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EDITORIAL

MAIEUTIC OR MEDDLESOME?
REFLECTIONS ON THE ROLES OF THE JOURNAL AND THE AUTHOR

Helga Molbæk-Steensig*

> Maieutic (adj.), from maieutikos, the Greek word for 'of midwifery'. The Socratic method for assisting someone in clarifying their ideas.
>
> Meddlesome (adj.), from Latin miscēre to mix. To interest oneself in what is not one's concern.[1]

There is a fair amount of road to travel between a submitted draft and a published article. For authors, publishing takes time, effort, and in some journals, a significant monetary contribution as well. For editors and peer reviewers it also entails a fair amount of (usually unpaid) labour. By one estimate,[2] scholars and scientists globally spend more than 15,000 years peer reviewing annually and, to that, we would have to add the significant amount of time spent revising articles, copy editing, formatting and generally making pieces ready for publication. So, free it is not; even at a Diamond open access journal[3] such as ours. Since publishing incurs costs, it is worth enquiring at regular intervals into what sort of added value academic publishing and peer review contributes, for the author, for the editor, for the legal community, perhaps even for the world.

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1 Definitions by Merriam-Webster shortened by the author.

2 Balazs Aczel, Barnabas Szaszi and Alex O. Holcombe, 'A billion-dollar donation: estimating the cost of researchers' time spent on peer review', 6 *Research Integrity and Peer Review* (2021)

3 i.e. where scholars are not charged for making their articles available open access, <https://www.scienceeurope.org/our-priorities/open-access/diamond-open-access/> Accessed 21 August 2023.

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It is widely recognised that academia as a whole is in the midst of a peer review crisis.[4] Editors from the natural sciences to the humanities and everywhere in between are finding peer reviewers declining to review, not responding to requests, or ghosting them after having agreed to review. The whole debacle is slowing publication times down, frustrating authors and editors alike. Would-be reviewers cite not being renumerated or appreciated and reviewing not counting towards tenure as reasons not to review. There is even an increasingly vocal minority suggesting getting rid of peer review altogether, and academic publishing with it.[5] The argument goes that publishing in peer reviewed journals causes delays in article publication, makes authors overly cautious and repetitive and therefore ultimately articles more boring to read, snuffs out great ideas and does nothing to keep bad work from being published. In a world before digital publishing, the argument goes, perhaps peer review could keep poor ideas out of print, but with the advent of the internet, anyone can publish their rejected articles anyway, if not as working papers or in paper repositories such as SRRN or ResearchGate, then on their own blogs.

The indictment is a grave one, but it only rings true if the journal is merely a gate keeper. In this position the journal would at best check for plagiarism and evaluate the soundness of the research and clarity of argument. At worst it could perpetuate a particular academic culture and discriminate against work going against a common narrative or failing to exhibit the right linguistic markers of class belonging. Additionally, if journals are only gate keepers, they are not very successful ones. With the thousands of journals in existence, authors are spoiled for choice and can simply send their rejected articles along to the next journal unchanged, hoping for less attentive editors

[4] Lynn E. DeLisi, 'Editorial: Where have all the reviewers gone?: Is the peer review concept in crisis?', 310 *Psychiatry Research* (2022) ; Maria Petrescu and Anjala S. Krishen, 'The evolving crisis of the peer-review process', 10 *Journal of Marketing Analytics* (2022)

[5] Adam Mastroianni, 'Title', Volume *Experimental History* (2022)<accessed 6. July 2022.

and reviewers. This may even happen when articles are rejected for plagiarism since there is no field-wide mechanism chastising plagiarising authors or keeping their work from being resubmitted elsewhere and potentially getting published.

But what if the act of reviewing and editing itself contributes with some value to the article? Rather than simply stating whether an article can be published or not, editing ought to be a dialectic process where readers ask questions of the author, encouraging them to improve their argument, consider counterarguments and, if presented with too much counterevidence, abandon their idea.

