number of cases involving attacks on civilians and civilian targets. The *Ergi v. Turkey* case was about the accidental death during a military

operation of a woman who was not directly taking part in the hostilities.<sup>33</sup> Applying the IHL principle, the Court elaborated, "the lawfulness of the target, on the proportionality of the attack and on whether the foreseeable risk regarding civilian victims was proportionate to military advantage."<sup>34</sup> The ECtHR would have probably reached the same conclusion by referring to international human rights and applying provisions of the European Convention.

Conversely, in *Özcan v. Turkey*, the ECtHR may have reached a different conclusion had it analyzed the material damage caused to the applicants' homes from an IHL perspective.<sup>35</sup> The case involved killings, deprivations of liberty and the burning of houses in the above-mentioned Kurdish areas.<sup>36</sup> The Court strictly based its judgment on human rights law (provisions of the European Convention) and on no occasion applied IHL by questioning whether the properties destroyed could have been military targets. *Alkdivar and Others v. Turkey* is another example of the same approach, in which the ECtHR omitted any direct or indirect reference to IHL, merely finding that "the deliberate burning of the applicants' homes and their contents constitutes at the same time a serious interference with the right to respect for their family lives and homes and with the peaceful enjoyment of their possessions."<sup>37</sup>

*Isayeva v. Russia*<sup>38</sup> and *Isayeva, Yusupova and Basayeva v. Russia*<sup>39</sup> provide other examples in which the ECtHR followed the analysis established in its previous *McCann v. United Kingdom* ruling that individuals' property right had been violated.<sup>40</sup> The facts of both cases bear some similarities as they both deal with the use of heavy weaponry that killed civilians and damaged their properties through aerial bombardments. In *Isayeva I*, the Russian air force was accused of having bombed vehicles of individuals who were evacuating a village that had been declared a "safe zone."<sup>41</sup> Similarly, in *Isayeva II*, the Russian forces bombarded an outlying village as applicants were trying to take advantage of a "humanitarian corridor" arranged by the Russian military to escape from the fighting in Grozny.<sup>42</sup> Applying the IHL, the Court may have reached a different conclusion if it had started by determining whether there was a legitimate military objective for targeting the properties:

Risk to innocent civilian life and property must indeed also be minimized in armed conflicts, but if the target is a legitimate military one, then lethal force might be the first recourse, at least in some circumstances, provided that risks to people and objects in the vicinity are taken into account.<sup>43</sup>

Based on this application of IHL, if the attack had been carried out against a legitimate military objective, the collateral damage or destructions affecting applicants' homes should not have been considered a violation of their property rights.

## B. Contribution of the Inter-American Commission of Human Rights

The Inter-American Commission of Human Rights (“IACHR”) has applied the IHL in many cases involving armed conflicts. In the *Abella* case, the IACHR had to deal with attacks that took place at military barracks in La Tablada (Argentina), which gave rise to a battle between the attackers and Argentinean military forces that lasted for more than thirty hours.<sup>44</sup> Although a detailed analysis of the Commission’s report is beyond the scope of our analysis, it is worth highlighting that the IACHR defended the application of IHL as *lex specialis* based on the following reasoning:

the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance<sup>45</sup>

In the same vein, the IACHR noted in its 1999 Third Report on the Human Rights situation in Colombia that:

[T]he American Convention and other universal and regional human rights instruments were not designed specifically to regulate in detail internal conflicts situations and thus, they do not contain specific rules governing the use of force and the means and methods of warfare” and “both sets of norms [IHL and human rights law] apply during internal armed conflicts, although in many cases international humanitarian law may serve as *lex specialis*, providing more specific standards for analysis<sup>46</sup>

IACHR’s reasoning can set a precedent for other international bodies, such as ECHR. In that respect, one can claim that the European Convention fails to provide the tailored and detailed legal framework on the conduct of warfare that IHL norms offer.

## IV. The Right of Property in the European System of Human Rights

### A. Provisions of Article 1 of Additional Protocol I

Article 1 of the ECHR Protocol contains a sufficient legal basis to support the utilization of IHL rules as authoritative guidance in situations of armed conflict. It states:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived

of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>47</sup>

This is the first economic right protected by the Convention.<sup>48</sup> Although the norm refers to the concept of “possessions,” which should be understood in a broad and autonomous fashion,<sup>49</sup> in *Marks v. Belgium*, the ECtHR clarified that Article 1 is in substance guaranteeing the right of property.<sup>50</sup>

The article consists of two paragraphs, and the first paragraph can itself be divided into two parts. In relation with the first paragraph, its first sentence sets forth the basic guarantee of the right of property, while the second sentence seems to establish specific provisions concerning expropriation. The second paragraph contains the norm applicable to legislation restricting the use of property. In *Sporrong and Lönnroth v. Sweden*, the ECtHR adopted a similar position, noting that Article 1 contains three parts that are distinct but maintain nonetheless close links.<sup>51</sup>

The fact that expropriation appears as the only limit to the right of property contemplated in this article does certainly raise a number of legitimate questions. How should the ECtHR address situations in which military forces bomb a building where a group of insurgents have sought shelter, and as a result, cause damage or destroy several home in the neighborhood? Would this constitute a violation of the right of property? Most importantly, does the ECHR offer the required tools to adequately answer those questions?<sup>52</sup>

The second sentence of the first paragraph states that “no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”<sup>53</sup> Two explanations are possible: a) the drafters pursued the objective of guaranteeing that the special rules established in the ECHR would not supersede general rules of public international law whenever those applied;<sup>54</sup> b) the ECHR established the same standards as recognized in public international law for those under the jurisdiction of a High Contracting Party to the ECHR.<sup>55</sup> The ECtHR, and before it the European Commission of Human Rights, adopted the first approach in their jurisprudence. Both bodies found that Article 1 offered no protection to nationals of a state deprived of their possessions by their own state.<sup>56</sup>

When both IHL and human rights law apply, the ECtHR should turn to the specific IHL standards in order to determine whether there was an illegal deprivation of

property.<sup>57</sup> The *Ireland v. United Kingdom* case perfectly demonstrates that under the ECHR, it is generally possible to refer to international humanitarian law. The ECtHR analyzed whether the derogations adopted by the U.K. in Northern Ireland were in accordance with the state's duties under the 1949 Geneva Conventions.<sup>58</sup>

Moreover, it is worth dwelling upon the rules regulating the right of property in situations of internal armed conflicts. A possible explanation for the existing reluctance to apply IHL norms is that, apart from Common Article 3 and the limited rules of Additional Protocol II, not many relevant rules apply in non-international armed conflicts, and that human rights principles are therefore the only source of guidance in those circumstances.<sup>59</sup> In that respect, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Red Cross Committee's ("ICRC") study on customary law have stated that there is a set of international norms applicable to any armed conflict whether internal or international. The ICRC study demonstrated that, although not all the rules of IHL are applicable to non-international conflicts, a majority of IHL provisions remain applicable.<sup>60</sup> Furthermore, in its decision in the *Tadic* case, the ICTY advocated in favor of widening the scope of IHL to noninternational armed conflicts, arguing that some treaty rules, such as Common Article 3 or a majority of norms in Additional Protocol II, became part of customary international law.<sup>61</sup> The ICTY also notes that the principle of distinction as well as the protection of civilian population and property apply in armed conflicts of any kind.<sup>62</sup>

### *B. Article 1 of ECHR Protocol and Its Relationship with Article 15 ECHR*

The interpretation given to Article 15 is particularly important in situations of noninternational armed conflicts. If a state decides to suspend certain guarantees based on the faculties granted by a derogation clause, and in addition the state has not ratified the relevant IHL instrument or the level of hostilities does not reach the necessary threshold, individuals are obliged to explore other alternatives for relief. Article 15 of the ECHR provides:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Article 3, 4 (paragraph 1) and 7 shall be made under this provision.<sup>63</sup>

This provision contains a general authorization for temporary derogation from the rights and freedoms established in the ECtHR in cases of public emergencies threatening the life of the nation. However, this article is not applicable to situations when the state decides to suspend certain guarantees based on the faculties granted by a derogation clause, or if the State has not ratified the relevant IHL instrument, or the level of hostilities do not reach the necessary threshold. The main limitations to the powers of derogation attributed to the States are the duty of proportionality and the requirement of compliance with international law, "provided that such measures are not inconsistent with other obligations under international law."<sup>64</sup>

From the perspective of the interplay between IHL and human rights law, this reference to international law principles could potentially play an important role.<sup>65</sup> Despite the position maintained by a majority of human rights bodies, arguing that their mandate only encompasses the rights and obligations set forth in their respective treaties, some have advanced the possibility of discussing IHL provisions through derogation clauses such as Article 15.<sup>66</sup> The first element that should be emphasized is that the right of property was not included within the provisions from which no derogation may be possible under any circumstances.<sup>67</sup> Contrary to human rights law, IHL provisions are not subject to derogation at any time.<sup>68</sup> Therefore, IHL provides a set of minimum rules applicable even in cases of emergency.<sup>69</sup> The general requirements of humanitarian law, especially the principle of distinction between civilian and military targets, necessity and proportionality, and humane treatment of protected persons represent "the bottom line below which derogation from human rights treaties cannot justify the freedom of action of states parties."<sup>70</sup> This means, in situations of noninternational armed conflicts, where homes or others' property may be destroyed or severely affected as a result of an attack against a legitimate military target, the ECtHR will not be able to correctly assess the issue unless it turns to IHL for guidance.

