

# Erasmus Law Review



# ELR

Volume 14 | Issue 2 | 2021

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ISSN: 2210-2671

Nederlands  
**uitgeversverbond**  
Groep uitgevers voor  
vak en wetenschap

# The Common Law Remedy of Habeas Corpus Through the Prism of a Twelve-Point Construct

Chuks Okpaluba & Anthony Nwafor\*

## Abstract

Long before the coming of the Bill of Rights in written Constitutions, the common law has had the greatest regard for the personal liberty of the individual. In order to safeguard that liberty, the remedy of habeas corpus was always available to persons deprived of their liberty unlawfully. This ancient writ has been incorporated into the modern Constitution as a fundamental right and enforceable as other rights protected by virtue of their entrenchment in those Constitutions. This article aims to bring together the various understanding of habeas corpus at common law and the principles governing the writ in common law jurisdictions. The discussion is approached through a twelve-point construct thus providing a brief conspectus of the subject matter, such that one could have a better understanding of the subject as applied in most common law jurisdictions.

**Keywords:** Habeas corpus, common law, detainee, constitution, liberty

## 1 Introduction

The attitude of the common law<sup>1</sup> towards the invasion of the individual's right to personal liberty has been stated over the centuries by academics and judges alike as the foundational value of the common law and the constitutional system adopted in common law countries. In his edifice, Blackstone said that protecting the liberty of the individual is 'the first and primary end of human laws'.<sup>2</sup> The right to liberty, according to this great jurist of the eighteenth century, consists of 'the power of *loco* motion, of changing situation, or removing one's person to whatever place one's own inclination may direct; without imprisonment or restraint, unless by due course

of law'<sup>3</sup> and that under the common law, 'keeping a man against his will in a private house, putting him in stock, arresting or forcibly detaining him in the street, is an imprisonment'.<sup>4</sup> These rights belonged to persons 'merely in a state of nature'; these rights and liberties are 'our birth right to enjoy' unless constrained by law.<sup>5</sup> Lord Halsbury spoke of the liberty of the subject as implications drawn from two interrelated principles:

[T]he subject may say or do what he pleases, provided he does not transgress the substantive law, or infringe the legal rights of others, whereas public authorities may do nothing but what they are authorised to do by some rule of common law or statute.<sup>6</sup>

The courts have long treated the right to personal liberty and access to habeas corpus, which in Roman-Dutch law is known as *interdictum de libero homine exhibendo*,<sup>7</sup> as 'inherent'<sup>8</sup> and a human 'birth right'.<sup>9</sup>

The writ of habeas corpus, also known as the 'Great Writ of Liberty', has its roots in the *Magna Carta* of 1215, the English common man's fountain of liberty, wherein the principle that 'no free man shall be seized or imprisoned except by lawful judgment of his equals or by the law of the land' was first laid down in the fourteenth century; the writ of habeas corpus was used to compel the production of the prisoner in court to ascertain the cause of his or her detention.<sup>10</sup> From the seventeenth to the twentieth century, the writ was codified in various Habeas Corpus Acts starting with the Habeas Corpus Act 1679, in order to bring clarity and uniformity to its principles and application. This Act was designed to ensure that prisoners entitled to relief 'would not be thwarted by procedural inadequacy'.<sup>11</sup> In

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1. See generally, J. Farbey and R.J. Sharpe, *The Law of Habeas Corpus* 3rd ed. (2011); S. Brown, 'Habeas Corpus: A New Chapter' *PL* 31 (2000).

2. W. Blackstone, *Commentary on the Laws of England* (1765) vol 1, at 120.

3. *Ibid*, at 130.

4. *Ibid*, at 132.

5. *Ibid*, at 119 and 140 respectively.

6. *Halsbury's Laws of England* 3rd ed. (1954) vol. 7, at 195-6.

7. See *Wood v. Ondangwa Tribal Authority* 1975 (2) SA 394 (A); G.E. Devenish, *A Commentary on the South African Bill of Rights* (1999), at 510; N. Steytler, *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa* (1998), at 177.

8. *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, at 79 per Isaacs J.

9. See e.g. *Opinion on the Writ of Habeas Corpus* (1758) 97 ER 22, at 33 per Wilmot J; *Ex parte Nichols* [1839] SCC (NSWSC) 123, at 133 per Willis J.

10. W.F. Duker, *A Constitutional History of Habeas Corpus* (1980), at 25.

11. R.J. Sharpe, *The Law of Habeas Corpus* 2nd ed. (1989), at 19.

his celebrated lectures on the *Law of the Constitution*, Dicey identified two ways in which English law secures the right to personal liberty. The first is by way of redress for unlawful arrest or imprisonment by way of a prosecution or an action, while the second is by deliverance from unlawful imprisonment by means of the writ of habeas corpus.<sup>12</sup>

While the writ of habeas corpus has been incorporated into the Constitution as a fundamental right in countries that have Constitutions incorporating a Bill of Rights, the pattern is different in the case of countries without a written Constitution. For instance, apart from habeas corpus being a common law writ, the New Zealand law-makers have sought to preserve its application in contemporary New Zealand law through, at least, three separate enactments. The first is the New Zealand Bill of Rights Act 1990 (NZBORA). In terms of Section 23(1)(c) of NZBORA, everyone who is arrested under an enactment 'shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful'. The second is Section 1140(2)(c) of the Immigration Act 1987. One of the three stipulated events that may lead to the termination of the authority to detain a person who is subject of a security risk certificate is an order of the High Court on an application for a writ of habeas corpus, to release the person. The third illustration comes from the Habeas Corpus Act 2001, Sections 6 and 7 which stipulate the procedural requirements for the court in dealing with applications for a writ of habeas corpus to challenge the legality of a person's detention. Thus, re-enacting the constitutional common law procedural framework of securing immediate release from unlawful detention whereby it must be shown that: (a) there is detention; (b) it is illegal; and (c) it is not voluntary.<sup>13</sup>

## 2 The Scope of This Enquiry

Given the fact that the writ of habeas corpus exists in all common law jurisdictions, and even in civil law jurisdictions where the concept is referred to as *interdictum de libero homine exhibendo*, the enormity of available materials have ironically seemingly confounded the understanding of the essential attributes of the subject. Therefore, this article seeks to shed clarity on this important subject by, first, limiting the jurisdictions for coverage, and second, discussing concisely the common law jurisprudence emanating from the limited number of selected jurisdictions, namely England, Australia, New Zealand and the United States. The discussion adopts a twelve-point construct whereby the most crucial principles regarding the application for habeas cor-

pus at common law are crafted in the form of twelve propositions. The idea is to present available materials in a manageable form within the existing space. For instance, although the experience of the United States may be found in other units of the construct, the most recent and unique experience in the attempt by the Bush administration to take away through an Act of Congress the right to habeas corpus of the so-called 'enemy combatants' and the response of the Supreme Court provides a distinct construct in its own right. It is that judgment of the Supreme Court declaring Act of Congress unconstitutional that is discussed as the twelfth item of the construct. The other eleven aspects of the common law construct which bring together the law as derived from principally the English, Australia, New Zealand and other jurisdictions complete the subject matter of this article. One thing that is common in all these jurisdictions is that habeas corpus as a common law remedy, and supported by statutory enactments, is so much alive, not only in deportation and extradition matters, but it also features in all forms of detentions and constantly in prison disciplinary matters. With particular regard to the latter point, the Canadian jurisprudence becomes even more uniquely relevant, and for that reason, the Canadian experience is the subject of a separate investigation.<sup>14</sup> Though the civil law jurisdictions are not explicitly covered in this article, it is believed that by streamlining the subject and depicting the acceptable thresholds in the selected common law jurisdictions, the article provides viable tools for understanding the concept and for a future comparative study of legislative and judicial approaches to the overarching issue of protection of personal liberty in different legal families.

## 3 The Common Law Writ of Habeas Corpus: The Twelve-Point Construct

The limited space inherent in a work of this nature, and the need to keep available materials within manageable reach, demands a concise approach in discussing the operation of the common law writ of habeas corpus based on the law drawn from the various jurisdictions. Thus, the discussion is compressed in a twelve-point proposition constructed around cases decided essentially by the courts in England, Australia and New Zealand as well as the Privy Council judgments from the West Indies. The Canadian experience is briefly and separately discussed. Within this context, it is clear that some overlapping would be inevitable, even in the deliberate attempt to maintain a fairly stringent posture in the clas-

12. A.V. Dicey, *The Law of the Constitution* 10th ed. (ECS Wade ed. 1959), at 208.

13. *Zaoui v. Attorney General and Others* [2005] 1 NZLR 577 (CA), para. 80. See also D. Clark and G. McCoy, *Habeas Corpus: Australia, New Zealand, the South Pacific* (2000), at 65-6.

14. C. Okpaluba and A.O. Nwafor, 'Habeas Corpus as a Remedy for Deprivation of the Right to Personal Liberty: Contemporary Developments in Canada and South Africa' 23(10) *International Journal of Human Rights* 1594-614 (2019).

sification. However, opportunity is particularly taken to engage, espouse and highlight, inter alia, the distinction drawn by the courts between the application for judicial review and the application for a writ of habeas corpus; the relationship and, sometimes, the blurring lines, between the remedy of habeas corpus and an application for bail; and essentially, the major threat to the remedy as demonstrated by the US Congress enactment of a law that limits the application of habeas corpus in a particular regard.

### 3.1 The Divide Between Habeas Corpus and Judicial Review<sup>15</sup>

An application for a writ of habeas corpus is not an invitation for a court to review the proceedings of an official exercising statutory function, nor does it facilitate collateral attack upon the basis of the judicial exercise of discretion which is in issue in a case.<sup>16</sup> So, too, habeas corpus cannot be used to challenge a conviction<sup>17</sup> or sentence of a superior court of record, for these are regarded as valid until they are set aside on appeal or by

other valid means.<sup>18</sup> By virtue of this same principle, the orders or warrants of an inferior court or tribunal cannot be challenged under an application for habeas corpus.<sup>19</sup> It is, however, recognised that a court hearing an application for the writ can determine whether a public authority whose jurisdiction depends on objective facts has a total lack of jurisdiction to make the order or warrant because those facts do not exist.<sup>20</sup> It is concerned solely with the liberty of the subject which can only be taken away in accordance with the law. A person may not be lawfully imprisoned by a public officer acting in good faith in excess of his authority. The validity of an arrest or a warrant of imprisonment can never depend upon the good faith of the person making the arrest or issuing the warrant.<sup>21</sup> If the law were otherwise, an innocent third person whose person was wrongfully arrested or whose goods were unlawfully seized would be wholly unprotected. Such a state of affairs would be inconceivable. It is equally inconceivable that a person should be denied the right to obtain his immediate release from an unlawful detention because the person detaining him acted in good faith.<sup>22</sup>

The question with which the UK Supreme Court was confronted in *Rahmatullah* was whether an entitlement to habeas corpus is coterminous with the right to judicial review.<sup>23</sup> It was contended that it would be unacceptably incongruous that a different outcome should be possible on an application for a writ of habeas corpus from that which would result from an application for judicial review. In addressing this question, Lord Kerr referred to the opinion of Lord Wilberforce in *R v. Secretary of State for the Home Department, Ex parte Kwawaja*,<sup>24</sup> where the latter said:

These remedies of judicial review and habeas corpus are, of course, historically quite distinct and procedurally governed by different statutory rules, but I do not think that in the present context it is necessary to give them distinct consideration. In practice, many applicants seek both remedies. The court considers both any detention which may be in force and order for removal: the one is normally ancillary to the other. I do not think that it would be appropriate unless unavoidable to make a distinction between the two remedies and I propose to deal with both as a common principle.

15. It was held in *PG v. Chief Executive, Ministry of Social Development* [2013] NZHC 3089 (21 November 2013), paras. 35-36 that the writ of habeas corpus should be reserved for issues properly susceptible to fair and sensible summary determination – *Manuel v. Superintendent, Hawkes Bay Regional Prison* [2005] 1 NZLR 161, paras. 47-51; *E v. Chief Executive, Ministry of Social Development* [2005] NZCA 453, para. 91. The real issue in the present case was that Mr G's application was not the lawfulness of the guardianship, custody and parenting orders made in the Family Court, rather he believed that the Family Court has made the wrong decision. However, such concerns cannot be determined in the context of a habeas corpus application. The proper course would be to have raised them in the context of the Family Court proceedings including, if appropriate, by way of appeal from decisions made in the course of those proceedings. Accordingly, the two children, TP and TW were lawfully 'detained' in terms of Section 14 of the Habeas Corpus Act 2001, and hence the orders made by the Family Court relating to their custody, guardianship and parenting were lawfully made under the relevant legislation.
16. *PR v. The Department of Human Services* [2007] VSC 338, para. 6.
17. An Irish High Court has held in *Re Article 40.4.2 of the Constitution* [2015] IEHC 754 (1 January 2015), paras. 7 and 12, that an applicant in post-conviction custody cannot avail himself of the 'extraordinary procedure' of habeas corpus especially where there is no suggestion that his conviction or sentence was bad on its face. Thus, while the applicant may well have a legal right to have his bail application listed before the High Court, his appropriate remedy does not lie in habeas corpus. J. Clarke had held in *Arra v. Governor of Cloverhill Prison* [2004] IEHC 393 that it is well-established persons convicted upon trial by indictment, are not, in the ordinary way, entitled to release pending an appeal. Persons admitted to bail pending an appeal can only be characterised as being the exception rather than the norm. Even if the applicant can make out some unfairness or illegality connected with a delayed appeal against refusal of bail, he could not thereby be entitled to release from custody or on a writ of habeas corpus. His remedy would be to approach the Court of Appeal to hear his bail application expeditiously. Thus, it was held by C.J. Denman in *Ryan v. Governor of Midlands Prison* [2014] IESC 54 (22 August 2014), para. 18, that 'the general principle of law is that if an order of a court does show invalidity on its face, in particular if it is an order in relation to post conviction detention, then the route of constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In certain circumstances, the remedy of Art. 40.4.2 raises only if there has been absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw'.

18. *Censori v. Holland* [1993] 1 VR 509, at 512 per Harper J; *Young v. Registrar, Court of Appeal (No 3)* (1993) 32 NSWLR 262, at 285 per P. Kirby; *Re Officer in Charge of Cells, ACTSC, Ex parte Eastman* (1994) 123 ALR 478 (HCA), at 480 per Deane J; *Re Stanbridge' Application* (1996) 70 ALJR 640, at 643 per Kirby J; *Ah Shueng v. Lindberg* [1906] VLR 323, at 327 per Cussen J.
19. *Ah Shueng v. Lindberg* [1906] VLR 323, at 327.
20. *R v. Secretary of State for the Home Department, Ex parte Kwawaja* [1984] AC 74, at 101-2, 110, 122-3 and 128; *R v. Secretary of State for the Home Department, Ex parte Muboyayi* [1992] QB 244, at 254-5.
21. *Birch v. Ring* [1914] TPD 106.
22. *Mtetwa v. OC State Prison, Lobatse* [1976] BLR 1 (HC), at 4; *Cohen Lazar and Co v. Gibbs* [1922] TPD 142, at 145.
23. *Secretary of State for Foreign and Commonwealth Affairs v. Rahmatullah* [2013] 1 AC 614 (UKSC), para. 71.
24. [1984] AC 74, at 99.



Although the case law is riddled with contradictions and that the modern tendency is to view the writ of habeas corpus as a specific application of principles of common law judicial review to cases affecting the liberty of the subject, the Law Commission maintained that even if both applications are not assimilated, they are 'subject to a common law principle and that the scope of the review of these remedies is and should be essentially the same'.<sup>25</sup> As much as some might argue that drawing 'a rigid procedural dichotomy' between different prerogative orders 'is no longer justifiable',<sup>26</sup> others still hap on the overlap inherent in the two remedies. In respect of the latter, it is stated in *Halsbury's Laws of England*<sup>27</sup> that

[t]he greatest scope for overlap is where it is alleged that the decision is unlawful because it was based on no evidence or was an unreasonable decision on the available evidence. If an application is made for habeas corpus and the court determines that judicial review should have been sought, the application will not simply be rejected. The court will recognise the true nature of the application and deal with it accordingly.

And as Lord Steyn sums it up, 'pre-eminently, this is an area where substance rather than form governs. Semantics must yield to common sense'.<sup>28</sup>

Lord Kerr further held in *Rahmatullah* that the fallacy of the argument that habeas corpus should not be available where judicial review is not lies in its conflation of two quite different bases for the claim. The mooted judicial review application would proceed as a challenge to the propriety of the government's decision not to apply to the US authorities for Mr Rahmatullah's return. The application for habeas corpus does not require the government to justify a decision not to make that application. It calls on the government to exercise the control which it appears to have or to explain why it is not possible (not why it is not reasonable) to do so.<sup>29</sup> According to Lord Kerr, apart from the deferring nature of the two claims, the fact that habeas corpus, if the conditions for the issue are satisfied, is a remedy which must be granted as a matter of automatic entitlement distinguishes it from the remedy of judicial review which can be withheld on a discretionary basis. The remedy of habeas corpus is available as of right for, once there is no real basis for a person's detention, his right to his liberty depends upon no exercise of discretion. Speaking directly on the application in hand, Lord Kerr held:

[I]f it was established that Mr Rahmatullah was unlawfully detained and that the UK authorities had the means of bringing his unlawful detention to the

end, it is inconceivable that they could lawfully decline to do so on the basis that it would cause difficulty in the UK's relations with the US. Such a consideration might provide the basis for asserting, in defence of a judicial review application, that the decision not to request the US to take a particular course of action was reasonable. In the context of a habeas corpus application, however, the question of reasonableness in permitting an unlawful detention to continue when the government had the means of bringing it to the end simply does not arise.<sup>30</sup>

### 3.2 The Link Between Habeas Corpus and Application for Bail

When a person is released on bail, he continues to remain in custody, albeit, constructive custody, through surety; his or her liberty remains subject to restraint. An application for habeas corpus can lie in such a circumstance.<sup>31</sup> However, 'release from detention' is the expression often associated with the writ of habeas corpus, which means, or often refers to, outright release. As Hammond J explained in *Zaoui v. AG*:<sup>32</sup>

[H]istorically, habeas corpus was, amongst other things, employed to allow bail. Indeed habeas corpus was at one time a centre-piece of criminal procedure, and the principal method of gaining bail.<sup>33</sup> Even the famous Habeas Corpus Act 1679 (UK) was specifically designed to address two problems: bail, and the need for a prompt trial. Essentially, a defendant had to be tried within one term or session after his commitment, or bailed and then either tried within two terms or sessions or discharged. Although that Act has now been abolished, it was habeas corpus which gave birth to the notion of the requirement for an expeditious trial – a proposition which has resonated down the centuries, and still presses on us today. And the modern summary forms of applying for bail are a distinct offshoot of habeas corpus.<sup>34</sup>

Gleeson CJ held in the Australian High Court case of *Al-Kateb v. Godwin*<sup>35</sup> that it was not uncommon to find the interlocutory order of bail made by Mansfield J in the present case as an interlocutory step in habeas corpus proceedings. The Chief Justice of Australia went further to say that, indeed, a proceeding for habeas corpus was once the normal method of applying to the King's Bench for bail.<sup>36</sup> He cited the judgment of the English Court of Appeal in an immigration case, where Sir John Donaldson MR (Croom-Johnson and Bingham JJ concurring) held, that the court could grant bail ancillary to or as part of proceedings for habeas corpus.<sup>37</sup> As

25. Administrative Law: Judicial Review and Statutory Appeals, Law Com. No 226, HC 669, paras. 11.2 and 11.10.

26. C. Lewis, *Judicial Remedies in Public Law* (2000), para. 21-012.

27. 4th ed., Reissue (2000) vol. 17(2), para. 1255.

28. *Cartwright v. Superintendent, HM Prison (The Bahamas)* [2004] 1 WLR 902 (PC), para. 16.

29. *Rahmatullah*, para. 73.

30. *Ibid.*, para. 74.

31. *Krishma Singh v. State of Bihar* (1965) BLJR 35.

32. [2005] 1 NZLR 577 (CA), para. 143.

33. See generally, Sharpe (1989), above n. 11, at 134.

34. *Zaoui v. Attorney General*, para. 143.

35. [2004] 219 CLR 562 (HCA), para. 26.

36. *In Re Kray* [1965] Ch 736, at 740; Sharpe (1989), above n. 11, at 128.

37. *R v. Secretary of State for the Home Department, Ex parte Torkoglu* [1988] QB 398, at 399.

well as being used to obtain bail, habeas corpus proceedings were commonly brought in disputes relating to custody of children,<sup>38</sup> or matters concerning the mentally ill.<sup>39</sup> Gleeson CJ held that it is not antithetical to the nature of habeas corpus for an order to be made upon terms or conditions which relate directly to the circumstances affecting an applicant's right to be released from detention, and reflect temporal or other qualifications upon that right.<sup>40</sup> It is equally the practice in the United States that courts can release petitioners on condition that they post bonds to act in indicated manners.<sup>41</sup>

### 3.3 The Existence of an Alternative Remedy

Even where judicial review proceedings may be a more suitable vehicle for addressing the particular detention complained of,<sup>42</sup> the production of a warrant or other document which provides the basis for the detention may be a decisive answer to a habeas corpus application. Where a case is not suitable for summary determination, rights of appeal will also be relevant to a determination of whether habeas corpus should be issued.<sup>43</sup> Any alternative remedy, however, must be either equally efficacious or even more so than a writ of habeas corpus.<sup>44</sup> In any case, the existence of an alternative remedy, at least in the New Zealand statutory context, is not a jurisdictional bar to any inquiry into the underlying facts and law of Section 14(2) of the Habeas Corpus Act 2001. That there is another remedy gives a court the power to refuse to make such inquiries where the matter is incapable of summary determination. It does not prevent it from making inquiries in the context of a habeas corpus application into the underlying facts and law if the interest of justice so require.<sup>45</sup> To hold that the existence of another remedy, even one equally or more efficacious, prevents a court from examining the underlying facts and law when considering a habeas corpus application would not accord with the statutory language in Section 14(2) and with the scheme and purpose of the Act.<sup>46</sup> The foregoing should be read with some elements of circumspection insofar as the Canadian jurisprudence is concerned. In Canadian law, habeas corpus is an essential remedy and access to it is enshrined in Section 10(c) of the Canadian Charter of Rights and Freedoms 1982. At the same time, and in a somewhat contradictory note, it is well established that in immigration matters, where a complete, comprehensive and expert statutory scheme provides for a review that is at least as broad as and no

less advantageous than habeas corpus, the application for habeas corpus is precluded. This is the so-called 'Peiroo exception', having been derived from the Ontario Court of Appeal judgment in *Peiroo v. Minister of Employment and Immigration*.<sup>47</sup> The ratio in *Peiroo* was explained by Rouleau JA in *Chaudhary v. Canada (Public Safety and Emergency Preparedness)*<sup>48</sup> to the effect that a comprehensive alternative remedy to habeas corpus was in place within the administrative structure created to regulate immigration matters, and this alternative remedy was as broad and as advantageous to the detainee as would be habeas corpus. In those circumstances, a provincial superior court should exercise its discretion and decline to grant relief upon the application for habeas corpus.

After an extensive review of the case law including *May v. Ferndale Institution*<sup>49</sup> and *Mission Institution v. Khela*,<sup>50</sup> Rouleau JA held in *Chaudhary*<sup>51</sup> that the 'Peiroo exception' was not a blanket exclusion of habeas corpus in all matters related to immigration law. In any case, since the issue raised in *Chaudhary* was not a core immigration issue as in *Peiroo* and seeks only the determination of the legality of the appellants' continued detentions, these are cases that should be 'carefully evaluated' and, as was laid down in *May*, 'should not be allowed to expand unchecked'.<sup>52</sup> This careful evaluation will focus on whether the appellants' remedies for unlawful detention under the Immigration and Refugee Protection Act 2001 (IRPA), including judicial review, with leave, of Immigration Division (ID) detention decisions, are at least as broad as and no less advantageous than that available by way of habeas corpus. In any event, the existence of an alternative remedy to habeas corpus does not mean that the court should automatically decline its jurisdiction. If, as alleged by the respondents, the review process put in place by the IRPA to rule on legality of continued detentions in the appellants' circumstances is as broad as and no less advantageous than on habeas corpus, habeas corpus should be declined. If it is not as broad as and is less advantageous, habeas corpus should be available to the appellants, who would then have the choice of proceeding through the IRPA scheme or through habeas corpus.<sup>53</sup>

It was held, however, that the process of detention review under the IRPA is not as broad and is less advantageous than habeas corpus. Furthermore, the Supreme Court of Canada has recognised the importance of local

38. Per Lord Denman CJ, *R v. Greenhill* (1836) 111 ER 922, at 927.

39. *R v. Pinder: In re Greenwood* (1855) 24 LJQB 148, at 142 per Coleridge J.

40. *Al-Kateb*, para. 27.

41. See e.g. *US ex rel Chong Mon v. Day* 36 F 2d 278, at 279 (1929).

42. *Manuel v. Superintendent, Hawkes Bay Regional Prison*, paras. 48-49; *Campbell v. Superintendent, Wellington Prison* [2007] NZAR 52 (CA), para. 35.

43. *T(CA222/07) v. Regional Intellectual Care Agency* [2007] NZCA 208, paras. 28-30.

44. *Ibid*, para. 28.

45. *Manuel v. Superintendent, Hawkes Bay Regional Prison*, para. 49.

46. *E v. Chief Executive, Ministry of Social Development* [2005] NZCA 453, paras. 34-36; *PG v. Chief Executive, Ministry of Social Development* [2013] NZHC 3089 (21 November 2013), para. 12 per Katz J.

47. [1989] 69 OR (2d) 253 (CA).

48. [2015] ONCA 700 (CanLII), para. 60.

49. [2005] 3 SCR 809 (SCC).

50. [2014] 1 SCR 502 (SCC).

51. *Chaudhary*, paras. 74 and 78.

52. *May*, para. 50, where LeBell and Fish JJ for the majority held that the governing rule is that provincial superior courts should exercise their jurisdiction in accordance with the Supreme Court's decisions in the *Miller* trilogy provided that they should decline habeas corpus jurisdiction only where (a) a statute such as the Criminal Code 1985 confers jurisdiction on a court of appeal to correct errors of a lower court and release the applicant if need be; or (b) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision.

53. *May*, para. 44.

access to habeas corpus for inmates of both provincial superior courts and federal institutions because of the traditional role of the court as a safeguard of the liberty of the individual.<sup>54</sup> Thus, detainees in immigration matters who have been detained for a long period with no end to their detention in sight are in similar disadvantaged positions as provincial and federal inmates, and they too have greater local access to a provincial superior court.<sup>55</sup> Accordingly, the applicants in *Chaudhary*, who have been in immigration detentions for lengthy periods and whose detentions are to continue for an uncertain duration, should not be deprived of their Charter right to habeas corpus. They have the right to choose whether to have their detention-related issues heard in the Federal Court through judicial review of the ID decisions or in the Superior Court through habeas corpus applications.<sup>56</sup>

### 3.4 The Writ Is Available as of Right

The entitlement to the issue of the writ comes as a matter of right, and it is granted *ex debito justitiae*. Unlike the remedies of judicial review, it is not a discretionary remedy;<sup>57</sup> hence, the availability of another remedy is no impediment to its issue. By the same token, if detention cannot be legally justified, entitlement to release cannot be denied by public policy considerations, however important they may appear to be.

If your detention cannot be shown to be lawful, you are entitled, without more, to have that unlawful detention brought to an end by obtaining a writ of habeas corpus. And a feature of entitlement to the writ is the right to require the person who detains you to give an account of the basis on which he says your detention is legally justified.<sup>58</sup>

There is also a corresponding rule that there is no right of appeal from a successful application for habeas corpus absent express statutory authority.<sup>59</sup> Thus, it was held in a recent Nova Scotia Court of Appeal judgment in *Springhill Institution v. Richards*<sup>60</sup> that in the absence of a statutory authority, the Attorney General of Canada, as representing the detainer, has no right to appeal the issuance of the writ or an order of discharge of habeas corpus by the Supreme Court Justice. The broad lan-

guage found in Section 38 of the Judicature Act is insufficient, in light of the decisions of the House of Lords<sup>61</sup> and in Canadian Courts<sup>62</sup> – particularly, in light of the Legislature's decision to grant to the prisoner a right of appeal in the Liberty of the Subject Act, and not a detainer. Consequently, the appeal from the order discharging respondent from unlawful detention was accordingly dismissed for want of jurisdiction. Leave to appeal from the interlocutory orders was granted, but both appeals were dismissed.<sup>63</sup>

If the applicant can apply for the writ as of right, can he or she enjoy the right to appeal against a refusal to grant the application as many times as the courts refuse his or her application? The Canadian case of *USA v. Desfosses*<sup>64</sup> serves as an illustration. The applicant who was ordered to be extradited to the United States of America by the order of a judge brought several motions in relation to the appeals and applications for leave to appeal from the alleged refusal of writs of habeas corpus. The motions raised an issue of jurisdiction of the Superior Court to entertain appeals as of right in respect of the disposition of the applications for habeas corpus in the courts below. Sopinka J held that the first application was heard on the merits. Moreover, an appeal was heard on the merits pursuant to Section 784(5) of the Criminal Code 1985 consequent upon which the applicant sought leave to appeal. Leave was refused and an application for reconsideration was also refused. The applicant has therefore had his application determined on the merits and had thereby exhausted his appeals. He was therefore not entitled to start all again as if the matter were 'tabula rasa'. The applicant could not be heard to allege that he had been 'refused' a writ of habeas corpus and that Section 784(3) applied. Since he had a hearing on the merits pursuant to a consent procedure which treated the writ as having been issued, the applicable section for the purposes of appeal is Section 784(5) of the Act. The applicant, therefore, could not appeal as of right with respect to any of the judgments which dismissed his appeals in the second, third and fourth applications. As the court had no jurisdiction to hear appeals as of right, the application to extend the time to appeal suffered the same

54. *R v. Gamble* [1988] 2 SCR 595, at 635; *May*, para. 70.

55. *Chaudhary*, para. 105; *Khela*, para. 47.

56. *Chaudhary*, para. 113.

57. Per Lord Scarman, *R v. Secretary of State for the Home Department, Ex parte Kwawaja* [1984] AC 74, at 111.

58. Per Lord Kerr, *Secretary of State for Foreign and Commonwealth Affairs v. Rahmatullah* [2013] 1 AC 614 (UKSC), para. 41; *Antunovic v. Dawson* [2010] VSC 377 (25 August 2010), para. 149.