At this journal we were once complimented by an author as having done a 'marvellous maieutic job'. Maieutics is the act of assisting in the birth of an idea. The term originates from Plato's dialogue 'Theaetetus' in which Socrates meets a young man of that name and questions him about the nature of knowledge. At one point during the dialogue Socrates explains why he is interrogating Theaetetus, stating that the young man seems to be pregnant with an original thought,

> I tell you this long story, friend Theaetetus, because I suspect, as indeed you seem to think yourself, that you are in labour with some great conception. Come then to me, who am a midwife's son and myself a midwife [of ideas], and do your best to answer the questions which I will ask you.[6]

In terms of praise, being compared with Socrates is not half bad, nor, I say as someone who has given birth, is being compared with midwives. Socrates did however also state in that dialogue that he was himself barren of ideas, which I very much hope does not describe the general state of the editorial board,

[6] Plato (Translated by Benjamin Jowett), *Theaetetus (Classics of Ancient Greek Philosophy)* (360 B.C.E)

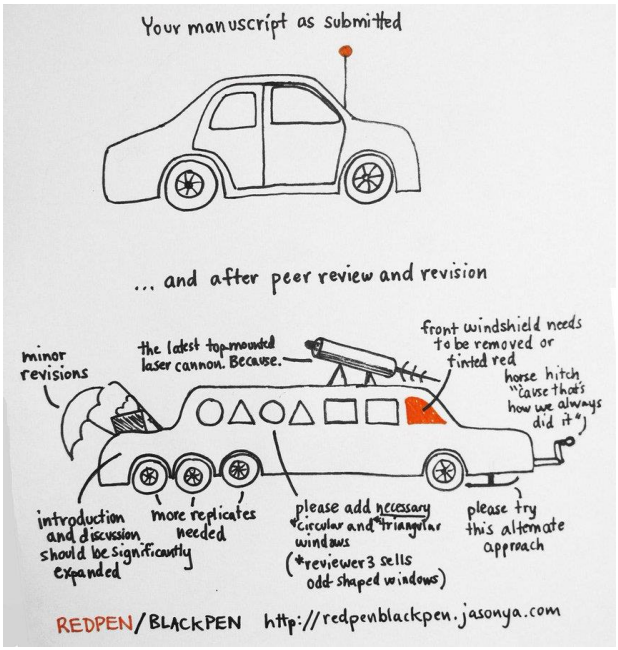
> 'I am not myself at all wise, nor have I anything to show which is the invention or birth of my own soul, but those who converse with me profit',

Subjecting one's work to critique and questioning is beneficial for any kind of scholarly or scientific endeavour, but for the fields within the scope of the EJLS – international, European, and comparative law as well as legal theory – a dialectic approach is particularly valuable. While we also publish empirical legal scholarship, many of the submissions we receive are more traditional doctrinal pieces. Such pieces come in a wide variety of types; those searching for trends in the literature or caselaw, those seeking out non-contradictory solutions to a fragmented legal landscape, those carving out general legal principles that apply across multiple jurisdictions, and those uncovering inconsistencies in legal practice. A common feature of these diverse types of scholarship is that the quality of the article lives and dies with the quality and comprehensiveness of its argument. Whereas an empirical field may make use of experiments of limited scope, incomplete musings in legal theory or half-done overviews of the caselaw on a topic are about as useful to readers as a hammer without a handle.

Another common feature in international law and related fields, is that a lot of us are working in our second, third or even fourth language. This means that for such work, perhaps even more so than for empirical work, subjecting your ideas to questions, even annoying ones, and having your work encounter a great, perhaps even slightly overzealous copy-editor, is paramount. The best submissions we receive have already been presented, reimagined, written, workshopped and rewritten again with the help of authors' colleagues, at conferences and seminars. What happens often however is that, when translating such multidimensional and partially oral ideas into the one-dimensional form that text is, insufficiencies in the argument suddenly become apparent and nuances may be lost. It is in this phase that the journal through peer review, editing and copy-editing can apply its maieutic trade. At the EJLS we aim to facilitate this by conducting structured reviews addressing various aspects of each article with substantial feedback even for articles that are eventually rejected. Just like the midwife

however, we cannot give birth for the author, who must ultimately go through the pains of idea-generation and finalisation themselves.

