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PREFACE

Opening Thoughts by the Editor-in-Chief

In 1956, Philip Jessup famously defined transnational law as “all law which regulates actions or events that transcend national frontiers.”¹ The *Journal of Transnational Legal Issues* operates very much in the spirit of Jessup in that it embraces and ‘lives’ a broad and inclusive concept of transnational law, or a view that sees it as a true “hybrid of domestic and international law.”² And yet, it seeks to go beyond mere transnational lawyering and focus most profoundly on *transnational legal education and scholarship*. The editors are committed to embrace the “bi-polarity of the national and the international”³ and to provide a forum for publication to both established and emerging legal authors “who are comfortable and skilled in dealing with the differing legal systems and cultures that make up our global community.”⁴

Much like law students of the present and future, lawyers in general are and will be presented with “choice[s] that challenge[…] them to identify options and that permit[…] multiple resolutions.”⁵ The *Journal of Transnational Legal Issues* has but one aim, clustered around the following paradigms: to foster a ‘thinking out of the box’ of lawyers; a creativity that allows the mind to transgress into the world of empirical and inspirational, not formally binding sources for resolving pressing problems of a legal – thus, societal – nature; a mind-set that accepts international law as well as comparative and transnational legal methodology as another “relevant and informative”⁶ source for conflict resolution that can operate alongside traditional and intra-systemic, or ‘original’ methods without jeopardizing the inherently national character of, in particular, constitutional solutions and approaches. The editors endorse a cautious⁷ and methodologically sound⁸ approach to comparative law. The editors are

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⁶ United States, Supreme Court, *Knight v. Florida*, 528 U. S. 990, at 993–994 (Breyer, J. dissenting): “[T]his Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances.
internationalists by design, by education and training, and by choice. The editors also perceive a transnational dialogue amongst lawyers – be they practising professionals or academics – as the best avenue for including international and non-domestic legal standards in the daily processes of domestic administration and adjudication that will continue to define the legal world for quite a while. A dialogue based on knowledge and an open exchange of ideas is what the *Journal of Transnational Legal Issues* aims to contribute to. The contributions in the present, inaugural volume reflect that mind-set.

First, the present editor-in-chief has contributed a brief piece on one particular aspect of the on-going process of reforming the European Court of Human Rights, namely the introduction, with effect from 2010, of an addition criterion for declaring applications inadmissible that did not cause the petitioner any substantial disadvantage. This innocent-looking standard was feared to have, and still has the potential to have the effect of thoroughly redefining the character of the European human rights protection machinery from one that, at least nominally, guarantees one’s right to petition to a more constitutional one.

*The Feng Shui of Study Abroad Programs*, by Gregory Bowman, extrapolates some innovative and thoughtful ideas on how to design international exchanges and study-abroad programs based on a well-balanced design. Such programs are dear to the heart or, in more prosaic terms, the daily business of the editors who also share the responsibility of further advancing the award-winning internationalization ventures of the University of Lucerne, School of Law, including our exchange, mobility, transnational PhD and Moot programs. The question begs an answer: what are successful programs that expose students to the realities of transnational law supposed to look like?

*A Tale of Hooligans and Terrorists*, by Peter T.M. Coenen, addresses one solution for two problems – football hooliganism and terrorist suspects. In striving to find both an effective and comprehensive solution to a public order issue and a national security issue, the UK government applied similar restrictions to these very different groups of individuals. Despite the disparity in group characteristics, the same human rights issues are implicated when a person’s liberty is restricted without full due process.

*The Value of Minimum Core Obligations in Health Care*, by Daniel Keevy, delves into a nail-bitingly current problem, namely what international law requires national health care programs to provide to comply with minimum standards. Not only since *National Federation of Independent Business v. Sebelius*, 567 U.S. ___ (2012), the mandate of national governments to secure a minimum standard of

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access to and services provided by governmental health care programs has been at the forefront of the debate in national and international fora. Using the South African reality as a starting point, the author explores the requirements of the ICESCR and other human rights treaties in the area.

Last, but not least, The Self-Amnesty Provision 2008 Constitution of Myanmar, by Silja Aebersold, is the first of a series of papers that emanate from outstanding contributions by emerging scholars we call Featured Articles. The editors seek to provide a medium for publication to those graduate students who have submitted strikingly convincing and thought-provoking pieces as masters theses or the like. The paper selected for the inaugural volume fulfils all criteria of excellence, and more: the suggested solution contributes to transitional justice and human rights protection while remaining firmly grounded in political realism and expediency.

On behalf of the editors and our board, I wish all readers an enjoyable and rewarding reading experience of the first issue of the Journal of Transnational Legal Issues. As those responsible for a new, peer-reviewed, open-access journal we welcome your opinion, whether critical or complimentary. And, first and foremost, we look forward to receiving proposals and submissions of pieces for publications in subsequent issues.

ALEXANDER H. E. MORAWA, S.J.D.
PROFESSOR OF LAW
EDITOR-IN-CHIEF
The *Journal of Transnational Legal Issues* strives to be at the forefront of both legal research and modern technology. The benefits of open access can only be fully utilized by taking advantage of advances in web presence and user friendliness. To that end, we have attempted to make our journal as easy to navigate and easy to use as possible. Each issue, we will include a short note about how to get the most out of the journal, including the website, the digital formats, and the benefits of open access.

While many of our great ideas will be implemented steadily throughout the upcoming issues, we have already done our best to make the inaugural issue a unique and coherent synthesis of both technology and conventional scholarly literature.

In this issue, we have embedded web addresses into the PDF files. This means that if you want to visit the websites listed in the footnotes, simply click the link and it will take you to the webpage. For aesthetic reasons, the links do not appear as links, but instead are masked. Those interested in doing further research along the lines of any of the articles featured in the journal will only need to click on the web address to access that information.

Further, scholars interested in submitting journal articles for publication to the journal can visit the website and submit using our online submission system. Articles submitted through the online submission system are subjected to an expedited review process.

The benefits to the legal field of open access journals are widely touted. We as a journal embrace those values, particularly the availability of scholarship to researchers worldwide, without subscription or fees. For more information about open access legal scholarship, you can visit the website of the Directory of Open Access Journals and the Open Access Overview.

XIAOLU ZHANG-COENEN

ASSISTANT EDITOR-IN-CHIEF
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The European Court of Human Rights’ Rejection of Petitions where the Applicant Has Not Suffered a Significant Disadvantage:

A Discussion of Desirable and Undesirable Efforts to Safeguard the Operability of the Court

PROF. ALEXANDER MORAWA*

ABSTRACT

This article looks at one particular aspect of the ongoing assessment of the various reform processes set in motion to reform, or rescue, the European Court of Human Rights: the amendment of Article 35 (3) (b) of the Convention by Protocol No. 14, which now allows the Court to reject a case in which "the applicant has not suffered a significant disadvantage." The article discusses the interpretation of this new admissibility criterion by the Court in the first two years since it became applicable (2010). It concludes that the case-law to date is case-specific and yields very limited material for suggesting general standards; thus, it does not allow a well-founded, yet simple disposal of 'insubstantial' matters. The question arises whether a true reform would not warrant the elevation of the 'negative' semi-discretion of the Court to reject cases that are minimal in importance to a 'positive' discretion of the Court to pick and choose those matters that are at the core of European human rights protection.

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I. PRELIMINARY REMARKS

The present paper contributes to the on-going assessment of the various reform processes set in motion to reform, or rescue, the European Court of Human Rights.\(^1\) Inevitably, the reform strategies proposed, accepted and dismissed revolve around the underlying question whether the human rights law regime of the Council of Europe, and in particular the European Convention on Human Rights,\(^2\) has attained at least “quasi-constitutional”\(^3\) status and if so, what the consequences for its operation should be. Waldock asserted as early as 1958 that the Convention and the first additional protocol “provide a constitutional code of human rights capable of detailed application by both international and municipal tribunals.”\(^4\) The Court has explicitly embraced the concept in cases such as *Al-Skeini v. the United Kingdom* (2011):

> The Convention is a constitutional instrument of European public order.\(^5\)

It is argued that the Convention derives that status from the theory that it has a “special character … as a treaty for the collective enforcement of human rights and fundamental freedoms”\(^6\) “compris[ing] more than mere reciprocal engagements between Contracting States”.\(^7\) “It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective

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\(^{1}\) As of October 31, 2012, there were 135,350 applications pending before the Court. See Council of Europe, European Court of Human Rights (E.Ct.H.R.), Pending Applications Allocated to a Judicial Formation, October 31, 2012, at: http://www.echr.coe.int/NR/donlyres/D552E6AD-4FCF-4A77-BB70-CBA53567AD16/0/CHART_311092012.pdf. This represents an 11% decrease from January 1, 2012, when 151,600 cases were pending. See E.Ct.H.R., Statistics 1/1–31/10/2012, at: http://www.echr.coe.int/NR/donlyres/5E03F01F-E899-4C56-A6E0-9ED85F8FA B10/0/CMS_31102012_EN.pdf.


\(^{5}\) E.Ct.H.R., Appl. 55721/07, *Al-Skeini and others v. the United Kingdom*, judgment of July 7, 2011, para. 141 [emphasis added].


enforcement.’”

Territorial limitations by means of reservations – customary under general public international law – would “diminish the effectiveness of the Convention as a constitutional instrument of European public order (ordre public)” “for the protection of individual human beings.” National interests, such as in “international cooperation [are] outweighed by the Convention’s [constitutional] role” if “the protection of Convention rights was manifestly deficient.” In *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, that finding pertained to the question of European Union integration and the transfer of judicial powers to the European Court of Justice. The jurisprudence of the Court goes even further by incorporating the concept of an “effective political democracy” – a distinctly constitutional paradigm – into its interpretative framework. This is both done in general terms by means of a repeated reiteration that “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’,” and in specific contexts, such as cases involving freedom of expression.

The European Court of Human Rights, in turn, has been described as a ‘quasi-constitutional Court of Europe’ since the 1980s. Buergenthal observed in 1988 and reiterated in 1997 that “by the time the Soviet Union collapsed, the European Court of Human Rights had for all practical purposes become the constitutional court of Western Europe” and added, interestingly, that “[i]ts case law and practice resembles that of the United States Supreme Court.” It may be presumed that what was meant is a resemblance in form and impact, rather than in substantive content. More recently, Stone

8 Ibid.

9 The Court found that “the consequences” of allowing such reservations to take effect “for the enforcement of the Convention and the achievement of its aims would be so far-reaching that a power to this effect should have been expressly provided for.” *Loizidou v. Turkey (Preliminary Objections)*, para. 75.

10 Ibid.


13 Preamble to the Convention, fourth recital.


15 In *Lingens v. Austria*, judgment of July 8, 1986, Series A, No. 103, para. 42, for instance, the Court said, “freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.”

16 But see the more modest approach of Luzius Wildhaber, “The European Court of Human Rights: The Past, the Present, the Future”, 22 Am. U. Int’l L. Rev. 521-38, 528 (2006/7), who says that the Court “is becoming a European quasi-constitutional Court”. [emphasis added]


Sweet has claimed that the Court possesses “structural judicial supremacy”\(^\text{20}\) based on its exclusive authority to interpret the Convention and ultimate supervisory power over its domestic implementation. The Court itself has at least once reiterated in general terms that it views itself in a “central place in the European constitutional architecture.”\(^\text{21}\) Indeed, the constitutional status of a tribunal must be assessed in ‘practical’ terms or, in other words, with due regard to the constitutional reality of the system it operates in. Opinions that openly question the functional quasi-constitutional status of the Court are rare, and seem to emanate more from international political actors than scholars.\(^\text{22}\)

However one views the constitutional status of the Court today, the reform discussions inevitably center around questions that would confer more or less powers to the Court to function as an apex court in a highly integrated, but also highly specialized system. The introduction, in 2004,\(^\text{23}\) of the ‘significant disadvantage’ criterion to the rules on admissibility spelled out in the Convention itself is an example.

II. A NEW ADMISSIBILITY CRITERION: THE ABSENCE OF A SIGNIFICANT DISADVANTAGE AND THE LATER ADDITION OF AN INDEPENDENT ‘PROPER CONSIDERATION’ EXCEPTION

A. Origins of the New Criterion and Initial Assessments

One of the more controversial reform proposals that was actually adopted and has become operative is the amendment of Article 35 (3) (b) of the Convention by Protocol No. 14, which allows the Court to reject a case in which “the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”


\(^\text{22}\) The Secretary General of the Council of Europe reasoned in 2009, prior to the Interlaken conference: “In recent years, there has been undefined talk of the Court becoming a ‘Constitutional Court.’ Although this has not yet led to any sort of agreement, let alone results, it has not been helpful. The Convention is not intended to be a ‘European constitution’ and it is difficult to see how the Court could become like any existing national constitutional court.” Contribution of the Secretary General of the Council of Europe, dated December 18, 2009, to the Preparation of the Interlaken Conference, in: High-Level Conference on the Future of the European Court of Human Rights, Organised in Interlaken, Switzerland, on 18 and 19 February 2010 by the Swiss Chairmanship of the Committee of Ministers of the Council of Europe, Preparatory Contributions 36-48, 45 (Strasbourg, Council of Europe, 2010).

This new admissibility criterion, which Mowbrey calls a tool to “save the Court from having to determine ‘minor’ complaints” and which O’Boyle would likely consider a wise addition to the Court’s instruments allowing it to “concentrate on cases … which raise prima facie issues of importance,” has its origins in a 2001 proposal by the Evaluation Group subsequently modified and re-introduced by Germany and Switzerland: the Evaluation Group recommended that the Court should be committed “to decline to examine in detail applications which raise no substantial issue under the Convention.” The Evaluation Group did not develop this idea further, but instead urged the inclusion of “a mechanism whereby certain applications might be remitted back to domestic authorities,” which would be intrinsically linked to the lack of a substantial issue criterion. Hioureas reminds us that the Council of Europe’s Steering Committee for Human Rights (CDDH) changed the term ‘substantial issue’ to ‘substantial harm’ early in the process of its deliberations and as a consequence of objections within the Committee of Ministers and in line with German and Swiss joint proposals in December 2002. In the opinion of the CDDH a reference to ‘substantial issue’ would give the Court “too wide a discretion … enabling it to pick and choose the cases it would wish to deal with.” Schwaighofer characterizes the original proposal as introducing “ein


28 Evaluation group, para. 93.

29 Evaluation group, para. 93. 2a.


31 The CDDH’s principal role, under the auspices of the Committee of Ministers, is to set up standards commonly accepted by the member states of the Council of Europe with the aim of developing and promoting human rights in Europe and improving the effectiveness of the control mechanism established by the Convention. See http://www.coe.int/t/dghl/standardsetting/cddh/default_en.asp. The CDDH has the lead in the ongoing reform discussions.


certiorari-Verfahren” in the style of the United States Supreme Court. In the opinion of international NGOs and the Parliamentary Assembly of the Council of Europe, on the other hand, the criterion took on a character that would deprive the Court of discretion, and instead require it to reject cases in the absence of a significant disadvantage. They characterized the proposal as a “complete conceptual shift” capable of “seriously undermining” the crucial role of the Court in policing human rights violations across Europe as well as in providing a forum for the victims to air their grievances and as “vague [and] too subjective.”

These discrepancies in views of the meaning of the new criterion are symptomatic of the vagueness of the provision, which the Court has embraced rather gracefully as another of those instances where it is called upon to apply a standard of assessment that is “relative et dépend des circonstances de l’espèce.” However, it seems true – the practice of the Court will be discussed in a moment – that the Court has begun using the criterion as a discretionary tool rather than a mandate to eliminate categories of cases on the basis of objective standards of non-significance, thus endorsing the views of commentators who have characterized the criterion as a manifestation of the principle of subsidiarity.

Protocol No. 14 now empowers the Court to declare inadmissible applications where the applicant has not suffered a significant disadvantage only if respect for human rights does not require an examination of the application on the merits and if the matter has been duly considered by a domestic tribunal. The provision contains two safeguard clauses, one of which provides that respect for human rights may indeed command the examination of an application that would otherwise be minor in character; the other

38 Ibid., para. 27.
40 E.Ct.H.R., Appl. 13175/03, Giusti v. Italy, judgment of October 18, 2011, para. 33 [in French only].
41 The Court’s secretariat (under)states the level of discretion in its June 2012 Research Report. The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on’ [hereinafter: 2012 Research Report], p. 3, para. 3: „[T]he terms contained in the new criterion are open to interpretation and … give the Court some degree of flexibility, in addition to that already provided by the existing admissibility criteria.”
excluding any rejection for lack of significant disadvantage of cases that have not been duly considered by a judicial body at the domestic level.\textsuperscript{44} It is sound to believe that the latter clause was intended as an incentive to introduce fully functioning domestic judiciaries in certain recent member states.\textsuperscript{45} The newly added admissibility criterion was also put on hold, so to say, for a period of two years during which only the Grand Chamber and the chambers, but not the committees or single judges were entitled to interpret the meaning of significant disadvantage, so as to develop a coherent jurisprudence that can later on be applied by the committees and single judge formations.\textsuperscript{46} The principle \textit{de minimis non curat praetor} is indeed introduced by the new admissibility criterion to the European human rights system; however, the principle is neither unknown in domestic legal orders in Europe\textsuperscript{47} nor, as Rüdin emphasizes, is it entirely new but has been present in previous jurisprudence of the Court in particular on manifestly ill-founded applications.\textsuperscript{48} The Explanatory Report quite openly admits that “[t]he new criterion may lead to certain cases being declared inadmissible which might have resulted in a judgment without it.”\textsuperscript{49} While some view the new criterion as entirely positive, the heated debate and strong criticism of it is also reflected in the literature; on the one hand, the likely limited effect on alleviating the case law of the Court is noted;\textsuperscript{50} indeed the new criterion requires interpretation on Grand Chamber and chamber level on the basis of the very cases the criterion seeks to have struck out in a summary procedure. Others view the new criterion as “rather disproportionate”,\textsuperscript{51} in particular in that the possible benefits of allowing certain minor cases to be struck out in summary procedure were “rather out of proportion”\textsuperscript{52} to the consequences for the human rights system in Europe as a whole. The somewhat overly enthusiastic embrace the new criterion received in the 2011 Izmir

\textsuperscript{45} See Schwaighofer, “Das Verfahren des EGMR …”, at 27.
\textsuperscript{46} See Article 20 (2), second sentence of Protocol No. 14.
\textsuperscript{49} Explanatory report, para. 79.
\textsuperscript{52} Ibid.
deliberations, which generally and more than the results of the 2010 Interlaken conference, display a rather government-friendly tone, certainly is a reason for a degree of caution.

The Court’s secretariat, probably correctly, reasoned that “violations which are purely technical and insignificant outside a formalistic framework do not merit European supervision.” However, Reiss correctly emphasizes that not infrequently an accumulation of seemingly minor, technical violations of the Convention are symptoms of systematic and indeed systemic problems that have been viewed with particular concern by the Court. Whether the assurances of the drafters that “cases which, notwithstanding their trivial nature, raise serious questions affecting the application or interpretation of the Convention or important questions concerning national law” will be protected against dismissal under the new criterion will hold true, remains to be seen. Egli adds that the Convention system has so far been sympathetic to ‘potential’ and ‘indirect’ victims of a violation who may well be said to have not suffered any disadvantage at all at the time they petition the Court. She sees a risk that the new criterion might jeopardize the position of such victims and may prompt the Court to revisit its jurisprudence in this respect. Last but not least, former judge Foighel, while acknowledging that the Strasbourg Court “has been criticized for hearing mostly minor cases that in reality are far removed from what are understood as genuine human rights violations”, nevertheless reminds us that “it is really very difficult to decide how much importance an apparently trivial case may have for the protection of the fundamental rights of an individual.”

53 The Follow-up Plan encourages the Court to “[g]ive full effect to the new admissibility criterion in accordance with the principle, according to which the Court is not concerned by trivial matters (de minimis non curat praetor).” High Level Conference on the Future of the European Court of Human Rights, Organised within the Framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe Izmir, Turkey, 26 – 27 April 2011, at http://www.echr.coe.int/NR/rdonlyres/E1256FD2-DBE5-41E8-B715-4DF6D922C7B6/0/20110428_Declaration_Izmir_EN.pdf, Follow-up Plan, at F. 2. b [henceforth ‘Izmir Follow-up Plan’].


57 Explanatory report, para. 83.


B. The Court’s Application of the New Criterion So Far

1. General Observations

Until today, “the Court had not yet had many opportunities to rule applications inadmissible on the basis of the new criterion but expected to use it increasingly in future;” the jurisprudence has, however, been slowly growing first and foremost by virtue of judgments of the chambers. Although the new criterion has only been left in the hands of the Court to interpret and fill with concrete meaning for some two years, three factors considered together make it ‘ripe’ for an at least preliminary evaluation: first, the criterion is now ‘transferred’ to the single judge formation who will apply it in summary procedure and without formal, published reasons; although it can be expected that the chambers and eventually the Grand Chamber will issue decisions clarifying open issues, the first cycle of interpretation is complete. Second, in the fact that single judges will now apply the criterion lies a compelling reason that something more than a self-assessment by the Court’s secretariat is needed. And third, the absence of a clarifying precedent by the Grand Chamber as to the very essential standards governing the application of the new criterion means that there is a far-reaching uncertainty.

In its initial decisions, the Court took note of several dissenting opinions in pre-Protocol No. 14 cases as well as a rare pronouncement, also prior to the entry into force of Article 35 (3) (b), that the “insignificance of a claim was the decisive factor in a recent decision by the Court declaring an application inadmissible,” in Bock v. Germany. In Debono v. Malta, for instance, Judge Borrego Borrego had concluded that “the case before us would be an obvious candidate for inclusion under the future Article 35 §3 (b) of the Convention, once Protocol 14 has entered into force,” although the application appears prima facie to concern a legitimate matter of procedural delay in a dispute involving environmental degradation and an award of compensation amounting to over 13,000 Euros. Other cases, such as Micallef v. Malta, concerned the question of applicants pursuing matters that came, at least in the opinion of dissenting judges, close to an actio

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61 The Grand Chamber was seized with an objection pursuant to Article 35 (3) (b) by the government in E.Ct.H.R., Appl. 71243/01, Vistiņš and Perepjolkins v. Latvia, judgment of October 25, 2012, paras 65-6, but did not consider it since the criterion “[does] not apply to applications declared admissible before the entry into force of the Protocol.”

62 E.Ct.H.R., Appl. 36659/04, Adrian Mihai Ionescu v. Romania, decision of June 1, 2010, para. 34.


64 E.Ct.H.R., Appl. 34539/02, Debono v. Malta, judgment of February 7, 2006, dissenting opinion of Judge Borrego Borrego. See similarly Appl. 61655/00, Miholapa v. Latvia, judgment of May 31, 2007, dissenting opinion of judges Fura-Sandström and David Thór Björgvinsson, para 15: “A supposer que la requérante puisse se prétendre victime d’une violation, nous constatons que, si le Protocole 14 avait été en vigueur, le grief aurait pu être rejeté en application du nouvel Article 35 de la Convention, car nous estimons que la requérante n’a pas subi un préjudice important du fait de son prétendu défaut d’accès au tribunal.”
populāris in light of the triviality of the underlying facts. In Micallef, a case originating from a dispute amongst neighbors, one of whom accused the other of hanging out clothes to dry over the courtyard of his apartment, thereby allegedly interfering with his property rights, other dissenters went further and stated:

The disproportion between the triviality of the facts and the extensive use – or rather over-use – of court proceedings is an affront to good sense, especially as serious human-rights violations subsist in a number of States Parties. Is it really the role of our Court to determine cases such as this?

Bock involved the length of proceedings instituted by a civil servant for the reimbursement of expenses for magnesium tablets from his employer, the Land of Brandenburg. The Fifth Section had no difficulty to correctly reason that, having “carefully examined all the circumstances of the case at hand” it “[i]n particular … had regard to the disproportion between the triviality of the facts, namely the pettiness of the amount involved and the fact that the proceedings concerned a dietary supplement, not a pharmaceutical product, and the extensive use of court proceedings - including the appeal to an international court - against the background of that Court’s overload and the fact that a large number of applications raising serious issues on human rights are pending.”

Based on this and other facts, the Section rejected the application as an abuse of the right to petition.

In Korolev v. Russia, the First Section reasoned that “[i]t is common ground that [the] terms [significant disadvantage] are open to interpretation and that they give the Court some degree of flexibility.” “[A] violation of a right,” the Court added, “however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court.” The Court thus explicitly linked the ‘disadvantage’ criterion of Article 35 (3) (b) ECHR to the ‘minimum level of severity’ standard established in its jurisprudence on the right to freedom from torture and inhuman or degrading treatment or punishment (Article 3).

Other language employed, for instance that “[t]he assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case,” reminds us of the same jurisprudence.

65 E.Ct.H.R., Appl. 17056/06, Micallef v. Malta, decision [GC] of October 15, 2009, dissenting opinion of judges Bjørgvinsson and Malinverni, para. 5, holding that “[w]hilst it is true that the legal issue raised in the present case concerned the proper administration of justice and could be considered to constitute a matter of general interest, it did not, in our view, do so to the point of extending the concept of victim to [the] degree” the majority accepted.

66 See Micallef v. Malta, para. 11.

67 Micallef v. Malta, joint dissenting opinion of judges Costa, Jungwiert, Kovler and Fura, para. 1.

68 Bock v. Germany, ‘The Law’.


70 Korolev v. Russia, ‘The Law’, A. [emphasis added].

71 Korolev v. Russia explicitly refers, mutatis mutandis, to Soering v. the United Kingdom, judgment of July 7, 1989, Series A, No. 161, para. 100.

2. ‘Subjective’ or ‘Objective’ Substantial Disadvantage?

Turning to the concrete measurements for assessing “the severity of a violation,” the Court announced that it would “[t]ake account of both the applicant’s subjective perceptions and what is objectively at stake in a particular case.” More specifically, the first few cases decided pursuant to Article 35 (3) (b) ECHR suggest at least one fact: that the consideration of whether a case is ‘sufficiently minor’ to warrant rejection and does not fall under any of the exceptions requires almost as much substantive consideration, and space, as a full consideration on the merits in uncomplicated cases. Thus, the effect of reducing the workload of the Court, at least initially, may be doubted. Also, the case of Van Velden v. the Netherlands and others are evidence for the risk that respondent states may attempt to solicit dismissals from the Court under the new criterion that clearly are not within its wording or spirit: in the case of an applicant who complained, under Art. 5 (4) ECHR, about his detention on remand, the government argued, first under the heading ‘victim status’ (Article 34 ECHR) and then under Article 35 (3) (b) that “the entire period of pre–trial detention had been deducted from his prison sentence.” The Court clearly rejected the preliminary objections:

It is a feature of the criminal procedure of many contracting Parties, if not most, to set periods of detention prior to final conviction and sentencing off against the eventual sentence; for the Court to hold generally that any harm resulting from pre-trial detention was thereby ipso facto nugatory for Convention purposes would remove a large proportion of potential complaints under Article 5 from the scope of its scrutiny.

3. Monetary Damage as a Starting Point

The Court has thus far turned primarily, but not exclusively, to monetary considerations when finding a lack of ‘significant disadvantage’, reasoning that “the absence of any such disadvantage can be based on criteria such as the financial impact of the matter in dispute.” This was the case for instance in a case concerning civil litigation involving breach of contract involving damages of ninety Euros; another case about the failure by the authorities to pay to the applicant a sum equivalent to less than one Euro awarded by

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73 Korolev v. Russia, ‘The Law’, A; see also Appl. 37346/05, Finger v. Bulgaria, judgment of May 10, 2011, para. 70, and Appl. 16347/02, Luchaninova v. Ukraine, judgment of June 9, 2011, para. 47. In Ladygin v. Russia, ‘The Law’, the Court reasoned: “Although the applicant’s subjective perception is relevant, this element does not suffice for the Court to conclude that the applicant suffered a significant disadvantage.”

74 See, e.g., E.Ct.H.R., Appl. 29218/05, Savu v. Romania, judgment of October 11, 2011, paras. 21-34.


76 Ibid., at para. 39.

77 See the survey of case-law in Finger v. Bulgaria, para. 71.

78 Ionescu v. Romania, para. 34; see also Appl. 24360/04, Giuran v. Romania, judgment of June 21, 2011, para. 18.

79 Ionescu v. Romania, para. 35.
a domestic court,\textsuperscript{80} and two similar cases involving payment of twelve Euros.\textsuperscript{81} 
Administrative fines, for instance one of 50 Euros for refusing to follow a summons to participate in the organization of federal elections in \textit{Boelens et al. v. Belgium},\textsuperscript{82} were also considered financially insignificant, despite the apparent underlying issue of a person’s freedom of choice. \textit{Rinck v. France}\textsuperscript{83} involved a traffic fine of one hundred and fifty Euros and the endorsement of the applicant’s driving licence with one penalty point. The secretariat’s categorization of such cases as involving claims falling below the threshold of 500 Euros\textsuperscript{84} may provide guidance to applicants, but is not to be interpreted as an objective or absolute amount. The Court has, on the other hand, found that the applicants in a case concerning delays in the payment of compensation for expropriated property and amounts running in the tens of thousands of Euros had suffered a 'significant disadvantage'.\textsuperscript{85}

A noteworthy and seemingly entirely unresolved question is whether an “applicant’s comfortable financial situation”\textsuperscript{86} or the prevalent “varying economic circumstances”\textsuperscript{87} in the different Council of Europe member states could render an application that would otherwise be significant enough suitable for rejection under Article 35 (3) (b) ECHR, or \textit{vice versa}, and thus, whether matters can be considered ‘substantial’ solely for economically disadvantaged applicants, at least under certain limited circumstances.

The Third Section’s reasoning in \textit{Burov v. Moldova} that “there is no evidence … that the applicant’s financial circumstances were such that the outcome of the case would have

\textsuperscript{80} \textit{Korolev v. Russia}, ‘The Law’, A. Here, the First Section rightly and pointedly stressed that it was “struck at the outset by the tiny and indeed almost negligible size of the pecuniary loss which prompted the applicant to bring his case to the Court.”

\textsuperscript{81} E.Ct.H.R., Appl. 34784/02, \textit{Vasilchenko v. Russia}, judgment of September 23, 2010, para. 49 and Appl. 51838/07, \textit{Fedotov v. Moldova}, decision of May 24, 2011, para. 19, where the Third Section “consider[ed] it to be beyond doubt that the petty amount at stake in the present case was of minimal significance to the applicant.” \textit{Fedotov} also involves the failure of a municipality to reply to the applicant’s letter regarding housing there, which he considered a breach of Article 6 ECHR, but the Court did not comment on that aspect specifically.