## **V. The Right of Property under International Humanitarian Law**

As mentioned earlier, so far the ECtHR has dealt with two types of situations involving the application of IHL regarding property rights: deprivation of property during military occupation and destruction of property during warfare, originated in non-international armed conflicts.

### *A. Military Occupation*

The 1907 Hague Regulations and the 1949 Geneva Convention contain specific clauses concerning private property in occupied territories.<sup>71</sup> The capacity of appropriation

and utilization of property in occupied territories substantially varies depending upon two main parameters: public or private character of the resource involved;<sup>72</sup> and the utility of the resource for the waging of war.<sup>73</sup> Taking of private property must be justified by a legitimate military necessity and private property cannot be taken for the occupant's own enrichment.<sup>74</sup> Additionally, an individual deprived of his property under such circumstances is entitled to compensation from the occupant.<sup>75</sup>

The 1907 Hague Regulations and the 1949 Geneva Conventions contain two central provisions regarding the destruction of property. Article 23(g) of the Hague Regulation No. IV sets forth:

In addition to the prohibitions provided by special Conventions, it is especially forbidden:

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.<sup>76</sup>

This rule has a wide scope. It covers all properties in any territory where an armed conflict is taking place, regardless of the public or private nature of the property, and whether the property is located in an occupied territory or not.<sup>77</sup> Furthermore, the article establishes a limitation to property rights based on the imperatives of military necessity "unless ... imperatively demanded by the necessities of war." The provision does not prohibit incidental damage and destruction collateral to operations, movements or combat activity of armed forces.<sup>78</sup> It, in fact, authorizes partial or total damage to any type of property if such damage is "necessary to, or results from, military operations either during or preparatory to combat."<sup>79</sup>

Contrary to the broad scope of the Article 23(g), Article 53 of the Fourth Geneva Convention is more limited and focuses on the destruction of property during occupation:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Once again, as it was the case in the Article 23(g), the destruction of private property will only be tolerated if the occupant can prove the necessity in causing damages ("except where such destruction is rendered absolutely necessary by military operations"), and it has met the requirement of proportionality. The destruction or appropriation of private property contravening the above-mentioned article is

considered a "grave breach" according to Article 147 of the Fourth Geneva Conventions.<sup>80</sup>

### *B. Non-International Armed Conflicts*

As previously mentioned, the ICTY and the ICRC have clarified applicability of customary laws of armed conflicts to all the parties to an internal conflict.<sup>81</sup> Those rules essentially mirror the regulation existing in cases of international armed conflicts.<sup>82</sup> Article 52 of Additional Protocol I establishes the general protection for civilian objects:

1. Civilian objects shall not be the object of attack or reprisal. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. Insofar as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

According to the second paragraph, civilian objects fail to meet the two-pronged test as military objectives. The presumption in favor of civilian objects contained in the third paragraph of the article only concerns objects that ordinarily have no military use or purpose, thus excluding objects having dual uses or functions.<sup>83</sup> As noted in the ICRC commentary, two issues are not regulated in this article and require the recourse to complementary provisions of Additional Protocol I: first, the rule of proportionality, which allows the parties to assess the extent to which damages caused to a property are acceptable collateral or incidental damage; second, the unintentional or unavoidable, but necessary destruction of civilian objects occurring as a result of military operations, such as destruction to delay pursuit.<sup>84</sup>

The second paragraph of Article 52 sets forth two cumulative requirements to determine whether we are dealing with a military objective or not. First, an intended target has to make an "effective contribution to a military action." It is sufficient that the destruction of a concrete target contributes effectively to the party's overall war effort as no direct connection with combat action is necessary.<sup>85</sup> Second, Article 52(2) also requires that the destruction, capture or neutralization of the intended target offers a "definite"

military advantage to the attackers. As highlighted in the ICRC Commentary, such circumstance should be determined “in the context of the military advantage anticipated from the specific military operation of which the attack is a part considered as a whole, and not only from isolated or particular parts of that operation.”<sup>86</sup> Therefore, the military advantage cannot be “hypothetical and speculative,” but concrete and perceptible under the circumstances ruling at the time.<sup>87</sup>

Determining that an intended target is a military objective is not sufficient to assess whether it can lawfully be attacked. It is indispensable that the attack does not cause excessive collateral damage to civilians or civilian objects and that the attackers adopt certain precautionary measures in order to spare the civilian population.<sup>88</sup> Articles 51 and 57 refer to the concept of “expected” civilian loss rather than “actual” loss.<sup>89</sup> In other words, although the assessment made initially might not correspond with the situation on the ground after the attack, the commander may not necessarily be held responsible if the anticipated military advantage exceeds the advantage actually achieved.<sup>90</sup> As to the precautionary measures set forth in Articles 57 and 58,<sup>91</sup> the burden to take all the measures necessary to avoid civilian injuries or casualties is attributed to *both* parties involved in the hostilities, i.e. the party launching the attack and the party in control of the civilian population.<sup>92</sup>

Applying the comments above to the jurisprudence of the ECtHR, one might ask how should the ECtHR react if a complainants’ properties are destroyed as a result of a carefully planned attack against a well-defined military objective, prepared with all due respect for the civilian population and carried out with appropriate and sufficiently precise weapons? Should the damage made to civilian objects not be considered a regrettable but lawful action, according to the IHL?<sup>93</sup>

The NATO bombing campaign against Yugoslavia generated a controversy for the ECtHR in determining what should be considered a military target.<sup>94</sup> The *Bankovic v. Belgium* case involved NATO’s bombing of Belgrade’s radio and TV station.<sup>95</sup> The ECtHR did not examine the merits of applicants’ claims as it ruled that the victims fell outside of the jurisdiction of the respondent states and thus declared that the Court was not competent to adjudicate their claims.<sup>96</sup> The question as to whether a TV station can be considered a lawful military target remained thus unresolved. As noted by Sassòli, two main justifications were given for the attacks. On the one hand, it was argued that the TV station was integrated into the military communication network of the Yugoslavian forces and therefore was a military objective. On the other hand, official NATO statements merely included the media in its list of legitimate objectives of attacks without backing their assumption with any concrete facts.<sup>97</sup> The key issue consisted in determining whether the television studios met the two-pronged test established in Article 52(2); i.e., whether the media made an effective contribution to the Serbian military action and whether the attacks offered a definite military

advantage under the circumstances ruling at the time.<sup>98</sup> In that regard, it was argued that the TV station was part of the propaganda machinery of the Serbian forces, therefore suggesting that such condition may suffice to consider it a legitimate target.<sup>99</sup> This position received strong criticism from commentators who claimed that “if the television studios were not used [for military transmissions] and were targeted merely because they were spreading propaganda to the civilian population, even including blatant lies about the armed conflict, it would be open to question whether such use could legitimately be considered an ‘effective contribution to military action.’”<sup>100</sup> Regardless of its low possibility, even if the first requirement of Article 52(2) was met, the negative consequences resulting from the attacks may have offset any advantage that the destruction of the TV studio could have generated.<sup>101</sup> In that case, the second requirement of “definite” military advantage was probably not met.