It has also occurred once or twice that we have been accused of being overly meddlesome or incapable of seeing genius even when right in front of us. It might be the dark side of our maieutic ambition. In certain cases, authors are not aiming to conceive a new great conception but are mainly attempting to increase the length of their publication list with as few hours invested as possible – something there are strong institutional motivations to do when hiring committees and tenure boards rely mainly on quantitative measures of research productivity. In such cases, maieutic reviewers and editors may certainly come off as meddlesome, going beyond their role as gate keepers. Or it may also be the case that we too occasionally get it wrong, as Jasonya's drawing below suggests.



Socrates had a different response to such criticism, stating that,

> And if I abstract and expose your first-born, because I discover upon inspection that the conception which you have formed is a vain shadow, do not quarrel with me on that account… For I have actually known some who

> were ready to bite me when I deprived them of a darling folly; they did not perceive that I acted from good will.[7]

Similarly, the editors and reviewers of the EJLS are acting in good will. We aim to conduct a service to the academic community, assisting great ideas in coming to light, and making them available for anyone to read for free, but the ideas, and the labours conducted in turning them into articles, are ultimately the merit of the authors. As is of course the blame should these ideas ultimately be vain shadows or darling follies.

Having thus absolved ourselves of any undue responsibility or merit, I present to you in this issue twelve great conceptions that we have assisted in delivering. The issue begins with three interesting New Voices pieces. Like this editorial, **Cian Moran** utilises a story from ancient Greece in his piece 'Navigating between Scylla and Charybdis' to illustrate the inherent conflict between freedom of navigation and maritime security. Staying in the world of waterways, **Giorgia Carratta and Liv Jaeckel** take on the question of global plastics governance, arguing that conceiving plastic pollution as a maritime issue prevents international law from addressing the problem at its root, which is much further upstream. Finally, **Henrique J. B. Marcos** contributes with a legal logic piece differentiating between the consistency of rules and the consistency of statements to show that although fragmented, international law has an internal logic – conversing with the very first article of the very first issue of this journal, Martti Koskenniemi's 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education'.

The issue also publishes four general articles. The first article in this section is **Gerd Winter**'s treatment on the right of standing before the Court of Justice of the European Union. That piece uncovers inconsistencies in the court's application of the Plaumann formula and suggests a reform of its approach to standing, rebuilding consistency within the caselaw. This is followed by **Barbara Warwas**' article reframing the debate on multilevel regulation and alternative dispute mechanisms, inspired by historical

[7] Ibid.

examples of dispute resolution. That piece presents a research framework for a newly established research group on multilevel regulation at the Hague University of Applied Sciences. Following this we have two articles on human rights-related topics. **MariaCaterina La Barbera and Isabel Wences** write about three different ways that Inter-American Court of Human Rights conceptualises gender, while **Emerson Cepeda Rodriguez** contributes with a piece on violence against human rights activists perpetuated under the guise of protecting democracy.

In addition to these regular articles and New Voices pieces, this issue contains a special section on legal imaginaries. This section is guest-edited and curated by **Rebecca Mignot-Mahdavi and Gail Lythgoe,** the latter of which starts off the section with an introductory piece on how academic disciplines limit the imaginaries of scholars and impact the kinds of questions they ask and answers they are willing to accept. The articles within the section are three. The first is written by **Weihang Zhou** who takes on the problem of states' right to self-defence when aggressor states attack from within the territory of a third state. Meanwhile **Armi Bayot** takes on the problem of indigenous peoples' rights in a state-centered understanding of international law and **Derya Çakım** writes on the use of metaphors in international law.

The issue closes with **Niels Hoek**'s enthusiastic review of Geoffrey Garver's new book, Ecological Law and the Planetary Crisis: A Legal Guide for Harmony on Earth.