59. *Cox v. Hakes* [1890] 15 App Cas 506, at 514 and 522 per Lord Halsbury LCC; per Lord Bramwell, at 525 and per Lord Herschell, at 530 and 534, respectively. It was held in this case that although Section 19 of the Judicature Act 1873 was couched in very wide terms, it was not in specific enough terms to confer jurisdiction on the Court of Appeal to entertain an appeal against an order of habeas corpus pursuant to which the detainees had been discharged. See also per Lords Clarke and Dyson, *Superintendent, Foxhill Prison v. Kozeny* [2012] UKPC 10 (28 March 2012), paras. 20-24.

60. [2015] NSCA 40 (CanLII), para. 166.

61. *Cox v. Hakes* [1890] 15 App Cas 506, at 522 where Lord Halsbury LC held that although the subject whose liberty was at stake was historically allowed to make repeated applications for the writ, but if successful, no writ of error or demurer was allowed. In *Secretary of State for Home Affairs v. O'Brien* [1923] AC 603, at 617-18, it was Viscount Finlay who clearly explained that not only was there no right of appeal from an order of discharge, but that there was no right of appeal from the issuance of the writ. See now Section 15, Administration of Justice Act 1960 (UK), which provides for a right of appeal in civil or criminal habeas corpus proceedings, whether the applicant secures his release or not.

62. In *Re Storgoff* [1945] SCR 526 where the Supreme Court of Canada held that since the Criminal Code at the time provided no right of appeal in criminal habeas corpus matters, the Court of Appeal was wrong to have cancelled the order of discharge on the return of a writ of habeas corpus. In *R v. MacKay* [1956] 2 DLR (2d) 358, the Supreme Court *in banco* was unanimous that the Attorney General had no right of appeal where a County Court judge had discharged the respondent from custody from an order in the nature of habeas corpus.

63. *Springhill*, paras. 232-233 and 235.

64. [1997] 2 SCR 326, para. 11.



fate. It would seem that while the applicant can appeal against refusal of the order, such an appeal only lies with the leave of court.

### 3.5 A Swift and Imperative Remedy

The remedy of habeas corpus is imperative, peremptory and swiftly obtained.<sup>65</sup> Since this reflects the fundamental importance of the right to liberty, it is a flexible remedy adaptable to changing circumstances.<sup>66</sup> In other words, the purpose of the writ is to provide swift and effective vindication of the personal liberty of the individual in cases where it is being unlawfully restrained.<sup>67</sup> As Martin JA put it in *R v. McAdam*: this ‘very high prerogative’ and ‘transcendent’ writ in English law,

is a civil right, the assertion of which in all cases is by its own peculiar and summary procedure which does not vary in essentials whether the custody be under criminal process, or civil, or military, or naval, or private, or governmental executive Act, or otherwise: its whole procedure with its ‘peculiarities’ is extraordinary and entirely apart and distinctive from the ordinary proceedings that it reviews, and brings the person detained thereunder before the Court or Judge so that the appropriate remedy may be applied.<sup>68</sup>

Referring to this quotation, the Saskatchewan Court of Appeal held in *Ross v. Riverbend Institution (Warden)*<sup>69</sup> that the nature of the prerogative writ of habeas corpus is a procedural writ which may apply in a criminal or civil matter but it is the proceeding under which the applicant is placed in custody which determines whether the character of the habeas corpus proceeding is criminal or civil.

The great policy of habeas corpus is that the legality of restraint on the person’s freedom will be ‘determined summarily and finally’.<sup>70</sup> As de Smith has described the writ, it is ‘a fast and effective method of challenging cases of illegal unlawful detention’.<sup>71</sup> From the earliest days of the writ, the emphasis has been on the speed of disposition such that the 1640, 1679 and 1816 Habeas Corpus Acts (UK) were designed to overcome the delays in determining the legality of the detention; to introduce procedural reforms to combat delays; and to achieve the objective of habeas corpus application being as it ought to be an ‘expeditious and effectual method of restoring any person to his liberty’.<sup>72</sup> The jurisdiction is

broad, flexible and adaptable.<sup>73</sup> Habeas corpus applications are given priority in the business of the courts. In such applications, the court has a positive duty to consider and determine the legality of the restraint.<sup>74</sup>

### 3.6 Objective Is to Release a Person Detained Unlawfully

The object of the writ is not to punish previous illegality, and it will only issue to deal with release from current unlawful detention.<sup>75</sup> The question, then, is: what is the purpose of the writ of habeas corpus? Or, put differently, what is the importance of the remedy? The often cited speech of Bankes LJ in *R v. Secretary of State for Home Affairs, Ex parte O’ Brien* explains the importance of the remedy. The Lord Justice had said that

[t]he duty of the court is clear, the liberty of the subject is in question whether the order of the internment complained of was or was not lawfully made. The Act is a very drastic one indeed on an individual. Parliament has seen fit to curtail the liberty of an individual in order to protect that of the state: Parliament has seen fit to give to an individual the authority to terminate another individual’s liberty is of a certain opinion. The detained person is at the mercy of that individual as to when he will be allowed to regain

65. Per Lord Birkenhead, *Rex v. Secretary of State for Home Affairs, Ex parte O’ Brien* [1923] AC 603, at 609.

66. *R v. Secretary of State for the Home Department, Ex parte Muboyayi* [1992] QB 244, at 269 per Taylor LJ.

67. *Ex parte O’ Brien*, at 609; *Ex parte Walsh and Johnson: In Re Yates* [1925] 37 CLR 36, at 77 per Isaacs J.

68. Quoted in *Ross v. Riverbend Institution (Warden)* 2008 SKCA 19 (CanLII), para. 24.

69. *Ibid*, paras. 26-28.

70. Per Lord Halsbury LC, *Cox v. Hakes* [1890] 15 App Cas 506, at 522; *R v. Kerr, Ex parte Groves* [1973] Qd R 314, at 316.

71. H. Woolf, J.L. Jowell and A.P. Le Sueur, *De Smith’s Judicial Review of Administrative Action* 6th ed. (2007), at 17-103.

72. *Antunovic v. Dawson*, para. 79.

73. Wilmut J had in *Opinion on the Writ of Habeas Corpus* (1758) 97 ER 29, at 39, described the process as drawing a ‘principle out into action, and a legal application of it to attain the ends of justice’. Similarly, Lord Donaldson described habeas corpus as ‘the greatest and oldest of all the prerogative writs, is quite capable of adapting itself to the circumstances of the times’ – *R v. Secretary of State for the Home Department, Ex parte Muboyayi* [1992] QB 244, at 258. In *Al-Kateb v. Godwin* [2004] 219 CLR 562 (HCA), paras. 24-28, Gleeson CJ said of writ or an order in the nature of habeas corpus as ‘a basic protection of liberty, and its scope is broad and flexible’. Lord Donaldson’s speech above was adopted and affirmed. In *R v. Gamble* [1988] 2 SCR 595, para. 66, Wilson J speaking at the Supreme Court of Canada wrote: ‘A purposive approach should, in my view, be applied to the administration of Charter remedies as well as to the interpretation of Charter rights and, in particular, should be adopted when habeas corpus is the requested remedy since that remedy has traditionally been used and is admirably suited to the protection of the citizen’s fundamental right to liberty and the right not to be deprived of it except in accordance with the principles of fundamental justice. The superior courts of Canada have, I believe, with the advent of the Charter and in accordance with the sentiments expressed in the habeas corpus trilogy of Miller, Cardinal and Morin, displayed both creativity and flexibility in adapting the traditional remedy of habeas corpus to its new role. I find it instructive the following innovative uses of habeas corpus as a Charter remedy: *Re Cadeddu and the Queen* 1982 CanLII 2138 (ONSC); *Swan v Attorney General of BC* 1983 CanLII 332 (BCSC); *Lussa v Health Science Centre* (1983) 9 CRR 350 (Man. QB); *MacAllister v Director of Centre de Reception* (1984) 40 CR (3d) 121 (Que. SC); *Re Marshall and the Queen* (1984) 13 CCC (3d) 73 (Ont. HC); *Re Jenkins* (1984) 8 CRR 142 (PEISC in banco); *Jollimore v Attorney General of Nova Scotia* (1986) 24 CRR 28 (NSSC); *Balian v Regional Transfer Board* (1988) 62 CR (3d) 256 (Ont.HC).’

74. *Antunovic v. Dawson* [2010] VSC 377 (25 August 2010), para. 146. As Hammond J put it in *Zaoui v. Attorney General* [2005] 1 NZLR 577 (CA), para. 133, ‘So important is the writ, and so wide its reach, that no leave of the court is required to apply for it. Indeed, a judge of the High Court will (if necessary) deal with the particular matter at any time. The application for the writ must be given a priority hearing, above all other business of the court.’

75. Per Lord Evershed MR, *Ex parte Mwenya* [1960] 1 QB 241, at 303.

his liberty ... it is the main function of the courts in our Kingdom to protect the rights of an individual. It is equally the function of Parliament. If those rights are infringed or curtailed, however slightly, and the situation is brought to the notice of the courts, courts will jealously guard against such an erosion of the individual rights. Any person who infringes or takes away the rights of an individual must show a legal right to do so. The rights of an individual being infringed or taken away, even if a legal right is shown, the courts will scrutinize such legal right very closely indeed. If it is an Act of Parliament, the court will give it the usual strict interpretation in order to see whether the provisions of the said Act have been strictly observed. If the courts come to the conclusion that the provisions of such an Act are not being strictly observed then the detention of the detainee would be illegal and the court will not hesitate to say so.<sup>76</sup>

As the Court of Appeal in New Zealand has held, 'traditionally the writ [of habeas corpus] has been used only where it is sought to release someone entirely from (unlawful) custody'.<sup>77</sup> The court also emphasised that the scope of the writ should 'not be shackled by precedent' and that the writ will 'adapt and enlarge as new circumstances require'.<sup>78</sup> Nevertheless, McGrath J held in *Zaoui v. Attorney General* that in providing that an order, made on a habeas corpus application, could be the basis for release of a person detained under Part 4A's provisions of the Immigration Act 1987, Parliament had in mind situations in which the detaining authority could not show there was a legal justification for the detention concerned. That situation might arise in the habeas corpus proceeding itself or in a habeas corpus proceeding brought following a successful judicial review proceeding under the Judicature Amendment Act 1972 in which it was established there was a lack of authority to detain the person the subject of the security certificate. The appropriate procedure may depend on whether the legality can be demonstrated in a summary process.<sup>79</sup> The scope of the circumstances in which an order covered by Section 1140(2)(c) of the Immigration Act 1987 might be made would accordingly cover situations where there was a serious irregularity in the warrant or where the statutory purpose of deportation following confirmation of the security certificate could no longer be achieved and there was no basis for continuing decision. This is the nature of the event terminating authority to detain under Section 1140(2)(c). Habeas corpus does not provide a general power for the court to allow conditional release of a person lawfully detained.<sup>80</sup>

### 3.7 Restraints Amenable to Habeas Corpus

The effectiveness of the remedy of habeas corpus would be substantially reduced if it was not available to require someone who had the means of securing the release of a person unlawfully detained to do so, simply because he did not have physical custody of the detainee<sup>81</sup> for, as Atkin LJ held in *Ex parte O' Brien*, 'actual physical custody is obviously not essential'<sup>82</sup>; or Vaughan Williams LJ put it: 'the writ may be addressed to any person who has such control over the imprisonment that he could order the release of the prisoner'.<sup>83</sup> At the heart of cases on control in habeas corpus proceedings lies the notion that the person to who the writ is directed has either actual control of the custody of the applicant or at least the reasonable prospect of being able to exert control over his custody or to secure his production to the court.<sup>84</sup> Thus, the appropriate respondent to a writ of habeas corpus is the person who has actual control of the custody of the detainee or at least a reasonable prospect of being able to exert a sufficient degree of control or secure his production to the court.<sup>85</sup>

Put differently, the proper respondent to a habeas corpus application is the person who asserts a lawful authority of custody, power or control over the applicant's personal liberty and the person, or the person responsible for managing the institution or place which is carrying out the physical restraint.<sup>86</sup> Lord Kerr further held in *Rahmatullah* that whether a person could exert such control was a question of fact and not of the legal enforceability of a right to assert such control.<sup>87</sup> Where it was uncertain whether the respondent had such control, the court could properly issue the writ to determine that matter on the return with fuller knowledge. The memorandum, assuming it was honoured, provided more than sufficient reason to conclude that the respondents could successfully request the applicant's return, but they claimed that it was unenforceable

76. [1923] (2) KB 361, at 375.

77. *Bennett v. Superintendent, Rimutaka Prison* [2002] 1 NZLR (CA) 616, para. 61; *Zaoui v. Attorney General* [2005] 1 NZLR 577 (CA), para. 81.

78. *Bennett*, para. 60.

79. *Zaoui v. AG*, para. 82; *Bennett*, paras. 59-74; *Manuel v. Superintendent, Hawkes Bay Regional Prison* CA67/04 (15 June 2004), paras. 49-51.

80. *Zaoui v. AG*, para. 83.

81. The US Supreme Court has held in *Jones v. Cunningham* 371 US 236 (1963), at 239-40, that the use of habeas corpus has not been restricted to situations in which the applicant is in actual physical custody and that '[h]istory, usage and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus'.

82. [1923] (2) KB 361, at 398.

83. *R v. Earl of Crewe, Ex parte Sekgome* [1910] 2 KB 576, at 592.

84. *Barnardo v. Ford* [1892] AC 326, at 338 and 340, respectively, where Lord Herschell held that the writ will be issued where someone was 'in unlawful custody, power or control' of another person while Lord MacNaghten said that the issue was whether the person was under the 'control or within ... reach'. In *R v. Secretary of State for Home Affairs, Ex parte O' Brien* [1923] 2 KB 361 (CA), at 391-2, habeas corpus was issued against the Home Secretary pursuant to undertakings given by the Irish Free State Government. The Court of Appeal held that that was enough to require a return. The House of Lords dismissed the appeal – *Secretary of State for Home Affairs, v. O' Brien* [1923] AC 603.

85. Per Lord Kerr, *Secretary of State for Foreign and Commonwealth Affairs v. Rahmatullah* [2013] 1 AC 614 (UKSC), paras. 45 and 64. See also *May v. Ferndale Institution* [2005] 3 SCR 809 (SCC) and the more recent case of *Mission Institution v. Khela* [2014] 1 SCR 502 (SCC).

86. *Antunovic v. Dawson* [2010] VSC 377 (25 August 2010), para. 147.

87. *Rahmatullah*, para. 48.

and superseded by a later agreement and that a request would be futile. The Court of Appeal, in its first judgment, was justified in concluding that there was sufficient uncertainty in issuing the writ. In doing so it required the respondents to test whether they had, in fact, control of the applicant and, if appropriate, to demonstrate why it was not possible to secure his return. That did not amount to an instruction or other impermissible interference within the 'forbidden' territory<sup>88</sup> of the executive's diplomatic relationship with the United States. However, the United States, aware of the basis on which the Court of Appeal considered that the respondents had retained control, was explicit in its assertion that it was legally entitled to hold the applicant.<sup>89</sup> It was clear that there was no opportunity for further discussion. The Court of Appeal, in its second judgment, was therefore entitled to conclude that the respondents had made a sufficient return and to make no further order on the writ.<sup>90</sup>

It does happen when the restraint is being imposed by someone whose alleged lawful custody, power or control is a step removed from those who are imposing the physical restraint. Where the restraint is being imposed at the direction of someone who asserts the contested legal authority from a physical distance, that person is also a proper respondent to an application for habeas

corpus.<sup>91</sup> In such a case, the proper course is to name the superintendent or manager of the institution having physical custody of the person, as well as the person having lawful authority.<sup>92</sup> For instance, in *R v. Wright*,<sup>93</sup> the doctor having the care of the mentally ill person was the respondent while in *R v. Turlington*,<sup>94</sup> it was the 'keeper' of the private house who produced the person concerned and who 'was confined there by her husband'. So, too, in *Re Shuttleworth*,<sup>95</sup> the respondent was the proprietor of a licensed private house for mentally ill people who claimed that the person concerned 'was delivered into my custody'. In the leading case of *R v. Board of Control, Ex parte Ratty*<sup>96</sup> the respondents were the medical superintendent of the institution for mentally ill persons in which the person was being detained and the board who authorised her detention.

### 3.8 Scope of Application of the Writ

The writ of habeas corpus is not confined to arrest and imprisonment; it applies where anyone having custody, power or control over another person imposes restraints on their liberty which are not shared by the general public. It applies to partial<sup>97</sup> as well as total restraint.<sup>98</sup> In effect, the court's jurisdiction in this matter covers, but is not limited to, unlawful imprisonments and other forms of detention; it extends to all unlawful restraints upon a person's freedom of movement which are not shared by the public generally.<sup>99</sup> Drawing out of the underlying principle of personal liberty which the remedy actually protects, it would cover a case where the applicant's freedom of movement and freedom to choose where to live are being restrained, even if only partially, and the principle takes the remedy with it. Indeed, habeas corpus is not just an available remedy in such a case; it is the most efficacious remedy.<sup>100</sup>

### 3.9 Burden of Proof

There is a presumption at common law in favour of liberty<sup>101</sup> and a corresponding obligation on the part of those who would restrict it to demonstrably establish the lawfulness of that restriction. In other words, every person is presumed entitled to personal freedom of the

88. This is in reference to matters of the executive's conduct in relation to foreign affairs which in *R v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Pirbhai* [1985] 107 ILR 462, at 479, where Sir John Donaldson said that 'it can rarely, if ever, be for judges to intervene where diplomatists fear to tread'. Similar sentiment was expressed by Lightman J in *R v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Ferhut Butt* [1999] 116 ILR 607, para. 12 to the effect that 'the general rule is well established that the courts should not interfere in the conduct of foreign relations by the Executive, most particularly, where such interference is likely to have foreign policy repercussions – *R v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Everett* [1999] 1 QB 811, at 820. This extends to decisions whether or not to seek to persuade a foreign government to take any action or remind a foreign government of any international obligation (e.g. to respect human rights) which it has assumed'. The foregoing is in a way saying that matters of foreign relations are not justiciable for, as Lord Phillips MR put it in *R (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2003] EWCA Civ. 1598, para. 106 (iii) that 'the court cannot enter the forbidden areas, including decisions affecting foreign policy'. Again, Laws LJ held in *R (Al Rawi) v. Secretary of State for Foreign and Commonwealth Affairs (UNCR intervening)* [2008] QB 289, para. 148 that '[t]his case has involved issues touching both the Government's conduct of foreign relations, and national security: pre-eminently the former. In those areas the common law assigns the duty of decision upon the merits to the elected arm of government; all the more so if they combine in the same case. This is the law for constitutional as well as pragmatic reasons'.

89. *Rahmatullah*, paras. 60 and 68. The argument was that the issue of the writ of habeas corpus in this case represented an intrusion by the courts in the area of foreign policy, an area which the courts scrupulously avoid. Rejecting this argument as flawed, Lord Kerr held that the decision of the Court of Appeal that there were grounds on which it could be concluded that the Secretaries of State could exercise control over Mr Rahmatullah's custody and that they were therefore required to make a return to the writ does not entail an intrusion into the area of foreign policy. It does not require the government to take any foreign policy stance; it merely seeks an account as to whether it has, in fact, control or an evidence-based explanation as to why it does not.

90. *Rahmatullah*, para. 76.

91. *Antunovic v. Dawson*, para. 92.

92. *Somerset v. Stewart* [1772] 98 ER 499.

93. [1731] 93 ER 939.

94. [1761] 97 ER 741.

95. [1846] 9 QB 651. See also *R v. Pinder; in Re Greenwood* [1855] 54 LJB 148, at 150 and 153.

96. [1956] 2 QB 109, at 112.

97. *Ruddock v. Vadarlis* [2001] FCA 1329 (18 September 2001).

98. *Antunovic v. Dawson* [2010] VSC 377 (25 August 2010), para. 196.

99. *Antunovic v. Dawson*, para. 147.

100. *Antunovic v. Dawson*, para. 177. It was held in this case (paras. 170-176) that Ms Antunovic's freedom was being restrained in that she was being required to live in a Community Care Unit at night and prevented from going to live in the place of her choosing. This restricted her freedom of movement under Section 12 of the Charter. Even though the restraint was partial and not total, but was amenable to the writ of habeas corpus, because they were not shared by the general public who, under the common law, can generally choose where to live, and go to and from their home, at will. Being able to do so is an important aspect of private and social life and the development of the individual, including that which occurs in their own family.

101. *Ex parte Walsh v. Johnson, In re Yates* (1925) 37 CLR 36 (HCA), at 79.



body<sup>102</sup> so that when a court considers the legality of a restraint on personal liberty, its starting point is the presumption that it is prima facie illegal at common law until the contrary is proved. This principle was stated by Lord Atkin in *Liversidge v. Anderson*<sup>103</sup> when he said that

a principle which again is one of the pillars of liberty is that in English law every imprisonment is prima facie unlawful<sup>104</sup> and that it is for the person directing imprisonment to justify his act.

Because the presumption is in favour of liberty, there is no room for the application of other presumptions such as the presumption in favour of the Crown<sup>105</sup> or the common law rule presuming the regularity of official acts has no relevance.<sup>106</sup> The legality of the detention must be demonstrably established by the respondent who bears the general onus as to the legality of the detention.<sup>107</sup> Although the standard of proof required is that of civil proceedings, on a balance of probability, it must be applied in a manner that takes account of the importance of protecting the personal liberty of the individual.<sup>108</sup> For, as Lord Scarman held in *Ex parte Kwawaja*,<sup>109</sup> 'the flexibility of the civil standard of proof suffices to ensure that the court will require the high degree of probability which is appropriate for what is at stake'. Again, as Bell J held in *Antunovic v. Dawson*:<sup>110</sup>

Requiring a high degree of probability in habeas corpus proceedings is consistent with the approach adopted in Victoria to determining whether a limitation is demonstrably justified under s 7(2) of the Charter.<sup>111</sup> Referring to the judgment of Denning LJ in *Baxter v Baxter*,<sup>112</sup> in Application under Major Crimes (Investigative Powers) Act 2004, Warren CJ said [that] the standard of proof required was high.<sup>113</sup> The Chief Justice went on to apply the principle

expounded by Dickson CJ in *R v Oakes*<sup>114</sup> that the evidence should be 'cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit'.

### 3.10 Successive Application for the Writ

A series of applications can be made for the writ of habeas corpus on the same matter. However, a second application will not be permissible if the idea would be to go over the judgment in the first application. There must be fresh evidence, or a new ground must have arisen. That such a ground was missed in the previous application cannot be a ground for a second application.<sup>115</sup> This position has been attained in several jurisdictions either by judicial decisions<sup>116</sup> or by statutory amendment<sup>117</sup> or through incorporation in the rules of court.<sup>118</sup> Otherwise, the principle at common law prior to the amalgamation of the then existing courts in England into one High Court by the Judicature Acts 1873-1875 was that each court could hear an application for habeas corpus de novo on its merits, because the refusal of the writ was not regarded as a judgment and therefore the matter was not res judicata.<sup>119</sup> However, dicta from the House of Lords<sup>120</sup> and the Privy Council held that Parliament could not have intended to restrict

102. Per Sholl J, *R v. Governor of Metropolitan Gaol; Ex parte Di Nardo* [1963] VR 61, at 62.

103. [1942] AC 206 (HL), at 245

104. See also *R v. Secretary of State for the Home Department, Ex parte Khawaja* [1984] 1 AC 74, at 110 per Lord Scarman; *Ruddock v. Vadarlis* [2001] 110 FCR 491, para. 73 per Black CJ; *Hicks v. Ruddock* [2007] 156 FCR 574 para. 53 per Tamberlin J; M. Aronson, B. Dyer & M. Groves, *Judicial Review of Administrative Action* 4th ed. (2009), at 14.105.

105. *Dillon v. R* [1982] AC 484 (PC), at 487.

106. *Schlieske v. Federal Republic of Germany* [1987] 71 ALR 215, at 223 per Fox, Wilcox and Burchett JJ.

107. *R v. Davey; Ex parte Freer* [1936] 56 CLR 381 (HCA), at 385 per Evatt J; *Trobridge v. Hardy* (1955) 94 CLR 147 (HCA), at 152 per Fullager J; *R v. Governor of Metropolitan Gaol; Ex parte Di Nardo* [1963] VR 61, at 62 per Sholl J.

108. *Briginshaw v. Briginshaw* [1938] 60 CLR 336, at 362-3 per Dixon J.

109. [1984] 1 AC 74, at 110. See also per Denning LJ, *Baxter v. Baxter* [1951] P 35, at 37; per Dixon J, *Wright v. Wright* (1948) 77 CLR 191 (HCA), at 210.

110. [2010] VSC 377, para. 124.

111. Referring to Charter of Human Rights and Responsibilities Act 2006 (Vic.).

112. *Baxter v. Baxter* [1951] P 35, at 37.

113. [2009] VSC 381, para. 147.

114. [1986] 1 SCR 103, para. 43. In similar tone, the Full Court of the Supreme Court of Western Australia held in *Truong v. Manager, Immigration Detention Centre, Port Hedland* (1993) 31 ALD 729, at 731, that since the liberty of the applicant was at stake, the habeas corpus application would require 'strong, clear and cogent evidence'. See to the same effect, *Neat Holdings Pty Ltd v. Karajan Holdings Pty Ltd* (1992) ALJ 170, at 171-2.

115. *Chandra Prakash Agarwala v. SC Bose Mullick* ILR (1967) 1 Punj 517. See generally, V.G. Ramachandran, *Fundamental Rights and Constitutional Remedies* (1959) vol. II, at 793.

116. *In re Hastings (No 1)* [1958] 1 WLR 372 (DC); *In re Hastings (No 2)* [1959] 1 KB 358, at 374-5; *In re Hastings (No 3)* [1959] Ch. 368, at 377 and 380.

117. Section 14(2), Administration of Justice Act 1960 (UK).

118. In the Australian State of Victoria, Order 57 on 'Habeas Corpus', Rule 57.04 provides that 'when an order for a writ is refused, an application for a writ shall not be made again in respect of the same person on the same grounds, whether to the same judge of the court or to any other judge of the court, unless fresh evidence is adduced'. The Court of Appeal of Victoria held in *Censori v. Adult Parole Board* [2015] VSCA 254 (17 September 2015), paras. 61-65, that in terms of the rule, it follows that if an unsuccessful applicant for habeas corpus makes a further application to the court, it is first necessary to ask whether it is made on the same ground as the previous application. To the extent that it is, such a ground may only be advanced if fresh evidence is adduced in respect of it. To the extent that the application is made on different grounds, or on the same grounds but supplemented with fresh evidence, the court retains its inherent power to dismiss the proceedings as an abuse of process, making due allowance for the fact that the liberty of the subject is in issue. That means that the trial judge was correct to have dismissed the application as a re-litigation of a matter already decided upon. Warren CJ, Ferguson and McLeish JJ held: 'In our opinion, the matter before Harper J directly raised the issues now sought to be pressed in grounds 3 and 4. They are the same grounds as were previously raised and, as the judge in the present case held, they were resolved adversely to the appellant in that proceeding. They can therefore only be pursued if fresh evidence is adduced in support of them.'

119. H. Phillips and P. Jackson, *Hood Phillips' Constitutional and Administrative Law* 7th ed. (1987), at 509-10; L. Goddard, 'A Note on Habeas Corpus' 65 LQR 30 (1949). Cf. D.M. Gordon, 'The Unruly Writ of Habeas Corpus' 26 MLR 520 (1963).

120. *Cox v. Hakes* (1890) 15 App Cas 506 (HL).



the rights of the subject in the vital matter of personal liberty which meant that the detainee reserves the right to apply to each Division of the High Court, and also to each High Court judge individually. In the Privy Council case – *Eshugbayi Eleko v. Government of Nigeria (Officer Administering)*<sup>121</sup> – the appellant had given a fresh notice of motion for the issue of a writ of habeas corpus in the Supreme Court of Nigeria after a previous motion for the same relief had been rejected. He contended that he was entitled to make successive applications to the same court. The respondent admitted that a right to make successive applications for habeas corpus exists, but only to different courts. The Privy Council held that the Judicature Acts had not intended to cut down the availability of habeas corpus for each judge of the High Court still has jurisdiction to entertain an application for a writ of habeas corpus in term or in vacation, and that each judge is bound to hear and determine such an application on its merits notwithstanding that some other judge has refused a similar application.<sup>122</sup>

The Supreme Court of the United States was considering in *McCleskey v. Zant*<sup>123</sup> the basis of the doctrine of abuse of the writ, which defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent habeas corpus petition. It was held that although the Court's habeas corpus decisions do not all admit of ready synthesis, a review of the precedents demonstrates that a claim need not have been deliberately abandoned in an earlier petition in order to establish that its inclusion in a subsequent petition constitutes abuse of the writ;<sup>124</sup> that such inclusion constitutes abuse if the claim could have been raised in the first petition, but was omitted through inexcusable neglect;<sup>125</sup> and that, because the doctrines of procedural default and abuse of the writ implicate nearly identical concerns, the determination of inexcusable neglect in the abuse context should be governed by the same standard used to determine whether to excuse a habeas petitioner's state of procedural defaults.<sup>126</sup> Thus, when a prisoner files a second or subsequent habeas petition, the state bears the burden of pleading abuse of the writ. This burden is satisfied if the

state, with clarity and particularity, notes petitioner's prior writ history; identifies the claims that appear for the first time; and alleges that petitioner has abused the writ. The burden to disprove abuse then shifts to the petitioner. To excuse his failure to raise the claim earlier, the petitioner must show cause, for instance, that the petitioner was impeded by some objective factor external to the defence, such as governmental interference or the reasonable unavailability of the factual basis for the claim – as well as actual prejudice resulting from the errors of which the petitioner complains. The petitioner will not be entitled to evidentiary hearing if the district court determines as a matter of law that the petitioner cannot satisfy the cause and prejudice standard. However, if the petitioner cannot show cause, the failure to raise the claim earlier may nonetheless be excused if the petitioner can show that a fundamental miscarriage of justice – the conviction of an innocent person – would result from a failure to entertain the claim. McCleskey has not satisfied the foregoing standard for excusing the omission in the first federal habeas corpus petition. He lacks cause for that omission, and therefore, the question whether he would be prejudiced by his inability to raise the claim need not be considered.<sup>127</sup>

### 3.11 Writ Not Subject to Suspension or Deferment

Personal liberty and security being a 'first and primary end' of the law,<sup>128</sup> it is the responsibility of the courts not only to 'see to it'<sup>129</sup> but it is their 'duty'<sup>130</sup> to protect it. The court's obligation in this regard applies equally in times of war, because, judges at all times, 'stand between the subject and any encroachments on their liberty, alert to see that any coercive action is justified in law'.<sup>131</sup> Thus, the idea of the suspension or deferment of habeas corpus is a matter of gravest constitutional moment,<sup>132</sup> and historically has only occurred in wartime, or in critical national emergencies.<sup>133</sup> The notion of non-suspension or deferment, observed Hammond J in *Zaoui*, is 'deeply enshrined in English law'. It is also found in the Constitution of the United States of America, where it is provided that habeas corpus shall 'not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it'.<sup>134</sup> Even then,

121. [1928] AC 459 (PC).