## VI. Challenges of Applying IHL by the ECtHR

### A. Differences and Complements of IHL and International Human Rights

So far, this paper has discussed the interplay between IHL and human rights law, commented on the position of the ECtHR on the application of IHL, and exposed how the right of property is regulated under the European Convention and under the applicable IHL rules. Nevertheless, from a practical point of view, application of IHL principles by the ECtHR may not be straightforward. There are fundamental differences between human rights law and IHL. First, while the scope of application of the laws of war is confined to situations of armed conflicts, human right law applies at all times.<sup>102</sup> Second, IHL applies to and binds equally all the parties involved in an armed conflict, whereas human rights law “restrains the abusive practices of only one party to the conflict, namely the government and its agents.”<sup>103</sup> Third, the majority of human rights instruments, including the European Convention,<sup>104</sup> contain provisions allowing states to derogate from certain obligations they assumed when they ratified the instruments. Contrary to human rights law, the laws of war do not allow derogations on grounds of emergency.<sup>105</sup> Fourth, while human rights law does not distinguish between the different types of conflicts, the applicable IHL norms vary depending on the qualification of the armed conflict that it is called to regulate.<sup>106</sup> Fifth, several commentators have highlighted the important differences between the two bodies of law in terms of procedural and secondary rights.<sup>107</sup> These two sets of laws, however, complement each other, thus providing a better protection to the victims of armed conflicts.<sup>108</sup>

## B. Main Obstacles in the Application of IHL

It is argued that IHL is a very specialized discipline and that human rights tribunals like the ECtHR may not have the required expertise to adequately assess, for instance, when a situation only amounts to minor internal disturbances or has escalated to an armed conflict.<sup>109</sup> According to other commentators, human rights bodies may still be reluctant to apply IHL rules to politically sensitive situations where the states deny that hostilities might amount to an international armed conflict.<sup>110</sup> Furthermore, since human rights bodies have limited competence in assessing violations that state actors commit, they carry the risk of governments considering them illegitimate when they are not able to declare rebel groups responsible for human rights crimes.<sup>111</sup>

Turning our attention towards specific issues affecting the right of property under the European Convention, one of the major obstacles that the ECtHR faces is the conceptual differences existing between key terms used in international human rights and IHL.<sup>112</sup> Both sets of norms refer to a balancing test where they utilize “proportionality,” but the values taken into consideration are different. The issue is particularly clear with regard to the use of lethal force. Human rights law severely restricts the use of lethal force by basing its assessment on the effect of a concrete measure on the targeted individual himself.<sup>113</sup> According to IHL, once it has been determined that the intended target is a military objective, the assessment as to whether it can be lawfully attacked focuses on the effect of the offensive on surrounding civilians and civilian objects, and not upon the targeted individual.<sup>114</sup> In the context of an armed conflict, the idea of proportionality is closely related to another key IHL concept: “collateral damage.” Therefore, IHL does not ban the use of lethal force; it rather aims at controlling the implementation of a shoot-to-kill policy.<sup>115</sup>

The implications derived from an erroneous application of the concept of proportionality with regard to the right of property are obvious. Finding that a concrete attack on a military target meets the requirement of proportionality opens the door to considering that the unintentional destruction of homes in the vicinity may be tolerated if the relevant IHL rules are complied with.

## VII. Conclusion

It is now widely accepted that human rights law does not automatically cease to apply during situations of armed conflicts. While IHL rules provide more specific answers concerning the means and methods of combat, in other situations — such as long-term occupation — human rights law has certainly a key role to play. Although the European Court has at times used IHL norms without expressly mentioning them, as a general rule, it has been extremely reluctant to apply IHL principles in

situations of armed conflict.

As discussed, the right of property constitutes a paradigmatic example of how the assessment of a concrete attack could change radically depending on the approach taken by the Court. In some cases, both sets of bodies can interact and complement each other. Nevertheless, they remain two separate elements dealing with profoundly different situations. They may share common values of humanity and respect for human dignity, but the *sui generis* context of warfare remains a peculiar situation that requires a specific and tailored set of rules to apply.

The content of Article 1 of ECtHR Protocol seems to contradict the argument often put forward by the ECtHR according to which the ECtHR can only address violations arising from the provisions of the European Convention. The requirement of compliance with the principles of international law includes respecting customary humanitarian laws and rules. These rules in turn comprise the principle of distinction between civilian objects and military objectives.

A correct assessment of the destruction of property in some of the cases brought before the Court required determining first whether the property affected constituted a military target or whether it was located in the vicinity of a lawful target. We have demonstrated that the European Convention does not furnish the elements necessary to make such a determination and that the ECtHR erred in ignoring IHL provisions. The recent events in the conflict between Russia and Georgia in South Ossetia could give rise to a number of claims in which the ECtHR may be called upon to assess possible violations of the right of property. IHL experts are hoping to see a change of direction in the Court’s jurisprudence and further application of IHL.

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1 See generally *Isayeva, Yusupova and Basayeva v. Russia*, case no. 57947/00, 57948/00 and 57949/00, Eur. Ct. H.R. Judgment of Feb. 24, 2005; *Isayeva v. Russia*, case no. 57950/00, Eur. Ct. H.R., Judgment of Oct. 14, 2005; *Özcan v. Turkey*, case no. 21689/93, Eur. Ct. H.R., Judgment of April 6, 2004; *Ergi v. Turkey*, case no. 23818/94, Eur. Ct. H.R., Judgment of July 28, 1998.

2 In 1994, Protocol no.11 put an end to the two-tiered mechanism existing in the European system for the protection of human rights, merging the Commission and the Court into

a single judicial authority.

3 According to this approach, IHL regulates situations of armed conflicts while the application of human rights rules is limited to peaceful situations. As Christopher Greenwood highlighted, the defenders of a rigorous distinction between IHL and human rights law stress that the “war is a too complex and brutal phenomenon to be capable of being constrained by rules designed for peacetime” and “with the outbreak of war the law of human rights must yield to the *lex specialis* of the laws of war.” See Christopher Greenwood, *Rights at the Frontier: Protecting the Individual in the Time of War*, in *Law at the Centre*, 277-93 (R. Barry ed., The Institute of Advanced Legal Studies, Dordrecht: Kluwer 1999).

4 See, e.g., Heike Krieger, *A Conflict of Norms: the Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 J. Conflict & Security L. 265 (2006).

5 While human rights law only addresses violations committed by the State and its agents (at least up to now), IHL applies equally to *all* parties involved in an armed conflict and whatever the merits of their cause under the *ius “ad bellum.”* This would for instance open the door to the possibility of holding accountable non-State actors for violations of the laws of war. See, e.g., Robert Kogod Goldman, *International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua*, 2 Am. U. J. Int’l L. & Pol’y 539, 543 (1987).

6 See generally Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 (1948); see also The Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 278 [hereinafter Fourth Geneva Convention] [all four collectively hereinafter 1949 Geneva Conventions].

7 See, e.g., Dietrich Schindler and Jiri Toman (eds.), *The laws of armed conflicts: A Collection of Conventions, Resolutions & Other Documents*, (Hotei Publishing 2004) (1973).

8 *Id.*

9 *Id.* Article 3 common to the four 1949 Geneva Conventions establishes a set of minimum humanitarian law rules applicable to non-international armed conflicts, thus affecting a legal sphere traditionally exclusively attributed to sovereign States: the relationship between the States and the persons under its control; see also, article 7 of the First, Second

and Third 1949 Geneva Conventions (“Wounded and sick, as well as members of the medical personnel and chaplains, *may in no circumstances renounce in part or in entirety the rights secured to them* by the present Convention) (emphasis added); see also Article 8 of the Fourth Convention relative to the protection of civilians in times of war (“Protected persons *may in no circumstances renounce in part or in entirety the rights secured to them* by the present Convention”) (emphasis added).

10 Article 15 of the European Convention constitutes a good example of a derogation clause affecting the application of human rights law during armed conflicts. It will be analyzed further in this paper.

11 See Final Act of the International Conference on Human Rights, UN Publication, Sales No. E.68.XIV.2 (Apr. 22 - May 13, 1968), available at

<http://www.unhcr.org/refworld/type,INTINSTRUMENT,UN,,3ae6b36f1b,0.html>.

12 Report for the Human Rights in Armed Conflict, UN Doc. A/7729 (Nov. 20, 1969); see also, Report on Respect for Human Rights in Armed Conflict, UN Doc. A/8052 (Sept. 18, 1970), at para. 20-29, annex 1.

13 See generally Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, II (1977) *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, II (1977) *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

14 See, e.g. article 75 of Protocol I; cf. International Covenant on Civil and Political Rights, Dec.16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

15 Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226-593 (July 8), para. 25 (Nuclear Weapons case). In relation with the European Convention, it should be noted that article 15 contains a derogation clause, which expressly contemplates situations of war. See European Convention on Human Rights, Nov. 4, 1950, article 15, 213 U.N.T.S. 221, *reprinted in* 1950 Y.B. on Hum. Rts. 418. Furthermore, even though the ICJ only refers to the right to life, the important elements of the reasoning used by the Court can be applied *mutatis mutandis* to the right of property as we will try to demonstrate.