\textsuperscript{82} E.Ct.H.R., Appl. 20007/09 et al., \textit{Boelens et al. v. Belgium}, decision of September 11, 2012.


\textsuperscript{84} See 2012 Research Report, p. 5, para. 10.

\textsuperscript{85} E.Ct.H.R., Appl. 8851/07 et al., \textit{Sancho Cruz and 14 other “Agrarian Reform” cases v. Portugal}, judgment of January 18, 2011, para., 35: “La Cour en déduit que dans les deux cas d'espèces, le préjudice subi par les requérants suite à l'expropriation de leurs propriétés était important. La Cour estime que la question de savoir si les intéressés ont finalement reçu des sommes éventuellement supérieures à celles qu'ils auraient reçues au titre du préjudice matériel dans le contexte de la procédure devant la Cour ne saurait être prise en considération aux fins de l'article 35 § 3 b) de la Convention, lequel appelle à un examen portant sur l'enjeu, et non uniquement l'issue, de l'affaire.”

\textsuperscript{86} \textit{Bock v. Germany}, ‘The Law’. The Court in \textit{Bock} seems to have been understandably outraged by a complaint – subsequent to domestic proceedings that reached all the way up to the Federal Constitutional Court – concerning a claim for 7.99 Euro by a civil servant with a monthly salary of more than 4,500 Euros. See ibid., ‘The Facts’. Thus, the statement should properly be considered a dicta rather than a proposed standard.

\textsuperscript{87} E.Ct.H.R., Appl. 38875/03, \textit{Burov v. Moldova}, decision of June 14, 2011, para. 29.
had a significant effect on his private life,”⁸⁸ points in that direction.⁸⁹ The complaint in this case related primarily to the alleged non-enforcement of a judgment in favor of the applicant awarding damages and fees equivalent to 107 Euros. An odd and seemingly both probing and laborious exploration of the applicant’s financial transactions, both related to his legal cases and his other activities, such as those related to home improvements,⁹⁰ in Burov is followed by the following much more useful and standard-setting observation:

The Court is conscious that the impact of a pecuniary loss must not be measured in abstract terms: even modest pecuniary damage may be significant in the light of the person’s individual circumstances and the economic situation of the country or region in which he or she lives.⁹¹

In Giuran, an example of the practical application of that standard, the Third Section first noted “that none of the parties submitted information concerning the financial status of the applicant”,⁹² and then quoted government statistics to conclude that stolen goods worth some 350 Euros must have represented a significant monetary loss for a retired person, given that the average retirement benefits amounted to 50 Euros a month.

4. The ‘ordre public’ Function of the Court and Serious Questions Raised in Trivial Cases

The question of whether the assessment of a disadvantage shall be objective or subjective, and focus on the financial effects of an alleged breach of the Convention relates, at least to a degree, to the first of the two safeguard clauses in Article 35 (3) (b) ECHR, namely that the Court is “compell[ed] … to continue the examination of the application, even in the absence of any significant disadvantage suffered by the applicant, if respect for human rights as defined in the Convention and the Protocols thereto so requires.”⁹³ The similarities between this clause and Articles 37 (1) on the striking off of applications and 38 (1) ECHR on friendly settlements was duly noted by the Court in Korolev – where it held that any “compelling reason of public order (ordre public) to warrant its examination on the merits”⁹⁴ prevented a rejection of cases for lack of a ‘significant disadvantage’ – and Finger – where it found that it was compelled “to continue the examination of a case when that is necessary because the case raises questions of a general character affecting the observance of the Convention.”⁹⁵ In Finger the Court, referring to the Explanatory Report, emphasized that “the application of the new admissibility requirement should ensure avoiding the rejection of cases which, notwithstanding their trivial nature, raise serious questions affecting the application or

⁸⁸ Burov v. Moldova, para. 27.

⁸⁹ The Court in E.Ct.H.R., Appl. 45175/04, Shefer v. Russia, decision of March 13, 2012, para. 26 reasoned similarly, that “the applicant did not reasonably substantiate that her financial situation was such that the outcome of the case would have been subjectively significant for her.”

⁹⁰ Ibid., para. 28.


⁹² Giuran v. Romania, para. 21.


⁹⁴ Korolev v. Russia, ‘The Law’, B.

⁹⁵ Finger v. Bulgaria, para. 72.
the interpretation of the Convention or important questions concerning national law.”

In *Juhas Đurić v. Serbia*, a question related to the role of a police-appointed lawyer in a preliminary criminal investigation was deemed worthy of consideration on the merits despite a limited financial disadvantage suffered by the applicant.

In *Korolev*, the Court ruled that, in light of the facts that “the Court has on numerous occasions determined issues analogous to that arising in the instant case and ascertained in great detail the States’ obligations under the Convention in that respect” and that “both the Court and the Committee of Ministers have addressed the systemic problem of non-enforcement of domestic judgments in the Russian Federation and the need for adoption of general measures to prevent new violations on that account,” “[a]n examination on the merits of the present case would not bring any new element in this regard.” Thus, the context of ‘trivial’ cases, and in particular whether they arise while the underlying serious question is still being scrutinized by the Court, seems to predetermine their fate. This is in line with the general *ordre public* function of the Court, according to which “questions of a general character would arise, for example, where there is a need to clarify the States’ obligations under the Convention or to induce the respondent State to resolve a structural deficiency affecting other persons in the same position as the applicant.” The essence of this approach is indeed reminiscent of the Court’s established practice when asked to approve friendly settlements. *Can v. Austria* is a telling example, where the Court required, beyond the convergence of minds of the applicant and the state to settle the matter, that the rules or even the legislation concerned be amended in light of its previous jurisprudence. There, the fact that “the Court’s caselaw does already provide certain indications as to the answer to the question” at issue was deemed relevant. The approach is mirrored, for instance, in *Živić v. Serbia*, where “inconsistent adjudication stemming from the same jurisdiction affected many individuals in the same situation” and led the Court to observe that “this practice inevitably reduced public confidence in the judicial system and furthermore jeopardized the principle of legal certainty and equality of all before the law, which constitute fundamental attributes of the rule of law and are inherent in the Convention.”

Thus, despite the monetary insignificance of the damage, the case remained on the docket.

5. **The Importance of the Case for the Individual Applicant, or: Resurrecting the Right to Individual Petition**

A further criterion for assessing the presence or absence of a ‘significant disadvantage’ is the “importance of the case for the applicant.” The Court was “ready to accept” in *Shefer v. Russia* “that individual perceptions encompass not only the monetary aspect of a

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96 Ibid., para. 72 [emphasis added].
98 *Korolev v. Russia*, ‘The Law’, B.
100 *Korolev v. Russia*, ‘The Law’, B.
101 E.Ct.H.R., *Can v. Austria*, judgment of September 30, 1985, Series A, No. 96, para. 17. Two dissenting judges held, however, that “the existence of any established case-law of the Court on the issue in question [was] a matter that is totally irrelevant for a decision to strike out.” Ibid., dissenting opinion of judges Matscher and Pinheiro Farinha.
103 Ionescu v. Romania, para. 34.
violation, but also the general interest of the applicant in pursuing the case.”

This reflects that the Court claims to be “mindful … that the pecuniary sum involved is not the only element that determines whether the applicant has suffered a significant disadvantage” and of the fact that “a violation of the Convention may concern important questions of principle and thus cause a significant disadvantage without affecting a pecuniary interest.” “Whether an issue indeed constitutes a question of principle or is otherwise important for an individual needs to be ascertained by the Court within the context of a specific case,”

thus again the assessment is necessarily case-specific and flexible. *Giuran v. Romania*, a case concerning claims for damages for stolen goods, is a promising example in this context, where the Court found that “it is necessary also to take into account the fact that the proceedings concerned a question of principle for the applicant, namely his right to respect for his possessions and for his home.”

In *Diaceno v. Romania*, the ‘question of principle’ for the applicant was “his right to be presumed innocent until proved guilty,”

even though the case involved a minor penalty for causing a traffic accident. *Holub*,

*Matoušek* and *Čavajda v. the Czech Republic* are examples for the Court exploring the actual effects of judicial action – here the lack of opportunity to reply to the observations of other parties before the Constitutional Court – and concluding, in a quasi-meritorious fashion, that “the applicant has not suffered a significant disadvantage when the Constitutional Court failed to communicate him the submissions of the other parties to the proceedings.”

Similarly, the Court held in June 2012 in the *Heather Moor & Edgecomb Ltd.* case that “while what was at stake for the applicant in the proceedings … was considerable, the non-public delivery of the decision did not in itself cause the company any significant disadvantage.”

This can be contrasted to *Luchaninova v. Ukraine*, where the applicant had been accused of stealing goods worth 0.09 Euros and fined 10 Euros: “[T]he outcome of the proceedings, which the applicant claimed had been unlawful and conducted in an unfair manner, had a particularly negative effect on her professional life. In particular, the applicant’s conviction was taken as a basis for her dismissal from work. The civil courts dealing with her eventual claim for reinstatement rejected it, relying on the findings made in the context of the proceedings against the applicant.”

Thus, the Court here delves into, again, a quasi-meritorious assessment of the ‘disadvantageous effect’ of the particular violation claimed, not merely the specific disadvantage caused by the measures taken against an applicant.

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104 Shefer v. Russia, at para. 2.
105 Burov v. Moldova, para. 30.
106 Fedotov v. Moldova, para. 20.
107 Shefer v. Russia, at para. 23.
108 Giuran v. Romania, para. 22.
115 Luchaninova v. Ukraine, at para. 49.
Not surprisingly, the applicant’s own conduct, “for example in being inactive in [domestic, but presumably also the Strasbourg] court proceedings during a certain period,” could demonstrate a lack of significance. This conclusion is indeed inescapable.

In the case of criminal matters, the Court found in Gagliano Giorgi v. Italy117 that a complaint concerning the length of criminal proceedings was to be rejected for lack of significant disadvantage because the applicant’s sentence was reduced as a result of the length of the proceedings, which according to the Court “at least compensated for or significantly reduced the damage normally entailed by the excessive length of criminal proceedings.”118 The Court here relied on “the following factors [that] should be taken into account: the nature of the right allegedly violated, the seriousness of the impact of the alleged violation on the exercise of a right and/or the possible effects of the violation on the applicant’s personal situation.”119

6. The Right to – at Least – One Judicial Examination

The purpose of the second safeguard clause in Article 35 (3) (b) of the Convention “is to ensure that every case receives a judicial examination, either at the national or at the European level, so as to avoid a denial of justice.”120 The Court has held that “the answer to the question whether the case was duly considered by a domestic tribunal [was] closely related to the substance of [a] complaint,”121 in particular when breaches of Article 6 of the Convention were alleged, for instance in a case where the applicant had submitted that the courts had not given sufficient reasons for their decisions convicting her of an administrative offence. Governments have sought to use Art. 35 (3) (b) to have cases rejected even though their authors complained “precisely about not having [their] case properly examined by the domestic courts” and the fact that the” Constitutional Court did not deal with the applicant’s complaints concerning an alleged breach of the guarantees of Article 6,”122 as in Flisar v. Slovenia. The Court has rightly and with the appropriate brevity rebuffed such advances.

Finally, under the new criterion’s safeguard clauses, the Court “is compelled to continue examining an application if it raises questions of a general character affecting the observance of the Convention.”123 It is noteworthy that the Court views this as a perpetuation of a standard well entrenched in its practice; judgments thus refer to the Commission’s Tytler v. the United Kingdom report of 1976124 as precedent. The practice of holding that the issue complained about “has been addressed on numerous occasions in its judgments” and that an “examination of[f] this application on the merits would not

118 Ibid., at para. 57.
119 Ibid., at para. 56.
120 Finger v. Bulgaria, para. 72.
123 Gaftoniuc v. Romania, para. 34.
bring any new element in this regard” is not surprising, but carries with it the obvious danger that only pilot-worthy cases would be preserved on the basis of that safeguard clause alone.

7. **A New Qualifier? – The Close Link of Substantial Disadvantage with the Merits of the Case**

In *Zborovský v. Slovakia*, decided in October 2012, the respondent state argued before the Third Section that the fact that the applicants had settled their civil dispute with their opponents in the course of the domestic proceedings meant that they had not suffered any substantial disadvantage. The case concerned the involuntary transfer of private land to a state corporation in communist times and the subsequent actions for recovery and damages starting in 1992. The parties had in fact “settled their differences by exchanging title to the garage for title to the adjacent plot, under the [domestic] judgment …, and by setting off their mutual financial claims, including those under the [domestic] judgments.” Thus, the financial damage seems to have been 0; the applicants, however, claimed that “the compensation awarded to them under the contested judgments was grossly inadequate in view of all the circumstances.”

The Court here appears to have embarked on yet another testing procedure by stipulating that it “considers that the Government’s objection raises issues which are closely linked to the merits of the complaint in question and that it would be more appropriately examined at the merits stage.” The chamber added that “the complaint regarding access to court raises serious issues of fact and law under the Convention,” thus resurrecting a standard that was commonly used by the Court and former Commission in their freestanding admissibility decisions.

If this example were adopted as a general standard, it would allow a great deal of flexibility on a case-by-case basis, something not dissimilar to discretion. Indeed, to answer the question whether something is ‘linked’, or ‘appropriate’, requires us to use almost open-ended terms with which the Court has had quite some success, safeguarding individual justice while preserving the required margin of appreciation in a heterogeneous system. It would also allow the perusal of zero-damage cases for a meritorious discussion of Convention rights, without having to go through an artificial evaluation whether ‘respect for human rights’ so requires. Instead, the Court could say, whenever the government has not made an unequivocal showing that no factual or legal damage has occurred, that a full consideration at least of the other, traditional admissibility requirements is still the better approach to human rights litigation.


Neither the limited literature nor the even more limited jurisprudence to date allow us to make any comprehensive assessment of the practical effect of the new admissibility criterion on (a) the standing of applicants to voice their grievances; (b) the integrity of the Strasbourg proceedings as a whole, and (c) the case-handling capacities of the secretariat and judges of the Court. So far, the cases reported are indicative of at least one fact: the

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125 *Gaftoniuc v. Romania*, para. 35.
127 Ibid., para. 39 [emphasis added].
128 Ibid., para. 40.
criterion does not yet allow an easy disposal of ‘insubstantial’ matters. Rather, the new
criterion has prompted a rather diverse jurisprudence reminiscent of the diverse opinions
as to what the criterion meant in the first place. The judgments and decisions rendered on
Art. 35 (3) (b) of the Convention so far are case-specific and yield very limited material
for suggesting general standards. This is true despite the Court’s claim that it was aiming
at fulfilling the “High Contracting Parties’ expect[ations that] the Court … establish
objective criteria for the application of the new rule through the gradual development of
the case-law.”129 It may be asked whether the ‘significant disadvantage’-approach will
ever become easy to navigate for the committees and single judges of the Court, who
alone are the workhorses who already process the bulk of the applications. The answer,
in this author’s opinion, is no. It may be said outright that the Court’s reformers will, in
all probability, merely have added yet another flexible standard requiring case-by-case
assessments to the tasks of the Court which is already overburdened by a need to navigate
a labyrinth of partly Convention-inherent, and partly self-imposed frameworks for the
assessment of violations that are saturated with ‘margins of appreciation’ and
‘proportionalities’. Is the new criterion, then, worth any further study or, to speak from
the advocate’s perspective, worth the worries about a demise of the individual right to
petition?

And more questions abound: does the criterion add anything that was not there before?
In particular the rules on abusive petitions – like in Bock v. Germany, could one not be
considered as abusing one’s right to an international remedy if the matter boils down to
the reimbursement of a minimal amount for a non-prescription drug without an additional
criterion inserted in the Convention? And, as to victim status – is someone whose aunt
was adversely affected by national courts’ not taking a case pertaining to where she dried
her laundry all that serious truly a victim of a human rights violation? – could very well
serve the same purpose of eliminating at the admissibility stage matters that are, plain and
simple, trivial and/or preposterous. The legitimate question thus is, whether the hype
about the new criterion was not just a proxy for the larger debate over the
constitutionalization of the Court and the consequential need to deliver it from the bulk of
applications that truly merit no international review?

And one may ask the follow-up question that is much, much more politically charged:
should the criterion not be developed into a more stringent standard for approaching an
overburdened Court that was, indeed, not perceived as a ‘small claims court’ of sorts by
its founders? Or, to take another step forward – or backward, in the opinion of some –
should we not elevate a ‘negative’ semi-discretion of the Court to reject cases that are
minimal in importance to a ‘positive’ discretion of the Court to pick and choose those
matters that are at the core of European human rights protection? Now, this does not at
all propose that we should slaughter the ‘holy cow’ of the right to individual petition.
Rather, the times we live in seem to urge us to become realistic about the future potential
of the Strasbourg Court and its staff and judges. They will, put simply, never be capable
of replacing a fledgling judiciary in several member states, repairing a rampant disregard
for the need to conform national legislation to international standards in many such states,
or remedying a growing dissatisfaction of the general population with national laws and
processes prompted by various factors but inevitably blamed on the national
governments. What the Court is quite capable of doing, on the other hand, is to function
as a supreme regional human rights court that, in order of priority, (a) ordains general
standards and, (b) devises practical remedies for as large a number of cases as feasible.

This is not the place to expound further on possible strategies for a much larger reform of the Court than the various reform conferences and Council of Europe bodies have envisioned so far; the present author has done that in a much more comprehensive fashion elsewhere. The conclusion one may draw from the application of the ‘substantial disadvantage’ criterion in the case law so far is that it serves as a very limited tool for disposing of unmeritorious petitions which could, in most instances, as well have been dismissed for lack of victim status, abuse of the right to petition, or other established admissibility criteria. The evidence so far does not suggest that it could evolve into a much broader, sweeping vehicle for declaring cases that are otherwise well-founded inadmissible. However imprecise and casuistic the jurisprudence of the chambers of the Court is to date, common to it is that the criterion will not be allowed to take on these characteristics, which were rightly feared by human rights advocates in Europe.
The Feng Shui of Study Abroad Programs
GREGORY W. BOWMAN*

ABSTRACT

U.S. law schools currently run more than 200 study abroad programs annually, but scant law review literature exists on the subject. This is surprising, because study abroad programs are a central mainstay of U.S. law schools’ global programming efforts. This Essay therefore addresses the design and administration of law school study abroad programs, and does so through the comparative lens of feng shui principles. The result is a useful taxonomy of factors that must be considered, and balanced, in order for law school study abroad programs to be fully effective—both as stand-alone programs and as platforms for additional global programming.

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I. INTRODUCTION

From 2008 through 2011, I spent one month each summer directing and teaching in a summer study abroad program in Seoul, Korea. It was a highly gratifying experience, and no small amount of work. The experience helped me refine my views regarding globalization and legal education, and in particular about the design and operation of law school study abroad programs. Appropriately enough, Seoul’s very location influenced my views on the subject. The nature of this influence, and the conclusions I have drawn based on it, are the subject of this Essay.

Seoul is a city described by Koreans as having excellent feng shui, because it has “mountains behind and water in front.” Indeed, this favorable placement—which according to principles of feng shui gives the city balance and positive energy—is what led to Seoul’s designation as Korea’s capital in the 1390s. I am of the view that these same feng shui principles of balance and energy that favor Seoul’s location can offer useful guidance for designing and operating law school study abroad programs, and for designing law school international programs generally.

Let me be clear about my purpose. This Essay is not a treatise on feng shui, and I do not advocate for a technical application of feng shui principles to study abroad programs. What I do suggest is that looking at U.S. law school study abroad programs through a feng shui lens can yield useful and practical insights into the design and administration of these programs. This observation is more than a little ironic. A central benefit of law school study abroad programs is that they facilitate comparative analysis of legal issues; application of comparative thinking to study abroad programs themselves, by viewing them through feng shui principles, can afford us a different—and I think quite useful—perspective on these programs. The result, in my experience, is an enhanced appreciation

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1 For purposes of this Essay, I am defining “globalization” and related terms quite loosely. Useful distinctions have been made between internationalization (characterized by a focus on international law and international institutions), transnationalization (characterized by comparativism), and globalization (characterized by collaboration and legal pluralism), but I am not drawing such distinctions here. See Alex Aleinikoff, The Globalization of the American Law School, 101 AM. SOC’Y INT’L L. PROC. 184, 184 (2007).

2 MICHAEL J. SETH, A HISTORY OF KOREA: FROM ANTIQUITY TO THE PRESENT 127-128 (2011); HONG-KYE YOON, THE CULTURE OF FENGSHUI IN KOREA: AN EXPLORATION OF EAST ASIAN GEOMANCY 231-238 (2006) (describing Seoul’s location as “one of the most [geomantically] qualified capital sites of Korea”). While Seoul has sprawled far beyond its former city gates, from the air Seoul continues to feel balanced despite its huge size, located as it is along the broad Han River and seeming to flow (along with the river) around the region’s granite peaks.
of the need for balance in these programs, the need for structure, and the need for curricular flow. A further result is that study abroad programs structured along these lines are more likely to support a law school’s overall strategic goals.3

In particular, feng shui’s principles of balance and energy flow offer a useful perspective on the difficult balance between the robustness of international programming and the cost of this programming. Such balance is important: U.S. law schools strive to improve the quality of their programming, but increasingly they do so in the face of serious fiscal constraints4 and growing public concern about the cost of legal education.5 These pressures are particularly strong at regional U.S. law schools. Regional law schools often have smaller budgets, smaller faculties, and support staffs than their national counterparts, and they tend to have fewer international programs already in place than

3 The principles and recommendations in this Essay are of course more broadly applicable to non-law school study abroad programs, as well as to non-U.S. school programs, but for the sake of brevity—and because this Essay is largely a reflection on my own experiences with U.S. law school study abroad programs—U.S. law school programs are the primary focus of this Essay.


their national counterparts. They also educate the majority of U.S. lawyers. In combination, these factors mean that most U.S. law students are graduating from law schools that are more likely to face competitive disadvantages in preparing lawyers for careers in an increasingly globalized world.

Well-balanced and cost-effective study abroad programs, therefore, can have an enormous positive impact on U.S. legal education. Structuring and administering such programs with core feng shui principles in mind can help make these programs more effective on multiple levels—as educational programs, as foundations upon which other law school international programs can be built, and as life experiences that will help participating law students, and faculty members, become better lawyers and more informed public citizens.

This Essay is organized as follows. Part II provides a very brief discussion of feng shui’s historical origins and relevant modern iterations, and also discusses some of the implications of feng shui for legal study abroad programs. Part III reviews some of the challenges globalization presents for U.S. law schools, and Part IV considers the central role of law school study abroad programs in meeting these challenges. Part V discusses how feng shui principles can be applied to improve the design and administration of U.S. law school study abroad programs. In particular, I provide a list of various program factors that are in tension with one another and offer my views on the balance of these factors. This section, in other words, seeks to take the feng shui principles discussed in this Essay and offer practical thoughts on their application in the study abroad program setting. Central to this discussion is the fact that the American Bar Association’s (ABA) rules for U.S. legal study abroad programs are nowhere near sufficient to ensure that programs are well-designed or well-run. Part VI offers final, concluding thoughts.

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6 I am not trying to draw a bright-line distinction between regional schools and national schools, and I fully realize that the regional-national distinction can be an ambiguous one, especially at the margins. Nonetheless, the distinction does have merit, at least for making general observations. For this Essay, it is sufficient (and I think non-controversial) to observe that U.S. law schools ranked highly in popular rankings such as the one published by U.S. News and World Report are generally considered “national” U.S. law schools, while schools ranked closer to the lower end in such rankings are generally considered “regional” law schools.” For the full U.S. News and World Report rankings of U.S. law schools (with the top 145 ranked in order), see U.S. News and World Report, Best Law Schools, U.S. News and World Report (2012), available at http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings (last visited Oct. 30, 2012).

7 It is worth pointing out that the application of feng shui to programmatic or institutional design is not unprecedented. A recent law review article on (of all things) the restructuring of hospital corporations characterized feng shui as “a structural system” that can be used “to align an internal environment with the outside world. . . . [F]eng shui [thus] can be applied to institutions, and while some may question such application, few students of organizational theory would quarrel with the need for an organization to be properly structured to meet internal and external objectives.” John D. Blum, Feng Shui and the Restructuring of the Hospital Corporation: A Call for Change in the Face of the Medical Error Epidemic, 14 HEALTH-MATRIX: J. L.-MED. 5, 5 (2004).
II. A BRIEF DISCUSSION OF FENG SHUI

A. Historical Origins

Feng shui, which originated in China and is often (but perhaps not entirely accurately) translated as Chinese geomancy, literally means “wind-water.” Originally, feng shui focused on the proper location of tombs and dwellings, in order to enable those structures to benefit from the positive flow of universal energy (qi or chi). The first known use of the term “feng shui” appears in the Chinese Book of Burial (fourth century CE), which states, among other things, that “Qi rides the feng [wind] and scatters, but is retained when encountering shui [water].” In other words, feng shui practices were intended to “hinder[ ] the wind and hoard[ ] the waters.” The Chinese Book of Burial described qi as “life breath”; in other works, qi was considered to manifest as atmospheric forces “composed of the six phases of cold, warmth, wind, rain, darkness and light” that could affect the human body. The dispersion or concentration of qi was thus viewed at that time as being influenced by the landscape, observable as weather phenomena, and affecting human health. From this, Feng shui scholar Hong-Key Yoon has concluded that feng shui was developed “by people who lived in foothill areas where there were various types of landforms” and “varied climatic conditions”—namely, the Loess Plateau of China.

Early feng shui assessments were also made through astrological observations that employed the Chinese zodiac. Yoon notes that this second approach developed “as geomancy spread to flat areas from the Loess Plateau” and began to be used in an urban environment. It is not entirely clear how the earliest such astrological observations were made, but feng shui scholar Stephen Field believes they likely involved use of a

8 Stephen L. Field, Qimancy: The Art and Science of Feng Shui (1998), www.fengshuigate.com (last modified Feb. 12, 1998), available at http://www.fengshuigate.com/qimancy.html (“The ‘art’ of fengshui derives little or nothing from the elemental, physiological plane but requires adherence to a belief in something like a force of destiny or fate. Borrowing the less than appropriate Western term, ‘geomancy,’ and adapting it to the Chinese tradition, I refer to the art and science of fengshui as ‘qimancy,’ divination according to qi.”).


10 Bruun, supra note 9, at 3; Field, supra note 8. The general view is that grave geomancy appeared first and was followed by dwelling geomancy—a view that Yoon disputes. See Yoon, supra note 2, at 10, 15-19, 21-29 (“My analysis of geomantic principles suggests that the ancient art [of geomancy] was most likely engendered by early cave dwellers of the Loess Plateau of China.”).


12 Field, supra note 8.

13 Id. Note that these atmospheric forces consist of three pairs of opposites.

14 Yoon, supra note 2, at 10, 15-19, 21-29.

15 Id. at 29.
A cosmographic instrument called the *shipan*, which consisted of a circular disc *kan* (considered male) within a square base plate *yu* (considered female). The male disc and female base plate could be moved to determine what times and locations possessed positive feng shui (locations could be determined because the constellations in the Chinese zodiac were considered to correspond to particular geographic locations). The compound word *kanyu* means heaven and earth—and this bipolarity of heaven and earth, of yin and yang (which is also a male-female pair), exemplifies the important principle of balance of opposites in feng shui.

Two primary feng shui schools evolved from these early practices, and these schools continue to exist today. The “Form School” concerns the location of physical structures in relation to surrounding geographical features; it traces its origins to the feng shui practices for choosing sites for tombs and homes. The “Compass School” likely derived from *kanyu*; it considers the cardinal compass directions to possess special *qi* and takes direction into consideration when making feng shui determinations.

From a western perspective, feng shui has always proven difficult to define. Nineteenth century western observers in China found the subject of feng shui maddeningly opaque: colonial administrators in Hong Kong and Macao repeatedly faced strong local objections to industrialization projects (roads, railways, telegraph lines, etc.) on the basis of feng shui, and yet they were unable to get a clear explanation of just what feng shui meant:

> Sinologues looked through the Chinese Classics for an answer to this question, searched through their Dictionaries, and found none. Merchants asked their comparedores and house-boys, What is Feng-shui? but the replies they got were rather obscure and confused, and at best they were told, that Feng-shui means “wind and water,” and is so called, “because it’s a thing like wind, which you cannot comprehend, and like water, which you cannot grasp.”

In some ways, modern academic commentary on feng shui is not all that different from the efforts of those nineteenth century western administrators. In 1978, Jeffrey Meyer described original feng shui sources as “cryptic rather than explanatory”—acknowledging that precise definitions could not be gleaned from feng shui’s founding texts. More recently, feng shui scholar Ole Bruun lamented that feng shui has not “been researched in 

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16 Field, supra note 8.
17 Id.
18 Id.
19 Meyer, supra note 9, at 146. For a detailed discussion of yin and yang in the context of feng shui, see Yoon, supra note 2, at 57-65.
22 Meyer, supra note 9, at 139.
any profound way” in the West, and that no “consensus has been reached as to its interpretation or even its proper disciplinary placement as a topic of study.” Bruun has suggested that this is at least partly due to “an absolutist bias in [western] methodology,” pursuant to which “efforts at definition [have] forced fengshui into Western intellectual conceptions,” at the expense of understanding. Yoon observes that “[m]any Western studies do not convey the full picture of geomantic principles,” and that as a result, “geomancy remains a confusing subject to contemporary Western scholars.”

B. Modern (and Western) Feng Shui

Despite this lack of definitional clarity—or perhaps in part because of it—over the past thirty years feng shui has become the subject of growing popular attention in the West. A perusal of the Internet turns up a large variety of feng shui websites” and self-help books, with a particular focus on interior design, architecture, and life balance. New schools of feng shui have emerged to address these interests and the needs of modern life—most notably the Black Hat (or Black Sect) Tantric School, which fuses feng shui with Tibetan Tantric Buddhism, a branch of Buddhism that focuses on rituals and meditation intended to achieve both worldly goals (such as protection from danger or illness) and soteriological goals. The Black Hat Tantric School of feng shui has been described (not terribly concisely) as a feng shui “framework to bridge the cultural gap

23 Bruun, supra note 9, at 1-2.

24 Id.

25 Yoon, supra note 2, at 9.

26 Bruun, supra note 9, at 1-2. The writings of Carl Jung and others contributed to this western interest. Bruun notes that “[w]ith the writings of Joseph Needham, Andrew March, C.G. Jung, Lynn White and many others, Chinese cosmology gradually gained prominence. From previously being seen as a collection of absurdities it now re-emerged as a source of holistic truths with direct relevance for the individual in modern Western society.” Id. at 235-236.