122. *Ibid.*, at 468 per Lord Hailsham LC.

123. 499 US 467 (1991).

124. See e.g. *Sanders v. US* 373 US 1, at 18-19 (1963).

125. *Delo v. Stokes* 495 US 320 (1990) where it was held that a stay of execution pending disposition of a second or successive federal habeas petition can be granted only where there are substantial grounds upon which relief can be granted. In the present case, there were no such grounds, because the respondent's fourth petition clearly constituted an abuse of the writ. His claim could have been raised in his first petition for federal habeas, and the principle he asserted were not novel and could have been developed long before the current application.

126. *Wainwright v. Sykes* 433 US 72 (1977), at 87-8, 91. It was held in this case that a federal habeas petitioner who has failed to comply with a State's contemporaneous objection rule must show cause for the procedural default and prejudice attributable thereto in order to obtain review of his defaulted constitutional claim. At any rate, this case plainly implied that default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision would, absent extraordinary circumstances, bind the habeas petitioner even if he had not personally waived that claim.

127. *Murray v. Carrier* [1986] 477 US 478, at 494.

128. Blackstone, above n. 2, at 120.

129. *Ex parte Walsh v. Johnson*, *In re Yates* [1925] 37 CLR 36 (HCA), at 79 per Isaacs J.

130. *R v. Carter*; *Ex parte Kisch* [1934] 52 CLR 221 (HCA), at 227 per Evatt J.

131. Per Lord Atkin, *Liversidge v. Anderson* [1942] AC 206 (HL), at 244.

132. Thus, Lord Browne-Wilkinson said in *Tan Te Lam v. Tai A Chau Detention Centre* [1997] AC 97, at 114, that courts must be astute to ensure that the protection afforded to human liberty should not be eroded save by the clearest of words.

133. Per Hammond J, *Zaoui v. Attorney General*, para. 126, referring to the House of Lords judgment in *Liversidge v. Anderson* [1942] AC 206 (HL), where their Lordships held, deferring to the Home Secretary, that 'reasonable cause to believe' that anyone was of hostile origin or association in the Defence (General) Regulations 1939 must be subjectively within the discretion of the executive to determine. See also *Green v. Home Secretary* [1942] AC 284 (HL).

134. Art. I, Section 9 cl (2).

Lord Atkin in his lone dissent in *Liversidge v. Anderson*,<sup>135</sup> warned about judges being more executive minded than the Executive. Thus, where, as in *Zaoui v. Attorney General*, the Crown, for all practical purposes, was contending that habeas corpus was suspended during this period in which the plaintiff deemed a security risk was detained pending his removal or deportation, notwithstanding the remedy provided for in Section 1140(2)(c), Hammond J held that a court should take a great deal of convincing on such a startling proposition.<sup>136</sup>

### 3.12 'Enemy Combatants' Equally Entitled to Enjoy Their Privilege to Habeas Corpus

It is important to preface the controversy that surrounded the 'enemy combatant' case with a brief discussion of the attitude of the courts in the United States which tilts towards an enlarged approach to the concept of custody for the purposes of habeas corpus. Originally, the courts in the United States were of the view that habeas corpus would only lie where a favourable judgment would result in immediate release from all forms of detention.<sup>137</sup> Since then, however, the concept of custody has greatly expanded to permit a wider use of habeas corpus for the protection of prisoner's rights. For instance, speaking in *Jones v. Cunningham*<sup>138</sup> on the scope of habeas corpus reflecting its fundamental purpose, the court held that:

[i]t is now and never has been a static narrow formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.<sup>139</sup>

The question the US Supreme Court had to answer in *Boumediene v. Bush*<sup>140</sup> was whether the petitioners had the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Article 1, §9, clause 2.<sup>141</sup> The major-

ity of the court held that the petitioners, who were aliens designated as enemy combatants and detained at the US Naval Station at Guantanamo Bay, Cuba, do have the habeas corpus privilege to challenge the legality of their confinement; that Congress had enacted a statute, the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739 prescribing certain procedures for review of the detainees' status and that those procedures were not an adequate and effective substitute for habeas corpus. Therefore, §7 of the Military Commissions Act of 2006 (MCA), 28 USCA §2241(e) (Supp. 2007), operated as an unconstitutional suspension of the writ. Delivering the opinion of the court, Kennedy J said:

Although we do not hold that an adequate substitute must duplicate §2241 in all respects, it suffices that the Government has not established that the detainees' access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus. MCA §7 thus effects an unconstitutional suspension of the writ.

In addition to the foregoing, habeas corpus has been used:

- To challenge the validity of a sentence yet to be served.<sup>142</sup>
- To challenge the validity of a condition of confinement in the form of prison regulation which limited the access of illiterate inmates to the courts by forbidding their fellow prisoners from serving as jailhouse lawyers. It was held that the unlawful regulations made the custody unlawful.<sup>143</sup>
- To challenge the validity of various forms of segregated confinements in a prison on the ground of a violation of due process.<sup>144</sup>
- To bring a prisoner or other detainees such as an institutionalised mental patient, before the court so as to determine the lawfulness of the detention or imprisonment. It is used to examine any extradition process used, amount of bail, and the jurisdiction of the court.<sup>145</sup>

135. [1942] AC 206 (HL), at 244.

136. *Zaoui v. Attorney General*, para. 126. Later at para. 157, Hammond J held: "In my view, the terms of the relevant provisions are such that the availability of habeas corpus is always speaking, to the fullest extent, from the inception of the detention process until its completion. I think that is plain on the face of the statute. But even if that were not so, there is a very heavy onus on proponents of the Crown's proposition to make out their case, for the reasons I have already given. Indeed, I would go as far as to say that if habeas corpus is not, continuously speaking, from beginning to end of the detention process, then Parliament really would have to say so unequivocally, and consequentially, be prepared to explain why, in face of its (assumed) international obligations, and its domestic undertaking in the New Zealand Bill of Rights Act 1990, it had chosen to suspend habeas corpus to the extent suggested."

137. *McNally v. Hill* 293 US 131 (1934).

138. 371 US 236 (1863), at 243.

139. See also *American Jurisprudence* 2nd ed., vol. 39, para. 11.

140. 553 US 723 (2008); 476 F 3d 981 (2008).

141. In *Felker v. Turpin* 518 US 1051 (1996), the Supreme Court held that Title 1 of the Anti-Terrorism Act and Effective Death Penalty Act 1996 which works substantial changes to chapter 153 of Title 28 of the United States Code, which authorises federal courts to grant the writ of habeas corpus, does not preclude the court from entertaining an appli-

cation for habeas corpus relief, although it does affect the standards governing the granting of such relief. So, too, the availability of such relief in the Supreme Court obviates any claim by petitioner under the Exemption Clause of Art III, §2, of the Constitution, and that the operative provisions of the Act do not violate the Suspension Clause of the Constitution, Art. 1, §9.

142. *Peyton v. Rowe* 391 US 54 (1968).

143. *Johnson v. Avery* 393 US 483 (1969).

144. *McCollum v. Miller* 695 F 2d 1044 (7th Cir. 1982); *Krist v. Ricketts* 504 F 2d 887 (5th Cir. 1974); *Bryant v. Harris* 465 F 2d 365 (7th Cir. 1972); *Dawson v. Smith* 719 F 2d 896 (7th Cir. 1983); and *Streeter v. Hopper* 618 F 2d 1178 (5th Cir. 1980).

145. For instance, in *Knowles v. Mirzayance* 556 US 111 (2009), Justice Thomas held for the court that a federal court may grant a habeas corpus application arising from a state court adjudication on the merits if the state court's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'. 28 USC §2254(d)(1). In this case, the respondent claimed ineffective assistance of counsel because his attorney recommended withdrawing his insanity defence. The California courts rejected this claim on state post-conviction review. The Supreme Court had to decide whether this decision was contrary to or an unreasonable application of clearly established federal law and held that it

- Other uses of habeas corpus include immigration or deportation cases and matters concerning military detentions, court proceedings before military commissions, and convictions in military court.
- Finally, habeas corpus is used to determine preliminary matters in criminal cases, such as: (i) an adequate basis for detention; (ii) removal to another federal district court; (iii) the denial of bail or parole; (iv) a claim of double jeopardy; (v) the failure to provide for a speedy trial or hearing; or (vi) the legality of extradition to a foreign country.<sup>146</sup>

Attention need to be drawn to the fact that apart from enjoining the courts to, in appropriate circumstances, disregard the technical language used and liberally construe habeas corpus laws, the *American Jurisprudence* also states that

a person who applies for a writ to secure the release of another must show some interest in the person or some authorisation to make the application. According to some authority, a mere stranger, or volunteer, having no authority derived from the person detained or the legal right to the custody of such a person, has no right to a writ habeas corpus to obtain the discharge of such person from custody. However, there are cases in which the writ has been issued on the application of a stranger or volunteer who bore no legal relation to the person in custody, or who was actuated solely from humanitarian motives. In such cases, the applicable rule is that a person may apply for habeas corpus for another if he sets forth in the application a reason or explanation satisfactory to the court showing why the detained person does not make the application himself.<sup>147</sup>

of the detention rests on the person having the custody of the detainee further strengthens the position of the detainee in seeking relief through the application for the writ of habeas corpus.

The American position that confers locus standi on persons not necessarily connected with the detainee to apply for habeas corpus on behalf of the detainee if they are able to set forth in their application a reason or explanation satisfactory to the court showing why the detainee is unable to personally bring the application, if generally accepted in other common law jurisdictions, would greatly empower the various human rights bodies and other non-governmental organisations to seek, through judicial process, the release of persons in long detentions whose voices could not be heard for political reasons or indigence. Such is prevalent in those nations with nascent democracies as they transit from the regime of absolute rulers or military dictatorships that rarely tolerate the voices of opposition. A recourse to this common law device of habeas corpus would certainly provide the much-needed succour for detainees if the courts of those nations are willing to exhibit the same robustness in upholding the tenets of the writ as witnessed in the decisions of courts from the more advanced democracies.

## 4 Conclusion

The writ of habeas corpus has survived as a portent instrument at the disposal of persons to fight against any encroachment on their personal liberty. The application of the writ in securing personal freedom is pervasive as demonstrated by judicial pronouncements, providing reliefs against any form of unlawful restraint to the liberty of the person. Even persons politically regarded as enemy combatants are not excluded from reliefs of habeas corpus.

The realisation of the fundamental nature of personal liberty to human existence has galvanised the judicial stance against any attempt, whether by executive or legislative acts, to restrict the application of the writ. The stance by the courts that the onus of proof of the legality

was not. And that whether reviewed under the standard of review set forth in §2254(d)(1) or de novo, Mirzayance failed to establish that his counsel's performance was ineffective. See also *Strickland v. Washington* 466 US 668 (1984).

146. Available at [www.law.cornell.edu/wex/habeas\\_corpus](http://www.law.cornell.edu/wex/habeas_corpus) (last visited 8 May 2016).

147. *American Jurisprudence* 2nd ed., vol. 39, paras. 4 and 117 respectively.

# The Influence of Strategic Culture on Legal Justifications

## Comparing British and German Parliamentary Debates Regarding the War against ISIS

Martin Hock\*

### Abstract

This article presents an interdisciplinary comparison of British and German legal arguments concerning the justification of the use of force against the Islamic State in Iraq and Syria (ISIS). It is situated in the broader framework of research on strategic culture and the use of international law as a tool for justifying state behaviour. Thus, a gap in political science research is analysed: addressing legal arguments as essentially political in their usage. The present work questions whether differing strategic cultures will lead to a different use of legal arguments. International legal theory and content analysis are combined to sort arguments into the categories of instrumentalism, formalism and natural law. To do so, a data set consisting of all speeches with regard to the fight against ISIS made in both parliaments until the end of 2018 is analysed. It is shown that Germany and the UK, despite their varying strategic cultures, rely on similar legal justifications to a surprisingly large extent.

**Keywords:** strategic culture, international law, ISIS, parliamentary debates, interdisciplinarity

## 1 Introduction

In early 2014 ISIS swept across Iraq and Syria and established a terrifying regime. While having been deprived of much of its territory after air campaigns by Western powers and ground fighting conducted by local forces, ISIS is not defeated. The international alliance's efforts have not been cancelled, and concerns about the group's comeback were pronounced after the Turkish attack on Kurdish forces in October 2019.<sup>1</sup> The international warfare against ISIS presents an interesting case study on the question of democratic warfare owing to its unclear legal background. Questions regarding the legal-

ity of the use of force against ISIS are manifold. Thus, the legal justifications become important.

This article studies the legal justifications for the use of force against ISIS advanced by the United Kingdom and Germany. These countries present a viable comparison – two mature democracies of comparable economic and military power that are members of the same alliance. However, their strategic cultures differ significantly. Building on the work of Geis *et al.*<sup>2</sup> and Wagner,<sup>3</sup> content analysis – including a novel coding scheme with a focus on international law – is used on parliamentary speeches in order to compare the legal justifications set forth in the British and German parliaments. This analysis is applied on five levels: the state, the government and the opposition, as well as the arguments for and against the use of force across the government-opposition divide. While the works mentioned present important studies in regard to political justifications for democratic warfare, the legal justifications for this have not been studied comprehensively, yet.

This article asks whether a different strategic culture leads to different choices with regard to the legal justifications. Hereby, justification refers to every legal argument made in favour of or against the use of force. Furthermore, arguments can be divided into three ways of understanding international law: formalism, instrumentalism and natural law. This allows for placing the countries on a scheme depending on the prevailing legal understanding. Additionally, the exact importance of these legal understandings will be refined by determining whether a given understanding is a decisive, dominant, influential or a minority position. Compared with the related concept of political culture,<sup>4</sup> strategic culture offers the benefit of being specifically designed to address questions of war and peace. Several outcomes are expected. Given the respective strategic cultures, Germany will rely more heavily on formalist arguments, while the UK will refer to instrumentalist and natural law-based arguments. Furthermore, in line with the theoretical premises of strategic culture, it is argued that

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1. R. Salloum, 'Türkische Offensive. Was nun mit den IS-Gefangenen passiert', *Spiegel online*, 10 October 2019, <https://www.spiegel.de/politik/ausland/syrien-tuerkischer-angriff-was-mit-den-is-gefangenen-passiert-a-1290886.html> (last accessed 24 February 2021).

2. A. Geis, H. Müller & N. Schörnig (eds.), *The Militant Face of Democracy. Liberal Forces for Good* (2013).

3. W. Wagner, *The Democratic Politics of Military Interventions. Political Parties, Contestations, and Decisions to Use Force* (2020).

4. For an overview on political culture see J. Gebhart (ed.), *Political Culture and the Cultures of Politics: A Transatlantic Perspective* (2010).



the overall distribution of arguments in the legal understandings will be roughly equal on all levels, i.e. formalist arguments will prevail in Germany on all levels, as against instrumentalist arguments in the UK. The study shows, however, only modest evidence for strategic culture being influential in regard to legal justifications. While Germany's and the UK's warfare against ISIS are studied in the present article, the framework should be expanded to include more countries and more uses of force, especially the case of France. Thus, this article should be read as a starting point for further research.

## 2 Democratic Warfare and Strategic Culture: State of the Art

While democratic peace theory has gained a great deal of traction since the 1980s,<sup>5</sup> the question of democratic warfare has received less attention – despite criticism of democratic peace theory after the Iraq War.<sup>6</sup> This holds especially true when one tries to turn around the constructivist argument made for democratic peace and asks for norms and justificatory patterns of democratic war – patterns that may be influenced by a country's strategic culture.<sup>7</sup> Early work on democratic warfare<sup>8</sup> was followed by a surge in the studies after the wars in Afghanistan and Iraq.<sup>9</sup> An important theoretical branch is the research into the connections between parliamentary powers and the decision to go to war.<sup>10</sup> These decisions

have traditionally been understood as driven by national interest in democracies and non-democracies alike. Nevertheless, after the end of the Cold War, the national interest has become disputed and unclear, leading to so-called wars of choice.<sup>11</sup>

A key work in this field is Geis *et al.* (2013),<sup>12</sup> building on their previous research, Geis *et al.* (2006).<sup>13</sup> The authors present a framework for understanding the argumentative patterns surrounding the justifications for democratic warfare but do not treat the question of international law comprehensively.<sup>14</sup> Their work has been expanded and continued by Wagner 2020<sup>15</sup> and Geis and Wagner 2021.<sup>16</sup> This points to an important gap in the study of democratic wars. Given the constructivist background of the arguments, the way international law is treated and the role that is given to it by democratic states matters. Choosing a specific legal justification is in itself a political act. It has, however, not been studied comprehensively yet. This holds true in the case of the war against ISIS and the legal questions surrounding it as well. There is plenty of debate in the field of international law with regard to the scope of self-defence against non-state actors and the legality of the Syrian/Iraqi intervention.<sup>17</sup> While notions of Just War and the Responsibility to protect (R2P) were discussed after the Kosovo War, legal scholarship focused on the question of self-defence against non-state actors and the problems surrounding the sovereignty of host states after 9/11. The unable-or-unwilling formula has emerged as a key concept in this debate. However, the interplay between legal justifications for democratic warfare, strategic culture and legal justifications is a field that has gained relatively little research attention.

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## 3 Research Design

The following section provides an overview of the distinguishing criterion of strategic culture. Furthermore, it presents content analysis as a method and the scheme

5. For recent examples see F. Bakker, 'Hawks and Doves. Democratic Peace Theory Revisited', 2018 (PhD dissertation, University of Leiden); M. Baum and P. Potter, *War and Democratic Constraint* (2015); S. Dieterich, H. Hummel & S. Marschall, 'Bringing Democracy Back in. The Democratic Peace, Parliamentary War Powers and European Participation in the 2003 Iraq War', 50 *Cooperation and Conflict* 87 (2015); W. Wagner, 'Is there a Parliamentary Peace? Parliamentary Veto Power and Military Interventions from Kosovo to Daesh', 20 *The British Journal of Politics and International Relations* 121 (2018).
6. D. Kinsella, 'No Rest for Democratic Peace Theory', 99 *American Political Science Review* 453 (2005).
7. M. Britz, 'Introduction', in M. Britz (ed.), *European Participation in International Operations. The Role of Strategic Cultures* (2016) 1, at 2; F. Doesser and J. Eidenfalk, 'Using Strategic Culture to Understand Participation in Expeditionary Operations: Australia, Poland, and the Coalition against the Islamic State', 40 *Contemporary Security Policy* 4 (2019); W. Mirrow, *Strategic Culture Matters: A Comparison of German and British Military Interventions since 1990* (2009).
8. P. Everts, *Democracy and Military Force* (2002).
9. Among others, J. Caverley, *Democratic Militarism: Voting, Wealth and War* (2016); O. Encarnacion, 'Bush and the Theory of the Democratic Peace', 8 *Global Dialogue* 60 (2006); J. Ferejohn and F. McCall Rosenbluth, 'Warlike Democracies', 52 *Journal of Conflict Resolution* 3 (2008); P. Mello, *Democratic Participation in Armed Conflict. Military Involvement in Kosovo, Afghanistan and Iraq* (2014); J. Owen, 'Iraq and the Democratic Peace. Who Says Democracies Don't Fight?', 84 *Foreign Affairs* 122 (2005).
10. Among others, H. Hegemann, 'Towards "Normal" Politics? Security, Parliaments and the Politicization of Intelligence Oversight in the German Bundestag', 20 *The British Journal of Politics and International Relations* 175 (2018); J. Kaarbo, 'Prime Minister Leadership Style and the Role of Parliament in Security Politics', 20 *The British Journal of Politics and International Relations* 35 (2018); T. Raunio and W. Wag-

ner, 'Towards Parliamentarisation of Foreign and Security Policy?', 40 *West European Politics* 1 (2017); Wagner, above n. 5.

11. T. McCormack, *Britain's War Powers. The Fall and Rise of Executive Authority* (2019), at 6; P. Mello and D. Peters, 'Parliaments in Security Policy: Involvement, Politicization, Influence', 20 *The British Journal in Politics and International Relations* 3, at 6 (2018); Raunio and Wagner, above n. 10, at 3.
12. Geis, Müller & Schörnig, above n. 2.
13. A. Geis, L. Brock & H. Müller (eds.), *Democratic Wars. Looking at the Dark Side of Democratic Peace* (2006).
14. The same applies pars pro toto for C. Hilpert, *Strategic Cultural Change and the Challenge for Security Policy. Germany and the Bundeswehr's Deployment to Afghanistan* (2014); more, but not sufficient work on legal justification has been done in M. Britz (ed.), *European Participation in International Operations. The Role of Strategic Cultures* (2016).
15. Wagner, above n. 3.
16. W. Wagner and A. Geis, 'What We Are Fighting For: Democracies' Justifications of Using Armed Force since the End of the Cold War', in L. Brock and H. Simon (eds.), *The Justification of War and International Order. From Past to Present* (2021), at 293.
17. Among many, see K. Weigelt, *Die Auswirkung der Bekämpfung des internationalen Terrorismus auf die Staatliche Souveränität* (2016).

between formalism, instrumentalism and natural law on which the cases will be placed.

### 3.1 Strategic Culture as Distinguishing Criterion

Compared with the related concept of political culture, strategic culture offers the benefit of being developed specifically to understand and explain acts by states concerning to the use of force. This is significant, since the decision to go to war is of extreme importance and is often institutionally separated from regular decision-making. The strategic culture has been used widely since as early as the work of Snyder (1977).<sup>18</sup> Despite its prominence, no clear consensus on a definition has emerged.<sup>19</sup> Doeser and Eidenfalk<sup>20</sup> distinguish between four generations of the concept: the first generation following Snyder (1977)<sup>21</sup> and Gray (1981; 1999)<sup>22</sup> was interested in understanding why states approached strategy and military interventions differently, considering culture as a country-specific context. This results in a specific viewpoint from which strategic choices are made, which then shapes behaviour – challenging hitherto dominant theories of states as rational actors driven by externally arising goals.<sup>23</sup> The second generation saw it as a tool of international hegemony. Additionally, their work was intended to conceptualise differences between official policy statements and actual actions by states.<sup>24</sup> Third-generation scholars emerging in the 1990s focused on the possibilities of falsifiable theory-building, using strategic culture as an independent variable to explain an actor's actions and predict choices made.<sup>25</sup> The fourth generation incorporated constructivist approaches by focusing on changes in strategic culture and subgroups.<sup>26</sup>

In the present work strategic culture is understood, along the lines of the first generation, as a set of 'socially transmitted, identity-derived norms, ideas, and patterns of behaviour that are shared among the most influential

actors and social groups within a given political community, which help to shape a ranked set of options for a community's pursuit of security and defence goals'.<sup>27</sup> However, in using strategic culture as an explanatory variable to test outcomes it draws on ideas of the third generation as well. For this purpose, strategic culture is seen as an 'ideational milieu, which limits behavioural choices'.<sup>28</sup> Those choices are not the concrete acts of foreign policy but the legal justifications. Therefore, they are political acts in themselves. It is assumed that these are an outcome of and are therefore limited by strategic culture. Furthermore, it is implicitly presupposed that these legal understandings are not part of the strategic culture itself but a product of it. Otherwise, the scope of research would be tautological.

#### 3.1.1 Strategic Culture in Germany

German strategic culture can be described as 'reactive, passive and reluctant',<sup>29</sup> with Germany being a 'Zivilmacht'.<sup>30</sup> It is based on the self-image of promoting a rule-based global order.<sup>31</sup> A public mistrust against the military and the use of force exists, and this societal preference is reflected in the institutional framework. Thus, the parliament has a decisive vote on the use of force.<sup>32</sup> Dominance of the civilian leadership is secured on all ministerial levels, while the military lacks preferred access to policy making. In addition, German forces are integrated into multilateral frameworks on all operational, strategic and political levels.<sup>33</sup> Reacting to the humanitarian catastrophes of the 1990s, Germany became more willing to use military force. The reluctant stance did not wane but was balanced by humanitarian impulses and the call for more contributions on common defence from allies.<sup>34</sup> However, if German troops are deployed, the rules of engagement tend to be restrictive.<sup>35</sup> Over the course of the Afghanistan war, reforms aimed at transforming the Bundeswehr into an expeditionary army were conducted, culminating in the abolishment of military draft in 2011. However, this did not necessarily lead to a major change

18. J. Snyder, 'The Soviet Strategic Culture: Implications for Limited Nuclear Options', *Rand Air Force Project Report R 2154 AF 1977*, <https://www.rand.org/content/dam/rand/pubs/reports/2005/R2154.pdf> (last accessed 24 February 2021).
19. H. Biehl, B. Giegerich & A. Jonas, 'Introduction', in H. Biehl, B. Giegerich & A. Jonas (eds.), *Strategic Cultures in Europe. Security and Defense Policies across the Continent* (2013) 7, at 11.
20. Doeser and Eidenfalk, above n. 7, at 6.
21. Snyder, above n. 18.
22. C. Gray, 'National Style in Strategy: The American Example', 6 *International Security* 21 (1981); C. Gray, 'Strategic Culture as Context: The First Generation of Theory Strikes Back', 25 *Review of International Studies* 49 (1999).
23. Biehl, Giegerich & Jonas, above n. 19, at 11; Britz, above n. 7, at 4.
24. Biehl, Giegerich & Jonas, above n. 19, at 10; examples for the second generation, B. Klein, 'Hegemony and Strategic Culture: American Power Projection and Alliance Defence Politics', 14 *Review of International Studies* 133 (1988); A. Johnston, *Hegemony and Culture in the Origins of NATO Nuclear First-use, 1945-1955* (2005).
25. Mirrow, above n. 7, at 5-6; as an example, I. Johnston, 'Thinking about Strategic Culture', 19 *International Security* 32 (1995).
26. As examples, J. Lantis, 'Strategic Culture and National Security Policy', 4 *International Studies Review* 87 (2002); J. Johnson, K. Kartchner & J. Larsen, *Strategic Culture and Weapons of Mass Destruction: Culturally Based Insights into Comparative National Security Decision Making* (2009).

27. C. Meyer, *The Quest for a European Strategic Culture: Changing Norms on Security and Defence in the European Union* (2006), at 20.
28. Johnston, above n. 24, at 46.
29. J. Junk and C. Daase, 'Germany', in H. Biehl, B. Giegerich & A. Jonas (eds.), *Strategic Cultures in Europe. Security and Defense Policies across the Continent* (2013) 139, at 149.
30. H. W. Maull, 'Germany and Japan. The new Civilian Powers', 69 *Foreign Affairs* 91 (1990).
31. See for example Permanent Mission of the Federal Republic of Germany to the United Nations, "Germany stands for a rules-based international order", Interview with Ambassador Heusgen, <https://new-york-un.diplo.de/un-en/news-corner/heusgen-bpa-interview/2246162> (last accessed 24 February 2021).
32. W. Wagner, 'The Bundestag as Champion of Parliamentary Control of Military Missions', 35 *Sicherheit und Frieden* 60 (2017).
33. A. Bergstrand and K. Engelbrekt, 'To Deploy or Not to Deploy a Parliamentary Army? German Strategic Culture and International Military Operations', in M. Britz (ed.), *European Participation in International Operations. The Role of Strategic Cultures* (2016) 49, at 53-4; I. Kraft, 'Germany', in H. Meijer and M. Wyss (eds.), *The Handbook of European Defence Policies and Armed Forces* (2018) 52, at 52-3.
34. Bergstrand and Engelbrekt, above n. 33 at 50-1.
35. Junk and Daase, above n. 29, at 148.

in operational strategy on the ground or in the societal and institutional framework.<sup>36</sup>

After the Russian invasion of Ukraine in 2014, Germany took steps to strengthen its forces – such as increasing military spending and personnel. These actions, however,<sup>37</sup> do not present a new strategic culture. A more prominent German role in security issues as well as increased spending on defence is contested in the German public and opposition parties.<sup>38</sup> This leads to the assumption that Germany's reluctance to use force will be reflected in the use of formalist understandings of international law since the UN-Charter is based essentially on restraint in the use of force (see 3.3).

### 3.1.2 Strategic Culture in the United Kingdom

British strategic culture is based on the self-image of being an important member of the international community coupled with high ambitions with regard to responsibilities and capabilities towards international security. This is especially true with regard to its post-colonial and Commonwealth position, its standing in the UN system, the special relationship with the USA and its influence in the North Atlantic Treaty Organisation (NATO). British forces have been deployed in conflicts nearly continuously for most of the 20th and 21st century.<sup>39</sup> Another defining feature is the lack of a unified document spelling out its conditions and prerogatives.<sup>40</sup> Given the close partnership with the USA, NATO became the means of choice to project British power. The UK remains reluctant towards European defence integration, which might be seen as undermining NATO.<sup>41</sup>

While retaining the main components of British strategic culture, significant changes took place from the late 1990s onwards. The idea of using force to defend human rights assumed prominence in British politics. Expeditionary missions became the British military's most important task.<sup>42</sup> This was accompanied by institutional changes. Starting with the vote on the war in Iraq, parliamentary powers over the use of force increased. The relationship between the civilian and the military levels, however, is not as clear-cut as it is in Germany. The decision to go to war traditionally lies with the government alone, while the parliamentary powers remain unstable. Although there is strong civil-

ian-military cooperation to the extent that all positions in the Ministry of Defence are staffed with a civilian and a military of the same rank, the balance between the two remains shaky. This is exacerbated by the lack of written formal rules in line with the British constitutional traditions.<sup>43</sup>

In 2010 military planning began showing a stronger focus on efficiency. A Strategic Defence and Security Review was conducted and a National Security Council established. This Council was aimed at making decisions about security issues more transparent. Furthermore, bilateral defence cooperation with France was significantly strengthened. The default reflex, however, remained reliance on an alliance with the USA.<sup>44</sup> While changes in the strategic culture are visible, the UK remains a 'middle-ranking power ... [with a] level of ambition in international security policy [that] could scarcely be higher'.<sup>45</sup> The influence of Brexit on strategic cultures remains to be determined.<sup>46</sup> This has led to the assumption that the UK's proactive stance on military means will lead to the preferred use of instrumentalist understandings of international law and a greater willingness to interpret international law in a way that will align with the intention to use force.