16 Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 Int’l Rev. Red Cross 737, 738 (2006).

17 *Id.*; but see M. Dennis, *ICJ Advisory Opinion on Construction of a Wall in Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and military occupation*, 99 Am. J. of Int’l L. 119 (2005) (questioning the relationship existing between

international humanitarian law and human rights law and stressing that the precise nature of their links remain unclear).

18 ICJ Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, July 9, 2004, at para. 106. The ICJ applied the same arguments in its decision related to the human rights' and humanitarian law violations committed by Uganda during its occupation of the Eastern part of the Democratic Republic of Congo following the second Congolese war. *See DRC v. Uganda*, I.C.J. 116, *Case Concerning Armed Activities on the Territory of the Congo*, Dec. 19, 2005, at para. 119.

19 *See* Lubell, *supra* note 16; *see also* Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 *Isr. L. Rev.* 310 (2007).

20 *See* Lubell, *supra* note 16, at 742.

21 *See, e.g., Ergi v. Turkey*, ECtHR, case no. 23818/94, Eur. Ct. H.R., Judgment of July 28, 1998 (stating that the responsibility of the State for a violation of the right to life is engaged "where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event to minimizing, incidental loss of civilian life); *cf.* article 57(2)(a)(ii) of Additional Protocol I (setting forth that in the conduct of military operations, the parties involved shall "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects").

22 *See Loizidou v. Turkey*, case No. 15318/89, Eur. Ct. H.R. Judgment of Dec.18, 1996.

23 *Id.* at para. 31.

24 *See* Hans-Joachim Heintze, *On the Relationship between Human Rights Protection and International Humanitarian Law*, 86 *Int'l Rev. Red Cross* 789, 806 (2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/692EUA/\\$File/irrc\\_856\\_Heintze.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/692EUA/$File/irrc_856_Heintze.pdf).

25 *See* Vienna Convention on the Law of Treaties, article 31, 1155 U.N.T.S. 331 (1969); *see also* Loizidou v. Turkey, *supra* note 22, at para. 43.

26 *See* Lubell, *supra* note 16.

27 *See* article 1 of Protocol II which requires dissident armed forces or other organized armed groups involved in the hostilities to be "under responsible command, exercise such control over a part of its territory [the territory of the State] as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

28 *See* McCann and others v. United Kingdom, case no. 18984/91 Eur. Ct. H.R., Judgment of Sept. 27, 1995.

29 *Id.* at para. 13-27.

30 *Id.* at para. 174-184.

31 *Id.* at para. 148-150.

32 *Id.*

33 *See* Ergi v. Turkey, *supra* note 21.

34 *See* Heintze, *supra* note 24 at 810.

35 Özcan v. Turkey, case no. 21689/93, Eur. Ct. H.R. Judgment of April 6, 2004, at para. 297.

36 Despite the prolonged state of emergency declared in the region, the Turkish government never recognized the applicability of Common Article 3 and the ECtHR has never made any comments as to whether Common article 3 or Additional Protocol II applies to the situation. Moreover, note that Turkey acceded to the 1949 Geneva Conventions on February 10, 1954, but it has not ratified Additional Protocols I and II. *See* Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 324 *Int'l Rev. of the Red Cross* 513, 513-529 (1998).

37 Akdivar and others v. Turkey, Eur. Ct. H.R., Judgment of Sept. 18, 1996, at para 88; *see also* Bilgin v. Turkey, case no. 23819/94, § 108, Eur. Ct. H.R., Judgment of November 16, 2000, at para. 105-109 (declaring that Turkey had violated Article 8 of the European Convention and Article 1 of Protocol No. 1).

38 Isayeva v. Russia, case no. 57950/00, Eur. Ct. H.R., Judgment of Oct. 14, 2005 (Isayeva I).

39 Isayeva, Yusupova and Basayeva v. Russia, case no. 57947/00, 57948/00 and 57949/00, Eur. Ct. H.R., Judgment of Feb. 24, 2005 (Isayeva II).

40 *Id.* at para. 171 (stating "It is necessary to examine whether the operation was planned and controlled by the authorities as to minimize, to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimized"); *see also* Isayeva I, *supra* note 38, at para. 175.

41 *See* Isayeva I, *supra* note 38 at para. 12-28.

42 *See* Isayeva II, *supra* note 39 at para. 13-34.

43 *Id.* at 744.

44 IACHR, Abella v. Argentine, case 11.142, Report no. 55/97, OEA/Ser.L./V/ II.98, doc. 6 rev. (1998).

45 *Id.* at para. 161; *but see* Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 38 *Int'l Rev. Red Cross* 505 (1998); *see also* Lindsay Moir, *Law and the Inter-American Commission on Human Rights System*, 25 *Hum. Rts. Q.* 182, 194 (2003) (stating that, "referring to and applying the relevant provisions of humanitarian law as authoritative sources in order to settle alleged violations of human rights law is not the same as applying international humanitarian law norms directly in order to assess the responsibility of the state for violations of that law as well as for violations of human rights").

46 IACHR, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, Doc. 9 Rev. 1 (26 February 1999), at para. 10-11.

47 Protocol to the European Convention for the Protection

of Human Rights and Fundamental Freedoms art. I, Mar. 20, 1952, 213 U.N.T.S. 262 (ECHR Protocol or P1-1), Article 1, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm>.

48 See Jochen Frowein, *The Protection of Property, in The European System for the Protection of Human Rights* 515 (R.St.J. Macdonald, F. Matscher and H. Petzold eds., Kluwer Academic Publishers 1993).

49 In other words, “possessions” (or “biens” in French) include immovable and movable property and the right of property guaranteed under the ECHR is not limited to the technical notion of property established under national laws.

50 See *Marckx v. Belgium*, case no. 6833/74, Eur. Ct. H.R., Judgment of 13 of June 1979, at para. 63.

51 The first sentence contains the general principle informing the right of property, while the second sentence of the opening paragraph and the second paragraph refer to instances of deprivation of possessions and subject them to certain rules. See *Sporrunga and Lönnroth v. Sweden*, case no. 7151/75 and 7152/75, Eur. Ct. H.R., Judgment of Sept. 23, 1982.

52 See, e.g., C. Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, Report of the International Symposium of the Netherlands Red Cross on the Protocols of 1977 Additional to the Conventions of Geneva of 1949 (The Hague, Sept. 25, 1978) (discussing to the extent to which Protocol II provides additional protection to war victims than the European Convention on Human Rights)

53 See ECHR Protocol, *supra* note 47.

54 The direct consequence of such approach is that only properties owned by foreigners would be protected and this protection would not include the property of those under their own country’s jurisdiction. See Frowein, *supra* note 48, at 521.

55 See Frowein, *supra* note 48, at 521; see also *Law of the European Convention on Human Rights* 530-531 (D.J. Harris, M. O’Boyle and C. Warbrick eds., Butterworths 1995).

56 The ECtHR noted that the respect for the general principles of international law implies that non-nationals enjoy a special protection against expropriations and in the case of lawful expropriations are entitled to compensation. See, e.g., *James v. United Kingdom*, case no. 8793/79, Eur. Ct. H.R., Judgment of Feb. 21, 1986, at para. 61-63.

57 This view is supported by article 60 of the Convention which states that, “nothing in this Convention should be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or *under any other agreement to which it is a Party*” (emphasis added). At this respect, it seems important to highlight that all the States parties to the ECHR are also parties to the 1949 Geneva Conventions.

58 See *Ireland v. United Kingdom*, case no. 5310/71,

ECtHR, Judgment of January 18, 1978.

59 See *Lubell*, *supra* note 16, at 744.

60 “The gaps in the regulation of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts”. See *Customary International Humanitarian Law*, Vol. 1 (J.-M. Henckaerts and I. Doswald-Beck eds. 2005).

61 ICTY, *Prosecutor v. Tadic*, Appeals Chamber case no. IT-94-1-AR72, Oct. 1 1995, at para. 97-98.

62 *Id.* at para. 112.

63 See *supra* note 15.

64 See Ali Riza Çoban, *Protection of Property Rights within the European Convention on Human Rights*, 251-252 (Ashgate Publishing 2004).

65 So far, the ECtHR only had to discuss possible violations of article 15 on very few occasions.

66 See *Reidy*, *supra* note 36.

67 Note that the four “non-derogable” rights are the right to life (subject to the conditions established in the same article), the prohibition of torture, the prohibition of slavery and servitude, and the right not to be punished without law.