28 See, e.g., Angel Thompson, Feng Shui: How to Achieve the Most Harmonious Arrangement of Your Home and Office (1996); Jayme Barrett, Feng Shui Your Life (2003); Vincent M. Smith, Feng Shui: A Practical Guide for Architects and Designers (2006). Yoon asserts that “[i]n recent years, more than one thousand books have been published in Western languages on fengshui or geomancy,” and that “[a]lmost all of them are popular geomantic guides and manuals for curious westerners who want to learn and practice this exotic art of place divination.” Yoon, supra note 2, at 8.


30 See Paul Williams & Anthony Tribe, Buddhist Thought: A Complete Introduction to the Indian Tradition 192-94 (2000). Tantric Buddhism is “complex and multiform,” id. at 194, and a discussion of it is beyond the scope of this Essay. There is an irony in the fusion of feng shui and Tantric Buddhist thought, however, in that an historical feature of Tantric Buddhism is its incorporation of non-Buddhist deities and rituals. See id. at 242-44.
between East and West,” and a central feature of this school is that it seeks to maximize feng shui for interior spaces, with little emphasis on the exterior orientation or location of the building in question. The explanation given is that it is not practical in the modern world to tear down a house or other structure, and that feng shui should evolve to adapt to the needs of the modern world. This adaptability of traditional feng shui principles to modern life is a key theme of modern (and Western) feng shui, and some modern observers have even tied the qi in feng shui to quantum physics. It also has become popular to characterize feng shui as both an art and a science—an art because it is imprecise and mystic, a science because it espouses principles that can be consistently applied to achieve desired outcomes.

This Western adaptation of feng shui is our departure point for consideration of feng shui in the context of U.S. legal study abroad programs. Black Hat Tantric feng shui views internal balance and energy flow as centrally important to harmony. It also espouses other principles whose origins lie in ancient feng shui practices but translate readily to modern life—namely, the “principle of subconscious reaction” and the “principle of intentionality.” The “principle of subconscious reaction” focuses on eliminating hidden stressors or tensions in our surroundings— aspects of our environment that we might not consciously identify, but which we nonetheless feel on a subconscious level, such as our reaction (read: relief) when we enter a room that previously was cluttered but now is organized. The “principle of intentionality” stands for the idea that balance and positive energy flow can be achieved only through intentional action—that in order to affect our environment’s balance and energy flow, we must consciously intend to do so. This focus on intentionality encourages deliberate thought about desired outcomes and possible paths to those outcomes.

31 Vincent M. Smith & Susan M. Reid, Feng Shui: A Universal Philosophy of Environmental Psychology, SK005 ALI-ABA 3107 (Jul. 28-31, 2004).
32 Id.; Smith, supra note 28, at 6; Diamond, supra note 29, at 120.
33 Smith, supra note 28, at 6.
35 See, e.g., Henry Lin, The Art and Science of Feng Shui: The Ancient Chinese Tradition of Shaping Fate 206 (2000) (asserting that “there should be no doubt that feng shui is both a science and an art”); Mak & Ng, supra note 20, at 427 (discussing the Form School and Compass School of feng shui); Alfred B. Hwangbo, A New Millennium and Feng Shui, 4 J. Architecture 191 (1999) (describing feng shui as “a mélange of art and science”); Field, supra note 8. Bruun offers a nuanced perspective on this art-science blend, suggesting that it is part of a re-emergence (in Western cultures at least) of religion and spirituality in a way that coexists with science. Specifically, he asserts that the meteoric rise in feng shui’s popularity in the West since the 1980s is due in part to a backlash against hard “scientism” and a “need for new perspectives that allow unity.” Ole Bruun, An Introduction to Feng Shui 5 (2008). See also Ole Bruun, Feng Shui—A Universal Mode of Thought?, in International Conference on Feng Shui (Kan Yu) and Architecture in Berlin 19 (Florian C. Reiter, ed., 2011).
36 Smith & Reid, supra note 31, at 3.
37 Id.; see also Smith, supra note 28, at 3.
38 Smith & Reid, supra note 31, at 3; see also Diamond, supra note 29, at 19.
C. Implications for Study Abroad Programs

With feng shui’s history and modern developments in mind, a viable working definition of feng shui for study abroad programs might be that feng shui is the “art and science of making an institutional (study abroad) program exist in harmony with its surrounding environment.” In fact, it takes relatively little effort to extend the modern view of feng shui to the design, location, and timing of U.S. law school study abroad programs. A study abroad program is, quite literally, an internal (U.S. law school) program that exists in an external (foreign country) environment, which requires some balancing of internal programming needs with the administrative challenges of being abroad. Other tensions also come into consideration: the balance between holding class and giving students free time; the balance between encouraging students to immerse themselves in the local culture and giving them opportunities for cultural “time-outs”39 the balance between the need for course coverage and the desire to not overload students; the balance between organized outings and unstructured free time; the balance between interacting with the students on a more informal level than usual and maintaining professorial control and authority over the program. Even the pacing of study abroad programs can be thought of in terms of achieving balance: time, after all, is a dimension, and timing is a relevant consideration under the Compass School of feng shui. A poorly paced program—such as one that tries to cover too much material, or too little, or rushes at the end—lacks balance and is less effective in promoting student learning. Balance is therefore essential.

Similarly, intentionality is important, as is subconscious reaction. A study abroad program that is not carefully thought out or executed might be successful, but there are greater possibilities for difficulties or disaster. I know of no law school whose slogan is “Success by Accident.” Thoughtful consideration of how to structure a study abroad program, where to locate it, and how it fits into a law school’s larger institutional goals will result in a more effective program. Thoughtful consideration of the stresses of studying abroad on students will help reduce sources of stress that impede the effectiveness of the program—including stressors that do not appear obvious but exist nonetheless.

With this general conceptual background in mind, this Essay now turns to the challenges of globalization for U.S. law schools, and how law schools have striven to address these challenges through study abroad programs.

39 A visit to the local McDonald’s fast food restaurant or going to see an English-language movie can do wonders in this regard.
III. THE CHALLENGES OF GLOBALIZATION FOR U.S. LAW SCHOOLS

U.S. law schools are, as a whole, far more globalized than only twenty years ago. They have many more faculty members who teach and write on subjects concerning globalization, more courses with international focus or content, more study abroad programs and faculty exchanges, more examples of sweeping curricular reform, and more transnational joint degree programs. It can be extremely difficult for some law schools to keep pace with these changes, however—especially for regional U.S. law schools, with their (often) smaller budgets, smaller faculties, and smaller staffs. Direct budgetary constraints are perhaps the most obvious restrictions, but there are also


41 See, e.g., Harvard to Revise its Case Law Approach, WOMEN HIGHER EDUC., Dec. 1, 2006, at 5 (discussing Harvard’s move “away from case studies and toward problem solving, international law and law making by government bodies”); New York University School of Law, NYU Law Announces Ambitious New Study-Abroad Program as Part of Curricular Enhancements Emphasizing Focused Study in Third Year, law.nyu.edu, available at http://www.law.nyu.edu/news/nyu_law_announces_study-abroad_program_curricular_enhancements_third_year (last visited Oct. 30, 2012) (announcing various reforms to NYU’s third-year curriculum, including “NYU Law—designed and managed programs for its students to study in Buenos Aires, Paris, and Shanghai during their final semester of law school”); Washington and Lee University School of Law, Washington and Lee School of Law Announces Dramatic Third Year Reform, law.wlu.edu/ (Mar. 10, 2008), http://law.wlu.edu/news/storydetail.asp?id=376 (“We believe it is incumbent on our Law School to be more ambitious in our mission and innovative in our approach to education as we strive to fulfill our duties to the public consumers of legal services, to the profession, and to the system of justice.”). See also Louis F. Del Duca, Educating Our Students for What? The Goals and Objectives of Law Schools In Their Primary Role of Educating Students—How Do We Actually Achieve Our Goals and Objectives?, 29 PENN ST. INT’L L. REV. 95, 101-04 (2010); Louis F. Del Duca, Enriching the Law School Curriculum in an Increasingly Interrelated World—Learning From Each Other, 26 PENN ST. INT’L L. REV. 834 (2008); Dianne Penneys Edelman, It Began At Brooklyn: Expanding Boundaries for First-Year Law Students by Internationalizing the Legal Writing Curriculum, 27 BROOK J. INT’L L. 415 (2002); Elaine McArdle, A Curriculum of New Realities: At Harvard Law School, Some New Answers to the Question, What do Future Lawyers Need to Know?, HARVARD L. BULL., Winter 2008, available at http://www.law.harvard.edu/news/bulletin/2008/winter/feature_1.php (“But over the last several decades, with the rise of specialization, globalization and an increasingly regulatory environment both at home and abroad, the practice of law has become more international in scope and has come to require a systematic grasp of statutory and regulatory institutions and practices as much as an ability to glean principles from appellate decisions.”).

significant indirect costs in terms of faculty time, and too often these indirect costs go 
under-appreciated. There is a certain amount of administrative effort required to run any 
law school, regardless of size—and at law schools with fewer faculty members, the per 
capita administrative burden on faculty and staff can be immense. These obligations, of 
course, take time away from the building and running of innovative programs.

Law school programs in other countries also present administrative difficulties that 
domestic programs do not present—language and cultural barriers, time zone differences, 
travel costs, and so on. These costs also are likely to be more burdensome for regional 
U.S. law schools, and this is especially true for schools that are trying to establish their 
very first international programs. If the law school in question has few faculty members 
with international backgrounds or areas of expertise—or any interest in developing such 
extpertise—these large administrative burdens will fall on a very small number of faculty 
members indeed.

In addition to these challenges, there is yet another difficulty that too often goes unstated 
for some U.S. law schools: the potential for insularity. The fact that it is hard to ignore 
the importance of globalization does not mean it is impossible to do so. At law schools 
with few or no existing international programs, there may be less internal faculty support 
for globalization efforts—and indeed there may be some faculty who are openly opposed 
for a number of reasons, including fiscal concerns or a desire to focus on local or 
domestic educational matters. There also may be less support from outside constituencies 
such as alumni, donors, and legislatures. Quite sadly, there even may be a significant 
portion of the student population that is indifferent, because they see study abroad 
opportunities as not relevant to their careers. This sort of inertia or indifference can be a 
feedback loop that is difficult to break.

In this sort of environment, it becomes critically important to develop globalization 
programs that are (a) cost-effective, (b) time-effective (in terms of the time needed to 
plan and administer them), (c) well-designed (so as to minimize the risk of failure and 
any resulting “once bitten, twice shy” faculty mentality about globalization programs), 
and (d) synergistic with a law school’s other strategic programming efforts. One such 
way—a very successful way in my experience—is through modestly sized summer or 
intersession study abroad programs.

43 In economic terms, this is a fixed administrative cost of running a law school; the additional cost 
of running larger, more complex law schools can be thought of as a variable administrative cost.

44 It is important, in the interest of fairness and full disclosure, to state clearly for the record that 
my own experience in developing and running study abroad programs has been a very positive 
one. At my previous school, where I developed and ran the Korea study abroad program, I did not 
rung into faculty roadblocks or opposition, and there was very strong administrative support, which 
was critically important and which I deeply appreciate. However, I do know of faculty at other 
schools who have not fared as well or not had such strong support in their international program- 
building efforts, and all too often I have experienced student myopia regarding how study abroad 
programs can benefit them both professionally and personally.
IV. THE ADVANTAGES OF SUMMER AND INTERSESSION STUDY ABROAD PROGRAMS FOR U.S. LAW SCHOOLS

Summer and intersession study abroad programs offer numerous advantages that make them particularly attractive to U.S. law schools. They do not require major curricular reform. They do not require students (or faculty) to alter their semester schedules. They provide an opportunity for travel by faculty and students to foreign destinations. Depending on when they take place, they can allow students to work for at least part of the summer, which is a critical part of the job-seeking process. Depending on how they are designed, they need only a modest critical mass of students to make them financially viable. They offer yet another way for law schools to promote themselves to other law schools and to recruit new law students. For faculty, their experiences abroad may lead to future faculty exchanges and research collaborations, as well as new areas of research interest, all of which benefit the law school.

In other words, summer and intersession study abroad programs can offer a lot of benefit for a relatively small investment. They may not offer the depth or richness of full curricular reform efforts, transnational joint-degree programs, or foreign campuses with permanent faculty, and they do not offer the immersive experience (for students or faculty) of spending a full semester or year abroad. However, they are a relatively straightforward way for a U.S. law school to provide groups of students with meaningful international experiences at relatively low cost. In modern feng shui (Black Hat tantric) terms, a school can foster globalization within its existing programmatic structure, rather than tearing down the existing structure and reorienting all programs to face in the direction of globalization.

Moreover, in my experience, a successfully run summer or intersession study abroad program is a way to cultivate faculty, student, and alumni support for a law school’s overall globalization efforts. In four years, the law school at which I started my teaching career (Mississippi College School of Law) went from having no international programs (and very few internationally focused courses) to having three summer study abroad programs.

For a discussion of the financial considerations of study abroad programs, see Part V.A.4 below.


See Arlene S. Kanter, The Presumption Against Extraterritoriality As Applied to Disability Discrimination Laws: Where Does It Leave Students With Disabilities Studying Abroad?, 14 STAN. L. & POL’Y REV. 291, 311 (2003) (“[I]nternational programs provide a basis for recruiting students.”); Christopher J. Gearon, Law Schools Go Global, U.S. NEWS & WORLD REP., Mar. 29, 2011 (stating that experts believe “global experience has become a major plus on résumés” and that “[c]learly, the thousands of students who enroll in these programs agree”). In my own experience, this is indeed a significant indirect benefit of study abroad programs. Students admitted to law school often have asked me about international programs and opportunities to study abroad when trying to make decisions regarding what law school to attend. This competition for students through international programming is occurring against a backdrop of growing focus and attention on globalization in U.S. higher education generally. See generally American Institute for Foreign Study, IMPACT OF EDUCATION ABROAD ON CAREER DEVELOPMENT vol. I (Martin Tillman, ed.); see also Susan W. Herrera, Effectiveness of Study Abroad in Developing Global Competence and Global Consciousness: Essential Outcomes for Internationalizing the Curriculum 17-19 (2008) (PhD. dissertation, University of Florida), available at http://etd.fcla.edu/UF/UFE0022495/herrera_s.pdf.
programs (in Korea, Mexico and Germany),\textsuperscript{48} multiple international or comparativist faculty members,\textsuperscript{49} an International and Comparative Law Center,\textsuperscript{50} an International Speakers Series,\textsuperscript{51} and an active student International Law Society—\textsuperscript{52} as well as strong overall faculty and administrative support for these programs. A fourth study abroad program was launched in France in 2012.\textsuperscript{53} Much of this support came after the law school’s very first international study abroad program was established in Seoul, Korea in 2008—and I am convinced that almost none of it would have happened (and certainly not happened as quickly) had that program been ill-conceived and poorly executed. Equally important is the fact that these programs were truly a group effort: they were conceived, established, and administered jointly by multiple faculty and administrators, and some of the programs listed above (namely, the Mexico and Germany study abroad programs, as well as the newer program in France) were spearheaded by other faculty members. I am pleased and proud to have played a central role in the globalization of legal education in Mississippi—to have helped change the direction of discourse and focus faculty energies on global programming—and I am especially pleased and proud that the international programs there continue to thrive and expand.

V. THE DESIGN OF STUDY ABROAD PROGRAMS: FENG SHUI

With these considerations in mind, how should a study abroad program be properly designed? The ABA’s criteria for review and approval of study abroad programs provide some guidance, but the ABA guidelines focus largely on the qualifications of the faculty and personnel involved in the program, the basic adequacy of the program’s physical environment (student and faculty housing and classroom space), and student and faculty safety.\textsuperscript{54} Program design is mostly left to the discretion of the sponsoring U.S. law school(s)—key caveats being that the ABA (a) places limits on daily classroom time and weekly class credit given,\textsuperscript{55} (b) requires that some local legal institutions be visited,\textsuperscript{56} (c) requires that courses offered must be of the same quality (and must be approved in the

\textsuperscript{48} See Mississippi College School of Law, Foreign Summer Studies Programs, law.mc.edu, http://law.mc.edu/academics/law-centers/international/study-abroad (last visited Oct. 30, 2012).

\textsuperscript{49} See Mississippi College School of Law, Meet the Faculty, law.mc.edu, http://law.mc.edu/faculty-staff/faculty (last visited Oct. 30, 2012).

\textsuperscript{50} See Mississippi College School of Law, International & Comparative Law Center, law.mc.edu, http://law.mc.edu/academics/law-centers/international (last visited Oct. 30, 2012).

\textsuperscript{51} Id.

\textsuperscript{52} Id.

\textsuperscript{53} See Mississippi College School of Law, Foreign Summer Studies Programs, law.mc.edu, http://law.mc.edu/academics/law-centers/international/study-abroad (last visited Oct. 30, 2012).


\textsuperscript{55} Id at § IV.A.

\textsuperscript{56} Id at § IV.H.
same way) as the law school’s other courses, and (d) requires that courses offered must relate in some way to the foreign host country.

In other words, the fact that a U.S. law school’s study abroad program satisfies these requirements does not ensure that the program is well-designed, well-run, or being used to its full advantage to promote globalization or other strategic goals of the law school. Consideration of feng shui principles, however, can help better advance these goals. Based on my experience, I believe that a well-designed study abroad program should balance the following tensions, which I have grouped into three categories: (a) size of the program, (b) faculty considerations and diversity, and (c) scheduling considerations.

Most or all of these aspects of study abroad programs will be familiar to anyone who has been involved in such a program. However, I am suggesting that developing and deliberately (intentionally) applying a taxonomy of these factors can facilitate effective planning and implementation of study abroad programs, and thus result in positive programmatic “energy” in the forms of beneficial student learning, the broadening of student perspectives, student and faculty safety, the reduction of student stress while abroad, the financial viability of the program, student body support for the program, positive effects on law school student recruitment, benefits to faculty teaching and research endeavors, and faculty (and university) support for the program. Failing to consider these factors, I believe, is likely to result in less effective programs, greater possibility of program failure, and other negative effects.

A. Size of the Program

1. Programming Robustness versus Administrative Cost

It is tempting (especially when perusing glossy flyers that arrive in the mail from other law schools) to design a large program with many faculty and course options. To be sure, such programs can offer a rich educational experience. They can allow for more in-depth treatment of a chosen subject (such as, for example, international human rights), and they may attract a larger number of students because of the variety of classes offered and the instructors involved. It is not uncommon for leading legal experts and jurists (such as U.S. Supreme Court justices) to participate in these programs as visiting faculty—and the

57 Id at §§ I.B & I.C.
58 Id at § I.D.
59 In fact, the American Bar Association’s website expressly acknowledges this:

The ABA’s oversight role with regard to study abroad programs is designed to provide assurance of a sound educational experience in a study abroad program sponsored by an ABA-approved law school. . . . These Criteria recognize that the primary responsibility for determining the quality of the educational experience that students receive during a study abroad experience rests with the faculty and administration of the law school.

American Bar Association, Foreign Study, americanbar.org, http://www.americanbar.org/groups/legal_education/resources/foreign_study.html (last visited Oct. 30, 2012). One might surmise that, at least in the year of an ABA site visit, a study abroad program must be well run in order to receive ABA approval. That might be so—but on the other hand, ABA site evaluators do not stay on site for the duration of the program, and site visits generally only occur every seven years. ABA Foreign Program Criteria, supra note 54, at § IX.B.2. In other words, the system of site evaluation (and annual reports filed by sponsoring law schools) is largely based on good faith and self-reporting. See id. at § IX.B.
opportunity to meet and rub elbows with such luminaries is a strong attraction indeed for students. 60

On the other hand, the overhead for larger programs can be significant, because more persons are involved. Faculty members must be transported, provided with room and board, and paid. And of course, the more students there are, the more classroom space (and study space) is required. Administrative staff may need to be hired, or pulled from other tasks in order to help run the program (which, while an indirect cost, can have a significant impact nonetheless in terms of opportunity costs).

The size and complexity of larger programs therefore makes them more vulnerable to problems of insufficient student registration, because more students are needed to make larger programs economically viable. (Whether that means the programs must break even or simply incur an acceptable loss will differ from school to school.) It also makes larger programs more susceptible to staffing problems, because more teachers and administrators are required to run the program. The burden of a large program can be particularly acute on smaller law schools.

Often, therefore, a smaller program may offer a better balance of costs and benefits. An ideal structure for a modest-sized program might be one with two or three courses, two or three professors, and a small group of 10-20 students who take all courses together. Of course, this being an exercise in balancing different interests, there is not one correct solution. A law school with a particular focus or interest may wish to offer study abroad programs that complement that focus or interest (such as law & economics, or a Latin American focus)—and running a larger program with broader and richer class offerings may be a way to accomplish that goal. Also, local faculty or guest lecturers can be used to add depth and richness to the classroom component of a study abroad program—although that approach presents the administrative challenge of coordinating multiple speakers. In other cases, several law schools could partner to offer richer and more diverse study abroad programming than they might be able to offer separately. This sort of economies of scale approach has been undertaken by the four member law schools of the Consortium for Innovative Legal Education (CILE), which currently collectively offer seven summer and semester-long study abroad programs for their students. 61

2. Number of Students

One school of thought about study abroad programs is that the number of participating students should be large enough to pay for much (but perhaps not all) of the program’s costs, yet small enough to be cohesive as a group. In my experience, any number above 15 may adversely affect group cohesion, and it also may make transportation for field


trips more difficult (e.g., motor vehicle excursions might require travel in multiple vehicles or a large coach). In fact, it is my view that lower group cohesion may be one of the more significant non-financial adverse effects of larger programs. The common, shared experiences of a study abroad program can help form powerful friendship bonds among the students, and the students hopefully will link their study abroad experiences—new activities as a group, close and informal interaction with faculty, a broadening of their horizons—with the sponsoring law school in a positive way. That sort of associational thinking becomes more difficult with larger groups—much in the same way that it is easier to get to know students in a small class setting than in a large class section.

Of course, restricting the size of a study abroad program may not be feasible for a program that has high overhead costs. Moreover, if there is significant student demand for the program in question, a law school might reasonably decide to risk lower group cohesion in order to allow more students to participate in the program. For larger programs, therefore, how might the adverse effects of group size on group cohesion be minimized? One approach is to limit participation to students from a single, sponsoring school, so that students will be more likely to know one another in advance. A related approach is to hold program meetings in advance of the program (prior to departure) to promote group cohesion. A third approach is to have the program operate as a “traveling program”—one that travels to multiple locations en masse—instead of being based in a single location abroad. Because the location is constantly new, students and faculty will be drawn more closely together in a cooperative adventure and be less likely to engage in separate explorations of the locales. Of course, that too presents its own cost, because independent exploration—and the resulting lessons about independence and self-sufficiency—can be one of the most profound learning experiences in a study abroad program. Still, group cohesion can be enhanced in this way. All three of these methods can be used separately or in combination to promote group solidarity.

3. Number of Credit Hours

The ABA permits a maximum of 220 minutes of classroom instruction per day on ABA-monitored and -approved study abroad programs, and a maximum of 1.5 hours of credit

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62 The point I am making about group cohesion and coordination is different than the common assumption that smaller classes result in better educational experiences for students—and it so happens that my point is also a much less controversial one. For general discussion on the relationship between class size and student learning, see Frederick Mosteller, *How Does Class Size Relate to Academic Achievement in Schools?, in Earning and Learning: How Schools Matter 117* (Susan E. Mayer & Paul E. Peterson, eds, 1999); Eric A. Hanushek, *The Evidence on Class Size, in Earning and Learning: How Schools Matter 131* (Susan E. Mayer & Paul E. Peterson, eds, 1999). *See also* Sid Gilbert, *Quality Education: Does Class Size Matter?, CCSH Professional File*, No. 14, Winter 1995 (noting a weak correlation between teaching effectiveness and class size, and discussing instructor characteristics for effective teaching of large classes).

63 *See, e.g.*, West Virginia University College of Law, *Legal Study in Brazil Program*, law.wvu.edu, http://law.wvu.edu/academics/legal_study_in_brazil (last visited Oct. 30, 2012). It should be noted that this program is currently run as an internal West Virginia University program. In other words, it is essentially an internal law school course that is taught in a foreign location, and it is therefore not subject to ABA study abroad oversight. This difference, however, does not affect its usefulness as an example of a “traveling” study abroad program.

64 *ABA Foreign Program Criteria, supra* note 54, at § IV.A.3.
This ties in nicely with the ABA’s standard formula that 700 minutes of class time constitute one semester credit hour. One purpose of these limitations is to help ensure an appropriate balance between time in the classroom and time for students to explore the local environment. Too much time in class reduces the quality of the classroom experience and casts a pall over the entire study abroad enterprise; too little renders the experience merely a for-credit holiday.

While the goal of the ABA’s daily maximum for classroom instruction is laudable, I do not believe it strikes the ideal balance between work and play. A study abroad program that meets five days a week for 220 minutes each day is the short-term equivalent of taking 22 semester credit hours in a semester—something far in excess of the standard course load in law school. For the same reasons that taking so many semester hours is often discouraged or prohibited by law schools, offering maximum credit hours in a study abroad program may not be ideal.

I have found that averaging approximately one credit hour (700 minutes) of instruction time per week (inclusive of classroom time and certain class-related field trips) can achieve a healthy balance between work and leisure. This somewhat slower pace—which is on par with taking fifteen credit hours in a regular semester—allows for both full weekends without classes and one or more days during the week with no classes. Of course, less instruction may mean lower tuition revenue, which in turn may affect a

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65 Id. at § IV.A.2.

66 Id. at § IV.B. Interpretation 304-4 to ABA Standard 304 (Course of Study and Academic Calendar) states, “Law schools on a conventional semester system typically require 700 minutes of instruction time per ‘credit,’ exclusive of time for an examination.” ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 23 (2012), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf.

67 A student taking fifteen 50-minute credit hours in a 14-week semester will be in class 750 minutes per week (assuming classes meet only five days per week). A student in a study-abroad program that meets for 220 minutes a day, five days a week will be in class for 1,100 minutes per week, or 15,400 minutes total, which for a 14-week semester is the equivalent of exactly 22 credit hours.

68 The ABA requires a minimum of 58,000 minutes of instruction for a juris doctor degree. See ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, supra note 66, at 22 (Standard 304.B). That minimum is the equivalent of taking 83 semester credit hours, or just under 14 credit hours per semester (for six semesters). A requirement of 90 credit hours would require a standard course load of 15 credit hours per semester for six semesters.

69 See, e.g., Duke Law School, Duke Law Academics: Rules & Policies Section 3, Rule 3-6, law.duke.edu, available at http://www.law.duke.edu/about/community/rules/sec3.html#rule3-6 (last visited Oct. 30, 2012) (“No student shall take for credit courses totaling more than sixteen credits per semester nor audit and take for credit courses totaling more than seventeen credits per semester, except with the permission of the Dean.”); Fordham University School of Law, Registrar Q&A, law.fordham.edu, available at http://law.fordham.edu/Registrar/10682.htm (“No student in the day division may take fewer than twelve (12) hours or more than sixteen (16) hours per semester without special permission.”) (last visited Nov. 1, 2012); West Virginia University College of Law, WVU College of Law Student Handbook 2012-2013, 4-5, available at http://law.wvu.edu/academics (requiring students to obtain approval of the Chair of the Academic Standards Committee to take more than 17 credit hours in a semester).

70 See supra note 67.
program’s financial viability, but it is my view that the benefits of this more modest pace often outweigh the adverse economic impact. In fact, letting financial considerations alone determine the time spent in the classroom while abroad is very much a case of the tail wagging the dog.

4. Cost of the Program

While at one time study abroad programs were profitable for the U.S. law schools that ran them, the same is generally not true today. Greater competition and higher tuition have conspired to reduce or entirely eliminate profit margins for many programs. Many U.S. law schools in fact offer discounts to students—either for tuition or administrative costs—in order to make their study abroad programs affordable.

Despite this, U.S. law school study abroad programs continue to proliferate—over 200 at the time this Essay was published. Clearly, many U.S. law schools are of the view that study abroad programs offer significant indirect financial benefits—for example, in terms of student recruiting and retention and faculty recruiting and retention. The benefits of these programs can be difficult to quantify, however. It is the age-old quandary of weighing direct-cost apples against indirect-benefit oranges.

To the extent that the benefits of a potential (or existing) program are being questioned, it is therefore important to intentionally reframe the debate—to think about the central purpose of study abroad programs, and how they fit into the overall stable of programs offered by a law school. One way to do so is to compare study abroad programs, which do generate some revenue, to other law school programs that do not—such as moot court programs. Moot court programs are generally regarded as beneficial despite their fairly significant expense. To state it differently, moot court programs are not expected to “pay their own freight.” Why not view study abroad programs—which expand student horizons, provide curricular diversity, and help prepare students for practice in an increasingly globalized world—in the same way? Why not view study abroad programs as programs that at least partially pay their own freight, unlike many other law school programs such as moot court programs—and even, for that matter, student-run law reviews?

Study abroad programs also can be usefully characterized as “loss-avoidance” measures. The fact that students study abroad through other law schools’ programs might result in a

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71 To increase the credit hours of a program (and thus perhaps revenue), a law school might offer some study abroad program course instruction prior to trip departure (an approach discussed in Part V.A.1 above in the context of building group cohesion)—although that has its own logistical drawbacks, such as the need to schedule around other semester activities and the challenge of including any participating students from other law schools.

loss of tuition to the student’s home law school (depending on the home school’s tuition structure). If the student’s home law school offers at least one study abroad program, however, this can help to avoid at least some of this tuition loss. The precise nature of this calculus will depend on the tuition structure of the school in question—but at a law school where students pay tuition on a “pay as you go” system (i.e., by the credit hour as courses are taken), the financial effect of retaining such tuition can be significant.

The main point regarding the cost of study abroad programs is that it is easy to see the hole and not the doughnut. A deliberate, intentional effort to focus on the desired benefits of legal education, and how study abroad programs can promote those goals, can help show how a study abroad program is (or is not) in line with the sponsoring law school’s strategic goals. This in turn will help ensure that the law school’s energies and funds expended on the program reap the desired rewards.