## 3.2 Patterns of Legal Justifications

The following part provide an overview of the three patterns of legal justifications used in the present work. These categories mirror closely the theoretical debates conducted in the field of international legal theory.<sup>47</sup>

### 3.2.1 Formalism

Formalism as a theoretical concept is based on law as it is written or conducted. It does not rely on ideas of power or moral acting as spheres outside the law.<sup>48</sup> Formalism is concerned mainly with what rules constitute law and what is meant by law. It is therefore necessary to identify which rule can be considered as law and what this rule means. One way of doing so is the source thesis. If a rule meets the criteria set up to make a rule law, it can be said that it is law.<sup>49</sup> Another possibility is the social thesis. A rule becomes law if it is socially accepted as law. According to this theory, law arises out of two social rules, the primary rule of obligation and the secondary rule of recognition. Taken together, these result in the socially constructed habitual obeying of laws by

36. Hilpert, above n. 14, at 137-66.

37. Contra: Kraft, above n. 33, at 69-70.

38. K. Oppermann, 'Between a Rock and a Hard Place? Navigating Domestic and International Expectations on German Foreign Policy', 28 *German Politics* 482, at 484-7 (2018).

39. M. Britz, 'Continuity or Change? British Strategic Culture and International Military Operations', in M. Britz (ed.), *European Participation in International Operations. The Role of Strategic Cultures* (2016) 151, at 151-3; P. Cornish, 'United Kingdom', in H. Biehl, B. Giegerich & A. Jonas (eds.), *Strategic Cultures in Europe. Security and Defense Policies across the Continent* (2013) 371, at 371; McCormack, above n. 11, at 27.

40. Cornish, above n. 39, at 371.

41. Britz, above n. 39, at 153; A. Dorman, 'United Kingdom', in H. Meijer and M. Wyss (eds.), *The Handbook of European Defence Policies and Armed Force* (2018) 71, at 71-6.

42. Britz, above n. 39, at 154; Dorman, above n. 41, at 76-7.

43. Britz, above n. 39, at 159, 171.

44. *Ibid.*, at 171.

45. Cornish, above n. 39, at 383.

46. For an overview of Brexit and British defence, see R. Johnson and J.H. Matlary (eds.), *The United Kingdom's Defence after Brexit* (2019).

47. For an overview see A. Orford and F. Hoffmann (eds.), in A. Orford and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (2016), on the use of formalism/instrumentalism among others M. Koskeniemi, 'What Is International Law For?', in M. Evans (ed.), *International Law* (2010) 32.

48. J. Kammerhofer, 'International Legal Positivism', in A. Orford and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (2016) 407, at 408-11.

49. J. D'Aspremont, *Formalism and the Sources of International Law* (2011), at 12-14.



the majority of its subjects.<sup>50</sup> Both theses do not sufficiently answer how law should be applied and what content it has. Interpretation remains crucial and has to be separated from the question of the legal form of a rule.<sup>51</sup> In formalist interpretations justice and legality are measured in terms of the fulfilment of procedural standards. If these are met, a decision can be considered lawful.<sup>52</sup>

### 3.2.2 Instrumentalism

Instrumentalist understandings of law are based on power and the state's will. This incorporates some strains of realist and positivist approaches to international law. In instrumentalist understanding, law and its invocation in the political debate are not an end in themselves but a means to foster other goals that a given state considers necessary. In this concept there is no viable distinction between legal disputes and political conflicts.<sup>53</sup> Starting from the question of the state's compliance with international law, Keohane<sup>54</sup> offers a compelling overview of instrumentalist understandings of law based on game theory. International law as a set of rules matters as it influences the interest calculation made by actors. It creates defined opportunities and restrictions. Compliance can be expected in situations in which adherence to law is in the state's interests. Nevertheless, if a situation arises in which the state's interest diverges from law, the state will find ways to modify, reinterpret or circumvent it. The more vital and strong the interest of a state, the more reinterpretation can be expected.

### 3.2.3 Natural Law

Natural law ultimately relies on notions of morality. It requires the grounding of a legal system in external factors. This entails the notion that something beyond the realm of the will of states or ordinary human beings – a guiding, higher moral order – is the source of law. The order may be derived from God's rules, the common humanity or the reason of every human being.<sup>55</sup> A central feature of natural law theories is arguments about just warfare, which often take the form of war as law enforcement.<sup>56</sup> During the Middle Ages and the Enlightenment many competing versions of natural law thought existed. They were invoked mostly as barriers against arbitrariness and as protection for the individual.

Gradually the idea of a God-given order became less prominent, replaced by the notion of a unified humanity and then by the concept of inalienable individual rights and contractual relationships between free human beings.<sup>57</sup>

## 3.3 Legal Questions Surrounding the War against ISIS

The military actions against ISIS are connected to a vast array of legal problems. While the general prohibition on the use of force may act as a restraint against interventions, various understandings of self-defence as well as concepts of Just War, humanitarian intervention and R2P as well as the unclear wording of Res. 2249<sup>58</sup> can be used to justify action against ISIS.

Formalist and instrumentalist understandings of international law concern the illegality of the use of force and various understandings of self-defence. According to Article 2 (4) UN-Charter,<sup>59</sup> the use of force is illegal if it is not based either on an authorisation by the Security Council or on self-defence.<sup>60</sup> The support of insurgents may be considered as indirect violence and is thus illegal, as well as interventions on behalf of insurgents. Intervention on behalf of the government is not an illegal use of force as long as there has been an invitation by the lawful government.<sup>61</sup>

Article 39 UN-Charter empowers the Security Council to determine the existence of a threat to the peace, breach of the peace or act of aggression and decide on measures necessary in order to maintain or restore international peace and security. The Council is relatively free to decide what situations may be regarded as falling within this scope. Once this decision is made, however, military measures according to Article 42 UN-Charter are possible.<sup>62</sup> This authorisation might be given by Res. 2249. Furthermore, the resolution might foster a broad understanding of the right to self-defence. Far from giving a clear-cut answer, however, this resolution is ambiguous in its wording. Problems surround the binding power of the resolution as well as the actual scope of authorisation.<sup>63</sup>

50. *Ibid.*, at 15-16; H.L.A. Hart, *The Concept of Law* (1994), at 100-10.

51. D'Aspremont, above n. 49, at 15.

52. Hart, above n. 50, at 157-60; see also M. Kramer, *In Defense of Legal Positivism. Law without Trimmings* (2003), at 23-4.

53. P. Danchin, 'Beyond Rationalism and Instrumentalism: The Case for Rethinking U.S. Engagement with International Law and Organization', 28 *SAIS Review of International Affairs* 79, at 83 (2008); O. Jüterssonke, 'Realist Approaches to International Law', in *The Oxford Handbook of the Theory of International Law* (2016) 327, at 336-42; S. Neff, *War and the Law of Nations: A General History* (2005), at 161-2.

54. R. Keohane, 'International Relations and International Law: Two Optics', 38 *Harvard International Law Journal* 487, at 489-91 (1997).

55. A. Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law', 5 *Social and Legal Studies* 321, at 323-7 (1996); G. Gordon, 'Natural Law in International Legal Theory: Linear and Dialectic Presentations', in A. Orford, and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (2016) 279, at 282-3.

56. Neff, above n. 53, at 54-7.

57. A.M. Gonzalez, 'Natural Law as a Limiting Concept: A Reading of Thomas Aquinas', in A.M. Gonzalez (ed.), *Contemporary Perspectives on Natural Law. Natural Law as a Limiting Concept* (2008) 11, at 11-12; Gordon, above n. 55, at 287-8.

58. SC Res. 2249 (2015).

59. Also in the following: Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

60. Y. Dinstein, *War, Aggression and Self-Defense* (2017), at 89-91, 329-39.

61. *Ibid.*, at 125-9; A. von Arnould, *Völkerrecht* (2019), at 480.

62. Dinstein, above n. 60, at 329-39; von Arnould, above n. 61, at 484-8.

63. D. Akande and M. Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution', *EJIL Talk!* (2015), <https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> (last accessed 24 February 2021); A. Deeks, 'Threading the Needle in Security Council Resolution 2249', *Lawfare Blog* (2015), <https://www.lawfareblog.com/threading-needle-security-council-resolution-2249> (last accessed 24 February 2021); P. Hilpold, 'The Fight against Terrorism and SC Resolution 2249 (2015): Towards a More Hobbesian or Kantian International Society?' 55 *Indian Journal of International Law* 535, at 536-7 (2015).



Self-defence, according to Article 51 UN-Charter, is a temporarily restricted right held by every state to the individual or collective use of force in response to an armed attack.<sup>64</sup> There is considerable debate about the scope of this right. The traditional reading of Article 51 UN-Charter refers to self-defence being applicable against armed attacks by states only.<sup>65</sup> Nevertheless, in the context of the war against ISIS it is directed against a non-state actor. While the wording of Article 51 UN-Charter does not explicitly exclude this – only the attacked one has to be a state<sup>66</sup> – questions regarding sovereignty arise. The self-defence actions will always infringe on the territorial sovereignty of a state. In order to solve the inherent contradiction and tension between the right to self-defence against non-state actors and territorial sovereignty, both the British<sup>67</sup> and the German governments<sup>68</sup> have invoked the notion of unable-or-unwilling which gives self-defence leverage over territorial sovereignty.<sup>69</sup> The basic argument of this formula is that if a state is unable or unwilling to prevent armed attacks by non-state actors emanating from its territory, self-defence trumps sovereignty.

While international law has precedence, European law has to be considered as well. The mutual defence clause of Article 42 (7) Treaty of the European Union<sup>70</sup> offers another ground for the use of force. It obliges all member states to offer aid and assistance to any member state that is a victim of armed aggression on its territory.<sup>71</sup> This framework was invoked by the French government as a response to the Paris attacks.

The questions about self-defence against non-state actors reflect back towards the understandings of international law. Formalist understandings entail all arguments that refer back to the legality of the use of force based on the formal Charter-law. This includes the general prohibition on the use of force and the reading of Res. 2249 in cases where it is read as permission to use force, since it is based on the grounds of a Security Council resolution. Connected to this is the question of

self-defence. If it is based on Article 51, it can be seen as a formalist argument. Unable-or-unwilling can be seen as either formalist or instrumentalist depending on how this issue is framed. It might be a formalist concept – in the way that unable-or-unwilling is consistent with the procedures of the Charter. It could also be an instrumentalist one – if reference is made to using force across borders and thereby catching the gist of the formula without the formalistic cover. The invocation of EU law shows an instrumentalist approach in the sense that UN law would have been the only formally valid legal framework for deciding on the legality of the use of force.

Natural law understandings, however, are focused on theories of Just War, humanitarian intervention and the R2P. Given the stunning number of atrocities committed by ISIS, the R2P or a wider Just War framework could be invoked. The main starting point is the assumption that peace is the norm and war an exception to be justified. Thus, warfare is considered as an act analogous to domestic law enforcement – essentially, the enforcing of international law by means of warfare. Just War thinking rose to new prominence in the 20th century, and UN-Charter can be read along these lines. With the general prohibition of violence, peace as a natural state and war as its aberration was established. The enforcement actions authorised by the Security Council were originally intended to be conducted by a standing UN army as consequence of a former wrongdoing – the threat to or breach of the peace. It therefore resembles a law enforcement action. However, given the background of the Cold War, the Just War elements were constrained by politics.<sup>72</sup>

Renewed interest in Just War thinking started in the late 1970s and was further enhanced by the lack of serious efforts to protect civilians during the Rwandan genocide and the atrocities in Yugoslavia.<sup>73</sup> This culminated in the ideas of humanitarian intervention and, ultimately, the R2P.<sup>74</sup> These interventions take place on the fault line between two competing norms: non-intervention, equal sovereignty of states and the general prohibition of the use of force, on the one hand, and the protection of human rights and the prevention of mass atrocities and genocide on the other.<sup>75</sup> The Kosovo War sharpened the contrasts. Western governments and lawyers argued for the legality, or at least legitimacy, of the intervention. This led to the idea that war was illegal but morally necessary.<sup>76</sup> With regard to the potential for misuse, these concepts are highly contested, mainly by

64. Dinstein, above n. 60, at 205-13, 253-5; on the armed attack requirement: T. Ruys, *Armed Attack' and Art. 51 of the UN-Charter. Evolutions in Customary Law and Practice* (2013).

65. See, for example, R. van Steenberghe, 'The Law of Self-Defence and the new Argumentative Landscape on the Expansionist's Side', 29 *Leiden Journal of International Law* 43, at 43-5 (2016).

66. S. Murphy, 'Terrorism and the Concept of Armed Attack in Art. 51 of the U.N. Charter', 43 *Harvard International Law Journal* 41, at 50 (2002).

67. A. Lang, 'Legal Basis for UK Military Action in Syria', *House of Commons Briefing Paper* 7404 (2015), <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7404#fullreport>, at 14-15.

68. Wissenschaftlicher Dienst des Bundestags, 'Sachstand. Staatliche Selbstverteidigung gegen Terroristen. Völkerrechtliche Bewertung der Terroranschläge von Paris vom 13. November 2015', WD-2-3000-203/15, at 12.

69. Mainly developed by A. Deeks, 'Unable or Unwilling. Towards a Normative Framework for Extraterritorial Self-Defense', 52 *Virginia Journal of International Law* 483 (2012).

70. Consolidate Version of the Treaty of the European Union OJ C 326, 26 October 2012, 13-390.

71. P. Koutrakos, 'External Action: Common Commercial Policy, Common Foreign and Security Policy, Common Security and Defense Policy', in C. Chalmers and A. Anthony (eds.), *The Oxford Handbook of European Union Law* (2015) 217, at 291.

72. J. Brunnée and S. Toope, 'Slouching Towards New Just Wars: The Hegemon after September 11th', 18 *International Relations* 405, at 408-9 (2004); Neff, above n. 53, at 323-5.

73. D. Zupan, *War, Morality, and Autonomy. An Investigation into Just War Theory* (2004).

74. G. Evans, *The Responsibility to Protect* (2009).

75. von Arnould, above n. 61, at 522-3.

76. For the shape of the legal argument see M. Koskeniemi, 'The Lady Doth Protest Too Much – Kosovo, and the Return to Ethics in International Law', 65(2) *The Modern Law Review* 159-75, at 159 (2002); for a variant of the moral necessity argument see: B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *European Journal of International Law* 1, at 14 (1999).

Table 1 Generalised Outcome Scheme

	Decisive (absolute majority)	Dominant (relative majority)	Influencing (not majority, but not smallest number)	Minority Position (smallest number of arguments)
Instrumentalism	Case X	Case Y		
Formalism			Case X	Case Y
Natural Law			Case Y	Case X

non-Western countries. In the end, they do not significantly change the *ius ad bellum* and the prohibition of the use of force.<sup>77</sup>

In the framework of these concepts, formalistic proceedings are essentially coloured by moral arguments and the inclusion of some higher metaphysical order. International law is thus understood as natural law if these legal justifications are used.

### 3.3 Hypotheses

Treating strategic culture as the independent variable raises several hypotheses about the use of legal justifications in Germany and Britain. It is expected that in Germany formalist arguments will prevail, while the UK will refer to instrumentalist arguments. Those will be decisive or at least dominant. Furthermore, in line with the theoretical premises of strategic culture, it is argued that the overall distribution of arguments in the legal understandings will be roughly equal on all levels, i.e. formalist arguments will prevail in Germany on all levels, instrumentalist in Britain.

### 3.4 Methods

The methods used in this work are based on the methodological foundation of content analysis. Applying this technique to speeches made in parliament offers important insights into the legal justifications made. This relies on the theoretical framework put forward by Geis *et al.* (2013).<sup>78</sup> In a second step, the justifications derived from the speech acts will be placed on a scheme between the three legal understandings.

#### 3.4.1 Content Analysis of Parliamentary Debates

Content analysis offers a viable route for studying the legal justifications for and against the use of force made in parliament. These arguments reflect back on the constraining and the permissive factors bearing on the use of force in democratic countries.<sup>79</sup> This means seeing speech as a performative act that illuminates the wider cultural and argumentative landscape shared in a political community – in the case of the use of force, this is the strategic culture of a country – since arguments presented in parliament are under constant scrutiny by

the political opponent and the public and have to be defended against counterarguments.<sup>80</sup>

Parliamentary debates therefore offer a greater insight into the arguments used by political elites than do statements by the government or similar documents. Given this theoretical background, a differing strategic culture should lead to differing permissive and restraining arguments across cases as well. Furthermore, it can be expected that the distribution of arguments in favour of and against the use of force among the three categories will be roughly similar in each case – if, for example, a country's strategic culture favours arguments based on natural law, it can be expected that the argument for going to war as well as those against it will be based mainly on natural law, since this type of argument will be the most persuasive.

The debates will then be analysed for the argumentative patterns according to the categories on the state level (government and opposition in Germany and the UK taken together), the government level (arguments put forward by both governments) and the opposition level (arguments brought forward by both oppositions). This affords a more in-depth analysis. In the next step, the most prevailing arguments in favour of and against the use of force in each country across government and opposition will be analysed. This further step is necessary since it is possible that speakers make arguments for and against the use of force in one speech, and it is therefore not sufficient to distinguish by opposition and government alone. If the majority of arguments in a country can be placed into one category and the majority of those of the other country in a different category, it will be reasonable to assume that a differing strategic culture is the cause of this.

#### 3.4.2 Outcome: Scale between Formalism, Instrumentalism and Natural Law

The outcome of the content analysis will allow for the countries to be placed on a scale regarding the understanding of law prevailing in the arguments most often used. This scale consists of three understandings based on the alleged nature of international law: international law as formalism, international law as instrumentalism and international law as a form of natural law. This then allows the cases to be organised according to the following scheme (Table 1):

77. Dinstein, above n. 60, at 75-7; M. Vashakmadze, 'Responsibility to Protect', in B. Simma, D.-E. Khan, G. Nolte, A. Paulus & N. Wessendorf (eds.), *The Charter of the United Nations. A Commentary* (2012) 1201, at 1236.

78. Geis, Müller & Schörnig, above n. 2.

79. *Ibid.*, at 34.

80. *Ibid.*, at 36.

In this scheme, *decisive* refers to the understanding of international law that encompasses an absolute majority of arguments (measured in percentage). A case will be classed under *dominant* if a majority (but not absolute majority) of arguments can be sorted under a given understanding. *Influencing* refers to understandings that contain fewer arguments than the majority (thus not *dominant*) but not the fewest arguments per understanding. This is reflected by *minority position*. If two cases share the same number of arguments per understanding, they will be classed into the higher category. Since it is statistically unlikely that two cases will have exactly the same percentage, cases will be sorted into different categories only if they differ by two percentage points or more – given the low number of arguments in some levels of analysis.

As a result, every case has to be represented in the scheme three times, once for every understanding of international law (as shown by the fictional cases X and Y in the preceding illustration).

## 4 Data Set and Coding Scheme

The data set consists of 213 speeches (including interventions or questions in parliament that are treated as speeches) given in nine parliamentary debates. Starting with the first debate held in one of the two parliaments on 26 September 2014, it contains all debates held in Germany (Bundestag) and Britain (House of Commons) until the end of 2018. Seven of those debates are German,<sup>81</sup> while two are British.<sup>82</sup>

A total of 55.4% of the speeches were given by members of the government and 44.6% by opposition members (both German and British). In Germany the government-to-opposition ratio is 50.8% to 49.2%. In the United Kingdom, this ratio is 57.2% to 42.8%.

81. Held on 2 December 2015, Plenarprotokoll 18/142, <https://dip21.bundestag.de/dip21/btp/18/18142.pdf> (last accessed 24 February 2021); on 4 December 2015, Plenarprotokoll 18/144, <https://dip21.bundestag.de/dip21/btp/18/18144.pdf> (last accessed 24 February 2021); on 20 October 2016, Plenarprotokoll 18/196, <https://dip21.bundestag.de/dip21/btp/18/18196.pdf> (last accessed 24 February 2021); on 10 November 2016, Plenarprotokoll 18/199, <https://dip21.bundestag.de/dip21/btp/18/18199.pdf> (last accessed 24 February 2021); on 21 November 2017, Plenarprotokoll 19/2, <https://dip21.bundestag.de/dip21/btp/19/19002.pdf> (last accessed 24 February 2021); on 12 December 2017, Plenarprotokoll 19/4, <https://dip21.bundestag.de/dip21/btp/19/19004.pdf> (last accessed on 24 February 2021); and on 18 December 2018, Plenarprotokoll 19/58, <https://dip21.bundestag.de/dip21/btp/19/19058.pdf> (last accessed on 24 February 2021).

82. Held on 26 September 2014, 'Iraq: Coalition Against ISIL', Hansard Vol. 585: debated on Friday 26 September 2014, <https://hansard.parliament.uk/Commons/2014-09-26/debates/1409266000001/IraqCoalitionAgainstISIL> and 'ISIL in Syria', Hansard Vol. 603: debated on Wednesday 2 December 2015, <https://hansard.parliament.uk/commons/2015-12-02/debates/15120254000002/ISILinSyria>.

The coding scheme draws on the codes developed by Geis *et al.*<sup>83</sup> and substantially refined by Wagner.<sup>84</sup> Given that in their work the focus is on the political reasons for the use of force and not the legal justifications, adaptations have to be made. The aforementioned authors provide a rather broad coding scheme concerning international law – for example, *enforcement of international law*; *support of the UN, covered by international law*, and *lack of UN mandate/weakening of UN through war*. Codes such as *Enemy Image*, *Warfare as Punishment* and *Solidarity with allies* are based on the work by Wagner.<sup>85</sup> Every argument made by speakers that can be considered as a legal justification for the use of force will be sorted into one of the codes. In this context, argument is understood as a logical connection between the presence or absence of a given legal concept (the code) that therefore allows or precludes the use of force. This creates a data set that is open to statistical, qualitative and quantitative research. The actual coding has been done by the author using the software Nvivo.

The codes are divided into the three understandings of international law. The codes are designed to cover both explicit and implicit references to legal debates and justifications for the use of force. For example, the concept of unable-or-unwilling is used as a coding of its own as well as in connection with Res. 2249 and the use of force across borders. This serves a dual purpose: it allows differing understandings of international law to be covered, and also reduces coder bias since explicit references, i.e. naming the concept, as well as implicit reference to the legal elements of a concept will be included in the data set.

Formalism contains codes based on the formal procedures of international law. *Action should be with UN, not with nation states* covers the reference to the UN as a primary means of conflict resolution and a reduction of state's interests. *Self-defence according to Article 51, Collective self-defence according to Article 51, no situation of self-defence according to Article 51, Self-defence should be based on UN law (not EU law), No self-defence according to EU law* and *Self-defence according to EU law* are included since they reflect the formalist approach set out in the charter – with Article 51 being an exception to the general prohibition of the use of force and the primary role of UN law in the realm of war and peace. This primary role is explicitly referred to in Article 42 (7) TEU. *Covered by international law* and *Not covered by international law* are included in formalism since this argument is essentially legalistic. While no specification about the actual basis of the coverage is given, the argument does not include interests, power or morality. *Invitation by government* and *No invitation by government* reflect back to the formal legal basis of an intervention by invitation. *Res. 2249 allows use of force* and *Res. 2249 precludes use of force* are formalist arguments in the sense that they refer back to the legal

83. Geis, Müller & Schörnig, above n. 2, at 40-1.

84. Wagner, above n. 3.

85. *Ibid.*



grounding in UN procedures, with the Security Council authorising the use of force by means of a resolution. Analogous to *Covered by international law*, the codes *Unable-or-unwilling against international law* and *Unable-or-unwilling consistent with international law* cover arguments that ask for the formal validity of this concept (as opposed to *Force can be used across borders* as an instrumentalist code).

Instrumentalism contains codes that refer back to the tinkering with international law in the name of state's interests. *Against national interest and security*, *National interest and security*, *Fostering international influence*, and *Diminishing international influence*, *International consensus against use of force*, *International consensus for the use of force*, and *Solidarity with allies* capture arguments that make the state's interest explicit. The same line of reasoning is present in *Counter threat (no situation of self-defence or direct attack suffered)*. Rather than formally through Article 51, it is the interest and the subjectively perceived threat that produces (il)legality. These codes could be considered to be covering extralegal aspects and therefore not grasping arguments about international law per se. However, it is a choice to argue for a counter-threat situation and not for self-defence. This reflects the value and importance that is given to law as well as the idea about how law is generated. Along the lines of American and Scandinavian legal realism, it can be argued that the normativity of law derives from observable social facts. Law is responsive to changes in behaviour.<sup>86</sup> Thus, seemingly extralegal arguments become legal and may create new law. Another cluster of codes incorporates arguments about the circumvention of formal constraints – such as disagreement in the Security Council and therefore the inability to reach a decisive decision, a state of exception that leaves no room for deliberation or the support for the UN's true intention, which are interpreted by the state – based on the intention of states but not on morality. These codes are *Blockade in Security Council allows use of force without resolution*, *State of exception makes legality less important*, and *True intentions of UN supported by warfare*. *Force can be used across borders* is the instrumentalist framing of the unable-or-unwilling formula.

Natural law includes codes that refer back to morality. *Moral arguments preclude warfare or warfare as a breach of norms* covers the morality aspect in the broadest way. *Just War* and *Responsibility to Protect* are used if a speaker refers explicitly to these concepts. In order to cover all criteria of these concepts, further codes such as *Humanitarian catastrophe and protection of locals*, *Just cause* and *No just cause given*, *Last resort*, *peaceful means exhausted*, *Peaceful means not exhausted*, *Proportionality of means given*, *No proportionality of means given*, *Prospect of success given*, *No sufficient prospect of success given*, *Rightful authority given*, *No rightful authority given*, and *Right intention, warfare as morally justified*. This is done in order to cover speakers that refer to the single elements of the concept as well as those that name it. *Ene-*

*my image* and *Enemy image not sufficient* cover another layer of morality-based arguments in the sense that degrading the enemy upgrades one's own position and moral standpoint. The enemy is portrayed as essentially wicked and evil. *Warfare as enforcement of international law*, *Warfare as punishment* and *Warfare should not be used as punishment* ask for the reasons for going to war that were often given in Just War theories.

## 5 Findings

The findings are presented in five steps. The first step of the analysis will be the state level, where the overall distribution of arguments is compared. In the second step the arguments made in favour of and against the use of force advanced by the governments and, in the third step, by the oppositions, respectively, will be compared. This allows for the cases to be placed on the scale between the three understandings of international law. The analysis led to evidence of strategic culture being modestly influential. Formalism is dominant on the state level in Germany, but instrumentalist and natural law understandings are both influencing. Instrumentalism is dominant on the state level in Britain. However, there are similarities between the cases: both governments rely heavily on instrumental arguments. The German opposition, however, focuses mainly on formalist arguments, while the British opposition offers natural law-based arguments. Thus, the findings run counter to the assumption that the overall distribution of arguments should be roughly comparable.

### 5.1 State Level

The state level shows differences between the two cases. In Germany 37.0% of arguments are formalist, 31.1% instrumentalist and 31.8% natural law arguments. In the UK 19.3% are formalist arguments, 41.6% are instrumentalist and 39% are natural law arguments (Figure 1).

It shows a clear difference in the prevalence of arguments. In Germany, a majority of arguments are formalist, rendering this understanding dominant. However, there are a significant number of instrumentalist and natural law arguments in Germany. Since these differ by less than 1%, both are considered to be influencing. In the UK significantly more arguments are based on instrumentalism and natural law than on formalism. Here, instrumentalism is dominant. Thereby, the hypothesis is validated: the UK relies on instrumentalist and natural law arguments to a higher degree, while Germany uses more formalist arguments. However, the large number of arguments based on instrumentalism in Germany indicates modest evidence for a causal relationship between strategic culture and understandings of international law only.

86. Jütersonke, above n. 53, at 328-36.



Figure 1 Comparison of Formalism, Instrumentalism and Natural Law on the State Level Germany/UK (as of percentages per category) Figures and tables have been designed and compiled by the present author.

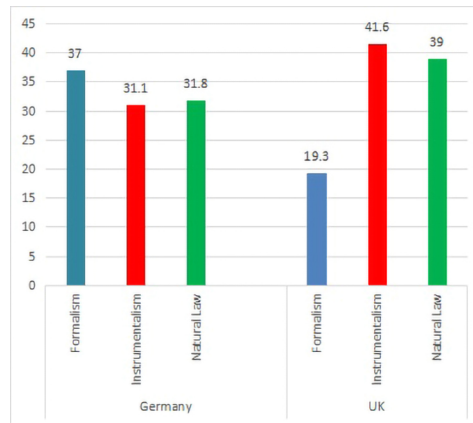
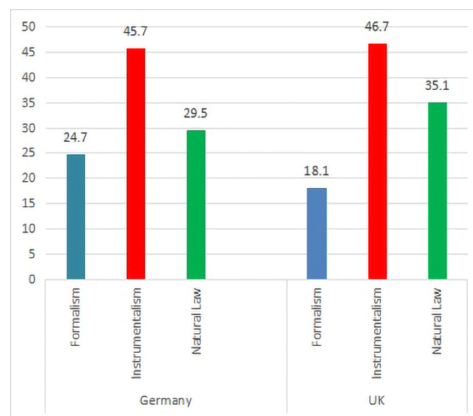


Figure 2 Justifications Offered by the German and British Governments (as of percentages per category)



## 5.2 Government Level

Comparing the arguments set forth by both governments leads to modest evidence concerning the hypotheses. A total of 24.7% of arguments by the German government are formalist, 45.7% are instrumentalist and 29.5% are natural law arguments. In the UK 18.1% are formalist arguments, 46.7% instrumentalist and 35.1% natural law (Figure 2).