68 See, e.g., Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 Eur. J. Int’l L. 161, 165.

69 *Id.*

70 See Orakhelashvili, *supra* note 68; see also Çoban, *supra* note 64, at 253 (stating that in addition to the 1949 Geneva Convention, the States should also take into consideration norms such as article 17 of Additional Protocol II which prohibits forced movement of civilians); see also P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* 555 (2d ed., Kluwer 1990) (recognizing that any derogatory measure under article 15 has to comply with the rules of 1949 Geneva Conventions. Nonetheless, the author warns that although the wide formulation adopted in the article may include other customary law obligations “the Strasbourg organs will not lightly go beyond the scope of conventional law, unless they can rely on clear international case-law or an express consensus within the community”).

71 See, e.g., Hague Regulation No. IV of October 18, 1907, Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No. 539 (Hague Regulation No. IV).

72 Base don rules regulating the right to confiscation, it is understood that there is no obligation to compensate the enemy State from which public movable property has been confiscated. While confiscation of *public* movable property is tolerated under certain conditions, article 46 of the Hague Regulation no. IV expressly prohibits such practice reaffirming that private property must be respected (with the exception of certain items of private property found on the battlefield).

73 See M. McDougal and F. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, 809-10 (Yale University Press 1961) (emphasizing that the protection of private property is not absolute and in case of doubt as to the public or private nature of a property, the presumption is that the property is public until its private nature is demonstrated).

74 See Jessup, *A Belligerent Occupant's Power over Property*, 38 Am. J. Int'l L. 457, 458 (1944).

75 *Id.*; see also Oppenheim's *International Law II: Disputes War and Neutrality* 410 (7th ed. Shearer (ed.) London Butterworths 1994) (noting that "from the rule that requisitions must always be paid for, it again becomes clear and beyond all doubt that private property is, as a rule, exempt from appropriation by an invading army").

76 See Hague Regulation, *supra* note 71.

77 See U.S. Dep't of the Army, Pamphlet 27-161-2, *International Law* 174-175.

78 See M. Bothe, K. Partsch, and W. Solf, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* 320-327 (1982) (ICRC Commentary) (noting that "destruction which is not necessary (relevant and proportionate) to the attainment of a military advantage is prohibited").

79 See U.S. Dep't of the Army, Pamphlet 27-161-2, *International Law* 174-175.

80 Following World War II, the Nurnberg Military Tribunals found that the looting of private property by the Germans in occupied territories constituted war crimes. Interestingly, the Court declared the individual criminal responsibility of the persons involved in those illegal activities. See Loukis G. Loucaides, *The European Convention on Human Rights* 126 (Collected essays, Nijhof 2007).

81 See, e.g., U.N. General Assembly Resolution 2444 (XXIII), U.N. GAOR, U.N. A/PV//1748 (1968) entitled "Respect for Human Rights in Armed Conflicts". The General Assembly expressly recognized the customary principles of civilian immunity and distinction between civilians objects and civilian objectives. It also made clear that these principles are applicable to any type of armed conflict, independently from its internal or international character.

82 Obvious difficulties in the day-to-day practice can stem from the fact that certain requirements, perfectly suitable to international armed conflicts, may be more problematic in the context of an internal armed conflict. For instance, it may be difficult to classify members of armed groups and determine with certainty when they can be lawfully attacked.

83 See IACHR Third Report on the Situation in Colombia, *supra* note 46, at para. 68; see also *Commentary on the Additional Protocols of 8 June 1977* 636 (Claude Pilloud, Yves Sandoz, and Bruno Zimmermann eds., Kluwer Law International 1987) ("the criterion of *purpose* is concerned with the intended future use of an object, while that of *use* is concerned with its present

function. Most civilian objects can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, but if they are used to accommodate troops or headquarters staff, they become military objectives"); for a discussion regarding the NATO targeting policy in Kosovo, where the NATO appeared to treat bridges and railway lines systematically as military targets without taking into consideration the concrete military context of the hostilities. See Michael Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, 12 Eur. J. Int'l L. 531, 533 (2001).

84 The requirement of proportionality is discussed in Article 51(5)(b), Article 57(2)(iii) and in concrete circumstances in Articles 55 and 56 of Protocol I.

85 See ICRC Commentary, *supra* note 78.

86 *Id.*

87 *Id.* The timeliness and reliability of the information on which military forces base their decision as to whether an attack may be considered unlawful or not, is crucial. As the assessment may drastically change depending on the concrete circumstances of the case, a target which was clearly a military target at a specific moment in time can lose such status within hours or days. The same reasoning applies in the opposite direction too. Additionally, it bears repeating that the requirements must be fulfilled *cumulatively* and must be examined based on the *actual situation at hand*, not considering some hypothetical future moment.

88 See Marco Sassoli, *Legitimate Targets of Attacks Under International Humanitarian Law*, International Humanitarian Law Research Initiative Working Paper, Harvard Program on Humanitarian Policy and Conflict Research (January 2003), available at <http://www.oejc.at/recht/Session11.pdf>.

89 See Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977 Part II*, 9 Neth. Y. B. Int'l L. 107, 113-23 (1978).

90 *Id.*

91 Article 57 refers to "Precautions in Attack" clearly regulating the duties of the attacking Party, while Article 58 refers to "Precautions against the Effect of Attacks" articulating the obligations of the Party in control of the civilian population.

92 Although the burden placed on commanders is significant, the ICRC Commentary clarified that their action have to be judged based on a "reasonable and honest reaction to the facts and circumstances known to them from information reasonably available to them at the time they take their actions." See ICRC Commentary, *supra* note 78, at 276-280.

93 See, e.g., W. Hays Parks, "Precision" and "Area Bombing: Who Did Which, and When?", 18 Journal of Strategic Studies 145 (1995) (stressing that direct and intentional attacks against civilians are prohibited, but nonetheless collateral injury to the civilian population or damage to civilian objects is the "price

of doing business”).

94 Following the Federal Republic of Yugoslavia’s failure to comply with the demands of the international community in the context of the Kosovo crisis, the North Atlantic Treaty Organization (NATO) announced air strikes on Yugoslavian territory. The bombing campaign lasted from March 24 to June 9 1999. See W.J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, 12 Eur. J. Int’l L. 489 (2001).

95 See *Bankovic v. Belgium*, case no. 52207/99, Eur. Ct. H.R., Judgment on Admissibility of Dec. 12, 2001.

96 This case raised a number of issues regarding the extraterritorial application of the European Convention on Human Rights and the concept of “effective control over a territory” that has informed the ECtHR case law. One could be tempted to question whether effective control “on the ground” is any different or more effective than control “in the air.” For a more detailed discussion on the topic, see, e.g., M. Happold, *Bankovic v Belgium and the Territorial Scope of the European Convention on Human Rights*, 3 Human Rights Law Review 77, 77-90 (2003).

97 See Sassòli, *supra* note 88, at 4.

98 See Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int’l L. 239, 276 (2000).

99 See, e.g., Fenrick, *supra* note 94.

100 George H. Aldrich, *Yugoslavia’s Television Studios as Military Objectives*, 1 International Law Forum 149, 150 (arguing that the media would make an “effective contribution” if they were used to transmit orders or intelligence for military forces. Notwithstanding, Aldrich insists that not every object used to strengthen civilian morale is, by virtue of such use, a lawful military target); see also Amnesty International, *“Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force*, at 41-48 (2000).

101 See Aldrich, *supra* note 100 (mentioning the deaths of civilians working in the studio, the deprivation of information affecting the population and other adverse political and psychological effects, to illustrate negative consequences).

102 See Droege, *supra* note 19.

103 See, e.g., Robert K. Goldman, *International Humanitarian Law: Americas Watch’s Experience in Monitoring Internal Armed Conflicts*, 9 Am. U.J. Int’l L. & Policy 49, 51 (1993) (emphasizing that only States and their agents can commit and be held internationally accountable for human rights violations. Abuses of a similar nature carried out by non-State actors do not constitute human rights violations).

104 See analysis of the relationship between article 1 of ECHR Protocol and article 15 ECHR under section V (B) of this paper.

105 See Meron, *supra* note 98. In relation with the non-derogability of IHL rules, it seems nonetheless important to keep present the provisions set forth in article 5 of the Fourth Geneva Convention.

106 See Krieger, *supra* note 4, at 279.

107 See Droege, *supra* note 19, at 336 (discussing the differences existing between IHL and human rights law in relation to the right to an individual remedy).