B. Faculty Considerations and Diversity

1. Cost of Faculty versus Number of Faculty

Each faculty member adds significant cost to a study abroad program (in terms of travel expenses, living expenses, and/or salary), so the benefit of additional faculty must be balanced against their cost. That said, there generally should be at least two faculty members on each program. Not only can they share the program’s heavy administrative and teaching loads, but having at least two faculty members also will help avoid cancelation in the event one of the faculty members experiences an illness or personal emergency. Canceling a program for lack of staffing is most certainly not a good way to promote a school’s global programming or other strategic goals. Moreover (and I speak from personal experience), running a study abroad program on a solo basis adds a great deal of background stress to the administrative and teaching endeavor. In other words, even when the stress of being a sole faculty member is not readily apparent, it is there subconsciously (per the feng shui principle of subconscious reaction), and only is eliminated through the addition of at least one other faculty member. Having three or more faculty members might be even more beneficial (assuming the faculty work well together), but this of course would increase the cost of the program.

2. Expert Faculty versus Engaging Faculty

Hopefully a choice does not need to be made between faculty members who have subject matter expertise relevant to the program versus faculty members who are better at engaging with students. If the choice does need to be made, however, it can be a tough and delicate one, and it needs to be thought through carefully. On the one hand, it is desirable to include faculty with international expertise of some sort, and indeed the ABA’s rules concerning study abroad programs require that the program’s director “shall have had some experience with the same or a similar program or possess a background that is an adequate substitute for such experience.” On the other hand, students want to travel and spend time with interesting and engaging faculty members who will in turn enjoy spending time with the students. The choice of faculty therefore can affect a

73 See supra text accompanying notes 36-37.
74 ABA Foreign Program Criteria, supra note 54, at § II.C.
program’s student census—which in turn can affect the program’s revenue, reputation among students, and long-term viability.\(^{75}\)

If a difficult choice of this sort must be made, it may well be preferable to choose a gregarious and outgoing faculty member with less international expertise, and have this faculty member teach a comparative course in her or his particular discipline. Any concerns about the international depth of the program could be offset (if possible) by pairing this faculty member with another faculty member who possesses greater international expertise of some sort.

It is also important to view a faculty member’s lack of international expertise as a short-term problem: faculty members who participate in study abroad programs will develop experience relevant to the program and its subject matter, which then can be carried over into future years. In other words, the problem is in important respects a self-correcting one—which is all the more reason to choose engaging faculty members for study abroad programs, even if they begin with less international experience or expertise. In feng shui terms, this conscious design decision at the outset of the program will affect the flow and outcome of the program; starting off with the incorrect balance of expert-versus-engaging faculty can seriously hinder a program and reduce its effectiveness.

### 3. Faculty Experience with the Host Country

Tensions also exist with respect to choosing between faculty who have experience in and knowledge of the host country and faculty who do not. Early in the life of a study abroad program—that is, in its first several years—it is extremely valuable to involve faculty who have direct experience with the host country in question. In fact, a common genesis for study abroad programs is a faculty member’s interest in establishing such a program in a foreign country with which she or he is familiar. As time goes on, however, other faculty can be brought into the mix and gain similar experience through their participation in the program. In other words, early on, the analysis may skew in favor of faculty members who have direct experience in and knowledge of the host country—even if those faculty might not be ideal for student recruitment.

On-the-ground experience is therefore critically important, especially in the first years of a program. It is not, however, absolutely essential. It is possible to launch a successful study abroad program with faculty who are unfamiliar (in a firsthand sense) with the host country. This does raise some risks, of course—it is, for example, harder to identify and plan for problems in advance—but the challenges are not insurmountable. This is especially true if a law school’s university has a preexisting relationship with a local college or university in the host country, or if faculty members have trustworthy local contacts (e.g., local law faculty, or even local members of the practicing bar in some cases) who can serve as proxies for personal experience, and who can help arrange for and administer the program.\(^{76}\) It is also possible to hire faculty or administrators with

\(^{75}\) This point also relates back to the decision by some U.S. law schools to hire high profile faculty, such as U.S. Supreme Court justices, to teach on their study abroad programs. See supra text accompanying note 60. Those visiting faculty may or may not interact much with students outside the classroom, but they certainly serve as a strong draw for students to participate in the program.

\(^{76}\) Having someone on site who is fluent in the local language and familiar with the host country is in fact required under the ABA’s study abroad program rules. See ABA Foreign Program Criteria, supra note 54, at § II.D.
host country experience from some other U.S. law school, and thereby obtain host country knowledge and experience.

The main point is that the absence of direct faculty experience should not be viewed as an absolute deterrent to the launching or expansion of a study abroad program. There are short-term costs and challenges involved—launching a program without faculty who have direct experience in and knowledge of the country is quite a challenge—but when the costs and challenges are weighed against the longer-term benefits of the program, it may be worth it to proceed.

4. Faculty and Student Diversity Considerations

It is always important to take diversity into consideration when selecting faculty and students for a study abroad program. With respect to faculty selection, it is preferable to have gender diversity, because students (in my experience, at least) may be more comfortable seeking counsel on sensitive matters from faculty of their own gender. The same point also holds true for other types of diversity, including ethnic and racial diversity. Moreover, having diversity within a program, both of faculty and students, will affect a program’s richness and tone for the better. It is worth pointing out that gender diversity also ties in nicely with feng shui’s *kan-yu* and *yin-yang* pairs of opposites.

On the other hand, it is also my experience that a study abroad program can be highly successful with less diverse faculty, provided that the faculty members who participate in the program are sensitive to and conscientious about diversity issues. In addition, a study abroad program can be successful even if there is relatively little student diversity: because a study abroad program takes place in a foreign location with a different culture, various aspects of (and experiences with) local culture can be used to bring different perspectives into the classroom. This is not to suggest that such approaches are preferable to having internal faculty and student diversity, but it is to suggest that study abroad programs can be designed to be sensitive to (and benefit from) diversity considerations, even in the absence of actual internal diversity.

C. Scheduling Considerations

1. Class Days and Times

Study abroad programs seek to balance formal learning with experiential learning and exploration outside the classroom. Focusing on one at the expense of the other reduces the effectiveness of the program. I have found that it works well to hold class in the mornings and leave most afternoons free, or have class three or four days a week instead of five (with a free day in the middle of the week and/or a long weekend). As discussed in Part V.A.3 above concerning credit hours, such schedules set a manageable pace and do not overload students. Classroom time should be classroom time, and students should be held accountable for the course material and be given sufficient time to prepare—yet students also need time to experience the foreign locale without shirking their academic work.


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77 See supra text accompanying notes 14-20.
2. **Classes Offered**

There is a central tension in legal education between providing practical skills training and offering broader perspectives on the law. While arguably any single law school course should do both, I have found that in the setting of a law school study abroad program, it is effective to offer one fairly technical course and one more perspectives-focused course. This approach provides students with a multi-dimensional experience regarding the law and the foreign host country. It also can help attract a greater number of students, because, in my experience, students may be primarily interested in one type of course or the other.

3. **Class Instruction and Field Trips**

I have found it useful to provide more classroom instruction in the early days of a study abroad program and wait to begin field trips in week two and beyond. Students as a whole are less adventurous and more academically attentive early on during study abroad programs. In addition, frontloading classroom instruction provides students with a base of knowledge that subsequent field trips will help reinforce. For example, in Korea I had my students attend a briefing at a prestigious local law firm, visit the Demilitarized Zone, attend an economic briefing at the U.S. Embassy, attend security briefings by U.S. military personnel, and tour the Constitutional Court of Korea. Every visit complemented topics we had studied and discussed in class, and offering these visits later in the program enabled the students to ask better questions and engage in higher-quality post-visit discussions. On the few occasions when I had to frontload field trips prior to classroom instruction on relevant topics, the students asked fewer (and more basic) questions during the field trips, and some students expressed regret about their lack of foundational knowledge of relevant legal issues during the field trips.

If a study abroad program’s classroom instruction is frontloaded in this fashion, it is important to explain the rationale to students. This is part of intentionality in feng shui: it is conscious programmatic design that seeks to achieve a particular outcome. Students will better understand that there is a deliberate structure to the program—as opposed to a series of interesting events in no particular order—and that in turn will increase student confidence in and support for the program (and other international programming by the law school). It is also a way to reduce subconscious student stress.

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78 See, e.g., WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 34 (2007) (commonly referred to as the Carnegie Report) (“[M]any of the ongoing questions in legal education, such as how much uniformity is needed versus how much variation to promote or how broad a preparation for practice law schools should provide, concern relations among what we have called legal education’s cognitive, practical, and formative apprenticeships.”); SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 235 (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992) (commonly referred to as the MacCrate Report) (“Law schools can, and should, teach [professional values of the legal profession] in clinical and traditional courses and should instill in students the desire to achieve them in the course of their professional careers.”); see also Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 34 (1993) (“For some time now, I have been deeply concerned about the growing disjunction between legal education and the legal profession.”).
4. **Overnight Field Trips**

Overnight field trips can enrich a study abroad experience, because they allow a group to venture farther afield than is possible on day trips. Too many overnight trips (by all or part of the group), however, can disrupt the daily rhythm of living abroad. Balance is therefore essential. I have found that for study abroad programs that are based in a single location (as opposed to traveling programs that visit various locations as a group), overnight trips preferably should not occur until about halfway through a program and should be limited to no more than one trip per week. In Korea, I took my students on one overnight trip within Korea, and I also took them on a multi-day trip to China that truly offered a comparative cultural experience and put Seoul in an entirely different light (as well as helped to reestablish some group cohesion). The change of pace also refreshed the students and faculty for our remaining time in Korea.

For traveling study abroad programs—those that rotate through several locations—the considerations are of course different. For such programs, the benefit of establishing a daily rhythm is made secondary to the opportunity to see multiple locations within the host country or countries. As with all things feng shui, it is a matter of intentionally achieving the desired balance.

5. **Housing**

Living abroad in a new environment can be stressful, and not all students take to the experience naturally or with grace. Some students are quite cognizant of the stress they feel due to being in a foreign environment; others are less aware, but feel stress nonetheless. It is therefore beneficial, when possible, for students to have some private space, as well as a commons area in their quarters where they can gather. Private space and group commons areas allow students to take “time-outs” from the local culture, if need be—and perhaps most importantly, even if they do not realize they need such time-outs. Some students eagerly adapt to foreign cultures, and some students accept cultural differences with aplomb—but others do not. For the latter, the ability to take a break from local culture in a private space or group commons can be an important means to prevent cultural overload and withdrawal. In other words, a more positive student experience abroad can be fostered simply through attention to housing arrangements.

In addition, the benefits of having faculty housed in the same space as students, versus elsewhere nearby, must be considered, because this affects the tone and tenor of a study abroad program. Faculty members, like students, can benefit from having their own private space (something to which I can definitely attest). There are some advantages to having faculty housed close to the students—the ability to keep tabs on students and to tamp down mischief—but on the other hand, constant close proximity means less (or at least qualitatively different) down time for both faculty and students, which, again, can lead to stress. It is therefore important to deliberately decide what values are more desired, and try to obtain housing arrangements that further those values.

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79 *See supra* Part V.A.2.
VI. CONCLUSION

This Essay is not an exhaustive treatment of the tensions present in U.S. law school study abroad programs, and it is not an exhaustive discussion of feng shui. However, it is my hope—and my belief—that deliberately applying some of the principles of feng shui to U.S. legal study abroad programs can help U.S. law schools design programs that synergistically complement and foster their other globalization efforts. It is also my belief that the benefits of this approach may be particularly significant for regional U.S. law schools.

The key, I believe, is to appreciate that the tensions present in the factors discussed above cannot be resolved, and in fact should not be resolved. Rather, when these tensions are properly balanced they can contribute to the energy of a study abroad program in positive feng shui fashion. That is, these tensions—such as between in-class and outside activities, between the classes themselves (with possibly different styles or focuses on the local country), and between faculty being both peers and teachers for the students—can enhance the overall dynamic of a study abroad program and make it a far more rich and rewarding experience for all concerned. Deliberate attention to these factors can result in a better-designed program that supports the desired goals of the sponsoring law school. And if it is true that “nothing breeds success like success,” then nothing leads to strong international programs and happy participating students (and future alumni) than well-designed and well-executed programs that properly balance these tensions.

This same feng shui approach also can be used to ensure that the benefits offered by one study abroad program are complemented by other programs, be they additional study abroad programs in different regions and offering different courses, domestic efforts at globalization (such as new courses, inbound exchange programs, and the like), or other initiatives. These programs also will exist in tension with one another to a certain extent, and the same deliberate and intentional balancing approach that works to design a single program can be applied on a larger scale to balance the benefits of multiple international programs, and create a whole that is greater than the sum of its parts.

That, at least, has been my experience. And it is more than a little ironic, in the most positive sense possible, that my own study abroad time in Seoul exposed me to a culturally very different way of thinking about study abroad programs. That sort of diversity of thought—and the insights afforded to me by it—demonstrate in a quite gratifying way the intrinsic value of these programs.
A Tale of Hooligans, Terrorists and Human Rights

PETER T.M. COENEN

ABSTRACT

The Prevention of Terrorism Act introduced anti-terrorism control orders. These orders substantially restrict the movement of suspected terrorists. Such civil orders restricting the movement of persons suspected of certain offences are nothing new. Since the 1980s the movements of convicted and suspected football hooligans have been restricted by similar civil orders. This article will analyze a number of control order cases before the House of Lords and assess their impact on the whole spectrum of civil orders, including football banning orders.

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I. INTRODUCTION

What do football hooligans and terrorists have in common? At first sight, it seems the answer is nothing. However, there are some striking similarities in the way modern societies perceive both problems. Both terrorism and hooliganism lack a clear legal definition. Both terrorism and hooliganism have been hard to curb by the authorities. The existing criminal law framework has been seen as providing insufficient solutions for terrorism and hooliganism and therefore new and oftentimes draconian legislation has been introduced to counteract the two.

In England a particularly problematic set of preventive measures are used to limit the liberty and risk posed by both hooligans and terrorists. In 2007, the House of Lords issued a ruling in Secretary of State for the Home Department v. JJ that control orders imposed on several respondents, all of whom were foreign nationals suspected of terrorist activities, amounted to a deprivation of liberty. These control orders imposed restrictions on the respondents including, inter alia, 18-hour curfews, electronic monitoring tags, restrictions on movements outside of the curfew, and monitoring of electronic communications. Despite the Secretary of State’s arguments regarding national security, Lord Bingham of Cornhill likened the situation of the controlled persons to detention, noting that their lives were wholly controlled by the Home Office and they were completely cut off from meaningful social contact with the outside world. Even with the weight of imperative national security concerns, the House of Lords still found fundamental problems with the restrictions imposed on these suspects in light of Article 5 ECHR.

In the case of football hooligans, the imperatives are less pressing, yet the challenges posed to governments is similar in many ways. Football hooliganism has been and continues to be perceived as a serious public order issue. Like with fighting terrorism, police attention to this issue is frequently in the form of preventive measures. Also, like terrorism, these preventive measures tend to be civil and administrative in nature, with restrictions on a subject’s movements and liberty that can amount to a large interference with their rights.

The following will look at the special control orders that were the subject of scrutiny by the House of Lords and assess whether the rulings of the House of Lords will have an impact for football hooligans. First, I will examine football banning orders in the UK, particularly how these orders are made procedurally and the case law dealing with challenges to enforcement. Next, I will discuss the Prevention of Terrorism Act 2005 and the relationship of these control orders with the rights guaranteed under the ECHR. Finally, I will look at how the jurisprudence of the House of Lords impacts the analysis of human rights issues in relation to football banning orders.

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II. FOOTBALL BANNING ORDERS

Football banning orders (‘FBOs’) can be found in the Football Spectators Act 1989, as amended by the Football (Disorder) Act 2000. The Football Disorder Act made a number of important changes to the legislative framework for dealing with football hooliganism in the UK. The most important change was that a FBO under the amended Football Spectators Act of 1989 can be imposed upon complaint by the police in a civil procedure. For a FBO on complaint, a conviction is not necessary and such a football banning order is handed out on the basis of the civil standard of proof (balance of probabilities). The effect of a FBO under the amended Act is that the person receiving a FBO cannot attend prescribed football matches in England and Wales and may be required to report to a police station at the time of prescribed matches played abroad when required to do so by the enforcing authority (the Football Banning Orders Authority, or "FBOA"). A court imposing a FBO should normally also impose a requirement that the passport is surrendered on the occasions when the person is required to report unless there are exceptional circumstances for not requiring so.

The FBO made on complaint by the police is found in section 14B Football Spectators Act 1989. Section 14B reads as follows:

‘Section 14B Banning orders made on complaint:

(1) an application for a banning order in respect of any person may be made by the chief officer of police for the area in which the person resides or appears to reside, if it appears to the officer that the condition in (2) below is met.

(2) That condition is that the respondent has at any time caused or contributed to any violence or disorder in the UK or elsewhere.

(3) The application is made by complaint to a magistrates’ court.

(4) If (a) it is proved on the application that the condition in (2) above is met; and (b) the court is satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches, the court must make a banning order in respect of the respondent.’

No conviction is needed for a FBO on complaint. A FBO on complaint can be made following an application made by the police in name of the Chief Officer of police. A FBO on complaint is made when the judge is satisfied that the suspect has at any time caused or contributed to violence or disorder (in this respect it does not matter whether the violence or disorder was football-related). The second precondition for a Section 14B FBO to be made is that the judge has to believe that the imposition of a 14B FBO will help prevent football related violence and/or disorder in the future. This precondition is a clear reference to the (supposed) preventive nature of the FBO on complaint. Both tests are assessed on the basis of the civil standard of proof (a balance of probabilities). FBOs are viewed by the legislature as purely preventive and not punitive and therefore a civil

Footnote:


standard of proof is sufficient. A Section 14B FBO can be imposed for a minimum of two
two years and a maximum of five years.

A. Gough & Smith v. Chief Constable of Derbyshire

The main legal challenge to FBOs on complaint came in the case Gough and Smith v. Chief Constable of Derbyshire. Carl Gough and Gary Smith are fans of Derby County Football Club. They are suspected of being members of the Derby County hooligan gang. Gough and Smith both received FBOs on complaint for two years, the minimum period required under the FSA. The FBOs domestically applied to the stadium and the vicinity of the stadium of Derby County. As regards international matches, Gough and Smith were required to hand in their passports and prevented from traveling around each match of the English national team. Both Gough and Smith appealed against the orders. One of the main issues in the appeal was the compatibility of FBOs with the European Convention on Human Rights (‘the Convention’), and especially articles 5, 6 and 8 of the Convention.

The Court of Appeals stated that the FBOA, the Football Banning Order Authority which administers the precise restrictions imposed by FBOs, made clear that all those who were subject to a FBO would have to hand in their passports and were restricted from travelling when the English national team was playing abroad. This restriction would be imposed, without consideration of whether the person concerned was a fan of the English national team or whether the person concerned had ever traveled to watch a game of the English national team abroad. If someone who has received a FBO wants to travel during a period in which the English national team played abroad, that person can apply for an exemption of the travel restrictions imposed. Because of the existence of this possibility to obtain an exemption, the Court of Appeals concluded that there was sufficient individual consideration to safeguard the rights of those concerned. Both Gough and Smith were not regular followers of the English national team and both were not known to be troublemakers at matches of the England team abroad. However, both still had to hand in their passports during control periods when England played abroad for the duration of their FBOs.

The Court of Appeals added that problems under the Football Spectators Act 1989 could arise with regard to the question whether the restrictions of a FBO are rationally connected to the objectives of the Football Spectators Act 1989 and whether such restrictions were strictly necessary. The Court of Appeals explained that a FBO will normally be made on the basis that the person concerned is likely to engage in acts of football hooliganism at or around domestic football matches. The Court of Appeals, without adducing any evidence for this contention, concluded that if that person would go to a match abroad, it is just as likely (or even more likely) that person would also engage in acts of football hooliganism at or around that match abroad. The Court of Appeals went along with the FBOA’s conclusion that every match involving the English national team therefore is a match at which there is a high risk of disorder occurring, where those with domestic FBOs will also engage in hooliganism. The Court of Appeals therefore


6 Since the U.K. has signed but not ratified the protocol no.4 to the European Convention on Human Rights, the freedom of movement as protected by Article 2 of Protocol no. 4 was not at issue in this case.

agreed that the FBOA could impose a restriction on international travel during and around each match of the English national team for all those who had received a FBO. Those who received a FBO could then apply for an exemption allowing them to travel during such a control period in which the English national team plays, if the FBOA is satisfied that the person applying for the exemption will not travel to the match.8

The Court of Appeals then looked into the necessity and proportionality of this scheme. They concluded that previous measures to combat football hooliganism had not helped to prevent acts of football hooliganism at and around matches of the English national team abroad. However, this does not automatically validate the new scheme. The Court of Appeals looked at the test for making a FBO: whether the judge is satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches. They concluded that this standard was broad and imprecise, stating that the nature of the facts to be proven under this standard were unclear and that the standard of proof to be applied with regard to this condition was also unclear.9

The provisions of the Football Spectators Act 1989 were capable of being applied in a disproportionate manner, according to the Court of Appeals, especially if a civil standard of proof is used to prove a broad and imprecise condition, there is a substantial danger of FBOs being issued on the basis of meager evidence. However, the Court of Appeals concluded curiously that the question is not whether the provisions of the Football Spectators Act 1989 can be applied in a disproportionate manner. The question, rather, should be whether these provisions can be interpreted in a proportionate manner. The provisions of the FSA have to be interpreted in accordance with the European Convention on Human Rights and with European Union law. They held that the scheme of the FSA was proportionate and was also necessary to prevent football hooliganism abroad. Further, it was proportionate that those with a propensity for football hooliganism domestically are required to ask permission to travel abroad during international matches of the English national team. The Court of Appeals stated that there were no less invasive measures available and that FBOs on complaint therefore pass the proportionality test.10

The Court then looked into the standard of proof required for making a football banning order. In this part of the judgment, the reasoning by the Court of Appeals is possibly the most puzzling. The Court of Appeals started by saying that FBOs were not penalties and that proceedings under Section 14B are not of a criminal nature. While FBOs are made in civil proceedings, they have serious consequences for the persons against whom such an order is imposed. The standard of proof applied to FBOs therefore has to be flexible and take account of the consequences of such an order. In practice, the courts will have to apply a standard of proof that is akin to a criminal standard of proof. This means that the necessity to impose restrictions on fundamental freedoms needs to be strictly demonstrated by the Court. Accordingly, it seems that the Court of Appeals also had problems concluding that FBOs on complaint are purely preventive and do not have a punitive character. The Court of Appeals was not able to close its eyes to the harsh effects of a FBO on the person concerned. However, the Court of Appeals did not think it necessary to require a criminal burden of proof in this case. The Court of Appeals in the end concluded that Article 6 of the European Convention on Human Rights had not been

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9 Id. at para. 82.
10 Id. at para. 86.
violated, since a FBO was not a criminal measure and that the correct standard of proof had been applied. The Court of Appeals finally summarily rejected that article 8 of the ECHR had been violated in the instant case.  

III. THE PTA AND THE HOUSE OF LORDS’ CONTROL ORDER CASES

The Prevention of Terrorism Act 200512 (‘PTA’) was passed in March 2005 introducing the anti-terrorism control order.13 Control orders were designed to provide a solution for those persons against whom a strong suspicion of involvement in terrorist activities existed, yet could not be prosecuted or deported.14 In 2007, the House of Lords gave three judgments that are instructive when determining the outer limits of the PTA - Secretary of State for the Home Department v JJ (‘JJ’); Secretary of State for the Home Department v MB and AF (‘MB and AF’); Secretary of State for the Home Department v E (‘E’).15

The PTA defines a control order in Section 1 (1) as an ‘order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism.’ Section 15 (1) defines a non-derogating control order as ‘a control order made by the Secretary of State.’ A non-derogating control order does not include any obligations that derogate from the right to liberty protected by article 5 of the Convention. The power to hand out a non-derogating control order is vested in the Secretary of State by Section 1 (2) of the PTA. Judicial oversight of the Secretary of State’s power to make non-derogating control orders is contained in Section 3 of the PTA. According to Section 2 (1) of the PTA, the Secretary of State may hand out a non-derogating control order against the person concerned if he

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\text{‘(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.’}
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Before the Secretary of State makes a non-derogating order, the Court at a preliminary hearing will review the Secretary of State’s decision. The standard for this review is that the Court looks whether the decision by the Secretary of State is obviously flawed. A

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12 Prevention of Terrorism Act 2005
13 In January 2012 control orders were replaced with Terrorism Prevention and Investigation Measures (TPIM’s). The conditions imposed by TPIM’s are essentially similar to those imposed by control orders.
non-derogating control order has effect for a period of twelve months and can be renewed indefinitely with new 12 month periods.

Section 1 (4) PTA lists the obligations that can be included in a control order. The list provided in Section 1 (4) PTA is not exhaustive. In JJ, Lord Hoffmann set out the condition of one of the control orders at issue in that case.

‘The order provides that he shall:
(1) at all times wear an electronic monitoring tag;
(2) remain in his flat at all times except from 10 am until 4 pm;
(3) report to the monitoring company twice a day;
(4) allow the police any time to search his flat;
(5) not receive any private visitors except with the prior consent of the Home Office, supplying them with the visitor’s name, address and photograph;
(6) Not meet anyone by prior arrangement outside his flat except with Home Office consent and not attend any pre-arranged gatherings except to attend at one mosque approved by the Home Office;
(7) Not associate or communicate with 5 named individuals against whom control orders have also been made;
(8) Not use a mobile telephone or internet connection;
(9) Not go outside a designated area substantially the size of an Inner London borough;
(10) Surrender his passport;
(11) Not maintain more than one bank account of which details have been notified to the Home Office;
(12) Not transfer money or goods abroad without the consent of the Home Office.’ 16

The House of Lords in three different cases was asked to look whether the control orders at issue in these cases violated the right to liberty and security protected by Article 5 of the Convention and the right to fair trial guaranteed by Article 6 of the Convention.

A. Control orders and the right to liberty and security of person

Article 5 of the Convention predominantly deals with situations of classic detention. However, the European Court of Human Rights (‘ECtHR’) has recognized that there are situations other than classic detention that come within the ambit of Article 5 of the

Convention. The ECtHR for example held that there was a deprivation of liberty in cases where there was 24-hour house arrest\(^\text{17}\) and detention in an open prison.\(^\text{18}\)

The Law Lords looked for guidance for the decision in \textit{JJ} \cite{17} to the case of \textit{Guzzardi v. Italy} of the ECtHR.\(^\text{19}\) The ECtHR in \textit{Guzzardi v. Italy} stated that the ‘difference between deprivation of liberty and a restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance.’\(^\text{20}\) The ECtHR recognized that in certain borderline cases it is difficult to ascertain whether there is a deprivation of liberty or merely a restriction of liberty. A restriction of liberty is protected by the right to freedom of movement, which can be found in Article 2 of Protocol 4 to the Convention. The United Kingdom has not ratified Protocol 4 to the Convention and thus the protection of Article 2 Protocol 4 does not extend to control order cases. The ECtHR gave some guidance on when there is a deprivation of liberty in such borderline cases. The ECtHR listed a number of factors that should be taken into account in the determination of whether there is a deprivation of liberty. These factors include the nature, duration, effects and manner of execution or implementation of the penalty or measure in question.\(^\text{21}\) The ECtHR further concluded that even if one of these factors taken alone does not lead to the conclusion that there is a deprivation of liberty, the combined weight of the factors has to be taken into account.\(^\text{22}\)

The ECtHR’s case law on what precisely constitutes detention according to Article 5 of the Convention is however not entirely clear. There is still a lot of room for interpretation, which can be seen from the decision in \textit{JJ}, where the Law Lords with a 3 to 2 majority decided that there was a deprivation of liberty. The minority opinions interpreted Article 5 in a more restrictive manner and limited the concept of deprivation of liberty to situations of ‘classic’ detention. The majority in \textit{JJ} took as a starting point the overall length of the curfew in these cases.\(^\text{23}\) Subsequently the majority went on to look at the combined weight of all the obligations imposed under the control orders. Lord Bingham described the situation of the controlled persons as follows:

\begin{quote}
‘[t]he effect of the 18-hour curfew, coupled with the effective exclusion of social visitors, meant that the controlled persons were in practice in solitary confinement for this lengthy period every day for an indefinite duration, with very little opportunity for contact with the outside world, with means insufficient to permit provision of significant facilities for self-entertainment and with knowledge that their flats were liable to be entered and searched at any time.’\(^\text{24}\)
\end{quote}

\(^\text{17}\) ECtHR, \textit{Mancini v. Italy}, application 44955/98, judgment of 2 August 2001.

\(^\text{18}\) ECtHR, \textit{Engel and Others v. the Netherlands}, applications 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, judgment of 8 June 1976.

\(^\text{19}\) ECtHR, \textit{Guzzardi v. Italy}, application 7367/76, judgment of 6 November 1980.

\(^\text{20}\) Id. at para. 93.

\(^\text{21}\) Id. at para. 92.

\(^\text{22}\) Id. at para. 95.


The isolation of the controlled suspects was further exacerbated by the fact that they were relocated to an unfamiliar area and the fact that they needed prior consent for social meetings, which added to the isolation of those controlled. Lord Bingham added that: ‘[t]heir lives were wholly regulated by the Home Office, as a prisoner’s would be, although breaches were much more severely punishable.’ On this basis Lord Bingham concluded that there was a deprivation of liberty.

Even though this judgment gives some guidance as to when a control order amounts to a deprivation of liberty according to Article 5 of the Convention, some uncertainty remains. Lord Brown seems to suggest that a curfew of 16 hours would not engage Article 5 of the Convention. However, Lord Bingham, Baroness Hale, Lord Carswell and Lord Brown all seem to indicate that whether a control order amounts to a deprivation of liberty should be determined on a case-by-case basis. This has been confirmed in subsequent litigation before lower courts.

B. Control orders and the right to a fair trial

The House of Lords in MB and AF dealt with the right to a fair trial protected by Article 6 of the Convention. One of the issues of fundamental importance raised in MB and AF was whether a control order review concerned the determination of a criminal charge. If this question is answered in the affirmative, this means that the additional fair trial guarantees of Article 6 (2) and 6 (3) of the Convention apply.