While the German government uses more formalist arguments, a majority of arguments are instrumentalist in both cases. Thus, instrumentalist understandings are dominant in both cases. The British government uses more natural law arguments. Again, this is modest evidence regarding the hypotheses. Formalist arguments are more important to the German government but not to the extent of becoming more important than instrumentalist arguments. However, the hypothesis is validated with regard to the relatively higher reliance on instrumentalist and natural law arguments in Britain. The hypothesis, however, is refuted on the basis that the distribution of arguments is not similar between levels of analysis.

## 5.3 Opposition Level

In Germany 53.9% of the arguments made by the opposition are formalist, only 9.5% are instrumentalist and 36.5% are natural law based. In Britain 21.3% are for-

malist, 32.3% instrumentalist and 46.4% natural law arguments (Figure 3).

The heavy reliance on formalist arguments and the sparse use of instrumental arguments by the opposition in Germany run along the lines of the hypotheses. Formalism is dominant in the case of the German opposition. In Britain a relative majority of arguments are natural law based, while instrumentalism is the second strongest category. While this is in line with the expected outcomes, the distribution of arguments is not similar across the government and the opposition, thereby refuting the hypothesis. This is blatant in the case of Germany, but traceable in the British case as well.

## 5.4 Arguments Supporting the Use of Force

The next step analyses arguments supporting the use of force across categories and across government and opposition. This is necessary since not every argument made by the government or the opposition might be an argument in favour of or against the use of force, respectively. In both cases – contrary to the hypothesis – instrumentalist approaches dominate (47% in Germany and 44.8% in the UK). Natural law arguments do play a more important role in the UK, with 42.2% of arguments following a natural law understanding (29.2% in Germany). Formalism is a minority position in both cases, with 23.8% of arguments in Germany and 13.1%

Figure 3 *Justifications Offered by the German and British Opposition (as of percentages per category)*

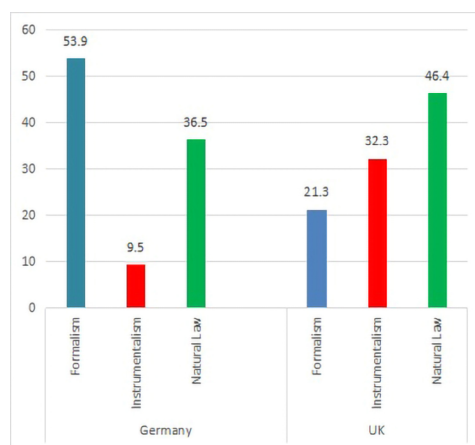
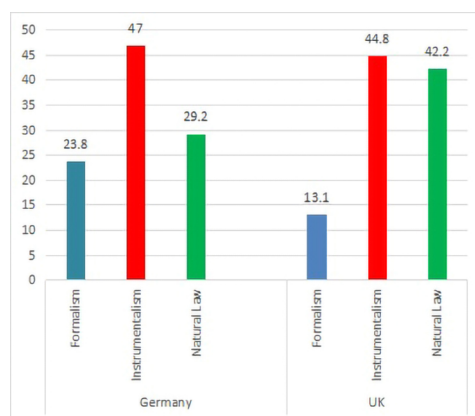
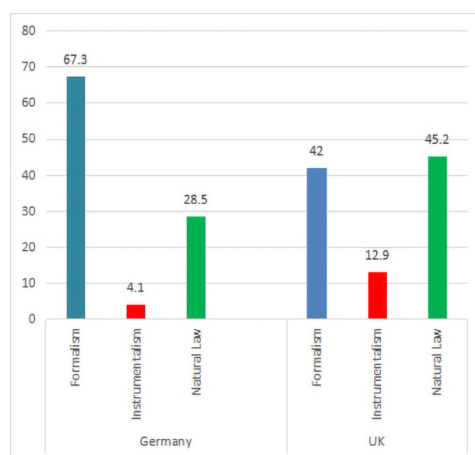


Figure 4 *Arguments Supporting the Use of Force in Germany and the UK (as of percentages per category)*



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Figure 5 *Arguments against the Use of Force in Germany and the UK (as of percentages per category)*



of arguments in the UK. It differs, however, from the other levels of analysis, thereby challenging the hypothesis (Figure 4).

### 5.5 Arguments Made against the Use of Force

The next step analyses arguments against the use of force across categories and across government and opposition. Analogous to the previous step, this is necessary because not every argument made by the opposition might be an argument against the use of force. In Germany, formalist arguments against the use of force are decisive, with 67.3%. Natural law understandings are influencing with 28.5%, while instrumentalism is in

a clear minority position. In the UK, natural law arguments are dominant, with 45.2%, while formalist arguments are influencing, with 42.0%. Instrumentalist arguments are a minority position, with 12.9%. Contrary to the hypothesis, the pattern of distribution does not resemble the distribution regarding the arguments in favour of the use of force (Figure 5).

*UN-Charter, International consensus against use of force, and No sufficient prospect of success given* are used in Germany only. Given the decisiveness of formalist arguments, the hypothesis that Germany will rely more on

Table 2 *Placing of Germany/UK Regarding the State Level*

Decisive	Dominant	Influencing	Minority Position
Formalism	Germany		UK
Instrumentalism	UK	Germany	
Natural Law		Germany and UK	

Table 3 *Placing of Germany/UK Regarding the Arguments in Favour of the Use of Force*

Decisive	Dominant	Influencing	Minority Position
Formalism			Germany and UK
Instrumentalism	Germany/UK		
Natural Law		Germany and UK	

formalism is validated in regard to the arguments against the use of force.

### 5.6 Placing the Cases on the Scale

The results point towards modest overall evidence in favour of the hypotheses. The patterns of justification do differ along the lines of Germany having a higher number of arguments based on formalism, while instrumentalist and natural law arguments are more often used in Britain. While formalism is the legal justification that is most often used in Germany, natural law and instrumentalist understandings are used frequently.

The observation of modest evidence favouring the hypotheses, however, is challenged as soon as another level of analysis is included. According to the hypotheses, the distribution of arguments should be roughly similar regardless whether all arguments, the arguments by the government and the opposition or the arguments in favour of or against the use of force are examined. While the legal justifications brought forward by the British government are of comparable – though not the same – distribution to the state level, a clear shift towards instrumentalism is evident in the case of the German government. This contradicts the hypothesis.

A similar observation is made on the opposition level, where, at first glance the German case behaves as expected in showing a strong inclination towards formalism. This, however, stands in contrast to the observation made on the government level and therefore contradicts the hypothesis. This holds true for the British case as well.

A look at the arguments made in support of the use of force across the government-opposition divide shows a remarkable tilt in the German and the British case towards instrumentalism. Furthermore, in the UK natural law arguments are used more frequently. In both cases the arguments made against the use of force show a tilt towards formalism and natural law. The higher overall consensus in Britain is remarkable. All in all, this

presents – at best – modest evidence in support of the hypothesis.

In addition to that, the results pose serious challenges to the research framework of the present article. Had a clear distributive pattern spanning all levels of analysis emerged, the ranking of the cases on the scale would have been straightforward. With the results pointing to the contrary, this becomes problematic. One possible way forward might be discarding the placing on the scale. However, the ranking of cases and the inclusion of more cases in future research remains a possibility. Using the state level as a reference for placement covers the argumentative landscape, while analysing the arguments in favour of and against the use of force covers those arguments that are considered the most convincing. Making use of the latter has the advantage of circumventing the problem that a speaker may make arguments in favour of and against the use of force in the same speech.

This leads to the following placing for the state level (Table 2).

In the German case formalist understandings of international law are *dominant* but present a *minority position* in Britain. Instrumentalism is *dominant* in the UK and presents an *influencing* position in Germany, while natural law is *influencing* in both cases.

With regard to the arguments in favour of the use of force, the scale differs (Table 3).

Formalism is a *minority position* in both cases. The cases are similar in regard to natural law as well, which is *influencing*. Additionally, instrumentalism is *dominant* in Germany and Britain.

A look at the arguments against the use of force reveals a different outcome again (Table 4).

For Germany, the rejection of warfare on formalist grounds is *decisive*, while this plays only an *influencing*

Table 4 Placing Germany/UK Regarding the Arguments against the use of Force

	Decisive	Dominant	Influencing	Minority Position
Formalism	Germany	UK		
Instrumentalism				Germany and UK
Natural Law		Germany and UK		

role in Britain. However, in both cases instrumentalism is a *minority position* and natural law is *dominant*.

## 6 Conclusion

The analysis of legal justifications has led to results that often run counter to the hypothesis. There is evidence that strategic culture is modestly influential – the broader argumentative landscape on the state level differs, formalism being more important in Germany than in the UK. More striking, however, are the similarities. Instrumentalism is *dominant* in both cases when it comes to arguing in favour of the use of force. Formalism is *decisive* in Germany and still *influencing* and only slightly less relevant than natural law in the UK when it comes to arguing against the use of force. Furthermore, the findings run counter to the assumption that the overall distribution of arguments should be roughly equal on all levels of observation. Additionally, it became evident that the overall level of legal discussions was low, with relatively little reference made to actual legal concepts – it was even lower in Germany than in the UK. On the other hand, it is open to debate whether most codes in the category of formalism might signify a distinct legal concept and therefore present a sophisticated level of debate. The fact that natural law played an important role in both debates, however, reflects the similar standing of humanitarian concerns in both strategic cultures and the role of ethics to justify the use of force as well as the refusal to use military means.

This modest evidence leads to broader questions. German and British strategic cultures may be more alike than assumed and thereby may significantly challenge the research framework. Nevertheless, strategic culture is broader than legal justifications, and serious differences between the use of military force and the way warfare is conducted remain. Another means by which this result could be challenged is the structure of the codebook. A possible explanation for the outcome of the analysis might be the distribution of codes across the legal understandings.

Regardless of these limitations, the research design of the present work can be adapted to include more cases and to study more usages of force. The generalisability of the outcomes needs to be determined by further research. This includes building a larger data set and executing the coding by more persons in order to reduce possible coder bias. Given the prevalence of instrumen-

tal understandings in both cases, it may be assumed that these will play a major role in other democracies as well. The perception of the enemy might have influence on the perceived need to wage war regardless of formal arguments against it (as in the Kosovo War). ISIS has used massive violence in order to fulfil its goal and deliberately spread terror. The perceived direct threat stemming from ISIS may have contributed to the legal justifications. It may be absent in other military missions and may alter the legal justifications. The direct threat, however, could have been used to make formalist arguments based on self-defence instead of instrumentalist understandings. In addition to that, the modalities of a given use of force such as the question of what type of military involvement is expected might lead to different legal understandings. Thus, there might be a link between strategic culture, legal discourse and the modalities of intervention. Taking this into account would be beneficial for further research. Furthermore, it might be that the common membership in alliances has streamlined the countries' strategic culture, thereby giving credit to the second generation of research on strategic culture. That would further strengthen the previous findings<sup>87</sup> that in missions framed as alliance politics, internal constraints are often overridden. This might also be the case when it comes to legal justifications. Important further work along these lines would be on cases where moral condemnation and direct threat are largely absent. In addition, studying countries that are not part of a military alliance would be beneficial. Including uses of force with a rather clear-cut formal legal basis might lead to interesting results – will instrumental arguments prevail in cases that offer clear formal arguments? Adaptions on the level of the coding scheme may be necessary to include the legal particularities of other wars and to even out biases introduced in the coding scheme. The main trio, formalism, instrumentalism and natural law, however, can be used for further studies.

If instrumentalist arguments are an important part of the debate in the cases studied, what does this say about the importance of international law? The rather missing debate on actual legal concepts in parliament could be interpreted as law playing a minor role in decision processes in general. Furthermore, the present work's findings could be interpreted as supporting a realist reading

87. Wagner, above n. 5, at 130.



of international law – law and politics are inseparable.<sup>88</sup> This holds especially true given the current debates on the blockade in the Security Council and the deterioration of international law in general. It seems that formal law is invoked when this is in the interest of the speaker – as in the case of the German opposition – but is marginalised if national interest is concerned. The case of Germany, with its self-image of promoting a rule-based global order, lends this argument even more strength. If national security and power come into play, adherence to formal legal contents may be expected to drop – even though they are not completely abandoned. Further studies, however, are necessary. The question of strategic culture and its connection to international law is open to continuing research.

88. A. Fischer-Lescano and P. Liste, 'Völkerrechtspolitik. Zur Trennung und Verknüpfung von Politik und Recht der Weltgesellschaft', 12 *Zeitschrift für Internationale Beziehungen* 209, at 212 (2005).

# The Role of the Vienna Rules in the Interpretation of the ECHR

## A Normative Basis or a Source of Inspiration?

Eszter Polgári\*

### Abstract

The interpretive techniques applied by the European Court of Human Rights are instrumental in filling the vaguely formulated rights-provisions with progressive content, and their use provoked widespread criticism. The article argues that despite the scarcity of explicit references to the Vienna Convention on the Law of Treaties, all the ECtHR's methods and doctrines of interpretation have basis in the VCLT, and the ECtHR has not developed a competing framework. The Vienna rules are flexible enough to accommodate the interpretive rules developed in the ECHR jurisprudence, although effectiveness and evolutive interpretation is favoured – due to the unique nature of Convention – over the more traditional means of interpretation, such as textualism. Applying the VCLT as a normative framework offers unique ways of reconceptualising some of the much-contested means of interpretation in order to increase the legitimacy of the ECtHR.

**Keywords:** European Convention on Human Rights, European Court of Human Rights, techniques of interpretation, the Vienna Convention on the Law of Treaties

## 1 Introduction

The European Convention on Human Rights and Fundamental Freedoms (hereinafter Convention or ECHR) was adopted in 1950 and created undoubtedly the most successful human rights regime in the world. It was drafted in a particular moment of history; the founding fathers were driven by the desire to create an effective mechanism that was capable of preventing mass human rights violations and precluding further Communist subversion on the European continent.<sup>1</sup> The text was admittedly based on the Universal Declaration on Human Rights. The Preamble refers to the link between the two in the following terms: 'the governments of European countries ... take the first steps for the collec-

tive enforcement of certain of the rights stated in the Universal Declaration'.<sup>2</sup>

The Convention primarily guarantees civil and political rights and its text was far from being innovative; the geopolitical relations prevalent at the time of the drafting and the forced compromises left their mark on it. The formulation of rights reflects the drafters' strategy and motivation. Only non-controversial rights were included in the original text; the provisions embody the bare minimum states could agree on without a lengthy and heated negotiation process. The Convention textually offers rather generally worded minimal guarantees in comparison to the International Covenant on Civil and Political Rights that contains more detailed and fuller protection. The rights 'are expressed in sparse and abstract *universal* terms'<sup>3</sup> and are to be taken only as 'programmatic formulations',<sup>4</sup> which have been filled with content only through interpretation by the European Court of Human Rights (hereinafter ECtHR or Court). The interpretation of the text thus lies at the very heart of the European system's success and the creative solutions adopted by the ECtHR have triggered considerable amount of critique and resistance. The Court has confirmed numerous times that the ECHR is an international treaty,<sup>5</sup> yet the question remains open whether its interpretation conforms to the international – and customary law – standards.

The article explores the possibility of the sui generis nature of the Convention being reconciled with Articles 31–33 of the Vienna Convention on the Law of Treaties (hereinafter VCLT or Vienna rules) or – as some suggest – the Court having to bend or flexibly interpret these rules in order to accommodate the interpretation techniques it resorts to. In order to provide a frame of reference, it first reviews the relevant articles of the VCLT which had been endorsed by the Court even

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1. D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Law of the European Convention on Human Rights* (2018), at 3; B. Rainey, E. Wicks & C. Ovey, *Jacobs, White, and Ovey – The European Convention on Human Rights* (2017), at 3–4.

2. For a more detailed analysis of the relationship between the two documents see: M. Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (2017), at 321–4.

3. S. Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?' 3 *UCL Human Rights Review* 1 (2010).

4. L. Wildhaber, 'The European Court of Human Rights: The Past, the Present, the Future', 22 *American University International Law Review* 521, at 525 (2007).

5. See for example: *Rantsev v. Cyprus and Russia* 25965/04 (7 January 2010), para. 273.

before they entered into force. Although this acceptance – as discussed in part three – has not been called into question, it remains open to contestation whether the Vienna rules serve as a normative basis or merely a source of inspiration in the interpretation of the Convention. The last part examines how the Vienna rules are translated in the case-law of the ECtHR and seeks to demonstrate that all of the methods and doctrines of interpretation applied in the case-law do have basis in and may derive from the VCLT, and that the occasional slight departures are justified in light of the ‘object and purpose’ of the Convention. It argues that the interpretation of the ECHR is not in contradiction with or in denial of the Vienna rules, and despite the scarce explicit mentions, the jurisprudence remains committed to the interpretive framework laid down by customary international law and codified in the VCLT. When reviewing the Court’s interpretive techniques, the article will not address the doctrine of the margin of appreciation; it is understood as a standard of review based on the principle of subsidiarity and as such it falls outside the scope of the VCLT. As Ulfstein correctly notes, it does not instruct how the Convention has to be interpreted – it only distributes ‘the interpretational competence between the ECtHR and national organs’.<sup>6</sup>

## 2 Overview of the Vienna Rules

Interpretation is not a secondary process; ‘[a]ny application of a treaty ... presupposes ... a preceding conscious or subconscious interpretation of the treaty’.<sup>7</sup> As the International Law Commission famously put it: ‘the interpretation of documents is to some extent, *an art, not an exact science*’.<sup>8</sup> The general rules of interpretation for treaties are laid down in Articles 31–33 of the Vienna Convention on the Law of Treaties and these provisions are now considered to form part of customary international law.<sup>9</sup> Traditional academic scholarship differentiates between three methods or approaches to the inter-

pretation of international treaties: (1) the ‘objective’ method that relies primarily on the ordinary meaning of words (literal interpretation); (2) the ‘subjective’ approach that favours interpretation in line with the parties’ intent; and (3) the ‘teleological’ interpretation that places emphasis on the ‘object and purpose’ of the treaty.<sup>10</sup> In addition to these interpretive techniques, some take note of the systematic or contextual method that appreciates ‘the meaning of terms in their nearer and wider context’,<sup>11</sup> or complement the list with the logical method that applies ‘rational techniques of reasoning and ... abstract principles’.<sup>12</sup> These are not mutually exclusive approaches, however. As Shaw submitted, ‘any true interpretation of a treaty in international law [has] to take into account all aspects of the agreement, from the words employed to the intention of the parties and the aims of the particular document.’<sup>13</sup>

Articles 31–33 of the VCLT follow an integrated approach and endorse aspects of all the above doctrines. The ‘general rule’ of treaty interpretation is set forth in Article 31(1) according to which ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in the light of its object and purpose.’ The starting point of the process of interpretation is the text of the treaty, and the general rule of the VCLT requires ascertaining the ordinary meaning of its terms.<sup>14</sup> ‘Ordinary’ indicates that the meaning is ‘regular, normal or customary’;<sup>15</sup> it is not based on a layman’s understanding, but should rather follow the meaning ‘what a person reasonably informed on the subject matter of the treaty would make of the terms used’.<sup>16</sup> Mostly, the ordinary meaning cannot be determined in isolation; it is closely – or as Gardiner notes, ‘immediately and intimately’ – linked to the ‘context’ and the ‘object and purpose’ of the treaty.<sup>17</sup>

‘Context’ in Article 31(1) serves ‘as an immediate qualifier of the ordinary meaning of the terms used in the treaty’ and in this capacity it prevents ‘any over-literal approach to interpretation’.<sup>18</sup> It broadens the pool of materials that may be consulted when identifying the ordinary meaning, and adds the contextual means of interpretation which ensures internal consistency.<sup>19</sup> Article 31(2)–(3) details the sources or categories of evidence that may be used – ‘in addition to the text, including its preamble and annexes’ – to establish the ‘context’ referred to in the ‘general rule’: respect is paid

6. G. Ulfstein, ‘Interpretation of the ECHR in Light of the Vienna Convention on the Law of Treaties’, 24 *International Journal of Human Rights* 1, at 7 (2019).  
7. Schwarzenberger quoted in: O. Dörr, ‘Interpretation of Treaties’, in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A Commentary* (2018) 559, at 568.  
8. Quoted by P. Merkouris, ‘Introduction: Interpretation is a Science, is an Art, is a Science’, in M. Fitzmaurice, O. Elias & P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (2010) 1, at 8.  
9. Gardiner further emphasises that in addition to being accepted as customary international law, the Vienna rules are ‘not open to challenge’. R. Gardiner, ‘The Vienna Convention Rules on Treaty Interpretation’, in D.B. Hollis (ed.), *The Oxford Guide to Treaties* (2015) 475, at 476. See also: S. Sheeran, ‘The Relationship of International Human Rights Law and General International Law: Hermeneutic Constraints, or Pushing the Boundaries?’ in S. Sheeran and Sir N. Rodney (eds.), *Routledge Handbook of International Human Rights Law* (2013) 79, at 86; and Changfa Lo, *Treaty Interpretation under the Vienna Convention on the Law of Treaties. A New Round of Codification* (2017), at 34–47.

10. See for example: S. Dothan, ‘The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights’, 42 *Fordham International Law Journal* 765, at 766 (2019); or M.N. Shaw, *International Law* (2008), at 932.  
11. R.M.M. Wallace, *International Law* (2002), at 239–40.  
12. M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), at 422.  
13. M.N. Shaw, *International Law* (2003), at 839.  
14. Villiger, above n. 12, at 426.  
15. R. Gardiner, *Treaty Interpretation* (2015), at 183–4.  
16. Dörr, above n. 7, at 581.  
17. Gardiner, above n. 15, at 181.  
18. *Ibid.*, at 197.  
19. Villiger, above n. 12, at 427.

to both 'historical context' and 'forward-looking context'.<sup>20</sup> Paragraph (2) refers to those agreements and instruments that were drawn up between the parties in connection with the conclusion of the particular treaty, while paragraph (3) adds subsequent agreements and practice, and any relevant rules of international law<sup>21</sup> to the laundry list that have to be taken into consideration together with 'context'.<sup>22</sup>

Reference to the 'object and purpose' in Article 31(1) injects the teleological approach into treaty interpretation. Textually, together with 'context', these are 'modifiers to the ordinary meaning of a term which is being interpreted in the sense that the ordinary meaning is to be identified in their light'.<sup>23</sup> The concept of the 'object and purpose' is elusive. Buffard and Zemanek attempted to distinguish and define the two concepts in the following way:

[t]he object of a treaty is the instrument for the achievement of the treaty's purpose, and this purpose is, in turn, the general result which the parties want to achieve by the treaty. While the object can be found in the provisions of the treaty, the purpose may not always be explicit and be prone to a more subjective understanding.<sup>24</sup>

The fact that the singular form is used in the general rule suggests that it was intended to refer to 'a single overarching notion of the *telos* of the treaty as a whole'.<sup>25</sup> The VCLT does not specify where the 'object and purpose' may be found; traditionally, the title of the treaty, its preamble and some general clauses serve as sources.<sup>26</sup> Others also suggest that to establish the 'object and purpose', the full text of the treaty has to be consulted, and generally some intuition and common sense may also be helpful.<sup>27</sup> A treaty may have multiple 'objects and purposes'.<sup>28</sup> It is, however, important to note that all the mentions of the 'object and purpose' in the VCLT link it to the treaty itself either explicitly or through the use of a possessive pronoun. Hence, textually, the text does

not support taking the 'object and purpose' of a particular provision into account for interpretation.<sup>29</sup>

Finally, Article 31(1) of the VCLT grants a prime place to good faith. It is a subjective requirement addressed to the interpreter, and the concept is understood to operate on the presumption that the terms of the treaty are 'intended to mean something, rather than nothing'.<sup>30</sup> It relates to the prohibition to abuse rights or evade obligations, and it applies to the entire process of interpretation.<sup>31</sup> Some link good faith to the principle of effectiveness. Dörr, for instance, emphasises that the latter is 'a special application of the object and purpose test and the good faith rule and, therefore, an integral part of the general rule of interpretation laid down in Art 31'.<sup>32</sup>

Historical interpretation and recourse to the *travaux préparatoires* remained only supplementary means of interpretation as pronounced in Article 32.<sup>33</sup> Finally, Article 33 clarifies the interpretation of treaties authenticated in two or more languages; the provision – as a starting point – treats each version equally authoritative, unless the treaty itself indicates otherwise or the parties agreed on which text should prevail. The presumption is that terms have the same meaning in each authentic text. However, this presumption is rebuttable; the parties can make arrangements for potential discrepancies and prescribe which version should have precedence as indicated in paragraph 1, or if they have not done so, then paragraph 4 offers a solution.<sup>34</sup> Consequently, in case 'a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'.<sup>35</sup>

The 'general rule' detailed in Article 31 follows the 'crucible' approach: '[a]ll the various elements, so far as they are present in any given case, would be thrown into the crucible and their interaction would give the legally relevant interpretation'.<sup>36</sup> In sum, Article 31(1) combines

20. B. Çali, 'Specialized Rules of Treaty Interpretation: Human Rights', in D.B. Hollis (ed.), *The Oxford Guide to Treaties* (2012) 525, at 527.

21. Article 31(3) (c) is often labelled as a tool for systemic interpretation or as the reflection of 'the principle of systemic integration'. See for example: C. McLachlan, 'The Principle of Systemic Interpretation and Article 31(3) (c) of the Vienna Convention', 54 *International and Comparative Law Quarterly* 279, at 280 (2005); or U. Linderfalk, 'Who Are "the Parties"? Article 31 Paragraph 3(c) of the 1969 Vienna Convention, and the "Principle of Systemic Integration" Revisited', 55 *Netherlands International Law Review* 343 (2008).

22. VCLT Article 31(3): 'There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.'

23. Gardiner, above n. 15, at 211.

24. Quoted *ibid.*, at 213.

25. Dörr, above n. 7, at 585.

26. For example: Villiger, above n. 12, at 428.

27. Dörr, above n. 7, at 585-6.

28. Villiger, above n. 12, at 427.

29. See also: J. Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties', in S. Davidson (ed.), *The Law of Treaties* (2004) 167, at 180. Gardiner, however, notes that there are tribunals that invoke the 'object and purpose' of a particular provision. See Gardiner, above n. 15, at 220-1.

30. Villiger, above n. 12, at 425.

31. The principle of *pacta sunt servanda* is entrenched also in Article 26 of the VCLT.

32. Dörr, above n. 7, at 579. See also Gardiner, above n. 15, at 168.

33. Article 32 prescribes the following: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.' See also: A. Cassese, *International Law* (2005), at 179.

34. For a more detailed analysis see Villiger, above n. 12, at 454-62.

35. VCLT Article 33(4). The ECtHR in *James and Others* explicitly referred to Article 33 when interpreting 'in the public interest' in Article 1 of Protocol no. 1, and it opted for 'an interpretation that best reconciles the language of the English and French texts having regard to the object and purpose of Article 1 (P1-1)'. *James and Others v. the United Kingdom* 8793/79 (21 February 1986), A98, para. 42.

36. Yearbook of the International Law Commission (1966) vol. II, 95. The use of the singular rule was an intentional choice among the drafters,



three principles (interpretation in good faith, according to the ordinary meaning, which is determined in light of its ‘context’ and ‘object and purpose’).<sup>37</sup> One may argue that seemingly it gives priority to textual interpretation, and the ‘context’ and the ‘object and purpose’ of the treaty may be perceived as subordinated or secondary to that. However, there is consensus among scholars that no interpretive technique is superior to the others – they are of equal value and the formulation of the general rule is merely the reflection of ‘a logical progression’.<sup>38</sup>

### 3 The VCLT's Reception in the Case-law of the ECtHR – General Overview

To date, only a small portion of the judgments delivered by the ECtHR mentions explicitly the Vienna rules.<sup>39</sup> However, the present article argues that the scarcity of references does not indicate – as Letsas has submitted – ‘that the VCLT has played very little role in the ECHR case law’.<sup>40</sup> On the contrary, it seeks to demonstrate that the interpretive techniques and methods applied by the Court have basis in the ‘general rule’ set out in the VCLT.<sup>41</sup>

The ECtHR endorsed in *Golder v. the United Kingdom* – as ‘in essence generally accepted principles of international law’ – Articles 31–33 already, in 1975, five years before the VCLT entered into force.<sup>42</sup> In the case, the Court discussed at length the relevance and applicability of the VCLT and, arguably, settled the interpretive rules that have been applied in the jurisprudence ever

since.<sup>43</sup> The judgment embraced the ‘crucible approach’ and emphasised that ‘[i]n the way in which it is presented in the »general rule« in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.’<sup>44</sup> In the given case, the Court established that Article 6(1) contains the right of access to court ‘based on the very terms of the first sentence of Article 6(1) ... read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty ..., and to general principles of law’ without resorting to the supplementary means of interpretation set out in the VCLT.<sup>45</sup>

The Court in *Golder* accepted the VCLT as a guiding framework and as starting point for interpretation, and has reaffirmed this position numerous times.<sup>46</sup> Several judgments asserted that following the VCLT rules on interpretation is imperative; ‘as an international treaty, the Convention *must* be interpreted in the light of the rules of interpretation provided for in Articles 31–33 of [the VCLT]’;<sup>47</sup> while at times the Court appeared to have voiced a more cautious approach indicating that the VCLT is relevant, yet not the only source of guidance. In *Demir and Baykara v. Turkey*, for instance, the Court emphasised that ‘[i]n order to determine the meaning of the terms and phrases used in the Convention, the Court *is guided mainly* by the rules of interpretation provided for in Articles 31–33 of [the VCLT]’.<sup>48</sup> It also occurs that the Court merely recalls the relevant provisions of the VCLT under the heading of ‘International law and practice’,<sup>49</sup> ‘Relevant international law materials’<sup>50</sup> or ‘Relevant domestic law and practice and international texts’,<sup>51</sup> while other judgments contain a more focused summary of the applicable principles tail-

and this supports the ‘crucible’ approach. See: Gardiner, above n. 9, at 480.

37. Dörr, above n. 7, at 580.

38. M.D. Evans, *International Law* (2003), at 186.

39. As of 22 April 2021 eighty-one Grand Chamber judgments or decisions mentioned or discussed the VCLT. References to the VCLT are barely more frequent in Chamber judgments and decisions (in total eighty-eight). The Plenary Court invoked the rules of the VCLT ten times. In addition to Articles 31–33, it needs to be noted, however, that the Court or the authors of the separate opinions did not exclusively refer to Articles 31–33 (rules on interpretation): Article 26 (*Pacta sunt servanda*), Article 27 (*Internal law and observance of treaties*), and Article 28 (*Non-retroactivity of treaties*) were all mentioned several times. The present analysis relies predominantly on judgments and decisions delivered by the Grand Chamber as those offer the most comprehensive and detailed discussions on the role of the Vienna rules.