NEW VOICES

NAVIGATING BETWEEN SCYLLA AND CHARYBDIS: INTERNATIONAL LAW, MARITIME SECURITY AND FREEDOM OF NAVIGATION

Cian Moran*

There has been longstanding friction between international law and international security, with the Law of the Sea being no exception. Where once, states had wide latitude to utilise freedom of the seas to engage in commerce and colonialism, such freedom is now more restricted. While freedom of navigation is imperative for global commerce, the question arises as to how such freedom can be best protected from insecurity.

The research question determines whether the tension between maritime security and freedom of navigation can be reconciled. To answer this question, this paper will analyse the legal and security framework of maritime security and freedom of navigation. Through this analysis, the author will suggest a mechanism whereby maritime security can be improved to protect the freedom of navigation of seafaring states without compromising the sovereignty of coastal states.

The Law of the Sea's interaction with maritime security is vital in this area, particularly in relation to maritime terrorism. Relevant aspects of international law such as the UN Convention on the Law of the Sea, Convention on the Suppression

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of Unlawful Acts against the Safety of Maritime Navigation and the International Ship and Port Facility Security Code are reviewed.

The conclusion is that absolute freedom of the seas is impractical, and regulation and enforcement are vital to ensure the safe enjoyment of freedom of navigation. Notably, supporting state maritime patrols is a key method of protecting freedom of navigation from maritime insecurity while preventing the erosion of state sovereignty.

Keywords: International Law, Maritime Security, Freedom of Navigation, Law of the Sea, International Security, Law and Security, Maritime Terrorism, Piracy.

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I. INTRODUCTION

> The rule of law–often so solid on land, bolstered and clarified by centuries of careful wordsmithing, hard fought jurisdictional lines, and robust enforcement regimes–is fluid at sea, if it's to be found at all.[1]

Seafaring is a major industry, comprising for over 90% of global trade.[2] Such trade has expanded over previous years, even as it reduced somewhat recently due to the effects of Covid19.[3] Freedom of navigation is key in making this global trade possible.[4] Being the lifeblood of the maritime industry, freedom of navigation is a common good, in the interest of all nations to maintain.[5] However, in a globalised world, where maritime security[6] must be balanced against the importance of commerce, the tensions between security and freedom are more pressing than ever. There is a surprising lack of attention given to the intersection of the two, especially in relation to international law.

To remedy this lacuna, this article aims to determine whether the tension between maritime security and freedom of navigation can be reconciled. It does so by analysing the framework within which security and freedom conflict and suggests a mechanism whereby maritime security can be improved to protect

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1 Ian Urbina, *The Outlaw Ocean: Crime and Survival in the Last Untamed Frontier* (Vintage 2020), Xiii.

2 Marko Golnar and Bojan Beškovnik, 'Green Maritime Transport as a Part of Global Green Intermodal Chains' (2020) 3 *Journal of Maritime & Transportation Science*, 21.

3 United Nations Conference on Trade and Development, '*Review of Maritime Transport 2020* ' (2020), Xi.

4 The concept whereby ships can safely travel through the territorial seas, contiguous zones or Exclusive Economic Zones of a coastal state or the high seas. See: Tommy Koh, 'Setting the Context: A Globalized World' in Myron H Nordquist and others (eds), *Freedom of Navigation and Globalization* (Brill 2014), 5.

5 ibid, 4.

6 In essence, a set of policies taken with the aim of securing the maritime domain. See: Basil Germond, 'The Geopolitical Dimension of Maritime security' (2015) 54 *Marine Policy*, 137.

the freedom of navigation of seafaring states without compromising coastal state sovereignty.

This article first provides a brief overview of the tension between freedom of navigation and security. Then a review is made of the different types of freedom of navigation under international law (by treaty, case law and custom). This is followed by an analysis of maritime terrorism and piracy, and how these are distinct concepts under international law, before turning to the different legal instruments that attempt to resolve them. The next section analyses the tension between freedom of navigation and maritime security before offering tentative suggestions as to how these might be reconciled. Finally, the article concludes that there is a way to balance freedom of navigation with maritime security by strengthening coastal state support. Such a solution requires a compromise between both principles.