The determination whether something is a criminal charge will be made by the ECtHR and is autonomous from the domestic classification. The reason for this is the lack of uniformity in the domestic classification of various offences between the Members of the Council of Europe. In the case Engel and others v. the Netherlands, the ECtHR established a number of criteria to decide whether a charge is criminal in the sense of Article 6 of the Convention. These criteria are the domestic classification of the offence, the nature of the offence, the purpose of the penalty and the nature and severity of the penalty. These criteria according to the ECtHR in the case Ezeh and Connors v. the United Kingdom are alternative and not cumulative. However, the ECtHR has also held that if an analysis of each separate criterion does not give a clear result as to whether there is a criminal charge, the cumulative assessment of the criteria might still lead to the overall conclusion that there is a criminal charge under the Convention.

If a charge is classified domestically as criminal, this means that Article 6 of the Convention will apply. However, this does not exclude the application of Article 6 of the

26 Id.
27 Id. at paras 105 & 108.
28 Id. at paras 16 & 63 & 84 & 108.
29 ECtHR, Engel and Others v. the Netherlands, applications 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, judgment of 8 June 1976, at para. 59.
30 ECtHR, Ezeh and Connors v. the United Kingdom, applications 39665/98; 40086/98, judgment of 9 October 2003, at para. 86.
31 Id.
Convention if an offence is not classified as criminal. In *Engel and others v. the Netherlands* the Court held that: '[i]f the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a “mixed” offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will.'

Thus, even though a Member State classifies an offence domestically as administrative or civil, this does not mean that the Court will not hold the guarantees of Articles 6 and 7 of the Convention applicable.

With regard to the second criteria, it is important to consider whether the norm in question applies to the general public or to a restricted group. If a norm applies to a restricted group, this could be a sign that a certain offence is a disciplinary proceeding, rather than a criminal offence.

The third criterion deals with the purpose of the penalty. With regard to civil orders like control orders and football banning orders, the UK courts have held that the objective for such banning orders was purely preventive. In *Ozturk v. Germany*, the ECtHR held that a minor traffic violation was still criminal for purposes of the Convention, even though that particular offence was decriminalized under domestic law. In this case the ECtHR attached significance to the fact that the norm applied to the general public; that the offence was finable and that such an offence was criminal in most of the Member States of the COE.

The final criterion to determine whether an offence is a criminal charge is the nature and severity of the penalty. If the purpose of the penalty does not render Article 6 of the Convention applicable, the ECtHR will look at the nature and severity of the penalty. The ECtHR has held that a deprivation of liberty generally makes an offence criminal.

Lord Bingham addressed the issue whether a control order is a criminal charge in depth in *MB and AF*, with which the other Law Lords agreed. Lord Bingham started by noting that in the control order cases, the persons against whom control orders were made were all persons against whom there was a strong suspicion of involvement in terrorist activities. However, for various reasons, the police were not able to obtain convictions against these persons and they could not be expelled, either because they were citizens or because this could lead to a violation of Article 3 of the Convention. Lord Bingham stated that: '[o]n any common sense view involvement in terrorism-related activity is likely to be criminal.' Lord Bingham continued by noting the severe consequences that a control order has on the person concerned. He pointed out that in the case law of the ECtHR, it is not clear when the full protection of Article 6 of the Convention applies. Domestic courts have classified orders similar to control orders as civil because of their purely preventive

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32 ECtHR, *Engel and Others v. the Netherlands*, applications 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, judgment of 8 June 1976, at para. 81.


34 Id. at para. 53.


37 Id. at para. 21.
purposes. Lord Bingham points at a similar distinction between preventive and punitive measures in the case law of the ECtHR, but he recognizes that this distinction is not without problems or controversy. In the end, Lord Bingham concluded that control order hearings ‘on balance’ did not fall within the concept of a criminal charge, adding that:

‘Parliament has gone to some lengths to avoid a procedure which crosses the criminal boundary: there is no assertion of criminal conduct, only a foundation of suspicion; no identification of any specific criminal offence is provided for; the order made is preventative in purpose, not punitive or retributive; and the obligations imposed must be no more restrictive than are judged necessary to achieve the preventative object of the order.’

IV. IMPACT OF THE HOUSE OF LORDS RULINGS ON FBOs

A. Whether a FBO constitutes a deprivation of liberty?

FBOs raise a number of interesting issues for those receiving such an order. As seen before, control orders used to restrain the movements of terrorist suspects raise a lot of issues under Article 5 of the Convention. These issues will not arise as strongly in the case of FBOs, since the conditions imposed by a FBO are much less stringent than the obligations imposed by a control order. As can be seen from the House of Lords’ judgment in JJ and the case law of the ECtHR in Guzzardi, the threshold for a deprivation of liberty in the sense of Article 5 of the Convention has been established at quite a high level. It is doubtful whether a FBO will rise to this threshold level. The conditions imposed by a FBO would more probably fall under the protection of the right to freedom of movement contained in Article 2 of Protocol 4 to the Convention. However, since the United Kingdom has not ratified Protocol 4 to the Convention, persons against whom a FBO is made cannot benefit from the protection of Article 2 Protocol 4 to the Convention.

B. Whether a FBO is criminal charge?

Another important question is whether a FBO is purely civil in nature or whether it entails criminal elements. An analysis of the legislation under Section 14B leads to the conclusion that a FBO on complaint could very well be categorized as a criminal charge in accordance with the case law of the ECtHR. The norm is classified domestically as civil rather than as criminal. As Lord Bingham mentioned in MB and AF, the lawmaker has gone through great lengths to classify these orders as civil rather than criminal. However, according to the ECtHR this is not determinative for the nature of the norm. The norm is of general application, so in theory a FBO can be handed out to anyone. The objective of a FBO as stated by the Court of Appeals is the prevention of football hooliganism. However, a FBO certainly also must be viewed as a deterrent to engage in football hooliganism and a punishment for certain acts. Just as Lord Bingham in MB and AF remarked that involvement in terrorism on a common sense review is criminal,

39 Id.
40 Id.
involvement in football hooliganism would normally be classified as criminal.\(^{41}\)

Reviewing a FBO purely on the basis of its goal as stated by the legislature, while completely disregarding the effects on its subject, would present a distorted view of the factual situation of the imposition of a FBO. A FBO has very serious consequences for the person to whom it has been handed out. That person faces a serious restriction of their personal liberty. This goes to the heart of the fourth criterion recognized by the ECtHR, the nature and severity of the penalty. A FBO seriously restricts the free movement and privacy of the person against whom the order has been handed out. This is another argument why a FBO belongs in the criminal sphere.

Although authoritative, the ECtHR is not bound by the ruling of the House of Lords in *MB and AF*. Furthermore, the ECtHR on several occasions has held that the Convention is a living instrument, which ‘must be interpreted in the light of present day conditions.’\(^{42}\) This means that the ECtHR has to take account of changing values and attitudes among the Member States of the Council of Europe. In the opinion of the author, it is respectfully submitted that if the ECtHR would not find that either the third or fourth criteria characterize these ‘civil’ orders as a criminal charge under the case law of the ECtHR, these two criteria taken together should characterize these orders as such.

Control orders and FBOs seriously restrict certain fundamental rights protected under the Convention, most importantly those rights protected by Article 5, 6 and 8 of the Convention and Article 2 of Protocol 4 to the Convention. If one accepts that the protections offered by Articles 5, 6 and 8 of the Convention are minimized and the non-availability of Article 2 of Protocol 4 to those suspected of serious crimes under the PTA or the FSA, the Convention should at least provide that these orders are tested against the full spectrum of protections of Article 6 of the Convention available. If it would be allowed to circumvent the full protections of Article 6 of the Convention by classifying criminal orders as civil, this would render the protections offered by Article 6 (2) and (3) of the Convention meaningless.

### C. Overall fairness of the trial

Even if Article 6 (2) and (3) of the Convention are not applicable, the fair trial guarantees of Article 6 (1) of the Convention are still applicable. There is an overriding requirement under Article 6 (1) of the Convention that a trial should be fair.\(^{43}\) Mere compliance with all the specific rights mentioned in Article 6 of the Convention does not make a trial automatically fair.\(^{44}\)

There is an inherent unfairness in the processes that lead to issuing control orders and FBOs. Such orders are handed out on the basis of a mere suspicion of certain behavior. Violation of the conditions of a FBO and of a control order are offences which can lead to lengthy imprisonment. Accordingly, in a situation where there is not enough evidence to


\(^{44}\) Id.
establish beyond a reasonable doubt that someone is guilty of a certain offence, which is the reason for choosing a civil order in the first place, the violation of such a civil order could lead to a conviction for mere violation of the conditions of that civil order. This provides a backhanded way to punish the person concerned for the underlying behavior, for which the authorities were unable to obtain enough evidence in the first place to secure a criminal conviction. This unfairness is compounded by the fact that the effectiveness of these civil orders in the first place relies heavily on this threat of imprisonment upon violation of the conditions of the order.

The domestic courts, because of the design of the legislation (the PTA and the FSA), are unable to come to a full review of the evidence on the basis of the wording of these Acts and the domestic classification of such orders as civil. The requirements that have to be proven by the authorities are broad and imprecise, as acknowledged by the Court of Appeal itself in Gough. Even though the conditions in the FSA can be applied in a manner that is proportionate, this does not mean that they will be applied in a proportionate manner. Such broad and imprecise standards open the door for arbitrary decisions and hamper the principle of legal certainty. The independence of the judge is further seriously hampered by the instruction of the legislature in the FSA that if the executive makes it reasonably probable that these broad and imprecise requirements have been proven, the judge must hand out an order. Overall, this leads to the conclusion that FBOs are not the result of a fair trial in accordance with the principle of equality of arms. The balance has almost completely shifted to the advantage of the executive. The role of the judiciary in this process is reduced to giving such orders an appearance of legality and fairness, where in reality the outcome in these cases is predetermined by the executive.

The legislation regarding FBOs requires the judge to make an order if the two preconditions mentioned in Section 14B are fulfilled. The wording of the Act (the court ‘must’ make a banning order)45 takes away virtually all discretion from the Court. In its case law, the ECtHR has been careful not to endorse any theory of separation of powers.46 The meaning of independence under the Convention has a much wider scope than the separation of the judiciary from the other branches of government.47 The core of the principle of judicial independence is that in any individual case a judge is free to render a decision without pressure or undue influence from the executive or the legislature.48 In its case Van de Hurk v. the Netherlands, the ECtHR stated that:

> ‘the power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a „tribunal” … This power can also be seen as a component of the „independence” required by Article 6 § 1.’49

In the case of FBOs on complaint, the outcome of the case in a large part is determined beforehand. There is very little discretion left for the judge to refuse the making of such

45 Football Spectators Act 1989, Article14B.
47 Id.
48 Id.
49 ECtHR, Van de Hurk v. the Netherlands, application 16034/90, judgment of 19 April 1994, at para. 45.
an order. The executive needs to prove two broad and imprecise conditions, namely that the person concerned has at any time caused or contributed to any violence or disorder in the UK or elsewhere, and that there are reasonable grounds to believe that making a FBO would help to prevent violence or disorder at or in connection with any regulated football matches. For the first test, no criminal conviction is necessary. It is furthermore not necessary for this test that such violence or disorder be football-related.

With respect to the second test the Court of Appeals in *Gough* stated that

> ‘[t]he test to be applied by the Magistrates making a banning order of being “satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches” is broad and imprecise.’ 50

If the executive is able to fulfill both these tests, the Court must hand out a FBO to someone merely suspected of being a hooligan. The evidence on which a FBO is proven is the civil standard, balance of probabilities, so it only has to be more probable than not for a judge that these two tests are fulfilled. In these circumstances, the conclusion must be that the judge is not free from interference from the executive. Under the restrictions and confines of the Football Spectators Act 1989, the judge is unable to give a free appraisal of the evidence and a free judgment on the basis of this appraisal.

### V. Conclusion

Being placed on the football banning order list sounds like a plotline out of the television series *Homeland*.51 The controlled person’s activities are monitored, his associates vetted, his passport is taken, movement curtailed, and he must continuously report into the police station, without any of the process afforded to regular criminal suspects. However, unlike in *Homeland*, this person is not part of any shadowy organization bent on mass destruction. This person is a football fan.

Nothing in this Article is meant to indicate that football hooliganism is not a serious problem. Like terrorism, the offenses which can be associated with football hooliganism range from petty crimes to serious and often grave offenses. The frequency and risk of football related violence is too much for any government to ignore. However, a law that restricts freedom without full due process runs the risk of rampant abuse and arbitrariness. Governments have often struggled with this in the fight against terrorism, and the balancing act they must perform is a difficult one. As the previous sections show, many of the human rights that control orders restrict can be analogously interfered with in football banning orders. Both football hooliganism and terrorism are serious societal problems that deserve our attention and that warrant a response. However, not at all costs.

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The Value of Minimum Core Obligations in Health Care
A Case Study of South African Jurisprudence

DANIEL KEEVY*

ABSTRACT

The current position of minimum core obligations is quite uncertain in South African Domestic Law. Current South African Socio-Economic Jurisprudence is focused on what the state can afford, within available resources, and views minimum core obligations as an imprecise and ambiguous standard that will further complicate the realisation of socio-economic rights in South Africa.

This article will use an element of the minimum core, namely the concept of quality, to argue that a right to adequate healthcare, should it hypothetically exist in South Africa, can be utilised to improve the delivery of health care, especially in light of the current strategy which is only focused on broad universal access to health care.

The inclusion of adequate health care will bind the state to raising the quality of care and rethinking care strategies, without draining the state of significant resources, if applied properly.

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I. INTRODUCTION

The realisation of the right to health, and in particular the right to health care, is quickly becoming the unattainable goal of human rights jurisprudence. In many ways, this right is akin to the call for a worldwide abolition of the death penalty. However, realisation of the right to health care still faces problems more significant than member states simply refusing to abolish the death penalty.

The most significant problem is the outer boundaries of defining the right. As wide as the definition for the right to health is, the concept of the right to health care is almost just as wide. Can it be seen that health care includes the freedom to access any hospital within a state, or demand special care if the patient is a woman or a member of an indigenous population? Can health care be limited to focus on the most common or most treatable illnesses, with rare genetic disorders not covered? And what of that elements ancillary to healthcare, such as the effective administration of hospitals or patient access to different kinds of food while in the hospital?

While it would be irresponsible and injudicious to attempt to answer all of these questions, this article will specifically focus on the realisation of the right to health care in South Africa, and specifically on how the current focus of the government, being that the access to healthcare is paramount to the realisation of proper health, is ultimately detrimental to the lofty goals set by the Constitution of the Republic of South Africa, 1996. Section 27 of the CRSA provides for the right to access to healthcare, provided it is reasonably possible. Also, in the event of an emergency, health care cannot be refused. Section 1 of the CRSA, listing the values expounded by the CRSA, specifically mentions that the Republic of South Africa is founded on, inter alia, the value of human dignity and the achievement of equality.

It is this goal that underpins the achievement of proper healthcare in South Africa, and it is this value that also underpins the State’s obsession with guaranteeing access to health care, to the exclusion of all other elements in the right to healthcare.

In order to effectively demonstrate the problem facing South Africa, as well as provide an illustrative background for the scope of the right to health care this article will argue for, it prudent to use a hypothetical.

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1 The Constitution of the Republic of South Africa, 1996. Further abbreviated as the CRSA for the purposes of this article. See the discussion of the right to access to health care in David Bilchitz, “The Right to Access to Health Care” and Liebenberg “The Interpretation of Socio Economic Rights” in Bishop, Chaskalson and Woolman (eds.) Constitutional Law of South Africa; Juta; 2002.

2 Section 1 of the CRSA (“The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.”).
X brings a suit against the National Minister of Health. Her action is based on her suffering a severe infection because doctors had to use their cell phones to light a darkened surgical theatre and missed removing several surgical cotton swabs that had been placed inside X for the surgery. It has come to light that, during a power failure, emergency generators should automatically engage to provide power to the hospital, but the administrator failed to arrange for an inspection of these generators. The failure to inspect meant that no one noticed the generators needed to be replaced. The administrator, who already has an extensive record of poor decisions and unaccountable conduct, has also never received any medical training. He argues that there was no money to pay the generator inspectors.5

Currently, under South African law, X cannot attach liability to the state, as she was never denied access to the hospital. She only has an action against the doctors, possibly, and against the administrator if actual fault can be proven. It is unreasonable to expect X to suffer such hardships, especially because they are a direct result of a state-run hospital failing X. The situation facing public hospitals is much direr than this example attempts to show.

The majority of all South African public hospitals are currently running in situations of medium to high crises.4 This means the majority of South African hospitals lack the basic equipment to treat patients, such as bedding and bandages. This is not even taking into account the lack of proper hospital machinery.5 The problem is further compounded by the fact that currently most public hospitals run budgets in excess of 200 Million Rand.6 Currently a significant impediment in the realisation of the access to health care is the fact that money is being thrown at the problem, without real solutions being proposed or targeted.7 What is especially harmful is the concept of cost-cutting and corner cutting to attempt to reduce financial constraints. This ultimately results in over-worked physicians and nurses having to administer overpopulated wards.8

As of 2012, the Department of Health has yet to implement an actual infrastructure plan to provide a sustainable set of universally adopted norms and benchmarks.9 The situation is so dire that these basic guidelines are not even in place, and are still being developed. This is the leadership the hospitals have to deal with. While the cronyism is an extensive


5 Idem Von Holdt at 19-20.

6 Idem Von Holdt at 4-6.

7 Ibid Von Holdt, fn. 5 at 10-12.

8 Idem Von Holdt at 19-21.

problem, those few administrators who attempt to run an effective institution seemingly receive no help from the national department.\(^\text{10}\)

It is the purpose of this article to show that, through incorporating minimum core obligations, and in particular the adequate standard of health care, South Africa can return to the ideal of ensuring human dignity and equality for all her citizens. In order to best effect this, this article shall be divided into two broad sections. The first would be a brief overview of the minimum core obligation concept in international law, specifically for the African Regional Human Rights System.\(^\text{11}\) This article will exam, firstly, the right to health care and the specific obligations that arise from the realisation of that right.

After furnishing the reader with the minimum core obligations tools, this article shall then proceed to apply these tools to the current situation in SA by first critically analysing the current jurisprudence around the realisation of socio-economic rights and then proceeding to apply the adequate health care standard in order to show the efficacy of the adequate standard.

II. **THE INTERNATIONAL RIGHT TO HEALTHCARE**

A. **The ICESCR**

Article 12 of the International Covenant on Economic, Social and Cultural Rights\(^\text{12}\) is perhaps the most complete right to health in international human rights law, second only to the extensive protection offered by the African Women’s Protocol.\(^\text{13}\) It calls for the highest attainable standard of health, as opposed to merely forming part of the highest adequate standard of life. The right to health has suffered needlessly from being underdeveloped and rarely applied, due to the fact that it is a socio-economic right, and only seriously considered after the Cold War.\(^\text{14}\) At one stage the right to health, under the ICESCR, was considered to be vaguer than its predecessor in the Universal Declaration of Human Rights.\(^\text{15}\) It was only with the publishing of General Comment 14 on the Right to Health in 2000 that the right had finally begun to be defined again.\(^\text{16}\)

\(^{10}\) *Ibid* Von Holdt, fn. 4 at 6-7.

\(^{11}\) This is because SA is only a signatory to the ICESCR, but has signed and ratified the African Charter on Human and Peoples’ Rights.

\(^{12}\) Art. 12 International Covenant on Economic, Social and Cultural Rights. South Africa became a member to the ICESCR in 1996, but has never taken any steps to ratify the treaty.

\(^{13}\) Article 14 of the Protocol to the African Charter on the Rights of Women in Africa.


\(^{15}\) Article 25 of the UDHR provides for the right to “a standard of living adequate for the health and well-being of himself (or herself) of their family.” See further Alston “Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights” (1987) 9 *Human Rights Quarterly* 332 at 531.

\(^{16}\) *Ibid* Ssenyonjo, fn. 14 at 9 and Wallace, *International Law*; Sweet and Maxwell; 2005 at 315-316 where he discusses the value of General Comment 14 adding context to the overbroad concept of health.
In General Comment 14, the Committee on Economic, Social, and Cultural Rights (CESCR) divided the right to health into two broad concepts – 1) the right to health care and 2) the various underlying and contributory factors that contribute to good health. For instance, where a child is refused treatment at a hospital because she is a girl and, at the same time, she is suffering from starvation, General Comment 14 would argue that the total right to health is violated because her access to health care is violated and that her right to access healthy food has also been violated.

1. **The Right to Health Care**

Even though health is an all-inclusive right, health care is still the aspect that underpins the right as a whole. When one thinks of health, one considers hospitals or doctors rather than food or housing. Generally the right to health care is concerned with providing a right to access to any health care facility they might need. The right to health care can therefore be seen as “a system of health protection that provides equality of opportunity for people to enjoy the highest attainable standard of health.” It is essential to note Article 12(2)(d) of the ICESCR, which obliges the state to ensure that medical care is provided when necessary. This has been linked to pre and post natal care especially, which is provided for in Article 12(2)(a) of the ICESCR. This Article also places a duty on the state to ensure that proper emergency medical care is present, especially when read with Article 12(2)(c) of the ICESCR.

2. **State Obligations**

While every right has specific obligations and duties that are imposed upon a state, it is pertinent to first discuss those obligations that are common to the realisation of every socio-economic right. These can be considered the general state obligations and they are the duty to respect, the duty to promote, and the duty to fulfil. The purpose of this discussion shall be to analyse the three obligations, in order to fully determine the scope of socio-economic rights in general.

   a. **The Obligation to Respect**

The first obligation requires a state to avoid taking action that may interfere with the enjoyment of the right. On a practical level this prohibits the state from enacting policy...
or legislation that will violate the right, and to repeal all laws that actively hamper this right. An example would be the Bantu Education Act\textsuperscript{24} that extended access to education arbitrarily to all the races but one. The state clearly violated its duty to respect the right by enacting legislation that actively detracts from the access to education.

This is also the obligation that confers the negative duty aspect of socio-economic rights, as the state is not always required to take direct action, but rather to simply avoid interfering.

b. \textit{The Obligation to Protect}

The second obligation requires the state to prevent other parties such as non-state actors,\textsuperscript{25} other individuals\textsuperscript{26} and other organs of the state from interfering with the enjoyment of the particular socio-economic right. If one also considers regional authority from Europe and the Americas,\textsuperscript{27} then the duty is also extended to compel a state to ensure the enjoyment of the socio-economic rights, particularly for vulnerable groups.\textsuperscript{28} The rationale behind this link is to provide extra protection to the marginalised societies in any state, such as women or children.

If the obligation to respect was the generally negative duty, the obligation to protect is the ‘fence-sitting’ duty that requires equal parts positive action with negative respect. The obligation is ultimately discharged if a state creates an environment to allow all individuals the freedom to realise the socio-economic rights.\textsuperscript{29} Further, if the realisation of the right is interrupted by a non-state actor, then the state is tasked with utilising its due diligence to prevent, prohibit and remedy the interruption. An example of this duty is where a company causes severe harm to the health of any people working at the company. The state is obliged to investigate the cause of the health damage, prohibit the company from damaging the health of the employees and ensuring that the employees are restituted for the damages suffered.

\textsuperscript{24} Act 47 of 1953.

\textsuperscript{25} \textit{Ibid} SERAC, fn. 22 at par 44-47 where a corporation was found to have violated a plethora of socio-economic rights, but the state was held responsible because they failed in their obligation to protect its citizens.

\textsuperscript{26} Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) at par 73-74 and 77 where an individual threatened the safety of a community, but the state was found liable because it failed to protect the safety of its citizens through the prosecutors failing to oppose bail for a dangerous criminal.

\textsuperscript{27} \textit{Airey v Ireland}, Appl No 6289/73, judgement of 9 October 1979, Series A, No 32 (1979-80) 2 EHRR and \textit{Velasquez Rodriguez v Honduras}, judgement of 29 July 1988, Inter-AmCtHR (Ser C) No 4 (1988).

\textsuperscript{28} \textit{Idem} Ssenyonjo, fn. 14 at 24 as well as CEDAW, the CRC, African Women’s Protocol and the Protocol on the African Child all prove the marginalisation of women and children.

\textsuperscript{29} \textit{Ibid} Ssenyonjo, fn. 14 at 24 and Dowell-Jones Dowell-Jones, \textit{Contextualising the International Covenant on Social, Economic and Cultural Rights: Assessing the Economic Deficit}; Martinus Nijhoff Publishers; 2004 at 19-21. Both sources agree that the first step in progressive realisation is allowing the individual to freely seek and provide for socio-economic rights, e.g. through medical insurance or a school plan.
c. The Obligation to Fulfil

The final obligation on the state is also the traditional socio-economic requirement. In order to discharge this duty, a state must adopt measures such as legislation, executive policy, budget, judicial and all other measures to ensure the full realisation of the right for those people who cannot realise the right themselves. In order to realise this fulfilment three conditions should be met, namely facilitation; promotion and provision.

Facilitation requires a state to ensure that the positive measures necessary for the enjoyment of the right to be present. Practically speaking this requires the state to ensure that the systems necessary for rights realisation are present, adequate and available to all. For example that the department dealing with public housing has the necessary staff and power to ensure that every person receives a house or, for purposes of this thesis, that a hospital have the necessary infrastructure to not only allow access to patients, but an adequate standard of care.

Promotion requires a state to take the necessary steps to maintain the realisation of socio-economic rights. The steps necessary depend on the particular right, and would normally be referred to in the General Comment on a specific right. The specific steps necessary for the realisation of health will be discussed when the ICESCR is discussed later.

Provision requires a state to provide those who cannot possibly realise the rights themselves with the realised right. This is especially pertinent when dealing with the rights of women, children and the poorest of the poor.

3. State Obligations in terms of the ICESCR

Having analysed the general obligations, it is now essential to consider the state obligations required by General Comment 14. When defining the right to health, the CESCR found that the right could not be defined without considering the duties it would place on the state. The CESCR ultimately provided for four duties the state must comply with in order to have achieved the right to health. These are availability, accessibility, acceptability and quality. It must be stressed that these four obligations relate to the realisation of health, and not the minimum core. The minimum core will be discussed later.

30 Ibid Ssenyonjo, fn. 14 at 25 and Eide, Right to Adequate Food as a Human Right UN Document E/CN.4/Sub.2/1987/23 at 172 and ibid SERAC, fn. 22 at par 47. All the sources draw special attention to the state being obliged to generally provide for the socio-economic right and further providing for marginalised groups as well.

31 Idem Ssenyonjo at 25 and idem Eide at 128-155 where the authors uses the term facilitate as an example of fulfillment, of the right to food. While neither article makes an argument for facilitation to be extended to fulfillment, it can be understood to be a synonym of the ordinary meaning of fulfilled.

32 Op cit at 64-66.

33 See Skolgy “Is there a Right not to be Poor?” 2(1) Human Rights Law Review 59 and 79-80 for a discussion on the role poverty plays in gross human rights violations.

34 General Comment 14 at par 12 where the four obligations are listed.
a. Availability

The first general duty is that a state must make health available. This entails two distinct obligations upon a state. First, the state must guarantee a functioning public health and health care system, inclusive of goods, services and programmes. The second element pertains to the underlying causes of good health and requires a state to ensure food and sanitation is sufficiently available. It can be reasoned therefore, that a state must have adequate funding for public health care and health facilities to realise the right to health.\(^{35}\)

b. Accessibility

This requirement pertains to the general understanding of health care. This is the requirement that health care should be open to everyone, and not simply one group in society. This requirement forms the basis for the current health care rights in the CRSA, as is discussed infra.\(^{36}\)

c. Acceptability and Quality

It is necessary to discuss these two duties mutually, as read together they provide for the adequate standard in health care provision. Acceptability requires that the health care be of a set quality. “Medicine rejected in the North because they are beyond their expiry date must not be recycled to the South.”\(^{37}\) Acceptability is also extended to the minimum standard expected of health care providers as well as acceptable drugs and sanitation. It also requires that special care be taken when dealing with marginalised groups, so as to not violate their dignity or right to bodily integrity.

4. Coalescing the General Obligations and the Specific Obligations to Realise the Right to Health

The obligations to respect, protect and fulfil (which in turn consists of the duties to facilitate and provide) must be discharged before a right can be realised. The question is how these three obligations interact with the four obligations specific to the right to health.

What follows is an analysis of the extent to which the specific obligations and the general obligations can be read together, especially where the adequate standard is deemed to be necessary when realising the right to health.

\(^{35}\) Author’s emphasis.

\(^{36}\) Ibid Ssenyonjo, fn. 14 at 331 where the author argues that mere access is not enough, and uses the example of an open hospital that has no money for medical equipment. To use the colloquial phrase, just because the doors are open doesn’t mean there’s anyone there.

\(^{37}\) Op cit at 68-71 as well as the most recent case law, Minister of Health v Treatment Action Campaign No. 2 2005 (5) SA SA 721 (CC) where the Court fully analysed the concept of access to healthcare. This is further discussed op cit at 71.

\(^{38}\) Hunt, “Special Rapport by Rapporteur on Economic, Social and Cultural Rights” UN Doc A/HRC/7/11 at par 54 as part of the argument that each state should seek to realise rights without compromise.
a. The Obligation to Fulfil the Right to Health

The obligation to fulfil binds a state to adopt measures to ensure the realisation of the right. In this case of health such measures can be training medical staff to fill the hospitals, ensuring that hospitals bid for the most comprehensive tenders and, most importantly, to appoint experts in the medical field to administer hospitals. Currently in South Africa, public health care is considered to be the poor man’s service. Generally those who can afford it utilise the extensive network of private hospitals.

b. Health and the Minimum Core

Finally, the discussions concerning defining health and the scope of state duties can culminate in a critical analysis of the minimum core rights guaranteed by the ICESCR. The minimum core is the most basic service level that every right is expected to achieve. In the context of health, it must be seen as the level below which medical services must never fall, regardless of resource constraints. The CESC states that there are six core obligations which must be achieved in order to establish the minimum core. None of these conditions deal with an adequate standard of health care, but are focused on providing access to health essentials and health care. Although it can be argued that there needs to be an effective system implemented to realise these obligations, such an obligation is still not a minimum core. This is not a closed list however, as the CESC provides for five more obligations immediately following the minimum core obligations with the phrase “comparable priority” that have been read to add to the minimum core. Of these the fifth requirement is most illuminating. States are obliged to “provide adequate training for health personnel.”

It is submitted that such a requirement is present in General Comment 14 on the Right to Health. In order to ensure that health is provided, there must be an effective system to

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40 General Comment 14 at par 43.

41 General Comment 14, at par 43 provides for: “(a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups; (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone; (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs; (e) To ensure equitable distribution of all health facilities, goods and services; (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.”