40. G. Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’, 21 *European Journal of International Law* 509, at 512 (2010).

41. Villiger accords less importance to the sheer number of explicit mentions and draws attention to the fact that the references are “persistently present” in the case-law. M.E. Villiger, ‘Articles 31 and 32 of the Vienna Convention on the Law of Treaties in the Case-Law of the European Court of Human Rights’, in J. Bröhmer, R. Bieber, C. Callies, et. al. (Herausgeber), *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress* (2005) 317, at 330. See also: J. Gerards, *General Principles of the European Convention on Human Rights* (2019), at 47–51.

42. *Golder v. the United Kingdom* 4451/70 (21 February 1975), A18, para. 29.

43. G. Letsas, ‘Intentionalism and the Interpretation of the ECHR’, in M. Fitzmaurice, O. Elias & P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (2010) 257, at 259.

44. *Golder*, above n. 42, para. 30.

45. *Ibid.*, para. 36.

46. *Hassan v. the United Kingdom* [GC] 29750/09 (16 September 2014), ECHR 2014-VI 1, para. 100.

47. See for example: *Magyar Helsinki Bizottság v. Hungary* [GC] 18030/11 (8 November 2016), para. 118.; *Mihalache v. Romania* [GC] 54012/10 (8 July 2019), para. 90; or *Rantsev*, above n. 5, para. 273.

48. *Demir and Baykara v. Turkey* [GC] 34503/97 (12 November 2008), ECHR 2008-V 395, para. 65 (emphasis added). The same formulation appears in *Saadi v. the United Kingdom* [GC] 13229/03 (29 January 2008), ECHR 2008-I 31, para. 61. In *Hirsi Jamaa and Others v. Italy* the Grand Chamber noted that the Court “draws on” the provisions of the VCLT, however, the subsequent discussion on the relevance of the Vienna rules dispels the doubts about their role and does not signal a firm deviation from the Court’s commitment. *Hirsi Jamaa and Others v. Italy* [GC] 27765/09 (23 February 2012), ECHR 2012-II 97, para. 170 (emphasis added). See also Ulfstein, above n. 6, at 2–3.

49. *E.g. Molla Sali v. Greece* [GC] 20452/14 (19 December 2018), para. 63.

50. *E.g. Al-Jedda v. the United Kingdom* [GC] 27021/08 (7 July 2011), ECHR 2011-IV 305, para. 47.

51. *E.g. Sabri Güneş v. Turkey (Preliminary objection)* [GC] 27396/06 (29 June 2012), para. 20.

ored to the interpretive needs of the Court in the case at hand.<sup>52</sup>

Although it recognised the authority of the VCLT, the Court has also consistently emphasised that the Convention is unique and it has a ‘special character as a treaty for the collective enforcement of human rights and fundamental freedoms’,<sup>53</sup> which may prevent the mechanical application of the Vienna rules. The enforcement is ensured by the ECtHR,<sup>54</sup> and it is entrusted with the power to authoritatively interpret the Convention.<sup>55</sup> The Court eloquently explained the peculiarities of the Convention in *Ireland v. the United Kingdom*:

Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagement between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective enforcement’.<sup>56</sup>

For this reason, unlike in general international law, one must give preference to the interpretation ‘that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.’<sup>57</sup>

The aims of the European human rights regime are laid down in general terms in the Preamble to the Convention: first, when the Council of Europe’s aim is recalled, i.e. ‘the achievement of greater unity between its members’, and the method which contributes to its achievement is ‘the maintenance and further realisation of Human Rights and Fundamental Freedoms’. Second, the commitment of the signatory governments ‘to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration’ more specifically relates to the content of the Convention and may be understood as a broad formulation of its ‘object and purpose’. In one of its early judgments, the Court pronounced that ‘the main purpose [of the Convention] is to lay down certain international standards to be observed by the Contracting States in their relations

with persons under their jurisdiction’,<sup>58</sup> and subsequent case-law has further clarified this understanding:

the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective ... In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with ‘the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society’.<sup>59</sup>

The ‘special character’ of the Convention can thus be summed up as the following: in the interpretation of the ECtHR, the restrictive approach to state obligations is abandoned in favour of understanding duties objectively, and in accordance with its ‘object and purpose’ effective interpretation is to be applied. Furthermore, the Court perceives the Convention ‘as a constitutional instrument of European public order (*ordre public*)’<sup>60</sup> adding a constitutionalist vision to its role in the European legal space.<sup>61</sup>

The unequivocal and recurring acknowledgement of the Convention’s ‘special character’ and the constitutionalisation of the ECtHR, it is argued, does not – and has not – weakened the Court’s commitment to the VCLT,<sup>62</sup> and the Vienna rules do not constitute a ‘stumbling block’ in creating unique interpretive approaches, as was suggested by some.<sup>63</sup> The following sections will illustrate that the interpretive techniques applied by the Court do not bend the interpretive rules of the VCLT, and the Court has not developed a competing framework for interpretation. The VCLT is deemed to be – as Çali observed – ‘flexible enough to incorporate human rights treaties’, such as the Convention.<sup>64</sup> Yet, the full endorsement is coupled with reservations or adjustments: the ‘special character’ of the Convention prompted occasional departure from traditional public international law, as is shown later.<sup>65</sup>

52. *E.g. Correia de Matos v. Portugal* [GC] 56402/12 (4 April 2018), para. 134, where the Court invoked Article 31 (3) (c) of the VCLT and emphasised the need for systemic integration when interpreting Article 6 of the Convention. The same provision is referenced in – among others – *Neulinger and Shuruk v. Switzerland* [GC] 41615/07 (6 July 2010), ECHR 2010-V 193, para. 131.

53. *Soering v. the United Kingdom* 14038/88 (7 July 1989), A161, para. 87.

54. ECHR, Article 19.

55. ECHR, Article 32.

56. *Ireland v. the United Kingdom* 5310/71 (18 January 1978), A25, para. 239. See also: *Austria v. Italy* 788/60 (11 January 1961), 4 Yearbook 116, 138.

57. *Wemhoff v. Germany* 2122/64 (27 June 1968), A7, ‘As to the Law’, para. 8. See also: F. Matscher, ‘Methods of Interpretation of the Convention’, in R. St. J. Macdonald, F. Matscher & Herbert Petzold (eds.), *The European System for the Protection of Human Rights* (1993) 63, at 66.

58. *Case ‘Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium’ v. Belgium (Preliminary Objection)* 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (9 February 1967), A5, 19.

59. *Soering*, above n. 53, para. 87.

60. *Loizidou v. Turkey (Preliminary Objections)* [GC] 5318/89 (23 March 1995), A310, para. 75. See also: A. Orakhelashvili, ‘European Convention on Human Rights and International Public Order’, 5 *Cambridge Yearbook of European Legal Studies* 237 (2002-2003).

61. See: C. Grabenwarter, ‘The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights’, *ELTE Law Journal* 101, 103 (2014).

62. See more recently: *N.D. and N.T. v. Spain* [GC] 8675/15; 8697/15 (13 February 2020), para. 172; or *Nait-Litman v. Switzerland* [GC] 51357/07 (15 March 2018), para. 174.

63. This reservation was voiced by M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (2010), at 69.

64. Çali, above n. 20, at 526.

65. L. Wildhaber, ‘The European Convention on Human Rights and International Law’, 56 *International and Comparative Law Quarterly* 217, at 220 (2007).

## 4 The ECtHR's Interpretive Techniques in Light of the Vienna Rules

### 4.1 Textual Interpretation: Reliance on the Ordinary Meaning

According to Article 31(1) of the VCLT, establishing the ordinary meaning of terms is the 'starting point' of the interpretive process and it is not any different for the ECtHR either.<sup>66</sup> The Court has explicitly relied on the ordinary meaning of terms in order to interpret provisions of the Convention. However, oftentimes the results of grammatical interpretation are considered rather evident and judgments do not devote lengthy parts to describing the Court's inquiry.<sup>67</sup> For instance, in *Luedicke, Belkacem and Koç v. Germany*,<sup>68</sup> the Court had to decide whether the right 'to have the free assistance of an interpreter' guaranteed in Article 6(3) e) allows a domestic court to impose an obligation to bear the costs of interpretation. The Court carefully examined both the English and French version of the text and with the help of dictionaries defined the terms 'gratuitement / free'. As the words in both languages have a 'clear and determinate meaning' and they denote 'a once and for all exemption or exoneration', a conditional or temporary remission is not sufficient.<sup>69</sup> This interpretation is supported – or at least not defeated – by the 'object and purpose' of Article 6 and the 'context' of the provision at issue.<sup>70</sup>

A different approach was followed in *Johnston and Others v. Ireland*, where the Court was called upon to rule – among others – on the compatibility of the Irish divorce ban with Article 12.<sup>71</sup> In order to answer the question of whether the right to marry encompasses the right to divorce, the Court turned to examining 'the ordinary meaning to be given to terms [of Art. 12] in their context and in the light of its object and purpose'.<sup>72</sup> The meaning of the 'right to marry' was 'clear': it applies to 'the formation of marital relationships but not to their dissolution'.<sup>73</sup> This conclusion was further confirmed by the provision's 'object and purpose' as evidenced by the *travaux préparatoires*. The drafters intentionally omitted reference to divorce from Article 12 and they consciously deviated from the wording of Article 16 of the Universal Declaration of Human Rights, and this may not be 'corrected' by evolutive interpretation responding to social developments. States also had an opportunity to include the right to divorce

when Article 5 of Protocol no. 7 adding further rights to spouses was drafted.<sup>74</sup>

It is important, however, to recall what the Court held about the role of the preparatory works in the *Magyar Helsinki Bizottság v. Hungary* case thirty years later: they 'are not delimiting for the question whether a right may be considered to fall within the scope of an Article of the Convention if the existence of such a right was supported by the growing measure of common ground that had emerged in the given area'.<sup>75</sup> Intentionalism was thus subordinated to evolutive interpretation discussed later. The Court – as Letsas observes – not only read into the Convention rights that the drafters did not explicitly intend to provide, but also rights that the drafters openly did not intend to grant.<sup>76</sup> The fact that the case-law detached the ordinary meaning from the intention of the drafters runs counter to the prevalent approach in general international law that advocates for the relativity of the terms of a treaty, arguing that a meaning reflecting the common intention of the parties is to be preferred.<sup>77</sup> For the ECtHR, the textual argument is rarely decisive; it is the starting point, but the Court links it to the other elements listed in Article 31(1) of the VCLT, i.e. the 'context' and the 'object and purpose' of the provision or the ECHR as a whole.<sup>78</sup>

### 4.2 'Context'

The VCLT regards both the intrinsic and the extrinsic sources of 'context' listed in Article 31(2) instrumental for establishing the ordinary meaning. The intrinsic sources of 'context' primarily encompass the text of the treaty (i.e. the other provisions), its preamble and the annexes, or in case of the ECHR, the protocols.<sup>79</sup> Furthermore, the Vienna rules mandate recourse to two extrinsic sources that are to be included in the 'context': '(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty' and '(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'. As Dörr explains, these sources have to meet some conditions: they need to be backed by a general consensus of all the parties (i.e. those who are bound by the given treaty), they need to 'relate to the substance of the treaty', and their accept-

66. *Magyar Helsinki Bizottság*, above n. 47, para. 119.

67. See also: J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (1993), at 70.

68. *Luedicke, Belkacem and Koç v. Germany* 6210/73; 6877/75; 7132/75 (28 November 1978), A29.

69. *Ibid.*, para. 40.

70. *Ibid.*, para. 46.

71. *Johnston and Others v. Ireland* 9697/82 (18 December 1986), A112.

72. *Ibid.*, para. 51.

73. *Ibid.*, para. 52.

74. *Ibid.*, para. 53. For further examples see e.g. Rainey, Wicks & Ovey, above n. 1, 68-9.

75. *Magyar Helsinki Bizottság*, above n. 47, para. 137.

76. Letsas, above n. 40, 518. For the latter see e.g.: *Young, James and Webster v. the United Kingdom* 7601/76; 7806/77 (13 August 1981), A44, paras. 51-2; or *Sigurður A. Sigurjónsson v. Iceland* 16130/90 (30 June 1993), A264, para. 35.

77. See for example: A. Aust, *Handbook of International Law* (2012), at 9; or Dörr, above n. 7, at 580.

78. For example: Loizidou, above n. 60, para. 86. See also: F. Ost, 'The Original Canons of Interpretation of the European Court of Human Rights', in M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (1992) 283, at 288-9; or J. Gerards, 'The European Court of Human Rights', in A. Jakab, A. Dyevre & G. Itzcovich (eds.), *Comparative Constitutional Reasoning* (2017) 237, at 263.

79. VCLT Article 31(2).

ance has to fall ‘in a certain temporal proximity to the process of conclusion’.<sup>80</sup> These external sources do not seem to play a significant – or any – role in the interpretation of the ECHR; to date the ECtHR has not invoked them in any of its judgments, while it frequently refers, for example, to the Preamble to the Convention.<sup>81</sup>

The ECtHR has consistently showed respect to the internal ‘context’ of the ECHR, which is best illustrated by the references to the need to avoid contradictory or inconsistent interpretation of its provisions. This stance is profoundly summarised by the Grand Chamber judgment in *Saadi v. the United Kingdom*:

[t]he Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.<sup>82</sup>

Internal ‘context’ has been considered in the case-law in various ways, not necessarily in the most coherent manner, and the need to promote internal harmony between different provisions of the Convention has not prevented the Court from dismissing the government’s objection arguing that the matter falls within the scope of a detailed provision in a protocol to which the respondent state is not party. The Court thus accepted in support of the applicant’s claim that Article 8 – for example – applies to paternity issues in spite of the clear wording of Article 5 of Protocol no. 7.<sup>83</sup> This attitude – although not fully in line with international law – reflects the uniqueness of the ECHR and the understanding that the protection of individual rights may trump the restrictive interpretation of state obligations. Yet, without dismissing the special nature of the Convention, it may be argued that such interpretation may render the adoption of protocols meaningless. As in his concurring opinion Judge Gersing in the above mentioned *Rasmussen v. Denmark* case observed the following: The mere fact that a separate protocol had been drawn up to guarantee equality between spouses ‘in their relations with their children’ indicates that Article 8 was not understood to protect these aspects of private and family life.<sup>84</sup>

Reference to the internal ‘context’ of a provision, however, does not always lead to the results the applicants have hoped for. In *Johnston and Others v. Ireland*, the intentional omission of any reference to divorce from the text of Article 12 barred the Court from deriving it – ‘with consistency’ – from Article 8, despite the unquestionable social developments.<sup>85</sup> The drafters’ intent reflected in the text also hindered – at least initially –

the Court from finding, in light of the clear formulation of Article 2, that capital punishment in itself raises concerns under Article 3. In *Soering v. the United Kingdom*, it deferred to the Contracting States that had opted for ‘the normal method of amendment of the text in order to introduce a new obligation’ to outlaw death penalty.<sup>86</sup> But the case-law – in line with the reasoning in *Soering* – has followed up on the subsequent practice of the member states, demonstrated by the growing number of ratifications of Protocols no. 6 and 13, and now the textual reference to capital punishment in Article 2 is to be treated as inoperative.<sup>87</sup>

More recently the Court took a more doctrinal position in *Maaouia v. France*, where the applicant alleged that the excessive length of the proceedings initiated in order to lift an expulsion order against him violated his rights under Article 6(1).<sup>88</sup> Article 1 of Protocol no. 7 contains specific procedural guarantees for the expulsion of aliens and in the Court’s opinion, the adoption of the provision ‘clearly intimated [the States]’ intention not to include such procedures within the scope of Article 6 § 1 of the Convention’.<sup>89</sup> It has to be noted that – unlike in the previously reviewed cases – France ratified the protocol in question; hence, the applicant was not completely deprived of the protection of the Convention.

#### 4.3 The Relevance of the ‘Object and Purpose’ in the Interpretation of the ECHR

The core purpose of the Convention – as mentioned above – ‘is to lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction’ and to contribute to their ‘maintenance and further realisation’.<sup>90</sup> The explicit mentions of the ‘object and purpose’ in the case-law of the ECtHR can be broadly categorised into two groups. However, the teleological approach grounded in the concept serves as a basis for a number of further, allegedly ECHR-specific methods and doctrines of interpretation. While the Court does not always expressly link these interpretive techniques to the ‘object and purpose’, the latter arguably provides

80. Dörr, above n. 7, at 590.

81. In addition to *Golder*, above n. 42, see: *Rotaru v. Romania* [GC] 28341/95 (4 May 2000), ECHR 2000-V 109, para. 59.; or *Simeonovi v. Bulgaria* [GC] 21980/04 (12 May 2017), para. 131.

82. *Saadi*, above n. 48, para. 62.

83. *Rasmussen v. Denmark* 8777/79 (28 November 1984), A87.

84. *Ibid.* Concurring opinion of Judge Gersing, para. 5.

85. *Johnston*, above n. 71, para. 57.

86. *Soering*, above n. 53, para. 103.

87. Capital punishment in peace time was abrogated in *Öcalan v. Turkey* [GC] 46221/99 (12 May 2005), ECHR 2005-IV 131, para. 163; while five years later the Court extended the prohibition to times of war as well in *Al-Saadoon and Mufdhi v. the United Kingdom* 61498/08 (2 March 2010), ECHR 2010-II 61, para. 120. Subsequent practice is discussed separately in 4.4.

88. *Maaouia v. France* [GC] 39652/98 (5 October 2000), ECHR 2000-X 301.

89. *Ibid.*, para. 37. The Grand Chamber in *Muhammad and Muhammad v. Romania* clarified the Court’s position on the scope and the possible limitation of rights contained in Article 1 of Protocol no. 7. An alien’s procedural rights may be restricted, but the very essence of the right cannot be impaired, and the person needs to be protected against arbitrariness. While the limitation of procedural rights in question may be duly justified, the Court takes the counterbalancing factors into consideration when ruling on the compliance with the ECHR. *Muhammad and Muhammad v. Romania* [GC] 80982/12 (15 October 2020).

90. See for example: *Sunday Times v. the United Kingdom* (no. 1) 6538/74 (26 April 1979), A30, para. 61; or *Barberà, Messegué and Jabardo v. Spain* 10590/83 (6 December 1988), A146, para. 78.



– alone or in conjunction with other rules of the VCLT – a theoretical foundation for them.

The first group of cases relate to the actual application of the VCLT. In accordance with the Vienna rules, the Court has consistently emphasised that in order to ascertain the ordinary meaning of terms, the ‘context’ and ‘the object and purpose of the provision from which they are drawn’ has to be duly considered.<sup>91</sup> As a consequence, the ECtHR has eloquently defined the ‘object and purpose’ of a number of Convention articles, either to support the ordinary meaning of a term or to put the applicable limitation test into framework. Without being exhaustive, the following examples are illustrative of the Court’s standard practice to treat a provision’s ‘object and purpose’ independently from that of the Convention. The ECtHR has identified several ‘objects and purposes’ of Article 6, depending on the issue raised in the case. For instance, the ‘object and purpose’ of Article 6 taken as a whole has been described such as to ensure that ‘a person »charged with a criminal offence« is entitled to take part in the hearing’,<sup>92</sup> or to guarantee ‘the possibility for parties to take part in the proceedings’,<sup>93</sup> and ‘the rights of the defence’.<sup>94</sup> The ‘object and purpose’ of certain provisions is rather self-evident, such as the fact that Article 5 protects individuals against arbitrary deprivation of liberty,<sup>95</sup> or that Article 7 guarantees ‘that no one should be subjected to arbitrary prosecution, conviction or punishment’.<sup>96</sup> In spite of the explicit reference to it, judgments do not always define the ‘object and purpose’ of the provision under scrutiny; it is assumed that it is conspicuous and the Court only elaborates on what serves it best,<sup>97</sup> or what runs counter to it.<sup>98</sup>

The second group of cases invoke the ‘object and purpose’ of the ECHR itself. The Court has consistently emphasised that ‘the object and purpose of the Convention ... requires that its provisions be interpreted and applied so as to make its safeguards practical and effective’.<sup>99</sup> The principle of effectiveness may be considered

as ‘an overarching approach to human rights treaty interpretation’, and the ECHR is no exception to this.<sup>100</sup> According to Gardiner, the principle of effectiveness has two aspects: first, it favours an interpretation that gives effect to the terms of a treaty over one that fails to do so; second, it animates a teleological approach to interpretation.<sup>101</sup> The case-law of the ECtHR does not draw a clear line between these two ‘functions’ of effectiveness. Interpretive techniques corresponding to the teleological approach, such as evolutive interpretation or the use of autonomous concepts, are dogmatically grounded in the ‘object and purpose’; however, they are also linked to effectiveness in the narrower sense. As the Court has recently put it:

in order to interpret the provisions of the Convention and the Protocols thereto in the light of their object and purpose, the Court has developed additional means of interpretation through its case-law, namely the principles of autonomous interpretation and evolutive interpretation, and that of the margin of appreciation. These principles require the provisions of the Convention and the Protocols thereto to be interpreted and applied in a manner which renders their safeguards practical and effective, not theoretical and illusory.<sup>102</sup>

This suggests that the ECHR-specific methods and doctrines of interpretation advanced by the Court derive from the VCLT’s imperative to interpret the text in light of the treaty’s ‘object and purpose’. This quote unequivocally rebuts the allegations that there are interpretive techniques in the ECHR case-law that are alien to the framework set by the VCLT.

The ‘further [and effective] realisation’ of human rights presupposes a forward-looking, dynamic interpretation or – in Matscher’s words – ‘compels an evolutive interpretation’.<sup>103</sup> Teleological interpretation focusing on the ‘object and purpose’ of the ECHR is thus combined with the principle of contemporaneity embodied in the dynamic or evolutive approach, even though some authors propose to treat the two methods separately.<sup>104</sup> This article subscribes to the definition of Gerards blending both aspects: in her understanding, the evolutive method means ‘that the provisions of the Convention must be interpreted in accordance with the primary aims as defined in the Preamble, taking account of recent developments in society and science.’<sup>105</sup>

91. For instance: *Rantsev*, above n. 5, para. 274; or *M. and Others v. Italy and Bulgaria* 40020/03 (31 July 2012), para. 147.

92. See for example: *Hermi v. Italy* [GC] 18114/02 (18 October 2006), ECHR 2006-XII 91, para. 59; or *Dridi v. Germany* 35778/11 (26 July 2018), para. 30.

93. *Özgür Keskin v. Turkey* 12305/09 (17 October 2017), para. 32.

94. *Unterpertinger v. Austria* 9120/80 (24 November 1986), A110, para. 31.

95. For instance: *Schiesser v. Switzerland* 7710/76 (4 December 1979), A34, para. 30.

96. *Rohlina v. the Czech Republic* [GC] 59552/08 (27 January 2015), ECHR 2015-I 185, para. 71.

97. When discussing admissibility, the ECtHR has underlined numerous times that ‘the object and purpose of Article 35 § 1 of the Convention are best served by counting the six-month period as running from the date of service of the written judgment’. See for example: *Dobrić v. Serbia* 2611/07; 15276/07 (21 June 2011), para. 36 or *Akif Hasanov v. Azerbaijan* 7268/10 (19 September 2019), para. 27.

98. ‘[A] purely negative conception [of the states’ duty] would not be compatible with the object and purpose of Article 11 of the Convention’. *Identoba and Others v. Georgia* 73235/12 (15 December 2015), para. 94.

99. *Loizidou*, above n. 60, para. 73. See also: *Airey v. Ireland* 6289/73 (9 October 1979), A32, para. 24.

100. Çali, above n. 20, at 538.

101. Gardiner, above n. 15, at 179-81 and 221-2.

102. *Mihalache*, above n. 47, para. 91.

103. Matscher, above n. 57, at 69.

104. Yourow – for example – argues that with the teleological method ‘the Court reaches beyond Convention text to appreciate the object and purpose of the Convention as a whole’, while with dynamic interpretation it interprets ‘the Convention in light of current societal circumstances, secondarily incorporating the intentions of the framers of the document.’ H.C. Yourow, *The Margin of Appreciation in the Dynamics of European Human Rights Jurisprudence* (1996), at 185.

105. J. Gerards, ‘Judicial Deliberations in the European Court of Human Rights’, in N. Huls, M. Adams & J. Bomhoff (eds.), *The Legitimacy of Highest Courts’ Rulings. Judicial Deliberations and Beyond* (2009) 407,

The notion of ‘living instrument’, which requires ‘that the Convention ... must be interpreted in the light of present-day conditions’,<sup>106</sup> corresponds to evolutive interpretation. They are mutually referenced as corollary arguments, or even used interchangeably.<sup>107</sup> This technique of interpretation, although it derives from the teleological principle, also reaches beyond that and adjusts the content of terms to contemporary understandings.<sup>108</sup> If one treats the ‘object and purpose’ of the Convention as the basis for dynamic interpretation, it naturally prompts the question: Did the drafters foresee and indeed intend the principle of contemporaneity to be applied to the Convention? Arato submitted that the original intention of the drafters that ‘the treaty is capable of evolution’ lays the ground for evolutive interpretation.<sup>109</sup> This intention may be evidenced by how the aim of the Convention is formulated, which necessitates, or at least does not exclude, a dynamic approach. Letsas argues that the abstract intention of the drafters was to create a system capable of promoting and protecting human rights, while they also had a concrete intention about ‘which situations ... human rights cover’.<sup>110</sup> And ‘the values of the ECHR, its object and purpose, fully justify ... why it should not be interpreted in terms of the drafters’ concrete intentions back in 1950’.<sup>111</sup>

The case-law undeniably suggests that the Court does recognise new aspects of rights or broaden the scope of their protection. The dynamic approach to the interpretation of the Convention is well illustrated by the gradual acceptance of the post-operative transsexuals’ right of legal recognition under Article 8,<sup>112</sup> or the endorsement of the view that the denial of the right to conscientious objection constitutes an interference with and a violation of Article 9.<sup>113</sup> There is, however, a fine line between giving provisions a contemporary understanding and judicial legislation; the latter clearly stands in tension with the principle of state consent and legal certainty.

at 429. Letsas and Fitzmaurice also consider evolutive and dynamic interpretation synonymous. See: G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007), at 65; and M. Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties’, 21 *Hague Yearbook of International Law* 101, at 102 (2008).

106. The ‘living instrument’ doctrine was introduced by the Court in *Tyrer v. the United Kingdom* 5856/72 (25 April 1978), A26, para. 31.

107. A. Mowbray, ‘The Creativity of the European Court of Human Rights’, 5 *Human Rights Law Review* 57, at 64 (2005). For a critical analysis of *Tyrer* see also: M.-B. Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (2006), at 171-6.

108. For the relationship of the teleological principle and evolutive interpretation see: Fitzmaurice, above n. 105, at 117-18.

109. J. Arato, ‘Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences’, 9 *The Law and Practice of International Courts and Tribunals* 443, at 445 (2010).

110. Letsas, above n. 105, at 70.

111. *Ibid.*, at 74.

112. The process culminated in recognizing the right to have the new gender identity legally recognised in *Christine Goodwin v. the United Kingdom* [GC] 28957/95 (11 July 2002), ECHR 2002-VI 1; and has continued with eliminating the unjustifiable restrictions placed by states on the exercise of the right. E.g. *Schlumpf v. Switzerland* 29002/06 (8 January 2009); or A.P., *Garçon and Nicot v. France* 79885/12; 52471/13; 52596/13 (6 April 2017).

113. *Bayatyan v. Armenia* [GC] 23459/03 (7 July 2011), ECHR 2011-IV 1.

For this reason, the ECtHR has been cautious with its judicial creativity. Scholars of public international law hold that the text of the treaty ultimately limits interpretation based on the ‘object and purpose’. The latter may not bring about a result that is not supported by the text; it may assist the interpreter to select which ordinary meaning shall prevail, but the outcome cannot completely disregard the text.<sup>114</sup> The use of the dynamic interpretation has been subject to heated debates since its inception; in his dissenting opinion to *Tyrer*, Sir Gerard Fitzmaurice mounted a strong criticism against the majority’s overreaching activism and accused the Court of pursuing a universalist agenda.<sup>115</sup> More recently in *X. and Others v. Austria*, concerning the impossibility of second-parent adoption by same-sex partners, the partly dissenting judges emphasised that the rationale of evolutive interpretation ‘is to accompany and even channel change’ but not ‘anticipate change, still less to try to impose it’.<sup>116</sup>

Finally, the ‘object and purpose’ of the Convention is relevant in the context of autonomous concepts; in the Court’s understanding – cited above – it is a means of interpretation that draws on the ‘object and purpose’ of the ECHR and advances effectiveness.<sup>117</sup> However, it needs to be noted that there are further justifications based on the VCLT that may legitimise recourse to autonomous interpretation. Matscher – for instance – finds support for it in Article 5 of the VCLT that prioritises the ‘relevant rules of the organization’ over the VCLT,<sup>118</sup> and Killander draws attention to the relevance of Article 31(4) of the VCLT (‘special meaning’).<sup>119</sup>

The ECtHR, through the use of autonomous concepts, provides a ‘European meaning’ to – primarily legal – terms contained in the Convention. The same concept may be very differently defined in the member states and in the case-law of the Court, which creates an asymmetry in rights protection.<sup>120</sup> In order to prevent states from circumventing their obligations by simply applying different terminology, often arbitrarily,<sup>121</sup> and to preserve the integrity of the Convention, an equilibrium needs to be set between national discretion and European control.<sup>122</sup> The uniform interpretation of Convention terms pre-empts the inconsistencies arising from terminological differences in the national legal systems, and for this reason it leads to the harmonisation of stand-

114. Dörr, above n. 7, at 586-7. See the ECtHR’s approach in *Johnston*, above n. 71, para. 53.

115. *Tyrer*, above n. 106, Dissenting opinion of Sir Gerard Fitzmaurice, para. 14.

116. *X. and Others v. Austria* [GC] 19010/07 (19 February 2013), ECHR 2013-II 1, Joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos, para. 23.

117. *Merrills* is of the same view: he links autonomous interpretation to effectiveness. *Merrills*, above n. 67, at 77.

118. Matscher, above n. 57, at 71. See also: Villiger, above n. 12, at 119-20.

119. M. Killander, ‘Interpreting Regional Human Rights Treaties’, 7 *SUR* 145, at 148 (2010).

120. Letsas, above n. 105, at 42.

121. A. Legg, *The Margin of Appreciation in International Human Rights Law. Deference and Proportionality* (2012), at 111-12.