108 *Id.* at 337 (explaining that the concept of “complementarity” reflects the idea that IHL and human rights can influence and reinforce each other mutually).

109 See, e.g., Byron, *supra* note 111, at 893. Contrary to the position defended by Byron, we consider that the IACHR constitute a good example of how the assumption that human rights bodies may lack the required expertise is not always an absolute truth.

110 See William Abresch, *A Human Rights Law of Internal Armed Conflict: the European Court of Human Rights in Chechnya*, 16 Eur. J. Int’l L. 741, 757 (2005). The position held by many States involved in internal armed seems to be based on a fundamental misconception. The application of Common 3 or Protocol II to the party does not alter the status of the parties to the conflict and does not entail a formal recognition of the rebels or dissident groups. Furthermore, it seems necessary to stress once again that there is no such thing as prisoner of war status in a non-international armed conflict. In other words, a State can perfectly capture dissidents and punish them for the commission of crimes in accordance with its domestic laws.

111 See Byron, *supra* note 111.

112 See *Prosecutor v. Kunarac*, ICTY, IT-96-23-T, Judgment of Feb. 22, 2001, at para. 476 (specifying that “notions developed in the field of human rights can be transported in the international humanitarian law only if they take into consideration the specificities of the latter body of law”).

113 See Lubell, *supra* note 16, at 745.

114 See Lubell, *supra* note 16, at 745-746.

115 See Kenneth Watkin, *Controlling the Use of Force: a Role for Human Rights Norms in Contemporary Armed Conflict*, 98 Am. J. Int’l L. 1, 32 (2004).

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# COUNTRY - SPECIFIC ARTICLES

## The Abuse of Pardon Law in Ethiopia: The Case of Birtukan Midekssa

Fitsum Alemu\*

On December 29, 2008, the re-arrest of a vibrant Ethiopian opposition leader, Birtukan Midekssa, set off a debate about Ethiopian pardon law. Her arrest and imprisonment also caused U.S. congressmen<sup>1</sup> and senators,<sup>2</sup> and their Canadian and European counterparts, to condemn the actions of the ruling Ethiopian Peoples Revolutionary Democratic Forces (“EPRDF”).

Even though Ethiopia is among the ten poorest countries in the world, it has had a rich history of peacefully solving its own political and legal problems. Kings applied force as a last resort against their opponents, rebel leaders or separatist regional chiefs.<sup>3</sup> Moreover, on the world stage, Ethiopia was a charter member of the League of Nations in 1923 and one of the original members of the United Nations. However, starting in 1974, things began to change radically. In that year, a Soviet-backed military junta deposed Emperor Haile Selassie I, a leader of world renown, and extra-judicially killed government ministers, some members of the nobility, and church leaders, while establishing a one-party communist state. Under this new regime, led by Mengistu Hail Mariam, the government persecuted its own people in a campaign called the “red terror,” killing hundreds of thousands of political opponents.<sup>4</sup>

In May 1991, after the dissolution of the Soviet Union led to the end of its foreign aid to Ethiopia, the rebel group EPRDF overthrew the junta, and EPRDF’s chairman, Meles Zenawi, presided over a transitional government until May 1995, when he was elected Prime Minister in Ethiopia’s first free and democratic election. In May 2005, another multiparty election was held in Ethiopia, and although opposition parties gained many more parliament seats (200 seats, compared to only twelve in the 2000 election), Zenawa and the EPRDF retained their hold on power. After the election, however, members of the main opposition group, the Coalition for Democracy and Unity (“CUD”), refused to take their 109 seats as an act of protest because they believed that EPRDF had stolen the

election. The EPRDF then arrested CUD leaders, political activists, human rights defenders, and journalists, and charged them with genocide, insurrection, and inciting violence. After some of their pre-trial motions and bail requests were denied, the thirty-eight political prisoners declared that they would not present defenses to the charges.

With the situation at an impasse, a traditional council of Ethiopian elders, with the support of U.S. and European ambassadors, offered to mediate a reconciliation between the CUD leaders and the government.<sup>5</sup> Even though it took several months, the mediation resulted in agreement. According to CUD leaders, it was agreed that the government would release them and drop the charges in exchange for the prisoners signing documents of apology. Nevertheless, after this agreement was reached and while the mediation was still pending, instead of withdrawing the charges, the prosecutor’s office participated in a “trial,” where clearly false testimony and evidence were submitted to the court; the defendants were convicted of all charges except genocide, and some of them were sentenced to life in prison.<sup>6</sup> CUD leaders did not appeal the decision, since the council of elders had already negotiated their release. A few days after they were sentenced to life in prison, CUD leaders were granted “full pardons” by Ethiopian President Girma Woldegiorgis<sup>7</sup> and were released in July 2007. According to the pardoning document, CUD leaders were released from prison under the conditions that they would respect the Constitution of Ethiopia, refrain from participating in the activities that they were convicted of, and that they would recognize and respect the branches of the government.<sup>8</sup> However, according to the document, if they violated those conditions, they could be rearrested and serve the sentences previously imposed by the court.

Recently, on December 29, 2008, the government rearrested Birtukan Midekssa,<sup>9</sup> who was first deputy president of CUD,<sup>10</sup> revoked her pardon, and returned her to prison to serve out her sentence. According to the government media,

the only charge against Ms. Mideksa was that, during a political meeting held in Sweden, she stated that she had not requested a pardon in 2007<sup>11</sup> and that she and her fellow CUD leaders had been released after a political negotiation.<sup>12</sup> According to news reports, after Midekssa returned from Sweden, the Ethiopian Police Commissioner sent two police officers to her home on December 10, 2008, and orally summoned her to his office to discuss the pardon. Then on December 24, 2008, she received an oral as well as a written summons to appear at the Commissioner's office. When she appeared, she was ordered by the Commissioner to retract the statement she made in Sweden.<sup>13</sup> Mrs. Midekssa did not retract her statement.

According to Article 71(7) of the Ethiopian Constitution ("Constitution"), the President has the power to grant a pardon. However, the Constitution is silent about revocation of pardons. Proclamation 395/2004, which was passed by the parliament in 2004 and signed by the sitting President, governs the pardon procedure. This Act sets up a Board of Pardon chaired by the Minister of Justice<sup>14</sup> and accountable to the President.<sup>15</sup> The Board's duties include recommending pardons, as well as examining cases and submitting recommendations of revocation when "persons granted conditional pardon by the President have allegedly failed to meet such condition or have violated it."<sup>16</sup> Article 10 of the Act provides that the President may: 1) "grant or deny pardons based on the recommendations of the Board or on his own appreciation of the facts" and 2) "revoke pardons based on Board recommendations regarding persons who failed to meet or violated conditions of pardons." This means that the president is bound by the recommendation of the Board to revoke a pardon. In violation of the Constitution, the Act usurps the President's independent authority with regarding to revoking a pardon. Article 3 provides that the Board is accountable to the President. On the other hand, Article 10 seems to suggest that the President is accountable to the Board.

Moreover, certain legal procedures in the Pardon Act ("Act") govern the revocation of pardons. According to Article 17, the grantee should be given a written notice about the intent of the Board to recommend revocation and be given the opportunity to respond within twenty days.<sup>17</sup> There is no evidence in this case that the government followed the Act. There is no evidence of a proper meeting of the Board or of a majority vote on a recommendation for revocation.<sup>18</sup> Oral and written summons of the police commissioner do not satisfy the requirement of the Act. The substantive conditions for revocation of a pardon also do not appear to have been satisfied. According to the Act, pardon may either be revoked if it was granted because of deceit or fraud or if the condition for granting it has not been met.<sup>19</sup> The only apparent "offence" of Birtukan Midekssa is her statement made in Sweden in which she stated that her release was the result of political negotiation.

The arrest of Ms. Midekssa and the "revocation" of the

pardon are in violation of Ethiopian law. Ms. Midekssa was denied due process of law because she did not receive a written notice of the Board's intent to revoke her pardon, not given a twenty-day opportunity to respond to the government's allegation, and not given a fair trial to determine whether her act violated the condition of her pardon.<sup>20</sup> Moreover, the Proclamation 395/2004 of the Pardon Act violates the Ethiopian Constitution, because it does not provide fully for due process of law and it usurps the constitutional right of the President to grant, and by extension, revoke pardons.

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1 United States House of Representatives, Press Release, *Payne Calls for the Immediate Release of Ethiopian Political Prisoners*, available at [http://www.abugidainfo.com/wp-content/uploads/2009/01/donald\\_payne\\_010909.pdf](http://www.abugidainfo.com/wp-content/uploads/2009/01/donald_payne_010909.pdf), last visited July 16, 2009.