42 General Comment 14 at par 44.

43 Ibid Ssenyonjo, fn. 14 at 342-343 where the author agrees with the assertion that minimum core should adapt with the resources of the state, as well as the progress made by that state.

44 General Comment 14 at par 12(d).
ensure the rollout is done appropriately. In order to ensure effective medical education, medical information, concrete vaccination plans and adequate health care, there must be an effective infrastructure. This infrastructure is the adequate standard of health care. It can therefore be concluded that the General Comment 14, and by extension the right to health imply a minimum core obligation upon the state to ensure an infrastructure designed not only to provide access, but a reasonable standard of health care.

Due to the fact that the provision of adequate health care is a minimum core obligation, the right is easily justiciable. While the TAC decision has somewhat muddied the position minimum core obligations have in South African domestic law, the Court did agree that failure to meet minimum core obligations could result in a violation of the right.

5. Conclusion on the right to health under the ICESCR

The current interpretation of the right to health under the ICESCR binds states to ensure that certain minimum standards are met. Of these minimum core standards, there is an implied, contextual standard that requires the effective infrastructure of a right to health. This infrastructure requires that the right to health must not only be accessible, but that the realisation of health care must be of a high standard. This high standard permeates the ICESCR in the determination of suitable medicine as a duty to ensure acceptability and quality. Further, an adequate infrastructure underpins the entire process of providing health. If there is no administration, the right can never be realised.

It is submitted that as a signatory party, South Africa is still not bound entirely by the ICESCR and therefore that a violation of the minimum core would not defeat the purposes of the ICESCR. However, the failure to ensure an adequate infrastructure is a material violation that defeats the obligations under the right to health, and therefore defeats the purpose of the treaty. Further South Africa has signed and ratified the African Charter on Human and Peoples’ Rights, which binds South Africa to the same standard.

B The African Charter on Human and Peoples’ Rights

1. The Right to Health

Article 16(1) of the ACHPR is an exact copy of Article 14 of the ICESCR, and moreover, Article 16(2) of the ACHPR is a condensation of Article 14(2) of the ICESCR, focusing instead on the broader sweeps concerning the right to health. Although General Comment 14 was not interpreted with African jurisprudence, the Commission recently published a

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45 Idem Ssenyonjo at 343 where the author mentions the value of adequate infrastructure and high quality services, within resource constrictions.
46 Idem Ssenyonjo, fn. 14 at 348-350. Justiciability pertains to the ability of an individual to litigate the state obligation and compel the state to realise the right.
47 Ibid TAC, fn. 37 at 34 which is discussed at length op cit at 71.
49 General Comment 14 at par 12.
statement on socio-economic rights in Africa,\textsuperscript{50} where they declared that the right to health should contain, \textit{inter alia}, availability and accessibility of health facilities of a reasonable standard. Further, the duty to ensure availability and quality was mentioned in \textit{Free Legal Assistance v Zaire},\textsuperscript{51} where the Commission held that Zaire violated the right to health by not providing basic services such as medicines, drinking water and electricity. The requirements of availability, accessibility and acceptance were provided for in \textit{Purohit v. The Gambia},\textsuperscript{52} where the Commission further held that the right to health contains the duty to provide facilities, access to goods and services and those mentally ill patients be treated in such a way as to ensure their dignity.

It is thus clear that the values purported in General Comment 14\textsuperscript{53} must find applicability in the African context. This is further cemented by Article 14(2)(a) of the African Women’s Protocol,\textsuperscript{54} wherein the State is obliged to provide health care that is adequate.

As the ACHPR drew extensively from the ICESCR, it should be able to draw from the inspiration of the General Comments as well. Ultimately this allows for a contextual reading of the ACHPR to come to a similar conclusion, which is that the right to health inherently requires states to ensure an effective infrastructure, to best ensure an adequate standard is provided for all.

Further, by adding in the requirements found in Article 14(2)(a) of the African Women’s Protocol, it is clear that South Africa is bound by the adequate health care standard.

C. Analysis and Summary of the International Right to Health Care

In order to prove that X, our patient, would benefit from the inclusion of minimum core obligations, it is important to first establish what exactly is meant by minimum core obligations.\textsuperscript{55} Specifically, it has been established that South Africa has a duty to provide quality health care. This means that there is an adequate standard of health care that must be provided. In other words, there exists a duty on South Africa to provide all patients with a minimum standard of health care, which in the case of X would include working generators.

It must be stated that South Africa, while only providing for access to health care, has taken steps to realise many of the minimum core obligations of the right to health such as having access to sufficient food and water. Unfortunately, this is prefaced by access. As the next part of this article shall show, an over-reliance on access is ultimately detrimental to the effective realisation of the right to health care.


\textsuperscript{51} \textit{Free Legal Assistance Group and Others v Zaire} (2000) AHRLR 74 (ACHPR 1995) at 47.

\textsuperscript{52} \textit{Purohit v The Gambia} 2003 (AHRLR) 96 (ACHPR 2003) at par 80-83.

\textsuperscript{53} \textit{Op cit} at 64-66.

\textsuperscript{54} The Protocol to the African Charter on the Rights of Women in Africa entered into force on the 25\textsuperscript{th} of November 2008 and ratified by South Africa on the 17\textsuperscript{th} of December 2004.

\textsuperscript{55} \textit{Op cit} at 64-65.
III. APPLYING INTERNATIONAL LAW TO SOUTH AFRICAN SOCIO-ECONOMIC RIGHTS

The purpose of this article is to effectively determine the benefit that including the quality component of the minimum core obligations, in the spectre of adequate standard of healthcare will have on the current realisation of the right to health in South Africa.

It has been stated that South Africa only makes provision for access to health care domestically, but is still bound by its international obligations in the form of the African Charter and the ICESCR. As the hypothetical clearly illustrates, X had access to a hospital, but the hospital was not functioning. This state of affairs is ultimately untenable and a violation of the minimum core obligations South Africa has undertaken.

A. Critical Analysis of the South African Constitutional Court’s Jurisprudence concerning the Realisation of Socio-Economic Rights

The South African Constitutional Court has a 16-year history of interpreting and applying the CRSA. In those 16 years however, the Court has only dealt with four cases dealing exclusively with socio-economic rights in the Constitution.

1. Soobramoney

In Soobramoney, the Court was presented with the following facts: S, the applicant, was a 41 year old male who was suffering from, *inter alia*, chronic irreversible renal failure. S was being kept alive though daily dialysis treatments, but the Regional Minister of Health (the respondent) terminated these treatments as it had a set policy for not treating chronic irreversible renal failure. S argued, before the Constitutional Court, that this was a violation of his right to emergency medical treatment (S 27(3) of the CRSA) and failing that the policy was a violation of his right to access to health care (S 27(1) of the CRSA). The Court found that S 27(2) of the CRSA binds the state to realise access to health care within its limited resources. The Court, rather interestingly, took the view that S 27 of the CRSA could be seen as a group right, because everyone relying on public health is entitled to access to health care. The Court promulgated the 'available resources test.' While this test seems almost brutally pragmatic, it is the correct approach to adopt when dealing with socio-economic rights. While effectively sentencing S to death, there would be no value in rights that are simply bandied about without any state accountability.

Soobramoney also highlighted the Court’s plight in attempting to enforce rights where the demand far exceeds the supply.

56 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).
57 *Idem Soobramoney* at par 11.
58 *Idem Soobramoney* at par 31.
59 *Ibid Soobramoney*, fn. 56 at par 11-13. This test requires the Court to determine whether the state has the resources to provide for the right. If the state lacks said resources, then the Court argues that it cannot take action, as through S 27(2) of the CRSA that provides for the available resources test.
60 *Idem Soobramoney* at par 8.
“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one where will be human dignity, freedom and equality lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”

Sooobramoney went further than any other case to highlight the need for proper resource management and, especially, accountability from the state as an attempt to responsibly provide access to all who need it. While the interpretative guideline of broad interpretation, strict limitation was ignored, it was justified because socio-economic rights are always limited by available resources.

2. Grootboom

In Grootboom, the locus classicus of socio-economic jurisprudence, the court was presented with a class action suit, administered by G. G and 899 others were living in an informal settlement in the Western Cape that flooded every winter. When they moved to land that was above the water table, they were summarily evicted. Upon returning to their old location, they found it to have been occupied by another group. Forced to live on sports fields with no shelter from the elements, Grootboom et al brought this matter to Court. The Court held that this state of affairs was, indeed, a violation of the right to housing as it was unreasonable. While initially accepted, Grootboom has come under severe scrutiny because it rejected the minimum core concept, muddled the waters around the concept of reasonableness and, most damning of all, failed to craft and enforce an appropriate remedy.

While the concept of a minimum core and the rejection thereof has been discussed, Grootboom is relevant for this discussion for the following reason. Firstly, the Court was completely silent on the reasonableness criteria. Section 26(2) of the CRSA provides

61 Author’s emphasis.

62 The rejection of minimum core has already been shown to be in violation of our international human rights commitments, and possibly unconstitutional (op cit at 64-66).

63 Government of South Africa v Grootboom 2001 (1) SA 46 (CC) at par 10.

64 De Vos, “Grootboom, the Right to Access to Housing and Substantive Equality as Contextual Fairness” (2001) SAJHR 258.

65 Grootboom, ibid fn. 63 at par 93-95 where the Court laments the inequality in South Africa, but qualify the injustice by arguing that the state should not be compelled to provide resources beyond available resources; as well as at par 95-97 where the Court, lamentably, states that the right to housing cannot be seen as a guarantee to a house that should be provided as soon as possible. Instead the Court ordered that the state investigate the current situation and make a recommendation. For extensive criticism of this approach, see Bilchitz, “Giving Socio-Economic Right Teeth: The Minimum Core and its Importance” (2002) SALJ 484; Bilchitz, “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) SAJHR 1 and finally Swart, “Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor” (2005) SAJHR 215.

66 Section 26 of the CRSA provides for the right to access to adequate housing, provided such access is reasonable, within the available resources to provide progressive realisation.
that the state must provide housing as much as it is reasonably possible. It is also unclear as to whether the reasonableness is linked to the S 36 of the CRSA, whether the ends justify the means test for reasonableness,\(^{67}\) or whether it is linked to the administrative concept of reasonableness.\(^{68}\) However while the Court found the current housing plan to be unreasonable, it failed to justify why it found the plan to be unreasonable and, most lamentably, failed to order the state to take any action, thereby raising the spectre of unenforceable rights.\(^{69}\)

3. **TAC**

In the TAC matter, the Court had to decide on the following facts: T, an NGO, brought this complaint because the Department of Health had a policy refusing to provide expecting HIV positive mothers with free Neverapine.\(^{70}\) The respondent argued that the Neverapine was dangerous, but this submission was rejected by both the trial Court and the Constitutional Court. While the Court was silent, yet again, on what was meant by reasonableness and how that reasonableness was impacted by the fact that the medicine was provided at no cost to the state.\(^{71}\)

What makes TAC such an ineffective decision is the Court’s acceptance that it was reluctant to create binding remedies on the executive.\(^{72}\) While the Court is correct in raising the separation of powers, this hesitancy borders on cowardice. The Court cannot reasonably be expected to take the duty of delivering access to health care upon itself, but it can use mandatory interdicts and prohibitive interdicts to create a timetable for delivery.\(^{73}\) Further the Court could simply refer the matter to the legislature, to review the current policy. Yet there is a deafening silence from the Courts regarding the remedy.

B. **Summary of the Cases**

With the drafting of the CRSA, many notable academics criticised the inclusion of socio-economic rights in the CRSA, as they would be unenforceable.\(^{74}\) Lamentably it can be argued that the Constitutional Court, post-Soobranoney, has made socio-economic rights completely unenforceable by refusing to provide remedies and permitting uncertainty over the reasonableness element. Further there exists much confusion as to the role of limitations in socio-economic rights. While both the rights to access to housing and

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\(^{68}\) As is found in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC).

\(^{69}\) *Idem* at fn. 65 as well as Wesson (2004) at 448-450.

\(^{70}\) *Ibid* TAC, fn. 37 at par 1-4.

\(^{71}\) *Idem* TAC at par 38-39.

\(^{72}\) TAC at par 112-114. Here the Court analyses their broad powers under the CRSA, but argues that they lack the necessary skills to craft an effective order. Swart (2003) at 220 criticises this because the Court is creating an environment where socio-economic rights are violated without any punishment for the state. This effectively makes socio-economic rights unenforceable.

\(^{73}\) Swart (2003) at 215-220.

\(^{74}\) Davis, “The Case Against the Inclusion of Socio-Economic Demands in the Bill of Rights Except as a Directive Principle” (1992) *SAJHR* 475 from 475-480 as well as Scott (1992) at 5-10. All the authors concur that currently the state is allowed to violate socio-economic rights without any consequences for the state.
access to health care provide for the existence of available resources, it’s unclear as to how this interacts with the general limitations provided for in the CRSA.75

It is in this hostile environment that the right to adequate health care needs to find meaning and appropriate application, and possibly through this, provide some tangible meaning to the included socio-economic rights in the CRSA.

C. Applying Case Law to the Right to Health Care

From the decisions of Soobramoney, Grootboom and TAC, it becomes clear that the test employed by the Court is whether the claim is reasonable in light of available resources. In other words, can the state afford what the plaintiff is suing for?

In Soobramoney, the Court expressly focussed on the financial situation of the respondent, and seemingly took the view that available resources extend only to finances.76 While the financial well-being of the hospital results in effective realisation, it would be incredibly short-sighted to only focus on available resources as only being those fiscal resources necessary to realise the right. This is the benefit of having a right to adequate health care. While both access to health care and adequate health care are resource dependant, utilising both effectively not only increases the burden on the state, but does so in a way that sets clear parameters and goals.

In order to determine to what extent available resources plays a role, it is pertinent to first consider the positive and negative duties associated with the right to adequate health care. Negative duties require that the state seek to protect the right, meaning that the state should not purposely interfere, or through inaction cause the right to be violated. For the right to adequate health care this means the state should at all times be aware of this minimum standard and ensure all public health facilities are equipped with the most basic equipment. Insofar as the positive obligations are concerned, this extends to the state having to take steps to ensure that health care is of an adequate standard, and to constantly adjust the current delivery to meet minimum expected standards.

This discussion brings the debate back into the realm of minimum core obligations for the right to health. While the minimum core obligations of the right to health have remained purposely vague, access to health care as well as adequate health care are minimum core obligations for the universal international right to health.77

In our hypothetical, while the failed generators did not impede access to health care, they did cause the adequate standard of health care to drop considerably. The current delivery system is founded exclusively on the provision of access to health care, but as can be seen, the administrator did not impede access to health care; his inaction caused X to

75 Unfortunately none of the socio-economic rights cases, before the South African Constitutional Court, has ever progressed to a fundamental limitations analysis. It is uncertain whether the only factor that limits socio-economic rights are inadequate resources or whether the right is too wide to be justiciable.

76 Ibid Soobramoney, fn. 56 at par 19, where the Court held that while the right to access to healthcare should be available to everyone, it is always subjected to what the state can afford. The case further only references the economic cost of S’s access to the health care.

77 Op cit at 64-66 where the requirements are listed.
suffer a poor standard of health care. In other words how can the right to adequate health care be progressively realised?

By implementing the principles of effective management from the administrators\(^78\) and by having the Department of Health lead from the front by setting out infrastructure guidelines and accelerating the creation of health schools and implementing proper health education, South Africa, as a country can and hopefully will have achieved a foundation for the minimum core of adequate health care.

It is puerile to want to saddle an over-burdened system with more obligations, but health care and the judicial implementation of health care rights stands at a crossroads. Currently the policy towards health care is focused solely on having as many South Africans access a poorer and poorer hospital system. Currently the Annual Health Report only focuses on the development of hospitals as a primary health care service distributor.\(^79\) Hospitals will eventually vitiate into death traps filled to the bursting point with thousands of patients.

A second path indeed exists, but this path is one that will require extensive investment in terms of time and effort, disabling the current bureaucratic nightmare that is the public hospital system. If the focus is removed from admitting everyone to a treating physician in a hospital, and rather towards creating a holistic health care environment where the chain of care goes from trained family members, to clinical nurses and then only to a general practitioner; it is submitted that there will be a noted decrease in the staggering amount of individuals who seek hospital care. If the National Department of Health makes a serious effort to listen to the physicians, nurses and even administrators working in public health, and actually implement their suggestions the burden on the health care system will be lessened or at least made manageable.\(^80\)

The progressive realisation of the right to adequate care need not initially require mass amounts of fiscal investment. Nor should it be used as a way to get free services from the government. But it can be used as a policy directive, and a measuring stick for the health care needs in the country. Should X bring her matter before the Constitutional Court, they would find the minister of health had violated that right by not imposing stricter infrastructure guidelines, but that the individual harm suffered by X cannot result in monetary compensation.

D. Remedies for Violating the Right to Adequate Health Care

It is a basic tenet of the rule of law, that in order for a right to exist it must be judicially enforceable. What this means is that it is not enough to simply make a right, but that right must be able to be enforced by a Court.\(^81\)

Unfortunately socio-economic rights are not capable of such simple resolution when they are litigated. As was stated supra, the Courts in \textit{Grootboom} and \textit{TAC} were disinclined to make any binding order against the executive when it came to enforcing socio-economic

\(^78\) \textit{Ibid} Von Holdt, fn. 4 at 25-26.

\(^79\) \textit{Ibid} Annual Health Report 2011/2012, fn. 9 at 67.

\(^80\) \textit{Ibid} Von Holdt, fn. 4 at 25-27.

\(^81\) Scott (1992) 5-10 where the authors criticise the inclusion of socio-economic rights in the CRSA, as no Court can make an order binding the state, especially in fields the Courts do not understand.
rights. The arguments the Court raises are that they are incapable of determining the subtleties of ruling a population and, more importantly, that it is not the function of the Court to administer the law.\textsuperscript{82} This is similar to the reasoning the Court has used to reject minimum core obligations. How can a judge best assess what is more important between paying for a generator repairman and paying the electricity bill?

While the maxim of \textit{ius dicere non facere}\textsuperscript{83} is an essential element of the separation of powers, the principle of constitutionalism demands of judges to enforce the constitution where the state fails to uphold it.\textsuperscript{84} And, while it is more convenient to make constitutional issues someone else’s problem, the Courts have themselves failed to uphold the CRSA.\textsuperscript{85}

While a judge cannot be expected to make an order on the minutiae of setting policy, the CRSA does empower the Courts to use interdicts to compel the state to take certain actions. As Swart correctly points out, the use of a structural interdict\textsuperscript{86} will actually create consequences for the state that fails to deliver, and reduce the chances of the same socio-economic violations returning to court year on year.\textsuperscript{87} While such orders must be delicately crafted, the Court has shown it can create such orders, and the argument that they lack the necessary skill can be summarily rejected.\textsuperscript{88}

While the argument can also be made for constitutional damages\textsuperscript{89} but such a step would need to be carefully assessed. While the constitutional damages would link with the delictual claim that caused the positive obligation of the right to adequate health care, such damages would probably result in the state stonewalling further, instead of attempting to deliver the rights involved.

Socio-economic rights in South Africa are a collection of empty peals. As harsh as this may seem, there is no other way around the matter. The Constitutional Court has been loathe to ensure the implementation and efficacy of socio-economic rights, preferring to make declaratory orders decrying the state of affairs, but not taking any further steps.\textsuperscript{90}

It is in this hostile environment that this discussion attempts to interject another right, specifically the right to an adequate standard of health care. However, as socio-economic rights have become unenforceable, a shift in mind-set has occurred, wherein socio-

\textsuperscript{82} \textit{Ibid TAC}, fn. 37 at par 101, where the Court argues on the complexities of ordering the executive to take administrative steps, because it lacks the capacity to understand the duties of the executive. This has been extensively critiqued \textit{op cit} at 71-73.

\textsuperscript{83} Translated as: “A judge only speaks the law, but does not make it.”

\textsuperscript{84} Mbazira (2008) at 80-82.

\textsuperscript{85} \textit{Op cit} at 69-71. In this discussion the failures on the Constitutional Court is explained.

\textsuperscript{86} As found in \textit{August v Electoral Commission} 1999 (3) SA 1 (CC).

\textsuperscript{87} Swart (2005) at 236-240 as well as Mbazira (2008) at 84-87.

\textsuperscript{88} Bilchitz (2003) at 15-18 and Swart(2005) at 238.

\textsuperscript{89} \textit{Fose v Minister of Safety and Security} 1997 (3) SA 786 (CC) at par 69 where the Court makes provision for the claiming of damages that arise from a violation of the CRSA.

\textsuperscript{90} Mbazira (2008) at 89-93.
economic rights have become aggressive state directives. While it was easy to pass the right to access to health care on, as the state directive is to only provide access, the right to adequate health care seeks to remedy this troubling situation.

It seems almost paradoxical to argue that increasing the duties of the state can result in the state lessening its burden, but if the state utilises the minimum core obligations as a yardstick, then all of the socio-economic rights can find application. What this effectively means is that minimum core can be used as a road map to determine the extent to which rights have been realised, and more importantly whether the state is actually making the rights effective. If the right to adequate health care is progressively realised by cost-cutting measures and reviewing and completely overhauling current hospital administration policies, then the initial period will not cause extensive fiscal loss. If the state actually considers the delivery of these rights, and in particular health care, instead of building cloud castles of universal access to hospitals, then health care in South Africa can actually become profitable and effective, as opposed to the absolute nightmare it is now.

Linking this to the hypothetical, what should X be able to demand from the state? While X would be entitled to delictual damages, the focus of this article remains to concentrate on the constitutional aspect of the damage.

It is submitted that X, either as an individual or as part of a class suit, can utilise the hypothetical as a cautionary tale against the government. If it can be shown that X had her right to adequate health care violated, it is submitted that the Court can order the Department of Health to review the budget and provide a series of priority funding projects.

It is difficult to craft a remedy that is completely effective, as the Courts have shown. However it is imperative that the Court at least attempt a remedy, before the socio-economic rights in the CRSA become completely ineffective.

IV. CONCLUSION

Earlier in the article, the author made the assertion that the current public health system rests at a crossroads. After 19 years, the National Department of Health has had a string of miserable failures. From a publically ridiculed AIDS policy to a public hospital system that can be seen as one of the great failures of post-Apartheid South Africa. Currently, the Department is on the precipice of taking a step into the NHI it is not ready for, and a step that will result in tragic consequences, not only for providing broad-

91 Davis (1992) at 477-480.
92 While the term delict has common usage in Roman-Dutch legal systems and systems heavily incorporating that system, readers from the English common law system can simply substitute it with “Torts.”
93 McNeil, “A History of the Official Government HIV/AIDS Policy in South Africa” on South African History Online; date of publishing unavailable; accessed on 7 December 2012; http://www.sahistory.org.za/topic/history-official-government-hiv-aids-policy-south-africa, specifically take not of the lampooning of the late Minister of Health, Manto Tshabalala-Msimang by the cartoonist Jonathan Shapiro (a.k.a Zapiro). Minister Msimang also once argued against the administration of ARVs and opted, instead, for the ingestion of beetroot and onions to increase the T-Cell count.
spectrum equality and public health care but also in terms of actual human cost. Unfortunately the modern economic model of health care results in public health care being a labour of love, and if the NHI goes through the reduction in fees, that will make it more so. Without providing physicians with a suitable alternative, the Department is merely hoping young doctors will wish to stay in a public practice that is extensively over-burdened for a lot less money than they could make elsewhere.

The Department of Health, with able assistance from the Courts, have attempted to progressively realise the broadest element of the health care, namely access to health care, without paying heed to the other minimum core elements of the right to health. While it is unfair to demand the greatest public health care system in the world after only 17 years, the author submits that by only focusing on access to health care, such an over focus in a failure. It is this failure that has resulted in the dominance of private health care, and the slow destruction of public health care. It is forsaking the infrastructure involved in maintaining a hospital or refusing to consider that health care should be effective and comprise of a minimum standard that has resulted in the failure of public health.

The hypothetical case, discussed in the introduction of this article, is indicative of the significant problems facing the South African health care system. While X was at no stage denied access to health care, the access she received was lamentably poor. This proves that simply focusing on one aspect of the international right to health, and dismissing the other elements, such as minimum core, will result in failure. Had South Africa chosen to focus on high quality and an exceeding standard of health care, eventually access would have become problematic.

In order to effectively realise a socio-economic right, the state must take cognisance of all its duties and obligations, not only those it feels essential. South Africa is haunted by the terrible injustices of our past, and therefore access to any service is seen as pertinent. But currently this over-focus has resulted in serious violations of the international right to health, and the only saving grace (it can be assumed) is the dualistic nature of the South African legal system.

While the Department of Health should seriously consider its policies and create a new public health care system based on the actual realisation of the elements of the right to health, the Department is now determined to do so, but against the disastrous background of the NHI. One can only hope the Department realises its mistake before serious and long-term damage is caused.

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94 Which is a minimum core element of the international right to health. See op cit at 62-67.
95 Such as adequacy and, for the purposes of this article, quality.
96 Op cit at 71-73, where it has been shown that the state has been lax in even this duty.
97 Op cit at 60-61.
The Self-Amnesty Provision of the 2008 Constitution of Myanmar
On Its Legality and Possible Consequences

SILJA AEBERSOLD*

ABSTRACT

In the process of transitioning from a strict military dictatorship to a democratically-run regime, Myanmar adopted a new Constitution in 2008 which in its Article 445 exempts all members of the military junta from criminal accountability. The enactment of such a provision is particularly outrageous with view to the persisting serious human rights violations committed by State agents. International public law imposes on States the duty to investigate, prosecute and punish serious human rights violations and grants the victims of such abuses the right to truth, to an effective remedy and to reparation. Assuming in a hypothetical scenario that the new regime of Myanmar seeks to account for the past, the author reaches the conclusion that national accountability mechanisms are flawed or inexistent. The international community therefore has the duty to hold military members accountable for their crimes under universal jurisdiction. Another but less probable way of taking action is the establishment of an international tribunal. Finally, the ICC may hold the military members criminally responsible if Myanmar ratified the Rome Statute, subjected itself to the ICC’s ad hoc jurisdiction or if its situation were referred to the Court by the U.N. Security Council.

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I. INTRODUCTION

In 1992, for the first time, the United Nations General Assembly stated its grave concern about “the continued seriousness of the situation of human rights in Myanmar, including reports of torture and arbitrary execution, continued detention of a large number of persons for political reasons, the existence of important restrictions on the exercise of fundamental freedoms and the imposition of oppressive measures directed in particular at ethnic and religious minorities”. The appointment of a Special Rapporteur on the situation of human rights in Myanmar followed. So far, all annual General Assembly Resolutions on Myanmar have listed cases of forced disappearance, torture, extrajudicial killing, sexual violence and arbitrary detention. Other human rights abuses include the recruitment of child soldiers, forced labor and the persecution of ethnic and religious minorities such as the Muslim population of Myanmar, the Rohingya.

At the time of the General Assembly’s resolution of 1992, the military regime under General Than Shwe controlled the country. In 1988, it had replaced the military junta of General Ne Win who had come to power after a coup in 1962. Oppression of the political opposition by all means, grave human rights abuses and an internal armed conflict against ethnic minorities combined with international isolation were characteristics of both regimes.

After having received severe criticism of its dictatorial rule by the international community and rejected democratic reforms, the military junta started a process of transition. In 2008, a new Constitution was adopted with the alleged purpose of promoting democracy. However, the drafting process as well as the referendum showed several serious deficiencies.

In the meantime, members of the military continued to commit gross human rights violations without ever facing legal consequences. Instead of combating this culture of impunity, the regime adopted Article 445 in the 2008 Constitution, exempting all members of the military junta from criminal accountability.

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3 Goldstone et al., see fn. 2, 10ff.
5 For further details see International Center for Transitional Justice, see fn. 4, 8ff; Yash Ghai, “The 2008 Myanmar Constitution: Analysis and Assessment” 4f.
This provision is subject of the present paper. It is argued that Article 445 qualifies as a self-amnesty and that a State may not enact legislation to shield its own agents from criminal responsibility for serious crimes under international law. Hereinafter, the notion of “crimes under international law” covers “grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture [...].”

In order to determine the unlawfulness of Article 445 under international law in Section III, only the legal point of view, namely the State’s duties and the victims’ rights, is taken into account. In particular, the post-conflict policy arguments on whether amnesties are an adequate means of overcoming the violent past are left out of scope. Furthermore, the legality of this constitutional provision is examined in the light of self-amnesty laws adopted by other States such as Chile, Peru, Uruguay, Argentina, New Caledonia (France) and Mauritania.

In Section IV, it is examined how the perpetrators of human rights violations in Myanmar can be held accountable for their acts. Are there sufficiently effective national mechanisms? Otherwise, international instruments such as universal jurisdiction or international tribunals and courts may come into play.

Before dealing with the core of the hypothesis – the unlawfulness of Article 445 of the 2008 Constitution of Myanmar and the accountability mechanisms theoretically applicable to the Burmese military members – two remarks are necessary. Firstly, as already pointed out, the present paper is limited in scope. Only the legal aspects of self-amnesties are considered. The discussion is further reduced to crimes under international law and to the above-mentioned countries with self-amnesties. The French Enlightenment philosopher Voltaire already said it: “Le secret d’ennuyer est celui de tout dire.”

Secondly, for a better understanding, the next chapter describes the context in which Article 445 was adopted: the widespread human rights abuses committed by military and government. These human rights violations include forced labor, forced displacement, arbitrary detention and imprisonment, torture, persecution of minorities, sexual violence, child soldiers and extrajudicial killing of civilians.

II. CONTEXT OF THE AMNESTY PROVISION OF MYANMAR

A. Human Rights Abuses

“One of the most widespread human rights violations” in Myanmar is forced labor. Despite its prohibition in Section 374 of the Burmese Penal Code and the establishment

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6 Principles to Combat Impunity 6 (U.N. Doc. E/CN.4/2005/102/Add.1). It is noteworthy that Myanmar is not State party to some of the most important human rights treaties such as the ICCPR. However, it has ratified the Genocide Convention (14 March 1956), the Convention on the Elimination of All Forms of Discrimination against Women (23 November 1997), Convention on the Rights of the Child (15 July 1991) and 19 ILO Conventions.

7 International Center for Transitional Justice, see fn. 4, 18.
of an ILO Commission of Inquiry and ILO Government Body, military activities are still supported by forced labor. Civilians have to carry goods and equipment for troops or build and maintain infrastructure. They are also used as human minesweepers or human shields. Particularly in the East, the military and armed rebel groups have placed landmines in populated areas near the border without notifying villagers.