122. Ost, above n. 78, at 306.

ards.<sup>123</sup> In case of autonomous interpretation the Court disconnects the meaning of Convention terms from the domestic formulations and grants them – as Letsas puts it – ‘semantic independence’,<sup>124</sup> and state actions are judged under ‘the law of the Convention’.<sup>125</sup>

When defining autonomous concepts, the Court takes – in principle – the national legislation in question as ‘a starting point’, but the domestic law has ‘only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States’.<sup>126</sup> There are, however, limits to autonomous interpretation; the ECtHR cannot simply pick the most suitable standard and pay no attention to the views of domestic legislatures, and it cannot compromise the ‘object and purpose’ of the Convention or that of the provision at issue.<sup>127</sup>

Although autonomous interpretation appears to be a less contentious, interpretive technique in the jurisprudence of the ECtHR, its use spurred some critical remarks not only from judges but also from academics. Some argue that with its application ‘the Court is striving to empower itself, to the detriment of the states’.<sup>128</sup> Since the ECtHR assumes the role of national decision and policy-makers it may risk ‘venturing into the field of legislative policy’.<sup>129</sup> The failure to furnish evidence on how the ‘common denominator’ is identified and the lack of appropriate comparative analysis of the domestic laws have also made autonomous concepts subject to disapproval.<sup>130</sup>

#### 4.4 Subsequent Practice

Article 31(3) adds further sources that need to be taken into account together with the ‘context’ when establishing the ordinary meaning of a term. Subsequent agreements and practice constitute ‘forms of authentic interpretation whereby all parties themselves agree on (or at least accept) the interpretation of treaty terms by means which are extrinsic to the treaty’.<sup>131</sup> As Villiger noted, authentic interpretation offers ‘ex hypothesi’ the right interpretation and consequently it is conclusive to the

ordinary meaning.<sup>132</sup> In the ECHR case-law, subsequent agreements in Article 31(3) (a) do not play a significant role, and there is no judgment that would refer to them beyond the citation of the Vienna rules. This may be explained by the fact that such agreements would constitute an amendment to the text of the Convention, for which a separate procedure exists. Subsequent practice is, on the other hand, applied explicitly and – as it will be explained below – implicitly more frequently. In order to assess whether the case-law of the ECtHR is in harmony with the VCLT’s provision on subsequent practice, a brief overview of the rule is indispensable. ‘Practice’ itself covers a great number of positive actions; in public international law it would simply encompass ‘what states do in their relations to one another’.<sup>133</sup> Some argue that subsequent practice must be consistent, common and concordant,<sup>134</sup> and it has to be acquiesced to by other parties; otherwise it will remain a supplementary means of interpretation under Article 32 of the VCLT.<sup>135</sup> However, Special Rapporteur, Georg Nolte put forward a more permissive definition: in his view, subsequent practice does not require that all parties engage in a particular practice, ‘if it is “accepted” by those parties not engaged in the practice, [it could] establish a sufficient agreement regarding the interpretation of a treaty’.<sup>136</sup> It is traditionally limited to state practice only; however, recently a wider interpretation has surfaced including – among others – the practice of UN treaty monitoring bodies as well.<sup>137</sup> Finally, the VCLT itself is silent on the potential modifying effect of such practice, but this possibility is undoubtedly recognised in international law.<sup>138</sup>

The review of the case-law of the ECtHR presents little evidence of the widespread, explicit reliance on subsequent practice; however, it shall not lead to the quick conclusion that the notion is wholly absent from the jurisprudence. The first case when the Court considered the subsequent practice of the member states was *Soering v. the United Kingdom*,<sup>139</sup> where it reviewed state practice in relation to capital punishment. It importantly noted:

[s]ubsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 (art. 2-1) and hence to

123. See for example: Rainey, Wicks & Ovey, above n. 1, at 69; and Matscher, above n. 57, at 73.

124. G. Letsas, ‘The Truth in Autonomous Concepts: How to Interpret the ECHR’, 15 *European Journal of International Law* 279, at 282 (2004).

125. Yourow, above n. 104, at 185.

126. *Engel and Others v. the Netherlands* 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (8 June 1978), A22, para. 82.

127. See for example: *Ramos Nunes de Carvalho e Sá v. Portugal* [GC] 55391/13; 57728/13; 74041/13 (6 November 2018), para. 177.

128. J. Gerards, ‘The European Court of Human Rights and National Courts: Giving Shape to the Nation of “Shared Responsibility”’, in J. Gerards and J. Fleuren (eds.), *Implementation of the European Convention on Human Rights and the Judgments of the ECtHR in National Case-Law* (2014) 36, at 45.

129. *König v. Germany* 6232/73 (28 June 1978), A27, separate opinion of Judge Matscher, A.

130. E.g. *Öztürk v. Germany* 8544/79 (21 February 1984), A73, dissenting opinion of Judge Matscher, A.2.; or R. Bernhardt, ‘Thoughts on the Interpretation of Human-Rights Treaties’, in F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J. Wiarda* (1988) 65, at 71; and Letsas, above n. 124, at 295-305.

131. Villiger, above n. 12, at 429.

132. Villiger, above n. 41, at 326.

133. I. Buga, *Modifications of Treaties by Subsequent Practice* (2018), at 23.

134. I. M. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), at 137.

135. G. Nolte, *First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation* (19 March 2013), UN doc A/CN.4/660, para. 118.

136. G. Nolte, *Second Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation* (26 March 2014), UN doc A/CN.4/671, para. 60.

137. Killander, above n. 119, at 149.

138. Forowicz, above n. 63, at 37.

139. *Soering*, above n. 53.



remove a textual limit on the scope for evolutive interpretation of Article 3 (art. 3).<sup>140</sup>

Since member states opted for ‘the normal method of amendment of the text in order to introduce a new obligation’ even the special character of the Convention could not justify modifying the interpretation through dynamic interpretation.<sup>141</sup>

This position was revisited first in *Öcalan v. Turkey* where the Grand Chamber endorsed the Chamber’s finding on abolishing death penalty in peace time.<sup>142</sup> By the time all member states signed Protocol no. 6, three ratifications were awaited, though only Russia did not outlaw it domestically. On the basis of the strong support for Protocol no. 6, the Chamber concluded

[s]uch a marked development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1.<sup>143</sup>

The practice of the member states was consistent – in reality, even if death penalty existed in the law, executions were not carried out. Despite the fact that formally no unanimity was discernible among the member states, the practice was sufficiently concordant not to exclude the modification of the text of Article 2 on the basis of subsequent practice.

In May 2003, Protocol no. 13 completely abolishing capital punishment was opened for signature and it entered into force a year later. In 2010, the Court – on the application of two detainees who had been transferred to Iraqi custody – freshly reviewed the state practice with regard to the death penalty; when the judgment was delivered, only two member states did not sign Protocol no. 13 and three of those which signed failed to ratify it. These numbers ‘together with consistent State practice in observing the moratorium on capital punishment, [were] strongly indicative that Article 2 [had] been amended so as to prohibit the death penalty in all circumstances.’<sup>144</sup>

In these cases, the subsequent practice supported evolutive interpretation and led to heightened protection. But this is not always necessarily the case. In *Hassan v. the United Kingdom* the Grand Chamber noted that ‘[t]he practice of the High Contracting Parties is not to derogate from their international obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts’.<sup>145</sup> The common practice of states supported the government’s arguments that the Court should consider ‘the context and the provisions of international humanitarian law when interpreting and applying Arti-

cle 5 in this case’.<sup>146</sup> Invoking Article 31(3) (b) in this case provoked wide criticism; instead of enhancing the protection under the Convention, the ECtHR practically read into Article 5 additional legitimate grounds for detention with reference to international humanitarian law.<sup>147</sup> The dissenting judges objected to the Court’s method of establishing subsequent practice calling for a more restrictive understanding; in their view, the practice has to be ‘concordant, common and consistent’.<sup>148</sup> Apart from criticising the majority for the chosen methodology, they submitted a further – probably more important – reservation: subsequent practice that meets the criteria they propose may not introduce a more restrictive interpretation of the rights at issue, in clear contradiction with the narrowly and exhaustively defined text of the Convention.<sup>149</sup> This would also contravene the ‘object and purpose’ of the ECHR and fail to contribute to ‘the maintenance and further realisation of Human Rights’ set out in the Preamble.

In addition to the scarce explicit references to subsequent practice, the ECtHR has appealed to state practice numerous times without invoking the VCLT in the interpretive process: ‘the Court confirmed that uniform, or largely uniform national legislation, and even domestic administrative practice, can in principle constitute relevant subsequent practice.’<sup>150</sup> This approach translates into the consensus inquiry frequently applied by the Court in various contexts. In simplistic terms, the consensus is based on a rough, methodologically questionable comparative analysis of the national (and at times international) solutions adopted by the member states and sufficient convergence – in principle – constitutes a relevant consideration for interpretation. The ECtHR still owes a definition of the European consensus, but on the basis of the case-law, commentators understand the notion rather as a ‘trend’ than a ‘consensus’ in the traditional sense of the term: ‘the Court is looking to find a trend rather than an agreement as such or an outright majority’.<sup>151</sup> Although judgments do not assess the commonalities identified in the domestic laws openly under Article 31(3) (b) of the VCLT, it may be

140. *Ibid.*, para. 103.

141. *Ibid.*

142. *Öcalan*, above n. 87.

143. *Ibid.*, para. 163.

144. *Al-Saadoon and Mufdhi*, above n. 87, para. 120.

145. *Hassan*, above n. 46, para. 100.

146. *Ibid.*, para. 103.

147. See for example: L. Crema, ‘Subsequent Practice in *Hassan v. United Kingdom*: When Things Seem to Go Wrong in the Life of a Living Instrument’, 4 *Questions of International Law* 3 (2015).

148. *Hassan*, above n. 46, partly dissenting opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, para. 13.

149. *Ibid.* Similarly, the lack of state practice prevented the Court to extend jurisdiction extra-territorially in *Bankovic*, where the Grand Chamber noted that ‘State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case’, i.e. state responsibility for the rights violations caused by the NATO air strikes in Belgrade. *Bankovic and Others v. Belgium and Others (dec.)* [GC] 52207/99 (12 December 2001), ECHR 2001-XII 333, para. 59.

150. Nolte, above n. 135, para. 54.

151. P. Mahoney and R. Kondak, ‘Common Ground. A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?’ in M. Andenas and D. Fairgrieve (eds.), *Courts and Comparative Law* (2015) 119, at 122. See also: K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (2015), at 12.



argued that the Court is indeed relying on subsequent practice to some extent.

The consensus is understood ‘as a tool that can bring forward a particular human rights problem from the margin of appreciation and trigger evolutive interpretation’,<sup>152</sup> or in other words, it can bridge the gap between the margin of appreciation and the dynamic interpretation of the Convention.<sup>153</sup> References to the European consensus in the case-law do not constitute a homogeneous group, but the various labels applied by the Court cover different modalities; the more conservative notions, such as European consensus,<sup>154</sup> common European standard<sup>155</sup> or common European approach<sup>156</sup> have a different impact on the interpretation of the ECHR than those describing an emerging consensus or a trend, be that European<sup>157</sup> or international.<sup>158</sup>

From the perspective of subsequent practice, only the conservative notion of consensus may be relevant; it requires a broad convergence among the member states, i.e. an almost established legal consensus. It is submitted that the trend-based consensus inquiry leading to establishing a ‘hypothetical consensus’ as Letsas called it,<sup>159</sup> is merely a supplementary means of interpretation within the meaning of the VCLT and may only be used to support interpretation based on other conventional methods and doctrines deriving from Article 31(1) of the VCLT. However, at this point it is important to differentiate between subsequent practice that results – as shown above – in the modification of the ECHR and subsequent practice that is relevant for the interpretation of the scope of the right or the assessment of the limitation clause. From the point of view of international law, in the former case, the original intent of the states supporting the evolutive treaty interpretation is not sufficient; it needs to be supported by further evidence substantiating *opinio juris* in the traditional sense (e.g. the signature of the relevant protocol in the cases on abolishing capital punishment).<sup>160</sup>

Recourse to the consensus inquiry has been subject to widespread criticism primarily for the lack of methodological discipline.<sup>161</sup> Subsuming certain forms of the

consensus inquiry under subsequent practice and distinguishing their normative value on objective grounds, i.e. how consistent and common the state practice is, would add democratic legitimacy to its use; ultimately the solution elevated to the level of the Convention would verifiably originate from the member states. This approach is not new to the Court. In *Bayatyan v. Armenia*, the Grand Chamber overruled the Convention organs’ prior case-law on conscientious objection to military service – among others – on the basis that ‘there was nearly a consensus among all Council of Europe member States’.<sup>162</sup> At the time the right was recognised, only two countries did not share the ‘virtually general consensus’ on the issue, and thus the practice of the member states and other international developments warranted a dynamic approach.<sup>163</sup> If one accepts – as Nolte submitted – that member states are aware of their obligations under the ECHR when they legislate on a certain issue and their actions follow from a ‘*bona fide* understanding of [their] obligations’,<sup>164</sup> embracing a standard deriving from national laws – pending that it is widely shared – with reference to subsequent practice leading to an evolutive interpretation is not at odds with state consent.<sup>165</sup>

#### 4.5 Systemic Integration

Article 31(3) (c) embodies the principle of systemic integration and mandates the consideration of ‘any relevant rules of international law in the relations between the parties’ together with ‘context’.<sup>166</sup> In addition to the general rule in Article 31(1), this is the VCLT provision that has been cited the most frequently by the ECtHR and analysed by scholarly literature extensively.<sup>167</sup> Without attempting to give a thorough overview, the following section aims to briefly shed light on the ECtHR’s understanding of this rule.

The principle of systemic integration is the answer of international lawyers to the problem of fragmentation; it

152. Dzehtsiarou, above n. 151, at 24.

153. Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002), at 199.

154. *Alekseyev v. Russia* 4916/07; 25924/08; 14599/09 (21 October 2010), para. 83.

155. *Shtukaturv v. Russia* 44009/05 (27 March 2008), para. 95.

156. *Sheffield and Horsham v. the United Kingdom* [GC] 22985/93; 233390/94 (30 June 1998), para. 57.

157. *Vallianatos and Others v. Greece* [GC] 29381/09; 32684/09 (07 October 2013), ECHR 2013-VI 131, para. 91.

158. *Christine Goodwin*, above n. 112, para. 85. On the two notions of the consensus see also: E. Polgari, ‘European Consensus: A Conservative and a Dynamic Force in European Human Rights’, 12 *Vienna Journal of International Constitutional Law* 1 (2018).

159. Letsas, above n. 40, at 531.

160. A similar view is advanced in A. Seibert-Fohr, ‘The Effect of Subsequent Practice on the European Convention on Human Rights. Considerations from a General International Law Perspective’, in A. van Aaken and I. Motoc, *The European Convention on Human Rights and General International Law* (2017) 61, at 80.

161. See for example: J.L. Murray, ‘Consensus: Concordance, or Hegemony of the Majority?’ in *Dialogue between Judges* (2008) 37, at 39; or

K. Dzehtsiarou, ‘Comparative Law in the Reasoning of the European Court of Human Rights’, 10 *University College Dublin Law Review* 109, at 118-26 (2010).

162. *Bayatyan*, above n. 113, para. 103.

163. *Ibid.*, paras. 108-9.

164. Nolte, above n. 136, para. 14.

165. Recently European consensus has also been conceptualised as the manifestation of a ‘regional custom’. See: S. Besson, ‘Comparative Law and Human Rights’, in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (2019) 1222, at 1231; or I. Ziemele, ‘European Consensus and International Law’, in A. van Aaken and I. Motoc, *The European Convention on Human Rights and General International Law* (2017) 23, at 32-6.

166. McLachlan, above n. 21, at 280. Not everyone equates the two: see A. Rachovitsa, ‘The Principle of Systemic Integration in Human Rights Law’, 66 *International and Comparative Law Quarterly* 557, at 560 (2017).

167. See for example: Forowicz, above n. 63; V.P. Tzevelekos, ‘The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology – Between Evolution and Systemic Integration’, 31 *Michigan Journal of International Law* 621 (2010); or A. Rachovitsa, ‘Fragmentation of International Law Revisited: Insights, Good Practices, and Lessons to be Learned from the Case Law of the European Court of Human Rights’, 28 *Leiden Journal of International Law* 863 (2015).

‘goes further than merely restate the applicability of general international law in the operation of particular treaties. It points to a need to take into account the normative environment more widely.’<sup>168</sup> Article 31(1) (c) endorses the need for a contemporary interpretation of treaties. The provision clearly refers to rules of international law as defined in Article 38 of the ICJ Statute, and the term ‘applicable’ includes – in principle – binding norms only.<sup>169</sup> Relevance is broadly understood, and Gardiner suggests that rules ‘touching on the same subject matter as the treaty provision ... being interpreted or which in any way affect that interpretation’ are to be taken into consideration.<sup>170</sup> While the term ‘parties’ may give rise to issues in general international law, in the context of the ECHR it may be conclusively established that it refers to the member states.

The review of the case-law suggests that the ECtHR does not apply the strict standards laid down with regard to Article 31(3) (c) of the VCLT. It has repeatedly confirmed that the Convention ‘cannot be interpreted in a vacuum’ and it ‘must also take the relevant rules of international law into account’.<sup>171</sup> However, the pool of sources is not limited to ‘applicable rules’; the ECtHR is open to any international law instrument – including soft law – when performing interpretation with reference to VCLT. It has thus considered, among others, reports from specialised bodies,<sup>172</sup> the jurisprudence of other human rights organs<sup>173</sup> or a wide range of soft law documents.<sup>174</sup>

Admittedly, the Court reserves the right to determine which sources it reckons as relevant and accordingly how much weight it attributes to them.<sup>175</sup> Leaving room for cherry-picking weakens the normative value of systemic integration and the Court itself seems to be mindful of its limits. The case-law suggests that indeed a difference needs to be made between establishing ‘a continuous evolution in the norms and principles applied in international law’<sup>176</sup> or ‘[t]he consensus emerging from specialised international instruments and from the practice of Contracting States’,<sup>177</sup> on the one hand, and confirming that the measure at issue reflects ‘generally recognised rules of public international law’, on the other

hand.<sup>178</sup> While in the first group of cases the consensus inquiry is conflated with systemic integration in support of evolutive interpretation, and thus these may only be – as explained above – ancillary or supportive arguments, in the latter cases, the Court examines whether there is applicable customary law norm. The latter, to date, has been limited to state immunity in the context of Article 6(1).

The ECtHR – while retaining some flexibility in interpreting Article 31(3) (c) of the VCLT – has expressed commitment to an integrationist approach. It usually does not require that the developments in international law constitute a regional custom in the strict sense, and linking systemic integration to the consensus inquiry and evolutive interpretation allows it to disregard the lack of unanimity.

## 5 Conclusion

In the *Golder v. the United Kingdom*<sup>179</sup> case, the ECtHR unconditionally endorsed Articles 31–33 of the VCLT even before they entered into force, recognising that the rules on interpretation are reflections of customary international law norms. In spite of the scarce explicit mentions, all the constitutive elements of the Vienna rules can be traced in the jurisprudence. This article argued that the Court has not developed a competing framework for the interpretation of the Convention; on the contrary, the main methods and doctrines correspond to the interpretive techniques prescribed in the VCLT. While the ECtHR is the final authority to interpret the Convention, it has not abused its prerogative, and its methods and doctrines of interpretation can be accommodated within the Vienna rules. We must, however, not lose sight of the ‘special character’ and the ‘object and purpose’ of the Convention; these mandate an interpretation that ensures the effectiveness of the safeguards embodied in the founding document. Effectiveness also animates a teleological approach to the text, and the ‘object and purpose’ of the ECHR serves – in the Court’s view – as a justification or source not only for the evolutive interpretation, but also for autonomous concepts and the margin of appreciation.

Over the years, the ECtHR has been subject to widespread criticism for its activism, for its lack of respect for state consent and state sovereignty and for encroaching on territories that have been reserved for the member states.<sup>180</sup> The growing importance of the principle of subsidiarity and the related doctrine of margin of appreciation questions the Court’s ability to develop the guarantees further as required by the ‘object and purpose’ of the Convention. The most contested methods of interpretation are naturally those that result in the expansion of the protection under the ECHR and, for this reason, grounding them in the framework of the

168. ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (13 April 2006), UN Doc A/CN.4/L.682, para. 415.

169. Villiger, above n. 12, at 432–3.

170. Gardiner, above n. 15, at 299.

171. See for example: *Fogarty v. the United Kingdom* [GC] 37112/97 (21 November 2001), ECHR 2001–XI 157, para. 35.

172. *Kiyutin v. Russia* 2700/10 (10 March 2011), ECHR 2011–II 29, para. 67 with references to the World Health Organization.

173. See for example *Bayatyan*, above n. 113, with references to the Human Rights Committee’s case-law (paras. 59–60 and 105); or *Mamatkulov and Askarov v. Turkey* [GC] 46827/99; 46951/99 (4 February 2005), ECtHR 2005–I 293 for an outlook to the Inter-American Court of Human Rights (paras. 51–3 and 112).

174. E.g. *Oliari and Others v. Italy* 18766/11; 36030/11 (21 July 2015), paras. 56–61 and 166 where the ECtHR took into account soft law from other Council of Europe bodies.

175. *Tănase v. Moldova* [GC] 7/08 (27 April 2010), ECHR 2010–III 361, para. 176.

176. *Magyar Helsinki Bizottság*, above n. 47, para. 123.

177. *Demir and Baykara*, above n. 48, para. 85.

178. For example: *Cudak v. Lithuania* [GC] 15869/02 (23 March 2010), ECHR 2010–III 153, para. 57.

179. *Golder*, above n. 42.

180. P. Popelier, S. Lambrecht & K. Lemmens (eds.), *Criticism of the European Court of Human Rights – Shifting the Convention System: Counter-Dynamics at the National and EU Level* (2016).

VCLT may add further legitimacy to the jurisprudence of the Court and protect it from charges of overreaching activism. In order to demonstrate the disciplining potential of the Vienna rules, the article proposed to reconceptualise the consensus inquiry – an often-contested interpretive technique – in light of Article 31(3) (b) of the VCLT and differentiate between trends and emerging consensus on one hand, and European consensus or the conservative notion of consensus, on the other. While the former type of convergence among the member states constitutes only a ‘hypothetical consensus’ that may serve as supplementary means of interpretation, European consensus may be understood as subsequent practice within the meaning of the Vienna rules. Subsuming the consensus inquiry under subsequent practice would inject methodological rigour to its use, and developments based on a broad(er) agreement among the member states would encounter less fierce criticism.

# Hardship and Force Majeure as Grounds for Adaptation and Renegotiation of Investment Contracts

## What Is the Extent of the Powers of Arbitral Tribunals?

Agata Zwolankiewicz\*

### Abstract

The change of circumstances impacting the performance of the contracts has been a widely commented issue. However, there seems to be a gap in legal jurisprudence with regard to resorting to such a remedy in the investment contracts setting, especially from the procedural perspective. It has not been finally settled whether arbitral tribunals are empowered to adapt investment contracts should circumstances change and, if they were, what the grounds for such a remedy would be. In this article, the author presents the current debates regarding this issue, potential grounds for application of such a measure and several proposals which would facilitate resolution of this procedural uncertainty.

**Keywords:** contract adaptation, hardship, force majeure, investment contracts, arbitration

## 1 Introduction

Nearly 20 years ago, Berger expressed hopes that pragmatism would win over dogmatism and ‘doctrine, courts and arbitral tribunals alike will finally accept the international arbitrators’ power to fill gaps and revise contracts’.<sup>1</sup> Despite the time passing, hardly any developments have occurred in the field of investment. Hardship and force majeure have been frequently addressed in periods of crises.<sup>2</sup> The Covid-19 pandemic proved to be no exception and the issue of the change of circumstances which impacts contract performance became again one of the most frequently addressed topic. So far, both concepts received significant attention in the field

of international commercial contracts and international commercial arbitration. On the contrary, the issue of changed circumstances received little attention with regard to their investment counterparts. Given the particular characteristics of such agreements as well as growing dissatisfaction with the investor-State dispute settlement (ISDS), it is essential to further explore the impact of changed circumstances in relation to the performance of investment contracts and the remedies to which arbitral tribunals may resort. As noted in legal writing, not all findings applicable to long-term international commercial contracts ‘will hold true’ in the investment context,<sup>3</sup> and thus, it is essential to explore this field in greater detail.

This research article aims to fill the gap in legal scholarship on adaptation of investment contracts by highlighting the importance of this remedy in the foreign investment context. The author will tackle two research questions: (i) can arbitrators adjust investment contracts concluded between investors and the States in case of the change of circumstances, and, if answered in positive, (ii) what could constitute the grounds for such adjustment?

## 2 Investment Contracts: The Particularities

Protection of foreign investment may be based on two pillars: investment treaties concluded between the interested States, or investment contracts directly negotiated between investors and the States. Due to the growing number of bilateral investment treaties (BITs) concluded in the last decades, the importance of investment contracts protecting the investors has decreased.<sup>4</sup> However, with the rising discontent with the investors’ protection in foreign investment regime, conclusion of investment contracts may be on the rise.

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1. K.P. Berger, ‘Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense’, *Arbitration International* 17(1), at 17 (2001).

2. D. Maskow, ‘Hardship and Force Majeure’, 40(3) *American Journal of Comparative Law* 657, at 659 (1992).

3. S. Kröll, ‘The Renegotiation and Adaptation of Investment Contracts’ in N. Horn (ed.), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (2004) 425, at 426.

4. P. Dumberry, ‘International Investment Contracts’, *International Investment Law: the Sources of Rights and Obligations* (BRILL 2012), at 240.



In general, investment contracts are concluded for a considerably longer period of time than their commercial counterparts. Thus, they are more likely to be impacted by the change of circumstances. Such a change may involve a fundamental change of circumstances which leads to the performance of the contract being more onerous (hardship<sup>5</sup>) or render the performance of the contract impossible (force majeure<sup>6</sup>). The occurrence of these events is not uncommon, and thus 'there are probably very few investment contracts which during their existence have not been renegotiated and adapted by the parties to take account of changing circumstances or prerogatives'.<sup>7</sup> That is because long-term agreements are more exposed to 'geological, commercial and political risk' than the commercial contracts.<sup>8</sup> Nonetheless, given that investors assume certain risk under investment contracts, arbitral tribunals are faced with a difficult task to balance the so-called 'limit of sacrifice'. It means that they have to find a line between the risk assumed by the investor and too excessive disruption of the equilibrium of the contract.<sup>9</sup>

### 3 Contract Adaptation: Current Debate

The possibility of adapting contracts by arbitral tribunals has been highly debated in legal writing.<sup>10</sup> A distinction must be made between substantive and procedural requirements for contract adaptation. Indeed, the applicable substantive law (*lex causae*) sets forth conditions under which contracts may be adapted. The possibility to adjust contracts on the substantive level has not been disputed. Nonetheless, the substantive criteria do not 'authorise' arbitral tribunals to actually apply such a remedy. In other words, *lex causae* provides substantive basis for adjustment whereas the law of the seat (*lex arbitri*) enables the arbitrators procedurally to perform such a task.<sup>11</sup>

From a practical point of view, the adaptation or modification of a contract is 'a sensitive process' as it touches upon one of the critical values of arbitration, i.e. the

heart of the party autonomy principle and the freedom of choice.<sup>12</sup> Whilst adjusting a contract, arbitral tribunals 'rewrite' its original provisions. By doing so, they interfere with the intentions of the parties reflected in the agreement between them. Moreover, when resorting to such a remedy, a tribunal is not acting within its usual scope of functions, which is to produce an enforceable award.<sup>13</sup> It has been debated whether contract adaptation falls under the notion of a *dispute*, especially with regard to ICSID framework.<sup>14</sup> The authors have been denying such a possibility by stating that 'disputes regarding conflicts of interest between the parties, such as those involving the desirability of renegotiating the entire agreement or certain of its terms, would normally fall outside the scope of the Convention'.<sup>15</sup> To justify such a position, references have been made to the wording of Article 25 ICSID Convention and a definition of 'legal disputes' included in the report of the executive director, which provides that a legal dispute 'must concern the existence or scope of a legal right or obligation, or the nature or extent for the reparation to be made for a legal obligation'.<sup>16</sup>

It may be the case that the parties themselves decide to include such an adaptation clause into their contract, which serves as a mechanism to reinstate its equilibrium. The more difficult issue, however, occurs when there is no such agreement. With relation to investment contracts, the issue has only been addressed obiter dicta by the arbitral tribunal in *Kuwait v. Aminoil*.<sup>17, 18</sup> The tribunal found that theoretically, it is possible to authorise the tribunal to act in such a capacity; however, it requires an explicit consent from the parties.<sup>19</sup> Another dispute which dealt with the issue of contract adaptation arose out of the Exploration and Production Sharing Agreement ('EPSA') between Wintershall and Qatar. Without referring to the process as adaptation or adjustment, the arbitral tribunal revised the terms of the EPSA by finding that relinquishment provision contained therein should be extended. The EPSA did not contain any authorisation for the tribunal to adapt the contract. However, it adjusted the terms based on interpretation of parties' obligations in accordance with good faith principle. Pursuant to the EPSA, 'a contract shall only bind a contracting party to the contents thereof, but it still shall also extend to all its requirements in compliance with law, usage and equity depending on the

5. E.g. Art. 6.2.2 Unidroit Principles on International Commercial Contracts 2010.
6. E.g. Art. 7.1.1 Unidroit Principles on International Commercial Contracts 2010.
7. Kröll, above n. 3, at 425.
8. A. Kolo and T.W. Wälde, 'Renegotiation and Contract Adaptation in International Investment Projects', (1)1 *The Journal of World Investment & Trade* 5, at 5 (2000).
9. K.P. Berger, 'Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators', 36(4) *Vanderbilt Journal of Transnational Law* at 1352 (2003).
10. For example, Berger, above n. 1; Kröll, above, n. 3; C.H. Brower II, 'Mind the Gap', 54(1) *BYU Law Review* (2016); J.G. Frick, *Arbitration and Complex International Contracts* (2001); R.A. Hillman, 'Court Adjustment of Long-Term Contracts: An Analysis under Modern Contract Law', 1 *Duke Law Journal* (1987); C. Brunner, *Force Majeure and Hardship Under General Contract Principles: Exemption for Non-Performance in International Arbitration* (2008).
11. Brower II, above n. 10, at 18.