Such a balancing act is inherent in the very nature of seafaring. This might be illustrated with the legend of Odysseus, who was forced to navigate his ship through a narrow strait with the six-headed monster of Scylla on one side and the whirlpool monster Charybdis on the other. So too must international law navigate between the twin threats of unfettered free navigation and excessive maritime securitisation. I was especially struck by this when onboard a civilian ship near Indonesia in an area where there was a heightened risk of piracy. Due to this threat, the crew placed uniformed dummies in visible locations on the deck to give the impression of additional sentries and rigged hoses around the ship to respond to attacks with high-pressure jets of water. Indonesia lacks the capacity to conduct effective naval patrols, especially over its disputed territorial waters and resists letting other countries patrol its waters despite the high volume of shipping.[7] Despite the sense of security provided by the ship's proximity to land, the threat of maritime violence was therefore high, with the closeness to land paradoxically putting the crew in greater danger from shore based actors. This encapsulates a key issue: addressing the Scylla of freedom of

[7] Sebastian Axbard, 'Income Opportunities and Sea Piracy in Indonesia: Evidence from Satellite Data' (2016) 8 *American Economic Journal: Applied Economics* 154, 158–159.

navigation with the Charybdis of the enforcement of maritime security by states, especially when a state is unable or unwilling to conduct enforcement within their own sovereign waters. Critical in this is that piracy and maritime terrorism are distinctly different concepts whose designation matters when approaching maritime security.

II. BACKGROUND

The tension over freedom of navigation versus maritime security is not a new one. Scholars from two of Europe's major seafaring nations are central in this debate. Hugo Grotius of the Netherlands famously advocated for freedom of navigation in *Mare Liberum,*[8] while John Selden of England endorsed *Mare Clausum*, arguing that the sea required regulation for the exercise of ownership rights.[9] This was tied to contemporary English maritime interests, including laying claim to adjacent seas for jurisdiction.[10] Grotius' arguments prevailed, as the ideal of freedom of navigation was useful for other European powers, who needed freedom of the seas to explore and conduct commerce in the East.[11] Furthermore, European colonialism has meant that European concepts of international law became universalised by the end of the nineteenth century,[12] further promoting freedom of navigation.

The importance of freedom of navigation for global trade is evidenced by the *Ever Given's* grounding in the Suez Canal in March 2021, which cost an

[8] Hugo Grotius, Mare Liberum (The Free Sea) (Liberty Fund 2004),37. See: Efthymios Papastavridis, 'The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum Versus Mare Clausum Revisited' (2011) 24 *Leiden Journal of International Law*, 50.

[9] See also: Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press 1999), 116-118.

[10] Mark Somos, 'Selden's Mare Clausum. the Secularisation of International Law and the Rise of Soft Imperialism' (2012) 14 *Journal of the History of International Law,* 292-293.

[11] Malcolm N Shaw, *International Law* (Cambridge University Press 2017), 410.

[12] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 *Third World Quarterly,* 746.

estimated $9.6bn a day,[13] with every further week of closure reducing annual global trade growth by 0.2-0.4%.[14] While not a terrorist incident, the prevention of navigation by a single ship and its impact on the global economy shows the fragility of contemporary maritime trade and security, as well as the risks posed by terrorism. This was apparent to Singapore, who warned in 2005 that Al Qaeda was developing its maritime terrorism capabilities and even a single explosives laden vessel being driven into a port could halt global trade and cause severe economic damage.[15] Likewise, so called "maritime choke points" such as the Turkish or Malacca straits are highly vulnerable to disruption. Such choke points are notable for high levels of shipping amidst natural constraints to navigation, making them vulnerable to attacks with devastating economic consequences.[16] With this in mind, we must turn to freedom of navigation under international law.