Due to natural disasters, armed conflict and infrastructure and development projects, over 1.5 million civilians have been displaced since 1962, most of them in the Eastern zones such as the Shan State. Mainly ethnic minorities are affected by such forced evictions. In order to prevent their return, the regime has burnt villages and food sources. For instance in the second half of 2009, dwellers of 40 villages were displaced and the houses destroyed in the Shan State. The government does not recognize the existence of IDPs or grant them access to humanitarian aid.

According to the 2010 Progress Report of the UN Special Rapporteur, there are over 2,200 prisoners of conscience in Myanmar. Among them are several prominent members of the oppositional party, the National League for Democracy (NLD). The conditions of detention of these and normal prisoners do not meet international standards: Many prisons lack medical facilities, staff and equipment; denial of food and water are a common punishment and in particular prisoners of conscience are subjected to interrogation techniques which amount to torture. As a consequence, the number of deaths in prison is “alarmingly high”.

Another area of concern is the continued use of torture. During the forced relocation of 2009 in the Shan State, more than 100 civilians were arrested and tortured. Other cases of torture have occurred in the Kayin State in the North of Myanmar where the internal armed conflict between insurgent groups and the military still continues. Most victims of torture are political activists accused of supporting rebel groups.

Ethnic and religious minority groups face serious discrimination and suffer disproportionately from serious human rights violations. The Rohingya minority, which is still not recognized by the government, is denied citizenship and, therefore, de facto is stateless. This means a severe restriction of movement since in Myanmar identity cards are necessary to travel internally. Ethnic minorities also suffer from extortion and arbitrary taxation, restricted access to education, employment and land as well as property

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8 International Center for Transitional Justice, see fn. 4, 18.  
confiscation. Additionally, the military and armed ethnic groups continue fighting especially in the Kachin, Shan and Kayin States despite ceasefire agreements.  

The UN Special Rapporteur has noted in all Progress Reports on Myanmar “high levels of sexual violence”. Despite knowledge of gang rape, rape and murder, sexual slavery and forced marriage committed by the army, the regime denies its involvement in these practices and complaints are silenced. The prevailing culture of impunity shows that sexual violence is a “legitimate part of the strategy to intimidate people in areas of armed conflict or potential resistance and to punish communities for appearing to support the government’s opposition”.

Furthermore, UN sources mention the recruitment of child soldiers in Myanmar. Children under the age of 18 are physically forced to join the army or join out of poverty. They are mistreated should they exhibit disobedience or attempt to escape.

Extrajudicial killing of civilians is another practice used by the military. The Special Rapporteur on extrajudicial, summary or arbitrary executions reported in 2004 that “government soldiers summarily execute or torture civilians and gang-rape women before shooting them dead”. Particularly IDPs who wish to return to their villages of origin are endangered since the military applies the so-called “shoot-on-sight” policy.

There is no necessity to specify in greater detail the human rights violations committed by the military to show how serious they are when enforcing their rules. The government of Myanmar seemed to demonstrate willingness to put an end to these human rights abuses: In 2008, it adopted a new Constitution with the aim of transitioning from a military regime to democracy and, therefore, reforming its governmental structure into a civilian rule. However, despite the election of a civilian president in 2011, the human rights abuses and armed conflict continue unchanged. The new Constitution does not deal in depth with legal, social, moral and other relevant issues related to serious human rights violations, rather it has established a deficient judicial system and a broad amnesty provision has entered into force.

19 Goldstone et al., see fn. 2, 52.
23 International Center for Transitional Justice, see fn. 4, 25.
26 André & Louis Boucaud, “Birmas Schätze” 18 Le Monde diplomatique 20 (January 2012); see also footnote 30.
B. The 2008 Constitution

1. Court System

The Burmese court system encompasses a Constitutional Court, ordinary courts and courts martial (Article 293) but only the latter ones have the power to try members of the military (Article 20 lit. b and 319). The Commander-in-Chief, the supreme commander of the armed forces of Myanmar, has the final and exclusive authority over disputes concerning military members (Article 343 lit. b). He is appointed by the President (Article 342). However, the Constitution is silent on the procedure to be followed in courts martial, the appointment of judges and the relationship to ordinary courts. A fair and independent trial cannot be guaranteed because the final say lies with the Commander of the military – the defendant party – which is under control of the President and the National Defense and Security Council, a military dominated body of the executive.

The interpretation of the Constitution is subjected to the jurisdiction of the Constitutional Court only (Article 322 lit. a). The term of office of the judges lasts five years and runs simultaneously with the term of the President and the parliamentary members (Article 35). Thus, doubts can be raised against the fairness, impartiality and independence of these judges.

In addition to this non-transparent court system, the government seems to actively discourage people from complaining against human rights abuses by restricting access to judicial remedies and by instituting proceedings against those who complain against military members. The general fear of many people of death threats, false imprisonment, torture and disappearance after taking legal action against the military prevents them from going to court.

2. Amnesty Provision in the 2008 Constitution

Article 445 of the 2008 Constitution of Myanmar contains the amnesty provision in its second sentence. The Article belongs to Chapter XIV on transitory provisions and reads as follows: “All policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council and the State Peace and Development Council or actions, rights and responsibilities of the State Law and Order Restoration Council and the State Peace and Development Council shall devolve on the Republic of the Union of Myanmar. No proceeding shall be instituted against the said Councils or any

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27 All Articles cited in this chapter refer to the 2008 Constitution of Myanmar.
28 Ghai, see fn. 5, 30.
29 International Center for Transitional Justice, see fn. 21, 3.
member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.30

By constitutionally barring administrative, civil and criminal proceedings against the military regime, Article 445 falls under the definition of an amnesty provision. The personal scope of Article 445 encompasses all members of the military junta which governed the country in the past decades since the councils, the government and their members are mentioned as beneficiaries of the amnesty.

However, the Article’s wording is ambiguous with regard to the material and temporal scope.31 It is not clear which acts are encompassed since it refers only to “any act” within the scope of the Councils’ duties. A broad interpretation of this formulation would include administrative as well as civil and criminal activities as part of their duties. It could also be argued that the term “any act done in the execution of their respective duties” can, by definition, never cover violations of national or international law. Furthermore, the Article does not set a time period for the acts which fall within the scope of the amnesty. It is not evident whether past, present and/or future acts are included. The amnesty is neither limited to specific events nor to circumstances.

An interpretation restricting the amnesty to past infringements and excluding violations of human rights law would considerably limit the scope of the amnesty. However, the substantiation is left to the new Constitutional Court as the sole authority to interpret the Constitution. A restrictive interpretation seems to be unlikely considering that the “courts function as an extension of military rule”.32 As discussed above, neither the Constitutional Court nor the courts martial are impartial or independent from the executive branch. Taking into account also the scale of the human rights violations committed by the military regime, it is not very probable that the scope of the amnesty provision will be restricted by the jurisprudence. Additionally, the provision does not require the military members to fulfill certain conditions in order to benefit from the amnesty. Therefore, Article 445 qualifies as a blanket amnesty.

Furthermore, it is a self-amnesty since the Constitution and as a consequence also Article 445 was adopted by the State Peace and Development Council (Preamble and Article 443 of the 2008 Constitution) which is also the beneficiary of the amnesty provision. The perpetrators of human rights violations themselves issued the exemption from prosecution. As in all cases of self-amnesties, Article 445 aims at shielding members of the military regime from future prosecution.

In the following part, the legitimacy of the self-amnesty provision of Myanmar will be examined. Referring to the argumentation of Roland C. Syle, three aspects can question the validity of amnesties: the State duty to investigate, prosecute and punish human rights

30 The Councils mentioned in Article 445 refer to the name of the military junta of Myanmar from 1988 to 1997 and 1997 to 2011, respectively. The State Peace and Development Council governed the country until the new Constitution entered into force on January 31, 2011. Following this, the first civilian president after the military regime, Thein Sein, former general and prime minister, was elected and the Council dissolved (Wai Moe, “Than Shwe Officially Dissolves Junta “ The Irrawaddy (March 30, 2011)).

31 International Center for Transitional Justice, see fn. 4, 33.

32 International Center for Transitional Justice, see fn. 4, 37.
violations, the victims’ right to justice and the positive effects of amnesties on the rule of
law and democracy in post-conflict societies. 33 The right to justice is hereinafter
understood as the right to truth, to an effective remedy and to reparation. Due to the
limited scope of the present paper, only the two legal arguments are considered in greater
detail and the third argument on policy is omitted.

It will be argued that under international law self-amnesties for crimes under international
law are prohibited because they violate the State’s duties and the victims’ rights.

The examination will begin with the duty to investigate serious human rights violations
which exists independently and even in the absence of the State’s duty to prosecute
although investigations are frequently part of criminal proceedings and often the
precondition for possible future prosecutions.34

II. THE MYANMAR SELF-AMNESTY PROVISION VIOLATES INTERNATIONAL LAW

A. State Duty to Investigate

The most wide-reaching interpretation of the State duty to investigate has been given by
the Inter-American human rights bodies. According to the IACtHR, States must
investigate any violation of any convention right and organize their apparatus in order to
establish the truth and restore the victims’ rights.35 The IAComHR has concretized the
duty to investigate by stating that the investigation must be carried out “in good faith and
must be diligent, exhaustive and impartial”.36 The ECtHR has affirmed these criteria
when it held that the investigation is required to be “thorough and effective”37 as well as
“independent and impartial, in law and in practice”.38 The protection under the UN
human rights system goes in the same direction since the UNHRC requires States to
“establish effective facilities and procedures to investigate thoroughly, by an appropriate
impartial body,”39 in particular in the context of violations of the right to life. The ICTY

34 Anja Seibert-Fohr, Prosecuting Serious Human Rights Violations (Oxford, Oxford University
166.
36 I.A.Com.H.R., Monseñor Oscar Arnulfo Romero and Galdámez v. El Salvador, Case 11.481,
Report No. 37/00, decision of 13 April 2000, para. 80.
38 Eur.Ct.H.R., Appl. 43577/98 and 43579/98, Nachova et al. v. Bulgaria, judgment of July 6,
2005, para. 112.
39 U.N. H.R.C., Comm. 161/1983, Joaquín David Herrera Rubio et al. Colombia, decision of
November 2, 1987, para. 10.3.
has imposed the same duty to investigate with regard to torture arguing that torture is a

All above-mentioned courts and commissions have derived the duty to investigate from
the State’s obligation to secure rights and freedoms guaranteed under the respective
conventions and from the right to an effective remedy. Only the Convention against
Torture explicitly states such duty in its Article 12 by requiring the States to undertake “a
prompt and impartial investigation, wherever there is reasonable ground to believe that an
act of torture has been committed in any territory under its jurisdiction”.

As far as these international and regional courts have been confronted with the
assessment of the validity of self-amnesty laws, such laws have been declared
and are drafted with the intention to prevent any investigation\footnote{I.A.Ct.H.R., \textit{Barrios Altos v. Peru}, Serie C No. 75, judgment of March 14, 2001, para. 41; I.A.Ct.H.R., \textit{Almonacid-Arelleno et al. v. Chile}, Serie C No. 154, judgment of September 26, 2006, para. 114.}. In particular, the IACtHR as well as the ICTY have held that self-amnesty laws may not be adopted in connection with

National courts of Uruguay, Argentina and Chile have also affirmed the duty to
courts have even ordered the reopening of cases for the purpose of investigation.\footnote{Naomi Roth-Arriaza and Lauren Gibson, “The Developing Jurisprudence on Amnesty” 20 \textit{Human Rights Quarterly} 843 (1998) 880.} All
national courts have based the obligation to investigate on international conventions
binding on the respective States, such as the Inter-American Convention on Forced
Disappearance, the IACHR, the Convention against Torture and the Geneva Conventions.

Hence, where self-amnesties have been adopted and where State agents have been
involved in the commission of crimes, the duty to investigate has been strongly affirmed.
However, the self-amnesty of Myanmar prevents investigations, since its purpose is to
shield State agents and victims receive death threats if they inform the authorities about violations of their rights.

B. State Duty to Prosecute and Punish

Based on the Velásquez Rodríguez case, the Inter-American Court and Commission of Human Rights have recognized a very strong State duty to prosecute and punish serious crimes under international law.46 States must take all necessary measures to prosecute and punish perpetrators of grave human rights abuses administratively and criminally as appropriate with the aim of preventing future occurrence.47 Punishment is considered appropriate if it is "proportional to the rights recognized by law and the culpability with which the perpetrated acted”.48

Under the European system of human rights protection, States are required to implement effective criminal law.49 Deficiencies in the enforcement permit or foster “a lack of accountability of members of the security forces”50 contrary to the Convention. States are also required to previously conduct effective investigations which must be “capable of leading to the identification and punishment of those responsible”.51 Such duty is not only inherent in the State’s general obligation as enshrined in Article 1 ECHR but also in the procedural protection belonging to each substantive right.

In connection with self-amnesty laws, the IACtHR has held that “all amnesty provisions […] are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law”.52 States must refrain from all measures which, legally or in fact, prevent criminal prosecution or void the effects of a conviction.53 The fact that “State agencies act

in a manner that [international crimes go] unpunished leads to State accountability for the crimes committed. The duty to prosecute and punish becomes particularly important with regard to the seriousness of the crimes.\(^{55}\)

The ECtHR has also declared amnesty laws incompatible with the ECHR if they can be considered “to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes”.\(^{56}\) Furthermore, self-amnesties may not be adopted in order to “precisely […] block any criminal prosecution” and, therefore, the Court could “not question the obligation to prosecute such actions by allowing impunity to the perpetrator through adoption of an amnesty law, susceptible of being in violation to international law”.\(^{58}\)

The UNHRC has urged the State “to bring to justice those responsible for […] disappearance, notwithstanding any domestic amnesty legislation to the contrary”.\(^{59}\) The Committee has further stressed that perpetrators of serious human rights violations must be held individually responsible for their acts despite the existence of amnesty laws.\(^{60}\) The ICTY’s jurisprudence goes in the same direction when it has stated in the Furundzija case that individuals are bound to the prohibition of torture despite possibly enacted amnesty laws.\(^{61}\) The SCSL went even one step further by holding that the grant of amnesty in respect of such crimes as are specified in Articles 2 to 4 of the Statute of the Court is not only incompatible with, but is in breach of an obligation of a State towards the international community as a whole”.\(^{62}\)

Additionally, national courts of all instances have also condemned self-amnesties for being incompatible with international human rights law. According to Chilean case law, amnesties “cannot be invoked to prevent the punishment of individuals or State agents who, while required to protect and guarantee the life and physical integrity of others, have violated [human] rights”.\(^{63}\) To the contrary, States are obliged to bring perpetrators of


\(^{60}\) U.N. H.R.C. General Comment No. 31 (CCPR/C/21/Rev.1/Add. 13), para. 18.


\(^{63}\) Santiago Court of Appeals, Case of Lumi Videla Moya, Case 13.597-94, judgment of September 26, 1994, para. 15 (translated by the author); see also Santiago Court of Appeals, Case of Bárbara Uribe Tamblay and Edwin van Yurick Altamirano, Case 38-683-94, judgment of October 3, 1994, para. 9.
serious human rights abuses before court and to prevent the commission of future acts.\textsuperscript{64} The Peruvian Supreme Court has ruled that there is a duty to investigate and punish in connection with not only self-amnesty laws but also with “all practices aimed at preventing the investigation and punishment for violations of the right to life and to personal integrity”.\textsuperscript{65} In Argentina, the criminal court at federal level has reasoned that “the decision of this State to grant impunity for these crimes against humanity frustrates the expectations which the community of nations has in that such crimes are investigated and the perpetrators punished”.\textsuperscript{66} As a consequence, the Argentinian self-amnesty laws were declared null and void.

The duty to prosecute and punish can also be deduced from specific human rights conventions. The strongest formulation of such duty can be found in the Genocide Convention which states that States undertake to prevent and punish genocide (Article 1) by enacting the necessary legislation, providing effective penalties (Article 5) and punishing the perpetrators irrespective of their official position (Article 4). The Convention against Torture is less strong but, nevertheless, requires States to ensure that all acts of torture are punishable offences under criminal law (Article 4). If perpetrators are not brought to trial, they must be extradited (obligation “\textit{aut dedere aut judicare}”; Articles 7 and 8).

Furthermore, it is stated in all four Geneva Conventions that State parties must criminalize grave breaches of said Conventions by adopting the necessary legislation and bringing the perpetrators before their own courts or, in the alternative, extraditing them.\textsuperscript{67} However, States may “under no circumstances grant perpetrators immunity or amnesty from prosecution for grave breaches”.\textsuperscript{68} In the context of Myanmar, Additional Protocol II on internal armed conflict is also relevant which states in its Article 6 (5) that “at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict […]”. The ICRC interprets this provision narrowly by clarifying that those guilty of war crimes may not be exempted from war criminal liability.\textsuperscript{69} Furthermore, the duty to prosecute and punish is mentioned in the preamble of the Rome Statute. According to Article 27 of the Vienna Convention on the Law of the Treaties, “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.


\textsuperscript{65} Peruvian Constitutional Court, \textit{Case of Santiago Martín Rivas}, Case 4587-2004-AA/TC, judgment of November 29, 2005, para. 63 (translated by the author).


\textsuperscript{67} These obligations are imposed in common Articles 49 (Convention I), 50 (Convention II), 129 (Convention III) and 146 (Convention IV).


Applying these principles to the present case, the self-amnesty of Myanmar must be found in violation of the duty to prosecute and punish. The Commander-in-Chief, has the final say in proceedings against military members, the main perpetrators of human rights violations, which renders the whole system totally flawed and fosters the shielding of State agents.

C. Right to Truth

The right to truth stands in close relation to the State duty to investigate. The IACtHR has developed this right in the context of forced disappearance granting the next of kin the right to know about the whereabouts of their relatives. An autonomous right to truth is explicitly guaranteed and understood as “the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs”. It is also a form of reparation which includes the possibility of knowing what happened to the victim and the whereabouts of the mortal remains. The right to truth is collective in nature: “The next of kin of the victims and society as a whole must be informed of everything that has happened in connection with [grave human rights] violations.” Under the European human rights system, the right to truth has been interpreted similarly: In addition to “a thorough and effective investigation”, the State has to provide “effective access for the complainant to the investigatory procedure”. The State’s failure to inform the relatives of the missing persons “attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3”. The UNHRC has adopted the same approach in cases of death sentences.

In the context of amnesty laws, the IACtHR acknowledged the right to truth also for other human rights violations than forced disappearance and equaled the “lack of knowledge of the facts relating to human rights violations” to the lack of judicial protection “capable of guaranteeing the identification and eventual punishment of those

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responsible”.

According to the IACtHR, where self-amnesty laws are in force, “it is evident that the surviving victims, their next of kin and the next of kin of the victims who died were prevented from knowing the truth about the events”.

The Peruvian Constitutional Court has also affirmed the collective and individual nature as well as the autonomous standing of the right to truth. In Chile, the amnesty law was found to be inapplicable to a kidnapping because the destiny of the victim had not been clarified. Argentinian courts have conducted so called “truth trials” in order to establish the destiny of forcibly disappeared persons under the military regime despite the existence of self-amnesties. In the course of these trials, the right to truth as well as the State duty to apply legal means to reconstruct the past has been explicitly recognized.

As a consequence, the victims, their relatives and the Burmese society in general have a right to know about the crimes committed by the military regime. However, the military regime has seemed more willing to cover up the crimes than to reveal any details on their commission.

D. Right to an Effective Remedy

According to the jurisprudence of the IACtHR, judicial remedies are considered effective if they are “in accordance with the rules of due process of law,” “suitable to address an infringement of a legal right” and not illusory or rendered useless by State intervention. Proceedings must be directed “in such a way that undue delays and hindrances do not lead to impunity, thus frustrating adequate and due protection of human rights”. The ECtHR has interpreted the right to an effective remedy more vaguely. In

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78 Peruvian Constitutional Court, Case of Genaro Villegas Namuche, Case 2488-2002-HC/TC, judgment of March 18, 2004, para. 9 (translated by the author).


81 Argentinian Federal Chamber of Appeals of the Federal Capital, case of Alejandra Lapacó in: Abregú, see fn. 80, 32.


particular, this right requires the State to conduct a thorough and effective investigation,\(^{86}\) and to adopt domestic remedies which are adequate to implement the conventional rights and freedoms because the right’s “exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State”.\(^ {87}\) “Promptness and reasonable expedition”\(^ {88}\) is necessary in this context.

Self-amnesty laws have been found in violation of the right to an effective remedy since they impede the victims’ access to court,\(^ {89}\) deprive them of judicial protection and the right to a simple and effective remedy\(^ {90}\) and “lead to the defenselessness of victims and perpetuate impunity”.\(^ {91}\) Furthermore, such amnesties violate the State’s obligation to pass laws and develop “practices tending to achieve an effective observance of [the] guarantees”\(^ {92}\) enshrined in the Convention. Furthermore, according to the IAComHR, they “weaken the victim's right to bring a criminal action in a court of law against those responsible”\(^ {93}\) and help to ensure “that no charges would be brought against those responsible”.\(^ {94}\) According to the ECtHR, if State agents are involved in the commission of a crime, “criminal proceedings and sentencing are not time-barred and […] the granting of an amnesty or pardon should not be permissible”.\(^ {95}\) From a UN human rights perspective, self-amnesties have likewise been considered contrary to the right to an effective remedy since “the realization of the author's right to an adequate remedy” has been rendered “extremely difficult”.\(^ {96}\) The UNHRC has further held that “purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies […] in the event of particularly serious violations of human rights”\(^ {97}\).

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This victims' right is not only guaranteed in Articles 25 IACHR and 13 ECHR but also in the Convention against Torture whose Article 13 reads that the victim must have "the right to complain to, and to have his case promptly and impartially examined by, its competent authorities". The Genocide Convention mentions this right only implicitly in Article 5 by requiring States to give legal effect to the conventional provisions.

Due to the existence of the self-amnesty provision in the 2008 Constitution of Myanmar, victims may not bring charges against the perpetrators or initiate proceedings since such provision impedes judicial protection.

E. Right to Reparation

Both the IACtHR as well as the ECtHR derive the right to reparation from the general obligation to guarantee the full and free enjoyment of conventional rights, the right to an effective remedy and Articles 63 (1) IACHR and 41 ECHR, respectively. Under the Inter-American human rights system, these provisions require full restitution of the right violated and for damages resulting from such violation. Reparation of human rights violations mostly includes numerous forms. It follows from jurisprudence that investigation and punishment have not been sufficient – monetary compensation, accountability or the right to truth have additionally been adjudicated. The ECtHR has held that States “must prevent or remedy any breach at subordinate levels”. It has further ruled in numerous judgments that the effective remedy "entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure". Thus, mere monetary compensation is not sufficient for complete reparation of the damage suffered by the victims.

States which have enacted self-amnesty laws have violated the right to reparation since the legal consequence of such laws is the denial of the victims’ right to justice, which cannot be compensated. In particular, the establishment of a national truth commission does not comply with the preconditions of the right to reparation. Effective


investigation, prosecution and punishment are required. The IACtHR has ordered States not only to set aside their national amnesty laws and relating judgments, but also, \textit{inter alia}, to investigate the truth, to prosecute and punish those responsible, to pay pecuniary and non-pecuniary damage, to publicly acknowledge the responsibility, to cover health service expenses, to grant educational benefits, to make legislative amendments or to publish the IACtHR’s judgment. Likewise, the UNHCR has acknowledged different forms of restitution, “notwithstanding any domestic amnesty legislation to the contrary.” By enacting amnesties, “States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible”.

The right to reparation is further guaranteed in Article 14 of the Convention on Torture which calls on the State to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible”. This provision is not only applicable to acts of torture but, according to the Committee’s decision practice, also to cruel, inhuman or degrading treatment or punishment.

In Myanmar, the State has not even taken the first step to hold the perpetrators accountable, namely the conduct of investigations. Therefore, it is indisputable that the victims’ right to reparation is infringed.

IV. CONSEQUENCES OF MYANMAR’S UNLAWFUL SELF-AMNESTY PROVISION

A. Scenario

As demonstrated in the previous chapter, Article 445 is incompatible with customary international law. Thus, the question arises what consequences the unlawfulness of the self-amnesty provision entails. From the human rights situation in Myanmar it can be deduced that the actual government is very unlikely to render Article 445 inoperative or interpret it in a very restricted way to make it compatible with its international legal

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110 All Articles cited in Chapter 4.1 and 4.2 refer to the 2008 Constitution of Myanmar.
obligations. It is much more probable that the current culture of impunity will remain unchanged.

In order to outline the consequences of the enactment of the unlawful self-amnesty provision, the author proceeds on the assumption of a merely hypothetical case: namely that the political situation of Myanmar has changed. It is supposed that the military regime is no longer in power for whatever reason. The new government now seeks to account for the past and, therefore, wants to hold the leading members of the former military regime accountable for their human rights violations. It is further assumed that the 2008 Constitution – and consequently also the self-amnesty provision and the national measures of accountability – is still in force.\footnote{This assumption is justified by the fact that in order to amend the Constitution the approval of 75 percent of the Burmese parliament is required (Article 436). Since the military personnel holds 25 percent of the parliamentary seats, it is questionable whether the new government may achieve a constitutional amendment right after the take-over of power. Additionally, it has to be stated that to the best of the author’s knowledge there is no other legal instrument mentioning accountability mechanisms in Myanmar.}

Keeping the described scenario in mind, this chapter starts with an examination of national accountability measures for members of the government and military. Such analysis is necessary since international mechanisms come into play only subsidiary to domestic measures.\footnote{This is true for third States acting under the head of universal jurisdiction and for the ICC (Gerhard Werle, \textit{Principles of International Criminal Law} (The Hague, TMC Asser Press: 2005) 34 & Mallinder, see fn. 69, 304f.). \textit{Ad hoc} tribunals, on the contrary, have primary jurisdiction and national authorities may even be obliged to refer a case to the international tribunals.}

\section*{B. National Accountability Mechanisms}

\subsection*{I. Impeachment}

For the President, the two Vice-Presidents, Union Ministers, Union Auditors General, Chief Justice and other judges of the Supreme and High Courts, judges of the Constitutional Tribunal as well as members of the Election Commission impeachment is the only way of holding them accountable. State and Regional Chief Ministers and other ministers, Attorney-General, Advocate General and State and Regional Auditors General may additionally be removed by the President.

The procedure of impeachment is the same for the President, Vice-Presidents, Union ministers, Attorney General, Auditor General, judges and members of the Election Commission.\footnote{See Articles 71 (impeachment of the President and Vice-Presidents), 233 (Union ministers), 238 (Attorney General), 302 (Chief Justice and judges of the Supreme Courts), 312 (judges of the State and Regional Courts), 334 (judges of the Constitutional Court) and 400 (members of the Election Commission).} It is carried out for the following reasons: (1) high treason, (2) breach of the constitutional provisions, (3) misconduct, (4) disqualification from their office under the Constitution and (5) inefficient discharge of duties assigned by law. One house of the Burmese Parliament initiates the procedure by submitting the charge to the Head of the Parliament, whereas subsequently the other house forms a committee to investigate this
charge. For such procedure to be initiated, support of at least one quarter of the first house and two-thirds of the total number of representatives is required. If, after having investigated the charge, a majority of two-thirds of the investigating house finds the charge to be substantiated, the President removes the official concerned or, in his own case, is removed by the Speaker of the Parliament. In the case of impeachment of judges, not only the Parliament has the power to initiate such procedure but also the President. Then, the President acts “as a unicameral body”\(^\text{114}\) since he both accuses and removes the judges. These procedures have been criticized for being inadequate for some of the reasons of impeachment.\(^\text{115}\)

With regard to the accountability of the President, Article 215 is of particular relevance. It states that he cannot be held responsible by any house of the Parliament or any Court “for the exercise of the powers and functions of his office or for any act done or purported to be done by him in the exercise of these powers and functions in accord with the Constitution or any law”. Impeachment is mentioned as the only exception thereto. This lack of accountability to the Parliament is underlined by the fact that the President is not a member of the Parliament.\(^\text{116}\) Although his government implements resolutions, the Parliament’s control mechanisms are very weak.\(^\text{117}\)

All office holders initially mentioned are granted the possibility to resign voluntarily.

In view of the strong position of the Burmese military, the question arises whether and how its members can be held accountable.

2. Accountability of the Military

The constitutional provisions show that no powers are provided to the Parliament to hold military members responsible: In both parliamentary chambers, 25 percent of the parliamentarians are members of the armed forces appointed by the Commander-in-Chief.\(^\text{118}\) Committees of the Parliament dealing with matters concerning the military, security or defense must be composed of members of the military itself. Other, non-military parliamentarians are brought in only “if necessary”.\(^\text{119}\) Therefore, if the legislative power wished to establish a committee to investigate human rights violations committed by the armed forces, the members of such committee would necessarily belong to the military, a fact that would handicap an independent and impartial inquiry into the facts.

Remarkably, the Constitution is silent on accountability mechanisms for parliamentarians. According to Article 343, they are only responsible to the Commander-in-Chief who has the final say in all matters related to the military. Thus, even if the

\(^{114}\) Ghai, see fn. 5, 17.

\(^{115}\) Ghai, see fn. 5, 17.

\(^{116}\) Article 62.

\(^{117}\) Article 222, for instance, states that if the Parliament does not reach a consensus on the annual budget, the government is entitled to dispose of an amount equal to the one of the previous year.

\(^{118}\) Articles 109 and 141.

\(^{119}\) Articles 115 (b) and 147 (b).
military members are appointed parliamentarians, they remain under the control of the armed forces. The same is true for Ministers of defense, home affairs and border affairs who all must be military personnel nominated by the Commander-in-Chief. In this latter case, the corresponding accountability mechanism is impeachment of Ministers. However, Article 235 (c) states that the President can remove such an office holder only in coordination with the Commander-in-Chief. This constellation clearly shows the powerful position of the head of the armed forces.121 Furthermore, there is no constitutional provision on termination of office or accountability of the Commander-in-Chief.

Therefore, it can be concluded that there are no direct accountability mechanisms for military members, irrespective of whether they act as parliamentarians, ministers or military personnel. In every case, the Commander-in-Chief exercise considerable influence on the decision to hold them accountable.

The above-mentioned accountability measures available in Myanmar pose two major legal problems if the new government wants to resort to them. They are dealt with in the next chapter.