2 United States Senate, Letter to the Prime Minister of Ethiopia, Jan. 16, 2008, available at <http://ethioforum.org/wp/pdf/ethiopiaSenate.pdf>, last visited June 29, 2009.

3 Messay Kebede, *Survival and Modernization, Ethiopia's Enigmatic Present: A Philosophical Discourse*, pp. 96-99, 155-159, 168-169 (Red Sea Press 1998).

4 In 2006, Mengistu was found guilty of genocide in absentia and was sentenced to death by Ethiopia's Supreme Court in 2008. He currently resides in Zimbabwe, where he was granted asylum in 1991.

5 The use of the traditional reconciliation process ("shimgilina" in Amharic) was applauded by many and brought hope that Ethiopia was returning to its roots. It was a process, however, that took place totally outside the established legal framework of Ethiopian's pardon law.

6 According to Birtukan Mideksa, the EPRDF government asked for a modification of the agreement and delayed the process until after the verdict and sentence were announced. See [www.ethiomediamedia.com/aurora/9508.html](http://www.ethiomediamedia.com/aurora/9508.html).

7 President of Ethiopia since October 8, 2001.

8 Setting conditions was inconsistent with the fact that the prisoners were granted "full pardons" and not conditional pardons.

9 Mrs. Mideksa, is a graduate of Addis Ababa University Faculty of Law. She also served briefly as a judge.

10 Currently Midekssa is the chairwoman of Unity for Democracy and Justice, a new opposition party.

11 This was a simple matter of fact: her pardon was not a result of the codified pardon process, which requires either an application for a pardon by a petitioner, a family member, or a lawyer or an application by the Ministry of Justice and the Federal prison commission. Proclamation No.395/2004, Article 12. Instead, the pardon law was bypassed by the

traditional reconciliation process conducted by the Council of Elders.

12 Arbitrary Arrest, Fear for Safety, Jan. 27, 2009, available at <http://www.ethiomeia.com/aurora/9765.html>, last visited on July 22, 2009.

13 Birtukan Mideksa's letter, January, 2, 2009, available at <http://www.ethiomeia.com/aurora/9508.html>, last visited on July 25, 2009.

14 Ethiopian Const. Article 5(1).

15 *Id.* at Article 3.

16 Proclamation 395/2004 Article 4(3).

17 Ethiopian Const. Article 17.

18 *Id.* at Article 7.

19 *Id.* at Article 16.

20 *Id.* at Article 17.

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## Government, Religion, and the Courts: a Complicated *Marriage à Trois*

Astrid Gibier\*

On July 2006, two young people got married in the north of France. They were Muslims. The bride assured the groom that she was a virgin, but on their wedding night, he discovered that she had lied. He rejected her and went to court, seeking an annulment of the marriage. Like in many religions, virginity is an important value in Islam. Even though the couple could have divorced by mutual consent, they did not consider the option, as divorce is not well-accepted in Muslim communities.

According to Article 180 of the French Civil Code, a marriage can be nullified if a party proves there is an error in the “essential qualities” of the other party. However, the law fails to define what these “essential qualities” are. In this case, the husband claimed that virginity was one of them. France is a secular country where there is a clear separation between the church and the state.

There are two possible ways to interpret the concept of “essential qualities.” First, from an objective point of view, a person must have certain qualities to enter into marriage (e.g. be a woman or a man, be willing to be married, etc.). Second, from a subjective point of view, certain qualities are essential for some people but irrelevant for others. For example, forbidding individuals to live their faith is a violation of the freedom of religion and right to privacy. Moreover, French courts have nullified marriages on the basis of a newlywed’s past, such as prostitution, AIDS, or incarceration.

On April 1, 2008, the *Tribunal de Grande Instance* of Lille<sup>1</sup> (“the Court”) nullified this marriage on the basis that the above-mentioned bride had lied about her virginity. The legal basis of the judgment is surprising, because under French law, there is a maxim: “in marriage, deceive who you can.” This means that the newlyweds do not have to reveal everything about their past and should not be subject to an annulment for withholding information. In fact, the Court clearly did not want to decide whether virginity was an “essential quality”—particularly because this is a value associated with religion. The Court knew that ruling on this issue would mean “opening a Pandora’s box,” especially since it is common for Muslim husbands to seek annulment and not divorce. However, women who see their marriages annulled are often rejected from their communities and families anyway, which leads to exclusion and poverty. The Court wanted to avoid ruling on a bride’s absence of virginity so that it would not become convenient grounds for annulment in future cases.

After this particular marriage was annulled, many politicians, feminist groups and women’s organizations protested the judgment as a “retrogression of women’s rights.” The most famous organization for the protection of Muslim women, *Ni Putes Ni Soumises*, called this judgment “a fatwa against the emancipation of women.”<sup>2</sup> Initially, France’s Minister of Justice, Ms. Rachida Dati, stated that a marriage annulment was a good way to protect young Muslim girls who are forced into marriage. Ms. Dati has North African origins and was raised a Muslim. She had her own marriage annulled when she was younger, but on other grounds. After her position was attacked, she ordered the prosecutor to appeal against the judgment.

On appeal by the prosecutor, the Court of Appeal of Douai overturned the young Muslim couple’s annulment on November 17, 2008.<sup>3</sup> The Court ruled that virginity could not be accorded such a degree of importance, because “its absence has no repercussion on matrimonial life” and that virginity could not be considered an “essential quality.” The couple, now considered “remarried” pursuant to the invalidation of the annulment, failed to appeal the decision, and thus the issue was not ruled upon by the French Supreme Court. Because the Supreme Court did not rule on this case, jurisprudence for virginity as an essential quality has not been universally established in France.

Those who supported the marriage annulment are disappointed because they think that religious freedom has not been respected and that the government should not get involved in such private matters. They even invoked the right to privacy found in Article 8 of the European Convention on Human Rights. On the other hand, those who were opposed to the annulment think the decision by the Douai Court of Appeal rightly underlined the secular nature of marriage in France. Many organizations feared that allowing such annulments would unfairly undermine the right of Muslim women to marry in France; and moreover, the unscientific checking of white sheets to ensure a bride’s virginity might lead young Muslim women to turn to pre-marital surgery in order to avoid humiliation and rejection from their communities.

In the end, this case is a good example of the Executive and Judicial powers in France acting in concert to protect individuals. However, in order to do so, the separation of powers was not respected, and the solution was not really in conformity with established jurisprudence. The French

Government and the courts have sent a strong message that marriage in France is a secular institution and it wants to keep it that way. The Government is willing to go out of its way to protect individuals, and especially women, who are affected by religious traditions.

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1 TGI Lille, 1er avril 2008, available at <http://blog.dalloz.fr/blogdaloz/files/Lille.pdf>.

2 Le Point, *Rachida Dati défend l'annulation d'un mariage pour cause de non-virginité*, May 30, 2008, available at <http://www.lepoint.fr/actualites-politique/rachida-dati-defend-l-annulation-d-un-mariage-pour-cause-de-non/917/0/249404>

3 CA Douai, Nov. 17, 2008, available at [http://www.droitdesreligions.net/pdf\\_ca/cadouai\\_17112008.pdf](http://www.droitdesreligions.net/pdf_ca/cadouai_17112008.pdf)

## The Demarcation Case of Raposa Serra do Sol Indigenous Land in Brazil

Áquila Mazzinghy Alvarenga\*

The Brazilian Supreme Court (“the Court”) is currently in the process of voting on a leading case concerning indigenous people’s issues in Brazil. By voting in favor of the demarcation of the *Raposa Serra do Sol* territory as a single and continuous area, the Court would allow marginalized groups de facto recognition of second-generation human rights. The decision of the Court would also be a remarkable contribution towards the establishment of affirmative action and public policies that mitigate the social exclusion of indigenous people.

*Raposa Serra do Sol* is the indigenous homeland of the Wapichana, Patamona, Tauperang, Macuxi and Ingaricó people. It is located in Roraima, a northeastern state in Brazil that borders Venezuela and Guyana. According to the Brazilian Supreme Court, an estimated 19,000 indigenous persons live in the area.<sup>1</sup> For far too long, there has been a serious land conflict between these indigenous tribes and rice farmers who live and grow crops in the same area.