III. FREEDOM OF NAVIGATION

When discussing freedom of navigation, one must first specify the types of freedom of navigation that exist under international law. Critical in this is the United Nations Convention on the Law of the Sea (UNCLOS), which was heavily influenced by Grotian *Mare Liberum.*[17] UNCLOS is the result of the

[13] Economist Intelligence Unit, 'Suez Canal Blockage Disrupts Global Trade Supplies.' (*Economist Intelligence Unit*, 2021) <https://go-gale-com.jproxy.nuim.ie/ps/i.do?p=ITOF&u=nuim&id=GALE%7CA656991320&v=2.1&it=r&sid=summon> accessed 9 November 2021.

[14] Allianz Research, *The Suez Canal Is Not the Only Thing Clogging Global Trade* (Allianz SE 2021), 1.

[15] Nong Hong and Adolf KY Ng, 'The International Legal Instruments in Addressing Piracy and Maritime terrorism: A Critical Review' (2010) 27 *Research in Transportation Economics,* 53.

[16] See David L Alderson, Daniel Funk and Ralucca Gera, 'Analysis of the Global Maritime Transportation System as a Layered Network' (2020) 13 *Journal of Transportation Studies,* 296 and Mohd Hazmi Mohd Rusli, 'Navigational Hazards in International Maritime Chokepoints: A Study of the Straits of Malacca and Singapore' (2012) 8 *Journal of International Studies,* 66-67.

[17] David Garfield Wilson, 'Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of His Ship by Foreign Warships' (2008) 55 *Naval Law Review,* 163.

longest-running negotiation in UN history,[18] and is widely regarded as the "authoritative maritime safety and security instrument of our time".[19] It provides a comprehensive legal foundation, balancing the rights and duties of coastal states in exploiting the maritime resources off their coasts as well as the interest of the international community generally, particularly in maintaining freedom of navigation.[20]

Freedom of navigation relating to innocent passage through the territorial sea of coastal states is a longstanding principle of customary international law[21] and was codified in UNCLOS.[22] The right of innocent passage is qualified for vessels (including warships) in Article 19 of UNCLOS, which defines passage as innocent when it is not prejudicial to the peace, good order or security of the coastal state.[23] The principal was tested in the *Corfu Channel* case where the ICJ ruled that the mining of the North Corfu Channel "was a violation of the right of innocent passage which exists in favour of foreign vessels (whether warships or merchant ships) through such an international highway".[24] The coastal state has the right to protect against passage that is not innocent,[25] and can require

[18] David Freestone, 'The Law of the Sea Convention at 30: Successes, Challenges and New Agendas', *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas* (Brill 2013), 1.

[19] RL Castaneda, C Condit and B Wilson, 'Legal Authorities for Maritime Law Enforcement, Safety, and Environmental Protection' in Michael McNicholas (ed), *Maritime Security* (Elsevier 2016), 436.

[20] James Kraska and Raul Pedrozo, *International Maritime security Law* (Brill 2013), 215.

[21] Susan Breau, *International Law* (Oxford University Press 2009), 99.

[22] *Convention on the Law of the Sea (10 December 1982) 1833 U.N.T.S. 397.* Art. 17.

[23] The Convention also defines a number of examples. See: ibid, Art. 19.

[24] International Court of Justice, *The Corfu Channel Case (United Kingdom v Albania). ICJ Report 4* (Judgement of 09 April 1949), 10. It must be noted that the ruling specifically related to straits and warships though its ruling is important for what constitutes innocent passage. See Donald Rothwell and Tim Stephens, *The International Law of the Sea* (Hart 2016), 224-225.