3. Related Legal Problems

The perpetrators of human rights violations can only be held accountable for crimes under international law if the Penal Code of Myanmar criminalizes such acts. The actual Penal Code does not contain any provisions on war crimes, crimes against humanity or genocide – only individual crimes not committed on a large scale are punishable. Therefore, the new government is required to amend the Code. However, the problem of the applicability of such amendment arises: The principle of nullum crimen sine lege as a part of the principle of legality prohibits, inter alia, the retroactive application of criminal provisions.122 Thus, it requires “in its strict sense” that a criminal “can only be convicted and punished for something that was a crime under law applicable at the time the conduct occurred”.123

International tribunals such as the International Military Tribunal Sitting at Nuremberg, the ICTY and ICTR as well as national courts exercising universal jurisdiction have been faced with this problem when trying to uphold the international community’s interest in justice for acts which were not criminalized at the time of their commission. Criminal law has been found retroactively applicable if the human rights violations were prohibited by

120 Articles 232 (j). The Attorney General can also be military personnel. In such case, he does not have to resign from his military post either (Article 237).
122 Werle, see fn. 112, 36ff. The other elements of the notion of nullum crimen sine lege include specificity, meaning that the definition of a crime must be sufficiently precise, and non-extension by analogy, prohibiting the expansion of the scope of the criminal provision (Antonio Cassese, Guido Acquaviva, Mary Fan & Alex Whiting, International Criminal Law – Cases & Commentary (Oxford, Oxford University Press: 2011) 53).
123 Cassese et al., see fn. 122, 53.
customary international law and criminal liability for such violations was foreseeable.\textsuperscript{124} By adopting such reasoning, the courts of Myanmar would be able to try members of the military and the former government although their acts were only prohibited under the new government.

The second question concerns the relationship between the self-amnesty and the accountability mechanisms. The Constitution does not clarify whether the (weak) accountability measures, namely impeachment and removal by the President, override the self-amnesty provision. Does the formulation of Article 445 that “no proceeding shall be instituted against” members of the military regime “in respect of any act done in the execution of their respective duties” impede any impeachment procedure? This question remains unsolved since all relevant provisions are at constitutional level. Therefore, it is up to the Constitutional Court to decide on the matter.

In view of these irrevocably flawed semi-legal mechanisms, several sources have called upon the international community to step in.\textsuperscript{125} The following section argues that the figure of universal jurisdiction and jurisdiction exercised by international tribunals and the ICC make it possible to hold members of the military regime accountable. These instruments are analyzed in the light of the self-amnesty provision.

\textbf{C. Measures at International Level}

\textbf{1. Universal Jurisdiction}

Universal jurisdiction is generally understood as “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction”.\textsuperscript{126} The State trying perpetrators of serious crimes enforces international law on behalf of all States. However, it is disputed which crimes can be subjected to universal jurisdiction.\textsuperscript{127} For the purpose of this paper, only crimes under international law as defined in Section I are considered.

\begin{itemize}
  \item \textsuperscript{125} Burma Lawyers’ Council, “Revealing Burma’s System of Impunity” (2011) 1.
  \item \textsuperscript{126} The Princeton Principles P1.
\end{itemize}
When a State tries a criminal on the basis of universal jurisdiction, the question of the applicable law arises. The State may either refer to the domestic law of the State which the accused is a national of, its own domestic law or international law. This question is of particular relevance also in the context of amnesties: Is the forum State bound by a self-amnesty adopted in the State of nationality of the accused? Subsequently, it is argued that international law imposes on third States the duty to exercise universal jurisdiction over beneficiaries of self-amnesties and, therefore, not to apply the domestic law of the defendant’s State of nationality. Such duty stems from the respective jurisprudence of domestic courts and treaty law.

a. Duty to Apply the Concept of Universal Jurisdiction to Beneficiaries of Self-Amnesties

Despite the enactment of self-amnesty laws, military members of Chile, Argentina and Mauritania have been brought before courts of third States. Spain has taken a particularly active role in this regard. Its Appeal Chamber of the National Court rendered two blanket decisions on the jurisdiction of Spain over the Chilean and Argentinian cases. With respect to the self-amnesty laws of both States, the Court concluded “they decriminalize conducts [...], a fact which has no legality in extraterritorial cases under the jurisdiction of Spain due to the application of the principle of universal protection or prosecution”.\(^\text{128}\) In the subsequent trials on former Argentinian military members, Spanish as well as Mexican courts found self-amnesties to be contrary to human rights law and to have no legal effect on the exercise of jurisdiction by third States.\(^\text{129}\) The courts have rejected self-amnesties also by affirming the State’s duty to investigate, prosecute and punish serious crimes under international law based on international conventions, principles, the seriousness of the crimes committed and the need to combat impunity. If national authorities of the State which adopted the self-amnesty fail to bring the perpetrators and beneficiaries of the self-amnesty to justice, third States try them. The French and Belgium courts reached the same conclusion when dealing with crimes committed under the dictatorship of Augusto Pinochet Ugarte in Chile.\(^\text{130}\)


In the proceedings on the Mauritanian army lieutenant Ely Ould Dah before the Appeals Court of Nîmes, France, the Court based its competence on the principle of universal jurisdiction “even in the presence of a foreign law granting amnesty”.

Within treaty law, all four Geneva Conventions enshrine the principle of universal jurisdiction for the so-called grave breaches. States are “under the obligation to search for persons alleged to have committed or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts”. In Additional Protocol I, the concept of grave breaches and, therefore, also the applicability of the principle of universal jurisdiction was expanded. This duty to try war criminals irrespective of their nationality is considered mandatory in the context of international armed conflicts. With respect to internal armed conflicts, explicit reference to individual liability for crimes is missing. However, it follows from the adoption of the Rome Statute as well as from the establishment of the international ad hoc tribunals that certain violations of international humanitarian law committed in non-international armed conflicts amount to war crimes. As a consequence, these crimes fall within the scope of universal jurisdiction. However, the exercise of such jurisdiction is not mandatory, but only permissive. If States do not exercise universal jurisdiction over war criminals, they should extradite them to another State which is able and willing to carry out the investigation and prosecution (principle of aut dedere aut iudicare).

The Convention against Torture also provides the duty to prosecute under the head of universal jurisdiction or to extradite. Article 5 requires the establishment of jurisdiction over acts of torture if such acts were committed on the respective territory, if either the perpetrator or the victim is a national of that State or if “the alleged offender is present in any territory under its jurisdiction and it does not extradite him” (Article 5 (2)). According to Article 7 (1), a State which does not extradite the offender has to refer the case to the competent authorities. The duty to exercise universal jurisdiction over those who committed acts of torture is deemed mandatory.

The Genocide Convention, however, does not foresee the possibility of subjecting perpetrators of genocide to universal jurisdiction. On the contrary, its Article 6 states that persons charged with genocide or related acts have to “be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction”. Thus, under conventional law, jurisdiction is primarily based on the principle of territoriality. Nevertheless, States have relied on customary international law to try genocidaires under the universality principle. The fact that such

131 French Supreme Court, Ely Ould Dah, No. 02-85379, judgment of October 23, 2002 (translated by the author).
132 Emphasis added.
135 Broomhall, see fn. 133, 404.
prosecution by third States is permissible has been demonstrated in case law and scholarly writing. Article 6 is nowadays considered not to be exhaustive and limited to territorial jurisdiction only, but to allow other forms of jurisdiction, in particular the principle of universality.

It follows from the cited jurisprudence that no court of a third State has found itself bound to a self-amnesty adopted elsewhere. The international human rights conventions further strengthen the application of the concept of universal jurisdiction to beneficiaries of self-amnesty laws.

The Burmese accountability measures for members of the government are very weak. Regarding military personnel, they do not even exist. Myanmar has not tried any perpetrator for human rights violations or, at least, investigated such charges. A culture of impunity prevails, strengthened by the self-amnesty provision at constitutional level. Since the crimes committed in Myanmar are of such gravity and there is strong agreement on the fact that self-amnesties have no binding force extraterritorially, third States are obliged to exercise jurisdiction based on the principle of universality over beneficiaries of self-amnesties.

In the cases cited above, the main practical problem was the extradition of the accused to the third State. Their national States were not willing to surrender the perpetrators to foreign authorities and refused to cooperate. However, the authorities of Myanmar could be more likely to extradite members of the former military junta since – following the scenario described initially – they are interested in holding them accountable.

2. Other Means

a. International Tribunals

Other means to bring perpetrators of gross human rights violations to justice at international level include the establishment of an international ad hoc tribunal or a hybrid court.

Although the courts established up to the present do not regulate the applicability of domestic amnesties or even of self-amnesties, they were faced with the question of validity of such laws on several occasions. Remarkably, according to the international jurisprudence, “domestic amnesties, whatever their legality ab initio cannot immunize an accused faced with prosecution before an international court”.


torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime”. 139 Prosecutor v. Karadžić deals with an agreement concluded between the accused and the US negotiator Richard Holbrooke during the Dayton peace talks in November 1995 which granted to Karadžić exemption from criminal prosecution before the ICTY if he withdrew from public life. Although the agreement cannot be considered an amnesty provision, it is worth citing the Appeals Chamber’s following statement: “As the ambit of the Tribunal's primary jurisdiction is defined in the Statute, it follows that the only basis for limiting or amending the Tribunal's jurisdiction is a UNSC resolution.”140 However, the agreement at stake was not ratified by the U.N. Security Council and, therefore, did not limit the ICTY’s jurisdiction. The hybrid court of Sierra Leone stated on two occasions that it was not bound by amnesties guaranteed to the accused individuals under the Lomé Peace Agreement because „the grant of amnesty in respect of such crimes as are specified in Articles 2 to 4 of the Statute of the Court is not only incompatible with, but is in breach of an obligation of a State towards the international community as a whole”.141 The Extraordinary Chambers in the Courts of Cambodia (ECCC) had to consider the legality of the 1994 Outlawing Law granting amnesty to Ieng Sary, Deputy Prime Minister and Minister of Foreign Affairs under the Khmer Rouge regime. It held, inter alia, that “the crimes charged in the Closing Order, namely genocide, crimes against humanity, grave breaches of the Geneva Conventions, and homicide, torture and religious persecution as national crimes, are not criminalised under the 1994 Law and would therefore continue to be prosecuted under existing law, be it domestic or international criminal law.”142 With reference to Cambodia’s international legal obligations, the conclusion was reached that the amnesty did not exclude the ECCC’s jurisdiction.

Although the cases cited in this section do not concern self-amnesties, it can be deduced by analogy that self-amnesties would be equally rejected before international tribunals. However, the implementation of an ad hoc tribunal for Myanmar is questionable: After the establishment of the ICC, the U.N. Security Council is unlikely to establish ad hoc tribunals similar to the ICTY or ICTR.143 It is now the ICC’s task to try perpetrators of large-scale human rights violations.

b. International Criminal Court

Before considering the issue of self-amnesties under the Rome Statute, the question arises whether and when a particular situation falls under the jurisdiction of the ICC (Articles 12 and 13144). Three possibilities of how the ICC may come into play can be

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142 E.C.C.C., Decision on Ieng Sary’s Appeal against the Closing Order, No. 002/19-09-2007-ECCC/OCIJ (PTC75), judgment of April 11, 2011, para. 199.
144 All Articles cited in this chapter refer to the Rome Statute if not indicated otherwise.
On the one hand, Article 12 refers to the general or regular jurisdiction. According to this provision, the ICC may exercise jurisdiction over a specific situation if such situation has taken place in or if the perpetrator is a national of a State party to the Rome Statute. On the other hand, a State not party to the Rome Statute may subject itself to the jurisdiction of the ICC by consenting ad hoc to the exercise of such jurisdiction (Article 12 (3)). In this case, although not having acceded to the Rome Statute, the State is under the obligation to cooperate with the ICC pursuant to Article 86. Additionally, Article 13 (b) provides for the possibility of the U.N. Security Council to refer a specific situation to the ICC even if the State concerned has not signed the Rome Statute. The only conditions to be fulfilled are (1) the determination of a threat to international peace and security according to Article 39 of the U.N. Charter by the Security Council and (2) the referral must contribute to maintaining or restoring such peace and security.

Myanmar is not party to the Rome Statute and the ICC may not exercise jurisdiction automatically. Therefore, the first option for the new government to hold the members of the former regime accountable for their human rights violations is to sign the Rome Statute and then refer the situation to the ICC (Article 12 (1) combined with Article 13 (lit. a)). However, this option raises two problems: Firstly, the President of Myanmar has a strong influence on the matter of ratification of an international treaty such as the Rome Statute. According to Articles 86, 108 and 209 of the 2008 Constitution of Myanmar, the majority of the new Parliament as well as the approval of the President are needed for ratification. Additionally, the ratification procedure takes some time. Secondly, the temporal jurisdiction of the ICC is limited to crimes that have been committed after the Rome Statute for Myanmar has entered into force (Article 11 (1)). However, the State can make an explicit declaration to accept the jurisdiction for crimes committed after the entry into force of the Statute on July 1, 2002, but before its ratification (Article 11 (2)).

The new government of Myanmar may also accept the Court’s jurisdiction for a certain situation on an ad hoc basis. Considering his strong position under the 2008 Constitution, the acceptance of jurisdiction may largely depend on the President. The realization of this option seems to take less time than the ratification procedure. Myanmar would set the date of application of the Rome Statute in the declaration, which should be the date on which the Rome Statute entered into force in order to extend the jurisdiction ratione temporis as wide as possible. However, the ICC may take into account events which took


146 Kaul, see fn. 145, 610.


place prior to this date determined in the declaration if such events are related to criminal conduct falling within the relevant period of time.\textsuperscript{149}

For the third option, the referral of the situation by the U.N. Security Council, Myanmar does not necessarily have to ratify the Rome Statute. Although the requirement of a threat to international peace and security according to Article 39 of the U.N. Charter might be fulfilled\textsuperscript{150}, a referral does not seem to be very probable for political reasons. The Council’s permanent members China and Russia both maintain a good relationship with Myanmar for mainly economic purposes.\textsuperscript{151} Thus, these States are very likely to veto a resolution aiming at a referral of the situation to the ICC.\textsuperscript{152} Additionally, for such a referral, a change in the political reality of Myanmar is not required. The Security Council can refer a particular situation to the ICC irrespective of whether the accused are still in power and continue to commit crimes under international law.

This leads to the conclusion that it is up to the new government of Myanmar to bring the situation before the ICC, either by ratifying the Rome Statute and subsequently referring the situation or by accepting the Court’s \textit{ad hoc} jurisdiction.\textsuperscript{153} If the ICC gains jurisdiction over a situation and the prosecutor brings a specific case against a member of the former military regime before the Court, the issue of applicability of the self-amnesty arises.

The legality of amnesties is neither regulated in the Rome Statute nor has it been addressed by the ICC’s jurisprudence. Nevertheless, four possibilities of how to deal with such amnesties can be distinguished:\textsuperscript{154} deferred an investigation or prosecution as requested by a U.N. Security Council resolution (Article 16), prosecutorial declination of an investigation or prosecution for not serving the interest of justice (Article 53), complementarity (Article 17) and the principle of \textit{ne bis in idem} (Article 20). It follows from a consideration of these possibilities that self-amnesties have no stand before the ICC.

\textsuperscript{149} Carsten Stahn, Mohamed M. El Zeidy & Héctor Olásolo, „The International Criminal Court’s Ad Hoc Jurisdiction Revisited“ 99 \textit{The American Journal of International Law} 421 (2005) 431: The same approach applies to the above-mentioned situation where the State ratifies the Statute after its entry into force.


\textsuperscript{151} System of Impunity, see fn. 20, 5. China, for instance, is heavily involved in the production of rubber and in numerous huge investment projects such as the construction of an oil pipeline throughout the whole country into China and several hydroelectric power plants (André & Louis Boucaud, see fn. 26).

\textsuperscript{152} China and Russia have already made use of their right to veto a U.N. Security Council resolution: In 2007, they rejected a resolution on restoring peace and democracy in Myanmar (U.N. Press Release of January 12, 2007 (U.N. Doc. SC/8939)).

\textsuperscript{153} In the hypothetical case of a change of reality, it is possible that Myanmar will accept the ICC’s jurisdiction on an \textit{ad hoc} basis similar to the Ivory Coast where the newly established government issued such declaration.

Deferral of an Investigation or Prosecution by the U.N. Security Council

The U.N. Security Council’s authority to defer proceedings before the ICC as granted in Article 16 is closely linked to the U.N. Charter: 155 This exceptional power is subject to Chapter VII and, thus, the determination of a threat to international peace and security or of an act of aggression according to Article 39 of the U.N. Charter is previously required. Additionally, the resolution on the deferral must be in accordance with the purpose and principles of the U.N. Charter. If these two conditions are met, the U.N. Security Council could oblige the ICC to respect a national amnesty by deferring investigation or proceeding. Without going into further detail, the consequences of such deferral are “the suspension of any judicial proceeding before the Court, from the investigations of the Prosecutor to trials themselves”. 156 Such suspension is limited to the period of twelve months. However, it is generally considered that the ICC has the power to review the U.N. Security Council’s resolution on the deferral with respect to its legality. Therefore, if the Court is of the view that the national amnesty is contrary to international law, it may find itself not to be bound by the respective resolution and may continue with the judicial proceedings. 157

However, in the case of Myanmar, a deferral to the self-amnesty provision is not possible. Firstly, such provision would hinder judicial proceedings before the ICC only if, under the new regime, human rights violations amounting to a threat to international peace and security were still being committed. Secondly, “deferral” does not mean “a permanent respect for that amnesty,” 158 since such measure is limited to a period of twelve months. It is rather seen as a mechanism of delay, meaning that the ICC can continue to investigate or prosecute after the expiration of this term. Thirdly, the unlawfulness of self-amnesties – as demonstrated in Section III – leads to the consequence that the Court must exercise its power to review and declare a respective U.N. Security Council resolution to be invalid.

Prosecutorial Discretion to Investigate or Prosecute

In addition to suspension by the U.N. Security Council and according to Article 53 (1 lit. c and 2 lit. c), the Prosecutor may decide to refrain from investigation and prosecution, respectively, if there are “substantial reasons to believe that an investigation would not serve the interests of justice”. In order to decide so, the Prosecutor takes into account “all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime” (Article 53 (2 lit. c)). These criteria provide some guidance for the highly discretionary power of the Prosecutor. 159 Nevertheless, the Prosecutor is obliged to provide legal substantiation of

155 Scharf, see fn. 154, 187.
156 Condorelli & Villalpando, see fn. 147, 651.
157 Scharf, see fn. 154, 187. Such authority to review Security Council resolutions was affirmed in the Tadić case.
the decision. “General policy considerations in their own right”\textsuperscript{160} may not be invoked as the only reason.

The vague term of “justice” is generally understood in its broad sense, thus also including alternative forms to criminal justice. Therefore, the Prosecutor has to bear in mind “peace and reconciliation as the ultimate goals of every process of transition”\textsuperscript{161} although this approach implies many speculations about possible adverse future happenings.

In accordance with Article 53 (3 lit. b), the legality of the Prosecutor’s decision not to investigate or prosecute a specific case is subject to review by the Pre-Trial Chamber. However, this authority to review is optional and the Pre-Trial Chamber may also approve the Prosecutor’s decision silently.\textsuperscript{162}

When applying these deliberations to Myanmar, it can be concluded that both the Prosecutor and, later, the Pre-Trial Chamber must consider the validity of the self-amnesty provision in order to take a legally substantiated decision. In particular, it has to be assessed whether there is a duty to prosecute the crimes concerned.\textsuperscript{163} In this context, reference can be made to the previous Chapter 3: The self-amnesty provision contravenes international law and also the State’s obligation to prosecute. Therefore, a decision to refrain from investigation or prosecution would lack legal foundation in this context. As a consequence, the ICC is under the obligation to continue the proceedings despite the self-amnesty provision of Myanmar.

\textit{Principle of Complementarity}

The principle of complementarity requires the ICC to act only subsidiary to national courts. Regarding amnesties, Article 17 (1 lit. b) is relevant: A case is inadmissible if it “has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned”. However, this decision may not result “from the unwillingness or inability of the State genuinely to prosecute”. Three requirements can be derived from this provision: (1) A State investigation must have taken place, (2) the State must have decided not to prosecute and (3) the reason for this decision must not be the State’s unwillingness or inability. Although the first precondition does not necessarily call for a criminal investigation, such investigation must be systematic, carried out by the State and, at least, have the ultimate goal of a criminal prosecution.\textsuperscript{164} The investigation must precede the decision of non-prosecution in order to fulfill the second requirement of Article 17 (1 lit. b).

With respect to the third condition, “unwillingness” and “inability” mean that either the State exerts influence on the judicial system, thus creating a culture of impunity, or that


\textsuperscript{161} Ambos, see fn. 160, 85.

\textsuperscript{162} Turone, see fn. 159, 1177.

\textsuperscript{163} Scharf, see fn. 154, 188.

\textsuperscript{164} Ambos, see fn. 160, 75.
the judicial system is collapsed or unavailable, respectively.\textsuperscript{165} Whereas the concept of inability is more objective and, therefore, easier to assess, the unwillingness implies certain subjectivity. The ICC has to consider whether the measures taken by the State are aimed at shielding the perpetrators, whether the proceedings are delayed without justification and whether the independence and impartiality of the proceedings is guaranteed. Additionally, the State’s action must be consistent “with an intent to bring the person concerned to justice” (Article 17 (2)). This subjective element of the State’s intention usually makes reference to criminal prosecution.\textsuperscript{166}

Bearing this in mind, the self-amnesty provision of Myanmar clearly does not affect the admissibility of a case under Article 17 as none of the above-mentioned preconditions are met. The self-amnesty impedes an effective investigation into the facts and circumstances of the crimes. Even if an investigation was carried out, its ultimate goal would not be a criminal prosecution because Myanmar adopted the self-amnesty precisely with the purpose of avoiding such prosecution. Thus, the State cannot decide to refrain from prosecution due to its failure to inquire. Furthermore, the predominant purpose of self-amnesties is to shield State agents from criminal action which leads to unwillingness of the State.

\textit{Principle of Ne Bis in Idem}

Article 20 enshrines the principle of \textit{ne bis in idem}, the prohibition against double jeopardy at international level, according to which a perpetrator cannot be tried more than once for the same conduct or crime.\textsuperscript{167} This principle holds true at horizontal level for decisions adopted by the ICC itself (Article 20 (1)).\textsuperscript{168} It is also applicable to the vertical relationship between the ICC and national courts: National courts cannot try a person already convicted or acquitted by the ICC (Article 20 (2)) and the ICC is bound by domestic court decisions (Article 20 (3)). However, there exists an exception to this latter aspect of the \textit{ne bis in idem} principle. According to Article 20 (3 lit. a and lit. b), a case is admissible despite an earlier conviction or acquaintance for the same matter if such previous proceeding in the other court was “for the purpose of shielding the person concerned from criminal responsibility” or was “not conducted independently or impartially”. It lies within the competence of the ICC to decide whether there was a sham trial.

Concerning amnesties, the questions arise whether a confession before a truth and reconciliation commission equals a trial and conviction by a court, or whether an amnesty or pardon granted after conviction renders the preceding trial a sham trial.\textsuperscript{169} In the context of the amnesty of Myanmar, Article 20 is not of particular relevance: “National


\footnotesize{\textsuperscript{166} Gavron, see fn. 158, 111; Scharf, see fn. 154, 188.}


\footnotesize{\textsuperscript{168} Van den Wyngaert & Ongena, see fn. 167, 721ff.}

\footnotesize{\textsuperscript{169} Gavron, see fn. 158, 109f.; Van den Wyngaert & Ongena, see fn. 167, 726f.}
amnesties that are meant to shield perpetrators of war crimes, genocide, and crimes against humanity would deserve the same treatment as “sham trials”\textsuperscript{170}. Considering the culture of impunity in Myanmar, it must be assumed that the self-amnesty is also meant to apply to these crimes under international law. Furthermore, since Article 445 of the 2008 Constitution qualifies as a self-amnesty with the purpose of shielding State agents, this provision does not hinder the admissibility of a case before the ICC. Amnesties are never considered to be “judgments” equal to those rendered by ordinary courts. Therefore, a case on Myanmar would be admissible under Article 17.

D. Interim Conclusion

Other means to bring the human rights violators of Myanmar to justice include the establishment of an \textit{ad hoc} tribunal and the submission to the ICC. Although it can be deduced from the jurisprudence of the present \textit{ad hoc} tribunals that the self-amnesty would not be abided by, such tribunal is very unlikely to be established due to the UN Security Council’s unwillingness.

The submission of the Burmese situation to the ICC seems to be more realistic if the new government subjects itself to the \textit{ad hoc} jurisdiction of the Court. The ICC has not yet pronounced on the validity of self-amnesties. However, it is clear that the accused may not rely on such provisions. Investigation or prosecution cannot be suspended by the Security Council or the Prosecutor pursuant to Articles 16 and 53 of the Rome Statute, respectively. In both cases, the decision to suspend is – among other requirements – subject to judicial scrutiny, where the Court also takes into account the legality of the self-amnesty provision. Then, the ICC would necessarily come to the conclusion that Article 445 of the 2008 Constitution of Myanmar was contrary to international law and would quash the suspension.

Neither can the accused military members invoke the principle of complementarity in Article 17 of the Rome Statute because even if Myanmar is investigating or has decided not to prosecute, the case will be admissible: It lies in the very nature of a self-amnesty provision to shield State agents which automatically means that Myanmar is unwilling to investigate and prosecute.

The same reasoning holds true for the principle of \textit{ne bis in idem} as enshrined in Article 20 of the Rome Statute. A person can be convicted twice if the first trial was only a sham trial conducted in order to shield the person concerned from criminal accountability before the ICC.

Thus, the self-amnesty provision does not protect a member of the former Burmese army or government neither before an international \textit{ad hoc} tribunal nor before the ICC.

V. Conclusion

The grave concern about “the continued seriousness of the situation of human rights in Myanmar”\textsuperscript{171} expressed by the U.N. General Assembly in 1992 is as relevant and

\textsuperscript{170} Van den Wyngaert & Ongena, see fn. 167, 726.

appropriate as ever. The military regime ruling until 2011 and even the new, so-called “civil” government – which cements the strong position of the Burmese army and, therefore, can be considered a de facto prolongation of the former regime – have committed severe atrocities among the civilian population without ever being brought to justice. It is precisely in this context that the government adopted the 2008 Constitution with its self-amnesty provision in Article 445. But how can the victims come to terms with the past under such conditions?

The examination of the legality of this self-amnesty has shown that victims have no possibility to successfully account for the past. Firstly, Article 445 of the 2008 Constitution of Myanmar is unlawful under international law. It violates the duty to investigate, to prosecute and to punish as well as the victims’ rights to truth, to an effective remedy and to reparations. Systematically shielding State agents from criminal responsibility cannot be reconciled with the State’s duty to conduct an effective, serious and independent investigation; to effectively implement criminal law; and to punish the perpetrators proportional to the offence committed. It can neither be reconciled with the victims’ right to have access to all relevant information on the human rights abuses; to enjoy unimpeded judicial protection; and to obtain full restitution of the losses and damages suffered. The violation of these State duties and victims’ rights hinders an effective dealing with the past.

Secondly, the victims cannot take action against the perpetrators because national accountability mechanisms for members of the military are missing. The initiation of impeachment or removal proceedings lies outside their influence. Even if such proceedings were initiated for members of the government, the military may always exercise a considerable level of control that renders the mechanisms weak and judicially flawed. At international level, the principle of universal jurisdiction gives other States the possibility to try the military and government members even in the absence of any specific link. Regarding the persisting culture of impunity, the seriousness of the human rights abuses and the lack of a binding extraterritorial force of self-amnesties, third States are under the obligation to take action. No court has ever accepted the legality of self-amnesty provisions from another State. Other accountability measures include international courts. Given the current political situation, the establishment of an international tribunal is not very likely. However, the ICC could deal with the human rights violations if Myanmar ratifies the Rome Statute or subject itself to the ad hoc jurisdiction of the court. A referral of the situation by the U.N. Security Council seems to be less probable, given the veto power of China and Russia and their current attitude towards Myanmar. The jurisdiction of the ICC would be limited in time, but the Court would have to reject the validity of the self-amnesty provision.

It arises now the difficult question what can be undertaken to bring the members of the military and government to justice. Following from the above-examined State’s duties and victims’ rights, the crimes must be investigated and perpetrators prosecuted and punished. But who should take action? Myanmar bears the primary responsibility to try the perpetrators who committed crimes within its own territory. The international community should always step in only as a last resort. This perception is in accordance with international law that prescribes the principle of subsidiarity and the State’s duties as elaborated in the context of self-amnesty provisions. If it was for the international community to act first, Myanmar could very easily shuffle off responsibility to third States. However, the human rights abuses have continued for too long and the real situation has not changed for the victims. True possibilities to bring the perpetrators internally to trial do neither exist in the scenario as presented in this paper nor in reality. It is clear that Myanmar needs political changes: The actual government should show political and actual will to account for the past. Therefore, the judicial system must be
reformed in order to become independent and impartial; an accountability mechanism for members of the military, in particular also for the Commander-in-Chief, should be established; and the legal basis for crimes under international law such as crimes against humanity, genocide, war crimes and torture has to be adopted. These measures must be accompanied by means considering social, psychological and moral aspects of the process of coming to terms with the past. In order to determine which measures must be taken in the transitioning process, more knowledge about the internal structure and culture of Myanmar would be required. The formation of the transition could be the topic of another paper.

Despite the country’s recent movement towards the opening of the country, it is far from dealing effectively with human rights violations. Allowing access to its huge wealth of natural resources to foreign investors, receiving international politicians and releasing prisoners of conscience does not solve the problem at all. The current government seems to take a superficial, merely economic focus than a required comprehensive approach. This strategy reminds of China where the international community concludes trade agreements, but ignores the critical human rights situation.

Nobody knows how long it takes the government to change its attitude towards the grave human rights abuses – if it ever changed. It follows from the above-mentioned legal examination of the self-amnesty provision that third States have the duty to take actions under the head of universal jurisdiction. Furthermore, States are encouraged to enact the corresponding legislation and to become active. Such processes are mostly marked by politically contentious debates that may quickly lead to the watering down of the provisions.

Can the newly constituted government uphold its suppression of the victims’ voices for accountability mechanisms while at the same time demonstrating economic opening vis-à-vis the international community? This international community is just starting to enter into economic deals with Myanmar “à la China” instead of insisting on coming to terms with the past. In this context of opening and so-called democratic transition, it will be interesting to observe the importance of the constitutional Article 455, the self-amnesty provision.