Disputes over land involving indigenous people and farmers are not a new concern in Brazil. Throughout its history, the country has encountered many violent conflicts. To give one a better idea of the conflict’s extent, a rough estimate places the population of indigenous peoples in Brazil at five million before the Europeans first arrived in 1500 AD. Today, official government numbers place indigenous populations at about 300,000 people.<sup>2</sup> The decrease is a consequence of the acquisition by force of indigenous lands and livelihood practices. Many members of indigenous groups have also been the victims of torture, murder and slavery.

Even today, despite some progress over the years, many indigenous peoples live in poverty, starvation, marginalization and lack health assistance. As for the children, the problems are shameful. They grow up malnourished, have high levels of mortality, and lack access to even primary education in their mother tongue. Each of these alone constitutes a serious violation of basic human rights and dignity.

On April 15, 2005, the conflict in *Raposa Serra do Sol* intensified after President Luis Inácio Lula da Silva signed a decree that ratified the borders of *Raposa Serra do Sol* in the 4.2-million-acre reservation as being a single, continuous indigenous area.<sup>3</sup> The decree was an attempt by the federal government to eschew a policy that didn’t uphold fundamental indigenous rights and put an end to the historic land dispute. The decree was also recognition that demarcation in continuous areas is fundamental and important to indigenous

culture and survival.

The decree mandated that the rice-growers leave the territory in exchange for monetary compensation from the Brazilian government. It also stated that the Roraima State no longer had rights over the land. Many of the rice-growers, however, questioned the demarcation of the land and did not leave the territory.

The rice growers, along with the Roraima State government, filed an injunction, arguing that President Lula’s decree was an affront to the Brazilian constitution, and a threat to national sovereignty and national defense policy. The petition also claimed that the demarcation of the land would obstruct economic development in the region. The petitioners proposed discontinuous demarcation (that is, demarcation separating the territory into many islands, without links between them).

By then, Brazil’s Supreme Court had temporarily suspended the removals, and on August 27, 2008, began to deliberate the matter of demarcation. One justice, Minister Ayres Britto, voted in favor of maintaining the area as a single, continuous, indigenous land. He pointed out that, from the legal point of view, “there are no arguments to justify the overturning of the demarcation process.” Minister Britto also argued that the economic interests of the farmers would not only continue, but even accelerate the deforestation and devastation of the Amazon.

Two other justices, Minister Lewandowski and Minister Menezes Direito, also put to rest the majority of the arguments claimed by the rice farmers and the Roraima State. They pointed out that when the Roraima State was established, indigenous people were already living in the area that is the object of the demarcation issue. They also questioned the feasibility of a discontinuous demarcation for indigenous persons who live share common values, culture and customs. In this sense, the creation of “many islands” would sunder the links between the tribes.<sup>4</sup>

This decision seems to mirror the will of the Declaration on the Rights of Indigenous Peoples, adopted by the United Nations during its sixty-second session, which provides that “indigenous peoples have the right to own, develop, control and use the lands and territories,”<sup>5</sup> and have also the right “to the restitution of the lands, territories and resources which they have traditionally owned.”<sup>6</sup>

By moving in this direction, the Court also brings into play

Principle 22 of the Rio Declaration, recognizing the vital role that indigenous people play in environmental management, and the fundamental right to the restitution of their lands. In this sense, the Brazilian Court has opened a precedent of historic importance and has signaled a new orientation concerning indigenous human rights.

Despite being positive, the decision of the judges was just a first move, as the other ministers from the Brazilian Supreme Court are still expected to vote. This may take several months. Nonetheless, it is a move forward to implement standards, and to ensure compliance with the law.

All the Court judges are expected to vote in favor of the continuous demarcation. This moment is historic as it has been a long time since the Brazilian government has actively taken on the serious problems faced by indigenous tribes in its territory, and it is the first time that the government has sought to “take effective measures in guaranteeing ownership of indigenous territories” (from the Draft of the Inter-American Declaration of the Rights of Indigenous Peoples<sup>7</sup>).

Yet while this judgment is important, it might not constitute a “solution” to the indigenous issue in Brazil. The solution that would work best would be compliance with all U.N. and International Labour Organization conventions on indigenous peoples that Brazil has ratified, but that is still a long way off.

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1 Quarta-feira, *Raposa Serra do Sol: entenda o caso*, August 27, 2008, available at <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=95026>.

2 Please visit: [http://www.funai.gov.br/indios/fr\\_conteudo.htm](http://www.funai.gov.br/indios/fr_conteudo.htm).

3 Quarta-feira, *supra* note 1.

4 Quarta-feira, *Ministro Menezes Direito estabelece condições para índios viverem na Raposa Serra do Sol*, December 10, 2008, available at <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=100568>.

5 Article 1, United Nations Declaration on the Rights of Indigenous Peoples, UNGA A/61/L.67 (7 September 2007), available at [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

6 *Id.* at Article 28.

7 Draft approved by the IACHR at the 1278 session held on September 18, 1995.

## Employment of Foreign Citizens in Kyrgyzstan

Aizhan Albanova\*

The Government of the Kyrgyz Republic issued Resolution 639 (“Resolution”) on September 8, 2006. The Resolution states that employers have the right to employ noncitizens who have work permits, and the Resolution establishes the procedure for securing work permits.

An employer must first apply to the State Committee for Migration and Employment (“Committee”) for a permit to hire a noncitizen for a job vacancy. The Committee will issue the permit (“Employer Permit”) only if it determines that Kyrgyzstan lacks citizens capable of filling the job vacancy. The Committee must rule on the application within thirty days of its submission; the Committee may extend the deadline if it requires additional expertise. The Committee must inform the employer of its ruling within five business days. If the Committee does issue an Employer Permit, it will stipulate the rate of compensation and the dates of employment.

Once an employer has obtained an Employer Permit for a job vacancy, a noncitizen can apply to the Committee for a work permit to fill the job vacancy (“Employee Permit”). The noncitizen must document that he or she is at least eighteen years old (documents from foreign countries must be certified and translated into an official language of Kyrgyzstan) and must show that he or she has a valid work visa to enter Kyrgyzstan. The Committee must rule on the application within fifteen days of its submission.

Kyrgyzstan should simplify this procedure and resolve its inconsistencies. First, the Employer Permit and the Employee Permit substantially duplicate each other. Unifying the permits would greatly ease the bureaucratic flow. Second, the Resolution requires that employers pay for the Employer Permit and potential employees pay for the Employee Permit. But non-citizens come to work in Kyrgyzstan at the invitation of Kyrgyz employers. Therefore, why should an employee pay for what is in essence a request of the employer? Third, the Kyrgyz Republic issues work visas separate from the Employee Permit. No statutory definition exists for a “work visa.” Thus, a noncitizen may enter the Kyrgyz Republic with a work visa, and an employer may hire the noncitizen as long as the employer has an Employer Permit. Unification of the Employer Permit and Employee Permit would resolve this loophole. Fourth, the Resolution exempts noncitizens on business trips for certain activities (for example, repairing factory equipment) from acquiring Employee Permits; all other non-citizens on business trips must have a work visa and an Employee Permit. This conflicts with the standard international practice of countries simply issuing work visas to noncitizens on business trips and

complicates the activity of foreign companies.

Kyrgyzstan caps the number of noncitizens who may work in Kyrgyzstan. Four months prior to every calendar year, the Parliament approves next year’s cap. Thus, the Committee can issue work permits only for the current year (i.e. from January 1 through December 31) regardless of the date of issuance. When the year ends, the Commission may extend permits if next year’s cap is sufficient. The Committee allocates slots for noncitizen workers among employers, but Kyrgyzstan has failed to clearly regulate the allocation process.

In a nutshell, Kyrgyzstan’s Employer Permit, Employee Permit, and work visa system unduly burdens employers who need to hire specialists from abroad.

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1 Regulations “On order of realization of labor activity by foreign citizens and stateless persons on territory of Kyrgyz Republic,” approved by the Decree of the Government, September 8, 2006, No. 639.

2 Law of Kyrgyz Republic “On external migration” July 17, 2000, No.61.

3 Regulations “On order of realization of labor activity by foreign citizens and stateless persons on territory of Kyrgyz Republic,” approved by the Decree of the Government, September 8, 2006, No. 639, Item 21.

4 Law of Kyrgyz Republic “On external labor migration,” January 13, 2006, No. 4.

5 Explanation on order of application of Regulations “On order of realization of labor activity by foreign citizens and stateless persons on territory of Kyrgyz Republic,” approved by the Direction of Head of Government Administration, June 11, 2008, No. 45.

6 Regulation of State Committee for Migration and Employment, approved by the Decree of Board of State Committee for Migration and Employment dated as of January 25, 2006, No. 3, Minutes No. 1.