12. P. Muchlinski, F. Ortino & C. Schreuer, *The Oxford Handbook of International Investment Law* (2008), at 598.
13. *Ibid.*, at 599.
14. G.R. Delaume, 'ICSID Arbitration: Practical Considerations', 5(3) *J Intl Arb* 103 at 116 *et seq* (1984).
15. *Ibid.*, at 116 *et seq*.
16. Report of the Executive Directors on the ICSID Convention, [https://icsid.worldbank.org/en/Documents/resources/2006%20CRR\\_English-final.pdf](https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf), at 44.
17. *Kuwait v. The American Independent Oil Company (AMINOIL)* (1982).
18. Kröll, above n. 3, at 452.
19. *Kuwait v. The American Independent Oil Company (AMINOIL)*, (Ad-hoc award) (1982), at 1015: 'A tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations- or to modify a contract - unless that right is conferred upon it by law, or by the express consent of parties.'

nature of the obligation'.<sup>20</sup> In the tribunal's view these were sufficient grounds to extend the EPSA. Doubts were raised in legal writing whether such an extension actually constituted an 'interpretation'.<sup>21</sup> In the author's view, by doing so, the tribunal escaped uncertainty surrounding contract adaptation and resorted to a safe practice of contract interpretation. However, it seems to constitute a disguised modification of the contractual provisions between the parties, and in order to avoid the risk of an unenforceable award, it should have examined whether it is procedurally authorised to do so.

On the other hand, even if there was a general acceptance for such a practice, so far no general concept on how the contract adaptation would look like has emerged.<sup>22</sup> The most feasible proposal could consist in an increase or decrease of a price but we are still about to find out what the exact parameters would be. As of now, the lack of guidelines provides a lot of discretion for tribunals to come up with a model. For example in *ICC Case no. 2508*, the respondent was seeking adaptation of the contract under Swiss law because the world market petroleum prices had tripled after the conclusion of the contract.<sup>23</sup> The seller proposed to increase the purchase price to reach the new world petroleum prices. The tribunal did not agree with such a solution. It stated that price adjustment would need to be limited to 'what was strictly necessary so that performance of the contract did not become manifestly unfair'.<sup>24</sup> It means that the adjustment of a contract should 'not be designed to make the injured party whole, but only what was strictly necessary to make the performance bearable'.<sup>25</sup>

## 4 The Grounds for Contract Adaptation

Before addressing the issue of the empowerment of arbitrators, one should answer a question regarding the very nature of the contract adaptation. A useful insight in this regard has been provided by drawing distinction between 'adaptation' and 'gap filling'. That starting point of discussions on the power of arbitrators to adapt contracts is nonetheless often disregarded in the aca-

demic debate. Most scholars did not make that distinction, 'arguing either that it is not helpful to make the distinction, or that it is not possible to draw the line between adaptation and gap filling'.<sup>26</sup>

If unexpected circumstances occur which demand the adjustment of contract provision, the contract shows an 'ex post gap' since the parties failed to provide a provision for dealing with the unexpected event. In other words, the contract concluded between the parties is incomplete. In that case, the parties have a reasonable expectation for the contract to be adjusted as there is a real gap in the contract. This model is based on the notion of fairness that the parties should share the burden of unallocated losses.<sup>27</sup> Such adjustment does not violate the principle of *pacta sunt servanda* as the parties have a reasonable expectation of equal risk sharing which was not allocated at the formation stage.<sup>28</sup> Whereas adaptation – 'agreement model' – occurs when a party reasonably expects to adjust the contract in case of a serious disruption either based on the express adjustment clause (which demonstrates that parties have foreseen that unexpected circumstances may impact the performance of a contract) or in the lack thereof, the circumstances indicate that there is an underlying duty to adjust the contract. That may be the case if

- (i) the parties enjoy relatively equal bargaining power, (ii) are familiar with each other; (iii) have previously dealt with each other; (iv) the subject matter of the contract is not unusual and the parties are therefore comfortable with little formality; (v) and the parties want to continue to deal with each other because they are aware of the costs of finding a market substitute after investing in a relationship and after forming understandings that lower the cost of doing business.<sup>29</sup>

The competence of arbitrators to fill the gaps of the contract is widely accepted whilst adaptation of the contract, possibly against one of the parties' will, remains highly controversial.<sup>30</sup> It has been advocated that contract adaptation is only possible if the parties expressly authorised the tribunal to do so. Therefore, based on the proposed differentiation, one may assume that the process of gap filling deals with the issue of contract interpretation and intends to specify the obligations of the parties based on the express terms, parties' testimonies, implied terms derived from the structure of the agreement, dealings between the parties, etc.,<sup>31</sup> whereas adaptation of the contract, in the proposed distinction, would concern the adjustment of its terms to a new situation, i.e. rewriting the obligations the parties have agreed upon.

20. *Wintershall AG v. The Government of Qatar*, (28 ILM 795) (Partial Award and Final Award) (1989), at 823.

21. J. Carver and K. Hossain, 'An Arbitration Case Study: The Dispute That Never Was', 5(2) *ICSID Review – Foreign Investment Law Journal* at 321 (1990).

22. Frick, above n. 10, at 225.

23. ICC Case No. 2508, (Award) (1976); see also: M. Scherer, 'Economic or Financial Crises as a Defence in Commercial and Investment Arbitration', in A. J. Belohlávek, N. Rozehnalová (eds), *Czech Yearbook of International Law – Second Decade Ahead: Tracing the Global Crisis* (2010) 219; see F.R. Fucci, 'Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts Practical Considerations in International Infrastructure Investment and Finance', <https://www.transnational-dispute-management.com/article.asp?key=1037>.

24. ICC Case No. 2508, (Award) (1976).

25. Fucci, above n. 23.

26. Frick, above n. 10, at 147.

27. Hillman, above n. 10, at 3.

28. Frick, above n. 10, at 148, 151.

29. Hillman, above n. 10, at 3.

30. Frick, above n. 10, at 148.

31. Brower II, above n. 10, at 5.

The provided differentiation does not find vast approval in legal writing. Despite making a differentiation between gap-filling and adaptation process, Berger indicates that both of them ‘involve the evaluation of economic issues and the rewriting of the parties’ contract’ and thus constitute a creative task that is considered by many scholars to be incompatible with the procedural notion of arbitration.<sup>32</sup> Brower II argues that placing an equal sign between gap filling and interpretation means ‘vesting arbitrators with virtually unrestricted powers to pluck fundamental terms for arbitration agreements out of thin air under the rubric of contractual interpretation’.<sup>33</sup> There is, however, a minority view that a doctrinal separation of notions of gap filling and interpretation lacks coherence, stability and utility. Rau argues that both interpretation and gap filling serve the same purposes – they aim to specify the obligations of the parties but differ only in the degree of interference, and thus they should be treated as one concept.<sup>34</sup>

Therefore, even though distinction between contract adaptation and contract gap filling could potentially resolve the issue of the powers of arbitral tribunals to adjust the contract, as of now, the proposal is met with resistance as there is a thin line between the two notions.

#### 4.1 Contractual Grounds

Majority of legal scholars express the view that contract adaptation should be permitted if the parties expressly authorise the arbitrators to do so.<sup>35</sup> Adaptation clauses appear especially in energy contracts – the parties may wish to include price adjustment clauses to adapt the contract to changes concerning the value of, e.g. gas.

Adaptation clauses provide for adjustment of terms of an original contract in the presence of change of circumstances beyond control of the parties. It entails a fundamental alteration of the equilibrium of the contract. The onerousness in performance of the obligations and thus the need of such an adjustment can be raised by both an investor and a State.<sup>36</sup> Automatic adaptation clauses are one of the examples of adaptation clauses. These provisions are connected to objective standards such as exchange rate of certain currencies, the minimum wage, cost index for a particular commodity, etc.<sup>37</sup> Instead of agreeing on a fixed price in a contract, the payment is oftentimes calculated based on a formula that takes into account such a change in circumstances.<sup>38</sup>

Some authors argue that standard arbitration clauses are sufficient to empower tribunals to adjust contracts and additional express authorisation is not required.<sup>39</sup> Yet, it

still remains doubtful whether such a practice falls under a typical arbitration clause referring to ‘all disputes arising out of or in connection with the present contract’.<sup>40</sup> Adaptation of a contract does not involve a simple yes or no decision but rather constitutes a complex creative task, which may fall out of the scope of a notion of a dispute.<sup>41</sup> Under a standard arbitration clause, the arbitrators are vested with powers to resolve a dispute and not amend the contract concluded between the parties. It can be argued that adaptation of the contract amounts to a ‘rewriting of the contract’ for the parties and reshaping the rights and obligations, which does not fall under the notion of a legal dispute and cannot be arbitrated.<sup>42</sup> In a commercial dispute, an ICC tribunal found that the standard ICC arbitration clause may actually be interpreted as allowing for the adaptation of the contract. Such would apply to cases in which the contract was concluded for a long term and if that contract includes provisions that would need to be adjusted over a period of time.<sup>43</sup> Such a view was shared by Mann who viewed that a limited function for contract adaptation is ‘inherent in the arbitration clause’.<sup>44</sup> On the other hand, Bernardini argues that it is sufficient enough to confer to arbitral tribunal powers to adapt contracts by making a reference to certain texts such as, e.g. the UNIDROIT Principles, which under Article 6.2.3(4) allow for such an adaptation.<sup>45</sup> It means that the choice-of-law clauses pointing to the law which allows for such a mechanism would be sufficient to empower an arbitral tribunal. Some tribunals hold a more restrictive approach to this issue. In one of the commercial cases, the arbitral tribunal was requested by a party to adjust the contract on the basis of a force majeure clause, which did not provide for any adaptation as a remedy. The tribunal found that:

It is not for the Arbitral Tribunal to question the motives or judgement of the Parties, but to assess their rights and obligations in light of their legally significant acts or omissions. That is all; that is enough. To go beyond this role would be to betray the legitimate expectations reflected in the Parties’ agreement to arbitrate, and indeed to impair the international usefulness of the arbitral mechanism.<sup>46</sup>

Similarly, even an inclusion of a hardship clause into a contract without specifying a remedy may be insufficient for seeking contract adjustment.<sup>47</sup>

32. Berger, above n. 1, at 1.

33. Brower II, above n. 10, at 2.

34. A.S. Rau, ‘“Gap Filling” by Arbitrators’, in *International Council For Commercial Arbitration* (2015), at 464.

35. N. Horn, *Adaptation and Renegotiation of Contracts in International Trade and Finance* (1985).

36. P. Bernardini, ‘Stabilization and Adaptation in Oil and Gas Investments’ 1(1) *Journal of World Energy & Business* 98, at 99 (2008).

37. Frick, above n. 10, at 174.

38. Kröll, above n. 3, at 438.

39. J.-Q. De Cuyper and W. Peter, ‘Renegotiation of Long Term International Agreements and Flexibility: Consideration on the Ground of the Ghana/Valco Case’, *IBLJ* 775, at 794 (1995).

40. Standard ICC arbitration clause reads: ‘All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.’

41. Berger, above n. 1, at 8.

42. A. Al Faruque, 9(2) ‘Renegotiation and Adaptation of Petroleum Contracts: The Quest for Equilibrium and Stability’, *The Journal of World Investment & Trade* 113, at 140 (2008).

43. Berger, above n. 1, at 8.

44. Cuyper and Peter, above n. 39, at 794.

45. Bernardini, above n. 36, at 107.

46. UNCITRAL Award of 4 May 1999, 25 Y.B. COM. ARB. 13, 61 (2000), mentioned in Berger, above n. 9, at 1353.

47. Faruque, above n. 42, at 128.

Therefore, the parties should include a precise and explicit adaptation clause in the contract to procedurally authorise the arbitrators to apply such a remedy.

#### 4.2 Powers of the Arbitral Tribunal in the Absence of Adaptation Clause in the Contract

The possibility of contract adaptation becomes even more questionable due to the lack of an express authorisation in the contract. There is a concern that in case arbitrators decide to adapt the contract despite the lack of an express authorisation from the parties, the principle of *pacta sunt servanda* and the principle of party autonomy could be at stake.<sup>48</sup> Several possibilities have been discussed in legal writing but no indications were made by arbitral tribunals even *obiter dicta* in this regard.

*Lex arbitri* could constitute a possible source of necessary empowerment. *Lex arbitri* also referred to as the law of the seat of arbitration is the law which ‘governs the validity of arbitration and arbitral award’.<sup>49</sup> There is a general consensus that in case the contract remains silent on the empowerment of the tribunal to adapt the contract such implicit authorisation can be derived from the law of the seat of arbitration.<sup>50</sup>

Berger refers to the notion of contract adaptation as an ‘adaptration’.<sup>51</sup> He underlines that the contract concluded between the parties may provide a general authorisation for the arbitral tribunal; however, it is a matter of *lex arbitri* to determine whether the arbitrators are empowered to adapt the contract from a procedural perspective. If *lex arbitri* does not provide for such an authorisation, the arbitral award will most likely be unenforceable under the New York Convention. Therefore, tribunals do not only require an authorisation from the parties themselves but also provisions allowing them to do so under *lex arbitri*.<sup>52</sup> It renders the choice of the seat of arbitration of crucial importance.

Nonetheless, Berger points out that in case *lex arbitri* remains silent with regard to powers of arbitral tribunals to adapt the contracts, one may look into the competence of domestic courts’ competence in this regard. Thus, if domestic courts enjoy the competence to adapt the contracts, the arbitral tribunal acting under the arbitration law of that jurisdiction will be granted the same powers.<sup>53</sup> By such a comparison, Berger refers to the principle of ‘synchronised competences’.<sup>54</sup> In case domestic procedural law remains silent on that issue as well, Berger’s standpoint is that as a rule of last resort, one should look for the answer under the substantive law (*lex causae*), which is ‘an indicator for contract adap-

tation and gap-filling by national courts, and accordingly, for arbitral tribunals’.<sup>55</sup>

Frick disagrees with such a solution. He argues that the question of the power of arbitrators to adapt the contracts is solely answered by *lex arbitri* and one should not resort to the competence of domestic courts or *lex causae*.<sup>56</sup> At the same time, he argues that adaptation is possible when the parties include an express provision in a contract. He also allows for adaptation in ‘exceptional circumstances as defined by the applicable substantive law’.<sup>57</sup> In his view, the applicable substantive law sets forth conditions for contract adaptation; however, the question of the power of arbitrators constitutes a separate procedural issue which can be answered solely by *lex arbitri*.<sup>58</sup> He further purports that ‘if there is no rule of the *lex arbitri* prohibiting adaptation of contracts, one can assume that arbitrators in fact have such authority as part of their general decision making power derived from the arbitration clause’.<sup>59</sup> Therefore, in his view, an express authorisation from the parties is not required.<sup>60</sup>

Conflicting provisions of empowering arbitrators under the contract in case *lex arbitri* prohibits such a remedy have not been the subject of legal discussions in literature nor arbitral awards. However, one must bear in mind that such could create a risk of non-enforcement, especially if contract adaptation against *lex arbitri* would violate public policy.

## 5 Contract Adaptation: Opportunities and Threats

Contract adaptation attracted a lot of attention in international arbitration. Despite the potential procedural difficulties and current lack of guidelines for arbitral tribunals, legal scholars have been advocating the use of such a remedy. Before addressing the ways to reduce the uncertainty surrounding this legal mechanism, it is necessary to address first the opportunity and threats it entails.

First and foremost, contract adaptation provides more flexibility to the contractual relationship. Such a flexibility cannot be achieved through resorting to other remedies such as, e.g. renegotiation or termination of the contract. Renegotiations conducted by the parties are rarely successful since majority of conflicted parties are not able to reach an agreement.<sup>61</sup> In this event, tri-

48. Frick, above n. 10, at 146; Faruque, above n. 42, at 139.

49. L. Russi, ‘Chronicles of a Failure: From a Renegotiation Clause to Arbitration of Transnational Contracts’ 24(1) *Connecticut Journal of International Law*, 77 at 77 (2008).

50. Berger, above n. 1, at 5.

51. *Ibid.*, at 17.

52. *Ibid.*, at 10.

53. *Ibid.*, at 10.

54. J.D. Lew et al., *Comparative International Commercial Arbitration* (2003), at 652.

55. Berger, above n. 1, at 10. Similarly Bernardini argues that there is a widespread view that ‘that if the judge is so empowered the arbitrator is also empowered’ see Bernardini, above n. 36, at 108.

56. Frick, above n. 10, at 193.

57. *Ibid.*, at 148.

58. *Ibid.*, 194.

59. *Ibid.*, at 197.

60. The view has been accepted by majority of the legal scholars. It was also adopted by arbitrators in *Kuwait v. Aminoil*.

61. G.H. Daniel, ‘Adaptation of Clauses in North Sea Oil Supply Agreements’, 2 *Journal of Energy & Natural Resources* 100, at 102 (1983).



bunals would only be left with the option to terminate the contract (which may not serve the parties) or confirm the terms of the agreement and thereby allocate the risk to one of the parties, perhaps against the original terms of the contract.<sup>62</sup>

The adjustment of investment contracts results out of their vulnerability to changes of circumstances due to their long-term character and operation in fields highly subject to regulatory changes such as, e.g. petroleum industry.<sup>63</sup> The parties entering into investment contracts do not have the ability to predict all the events that may affect the contract in the future. If such circumstances materialise, the parties should have the space to make the necessary adjustments and level the playing field. Therefore, in literature, the commentators are putting forward adjustment arguments from a view of rational and ethical commercial behaviour.<sup>64</sup> In accordance with such a view, ‘the disadvantaged party does not “deserve” the loss and the party benefitted does not “deserve” the gain’.<sup>65</sup>

Another factor in favour of contract adjustment that the States should take into consideration is the risk of additional costs associated with finding a new business partner. If the parties are not able to reach an agreement on contract renegotiation and tribunal is left with the only viable remedy, i.e. termination of the contract, the parties will usually decide to pursue a new investment project. However, finding a new investor may be time consuming, more expensive and overall less beneficial for the State. From another perspective, a failure of the investment project, and a failure to adjust the terms of the original contract, may affect both of the parties’ goodwill and reputation.<sup>66</sup> Thus, since an attempt to renegotiate the contract by the parties themselves oftentimes is futile, adaptation by arbitral tribunals can salvage the contractual relationship and save the parties from negative repercussions.<sup>67</sup>

With the opportunities also come threats. It has been expressed in legal writing that arbitral tribunals may be overstepping their powers with regard to contract adjustment, i.e. adjust the contract’s provisions against the parties’ will.<sup>68</sup> These concerns, however, seem to be at least somewhat unsubstantiated. Arbitrators will only adjust provisions of the contract if one of the parties included such a request in the prayer for relief and reasonably motivated its standpoint.<sup>69</sup> The tribunals will not grant such a remedy *ex officio*. The fear that tribunals will unduly rewrite contracts has not materialised in practice.<sup>70</sup> Nonetheless, the concern cannot be simply overlooked. If the States remain under the impression that there is a risk of overstepping, it is fair to assume

that they will be more reluctant to enter into investment contracts containing arbitration clauses. With the adaptation practice becoming more established, the parties may knowingly exclude adaptation from the scope of tribunals’ powers.<sup>71</sup>

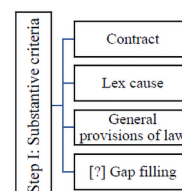
With tribunals overstepping their powers, another threat materialises. If authorisation of arbitral tribunals to adapt the contract remains doubtful, there is a risk that a court will refuse to enforce an arbitral award under the New York Convention. That risk is especially relevant in cases where the contract as well as *lex arbitri* remain silent on the issue of adjustment.<sup>72</sup>

Lastly, the parties themselves fear that inclusion of any type of adjustment clauses may provide ‘an easy way out’ of the contractual obligations.<sup>73</sup> What must be nonetheless emphasised is that arbitral tribunals will only adjust terms of the contract if there is a fundamental alteration of its equilibrium (unless the parties lower the threshold of hardship in their respective agreement). The contract will not be adapted simply because it stopped to be profitable – the change has to reach the so-called ‘limit of sacrifice’ in commercial setting.<sup>74</sup> Providing a detailed description of which events may cause such a burden as to give grounds to contract alteration by the parties may actually provide more stability to the contractual relationship and encourage the parties to refrain from seeking contract amendments without grounds to do so.

## 6 Adaptation: Steps and Possible Scenarios

The first step is to establish the substantive criteria regulating the change of circumstances, i.e. hardship or force majeure. The arbitrators must first look into the contract to examine whether the parties themselves included hardship and force majeure clauses and decide whether the supervening event satisfies the requirements under the contract.

### *Step II: Procedural Empowerment*



62. C.P. Gillette, ‘Commercial Rationality and the Duty to Adjust Long-term Contracts’, 69 *Minnesota Law Review* 521, at 539 (1985).

63. Faruque, above n. 42, at 115.

64. Gillette, above n. 62, at 524.

65. *Ibid.*, at 575.

66. Kolo and Wälde, above n. 8, at 31.

67. *Ibid.*, at 32.

68. Brunner, above n. 10, at 496.

69. *Ibid.*, at 496.

70. *Ibid.*, at 497.

71. Such exclusion was included in a contract between Tiffany and Swatch (*Tiffany & Co v. The Swatch Group Case*). The arbitral clause read: ‘The arbitral tribunal may not change, modify or alter any express condition, term or provision of this Agreement and to that extent the scope of its authority is expressly limited. The arbitral tribunal shall make its award in accordance with the rules of law and not as *amiable compositeur*.’

72. Berger, above n. 1, at 10.

73. Kröll, above n. 3, 441.

74. Berger, above n. 9, at 1354.

Contract*	Lex arbitri	Can arbitrators adapt the contract?
□	□	□
□	<<silent>>	?
□	○	?
<<silent>>	□	?
○	□	○

Further, based on the Claimant's prayer for relief, the tribunal will look into the available remedies under the contract and the applicable law, and decide whether or not to grant the remedy. If a party requests contract adaptation, and such remedy is available under the substantive law, the tribunal will need to assess whether it is authorised to modify the contract. As mentioned hereinabove, even though the use of adaptation disguised as gap filling has not been widely accepted in legal literature, the tribunal in *Wintershall AG v. the Government of Qatar* resorted to such a practice. In such a case, since gap filling is connected to the interpretative powers of the arbitrators, theoretically, the tribunal would not be required to seek procedural empowerment.

Thus, there are several procedural uncertainties with regard to the arbitrators' powers to adapt contracts. When it comes to empowerment included in a contract when *lex arbitri* remains silent, it has been generally accepted that contract adaptation could be allowed. The tribunal should nonetheless make its decision taking all circumstances into consideration, i.e. the risk of non-enforcement of the award and the approach of courts at the potential place of enforcement. The same remarks apply to the opposite scenario, i.e. when the contract remains silent on the issue and *lex arbitri* allows it. Arbitrators should also take precaution if an award will be enforced against a State and take into consideration political landscape. In developing countries where pro-enforcement regime under the New York Convention has not been effective yet, the risk of non-enforcement of an award against the State magnifies. In China it has been found that it is 'difficult to enforce a foreign arbitral award in the PCR against a State owned Chinese company'.<sup>75</sup> Enforcing an award against the State itself may be even more difficult.

The situation is more complicated when the parties empower the tribunal to adapt the contract in the agreement itself; however, the law of the seat of arbitration forbids such a practice. For example there is a traditional view in common law that neither courts nor arbitrators have the power to adjust the terms of the contract.<sup>76</sup> In such a case the risk of non-enforcement of the award

is significant, and thus arbitrators should be discouraged from engaging in contract modification. What could be encouraged, however, is supporting the parties to engage in renegotiation of the contractual terms or mediation in order to adapt the contract themselves. To overcome the procedural issue, Brunner advocates for the so-called 'Italian rule'. If an arbitral tribunal is not procedurally empowered to adapt the contract, the party should be entitled to request termination of the contract instead.<sup>77</sup>

Besides the highlighted procedural uncertainty, the very first step with regard to searching for empowerment under the contract is establishing what type of empowerment is needed. It is an express adaptation clause or, as mentioned earlier, an arbitration clause would suffice. Some scholars even argue that it is sufficient enough to include a choice-of-law clause on substantive level, such as, e.g. the UNIDROIT Principles, which under Article 6.2.3(4) allow for such an adaptation in order to confer such power.<sup>78</sup> That could be deemed as sufficient to determine the parties' will to empower the tribunal to act in such capacity. Similar view may be expressed about inclusion of a hardship clause which does not set forth the remedies. In the author's view, there is room for arguments that it indicates the parties' will to use the remedies generally available in case of hardship.

Lastly, there is uncertainty with regard to the actual modification process. There are no guidelines as to how such adaptation should be carried out. Therefore, arbitrators may be reluctant to grant the parties such a remedy.

## 7 Reducing the Uncertainty

The issue of change of circumstances impacting performance of contracts has been discussed in legal writing for quite some time now.<sup>79</sup> However, with the benefits of hindsight, it seems that hardly any progress in the context of investment contracts has been made since 1985 when the arbitral tribunal in *Kuwait v. Aminoil* theoretically recognised the powers of arbitral tribunals

75. A.G. Maurer, *The Public Policy Exception Under the New York Convention: History, Interpretation, and Application* (2013), at 344.

76. Brunner, above n. 10, at 491.

77. *Ibid.*, at 498.

78. Bernardini, above n. 36, at 107.

79. For example, Berger, above n. 1; Kröll, above n. 7; Brower II, above n. 10; Frick, above n. 10; Hillman, above n. 10; Brunner, above n. 10.

to adapt contracts under express authorisation. The arbitrators are in general reluctant to address the doctrine of changed circumstances.<sup>80</sup> It may be the case that arbitrators are hesitant to adjust the contracts because they are not equipped with any guidelines or tools on how to actually proceed with the issue. Ultimately, it is in the arbitrators' hands to recognise the remedy and use it in practice.

The first step is to increase awareness of the legal community, and through them of the parties, concerning negotiation of contractual provisions and hardship and force majeure clauses. With the Covid-19 pandemic outbreak, this goal has been partially achieved so far. The law firms have been organising many virtual webinars on the issue as well as providing overview of change of circumstances under major jurisdictions. The awareness regarding the contract adaptation clauses among legal practitioners would certainly facilitate contract drafting. Since arbitrators are currently lacking any guidelines, parties are advised to provide concrete criteria for contract adjustment. Instead of using soft references such as 'fair and equitable', 'reasonable' or 'restoring or maintaining the equilibrium of the contract', parties should specifically express what they expect from arbitral tribunals.<sup>81</sup> Another option, parallel to individually negotiated clauses, would be to encourage arbitral institutions to work out a model clause dealing with adaptation of contracts by arbitrators.<sup>82</sup>

On a bigger scale, the current discussions may constitute an incentive for issuing guidelines on contract adaptation by arbitral tribunals, such as, e.g. International Bar Association ('IBA') Guidelines.<sup>83</sup> They are defined as 'guidelines' as opposed to 'rules' in order to underline their contractual and somewhat consensual nature. The guidelines are applicable, and also a portion thereof, if the parties decide to adopt them in the original agreement. Arbitral tribunals may use them at their discretion as guidance.<sup>84</sup> Ultimately, the need for a change prompted by the pandemic may start discussions on inclusion of proper provisions into arbitration rules. Providing such a regulation would constitute a stepping stone in the development of the doctrine.

## 8 Concluding Remarks

Gillette stated that in case of change of circumstances the parties 'can do little better than to throw up their hands in despair and place themselves at the mercy of future events'.<sup>85</sup> The same wish can be applied to arbitral

tribunals. In order to effectively resolve disputes, arbitrators cannot face procedural uncertainty.

The issues of hardship and force majeure appear in literature in waves.<sup>86</sup> In these unprecedented times, it is therefore necessary to revisit the concept of contract adaptation and the scope of arbitral tribunals' powers. There is still a lot of uncertainty and hardly any developments have been made in this area. The grounds for contract adaptation remain unclear – it is still questionable whether arbitral tribunals can resort to such a remedy in case the contract lacks respective provisions with regard to change of circumstances and whether *lex arbitri* has to expressly allow for adjustment. Therefore, the current obstacle to making such a mechanism a standard (yet only available in exceptional and unforeseen circumstances creating distortion of the equilibrium of the contract) practice is the procedural empowerment.

In order to provide more clarity in this regard, the author of this research article proposed several solutions which may facilitate the process such as building awareness of the legal community (and improving the drafting process by inclusion of explicit and precise adaptation clauses) and introducing guidelines for arbitrators. Even though there is no 'one-size-fits-all' formula, which could be applied by arbitral tribunals, it would be beneficial to provide arbitrators with guidelines as to how such adjustment should be conducted. Certainly, the most attractive solution would be for the parties to provide the tribunal with more concrete expectations than 'restoring the equilibrium of the contract'. Such a change can be brought about by introduction of model clauses as well as familiarising the legal industry with a possibility to include such provisions in the contracts.

'Adaptation' has been advocated nearly 20 years ago.<sup>87</sup> Already then, Berger has been underlying that after decades of confusion, pragmatism should win with dogmatism. Hardship and force majeure have been largely recognised in many jurisdictions and requirements to adjust contracts from a substantive dimensions did not give rise to controversy. It seems that due to the complexity of international arbitration and multitude of applicable laws that might come into play, the obstacle that remains is the empowerment of arbitral tribunals, i.e. a procedural dimension of contract adaptation. With consequences of Covid-19 fast approaching, arbitrators might be faced with the issue much faster. Thus, this article calls upon the arbitration community, i.e. arbitral institutions, scholars and practitioners, to take the lead in facilitating the process – by introduction of appropriate guidelines and drafting better clauses concerning the change of circumstances. With the common effort, more clarity can be brought into adaptation of investment contracts. It is high time to once again revisit the discussions and work out practical solutions which might be implemented in practice.

80. Cuyper and Peter, above n. 39, at 787.

81. Berger, above n. 1, at 13.

82. H. Strohbach, 'Filling Gaps in Contract', 27(2:3) *American Journal of Comparative Law* 479, at 485 (1979).

83. [www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).

84. P. Ashford, *The IBA Guidelines on Party Representation in International Arbitration: A Guide* (2016), at 3.

85. Gillette, above n. 62, at 542.

86. Maskow, above n. 2, at 659.

87. Berger, above n. 1, at 10.

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