[25] *Convention on the Law of the Sea (10 December 1982) 1833 U.N.T.S. 397.* (n 23). Art. 25

warships not complying with laws within its territorial seas to leave immediately.[26]

During the twentieth century, coastal states' areas of maritime jurisdiction were extended significantly, which also increased their enforcement obligations.[27] Among these obligations, coastal states must ensure that foreign vessels can safely enjoy freedom of navigation within their waters. Failure to suppress maritime terrorism would thus constitute a breach of the coastal state's international obligations.[28] Coastal states also have an interest in protecting their waters, as their economies would be adversely affected by instability due to maritime terrorism.[29]

Freedom of navigation is thus an important aspect of the international law of the sea, with UNCLOS explicitly highlighting that freedom of navigation on the high seas is open to all states, whether coastal or landlocked.[30] Vessels are subject to the jurisdiction of the state under whose flag they sail. [31] Essentially, flag states are responsible for order in the high seas and regardless of the ship's location, the flag state maintains jurisdiction. This includes prescriptive jurisdiction in other states' territorial and internal waters.[32] A flag state may authorise another state to exercise jurisdiction on its behalf, or even enforce flag state law, although this is rare.[33] A key reason for exercising such sovereignty is countering maritime terrorism.

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[26] ibid. Art. 30.

[27] Stuart Kaye, 'Maritime Jurisdiction and the Right to Board' (2020) 26 *James Cook University Law Review*, 17.

[28] Md Saiful Karim, *Maritime terrorism and the Role of Judicial Institutions in the International Legal Order* (Brill 2017), 98.

[29] Hong and Ng (n 15), 51.

[30] *Convention on the Law of the Sea (10 December 1982) 1833 U.N.T.S. 397.* (n 22). Art 87 (1).

[31] Shaw (n 11), 455.

[32] Kaye (n 27), 17-18.

[33] ibid.

IV. MARITIME TERRORISM

Despite the threat that international terrorism poses to freedom of navigation, the international community has been slow on maritime terrorism prevention, preferring to focus on jurisdiction once a terrorist incident has already occurred.[34] Both piracy and terrorism pose a threat to freedom of navigation and are frequently conflated. Distinguishing between the two is, however, important. International opposition to piracy is longstanding, with pirates being seen as *hostis humani generis*; enemies of all humankind and prosecutable by any nation upon the high seas.[35] Furthermore, piracy has an explicit definition under UNCLOS,[36] whereas there is no internationally agreed definition of terrorism.[37] As is often reiterated, political violence's classification as either freedom fighting or terrorism can be a matter of opinion.[38] Given that piracy and maritime terrorism are distinct, it is important to differentiate between an act of

[34] Justin SC Mellor, 'Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime terrorism' (2002) 18 *American University International Law Review*, 343.

[35] Robert C McCabe, *Modern Maritime Piracy: Genesis, Evolution and Responses* (Routledge 2018), 22.

[36] Namely, piracy is defined under UNCLOS as:

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

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

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

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

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

Convention on the Law of the Sea (10 December 1982) 1833 U.N.T.S. 397. (n 23). Art. 101.

[37] Rumyana Grozdanova, '"Terrorism" - Too Elusive a Term for an International Legal Definition?' (2014) 61 *Netherlands International Law Review*. 306-307.

[38] Gus Martin, *Understanding Terrorism: Challenges, Perspectives, and Issues* (SAGE Publications 2006), 3.

maritime violence as terrorism or piracy. Acts of piracy can enable a state to avoid its obligations under UNCLOS.

There have been various attempts to assimilate piracy and terrorism as crimes,[39] but the conventional view remains that the definition of piracy excludes terrorism, as terrorism is politically motivated.[40] Pirates and maritime terrorists do however share several attributes; notably, both need money to sustain their operations and operate in areas of weak governance.[41] The distinction between pirates and terrorists can also be blurred, with terrorists adopting pirates' tactics and pirates adopting terrorists' ideology.[42] However, pirates and maritime terrorists have a key difference, in that pirates are motivated by profit while terrorists have ideological goals.[43] Furthermore, while terrorists court the media, pirates usually seek to avoid attention.[44] This was notable in the hijacking of the Italian cruise liner, *Achille Lauro* by the Palestine Liberation Front in 1985.[45] Likewise, after the 9/11 terrorist attacks in 2001, states saw the need to cooperate against terrorism, including maritime terrorism[46] and the International Maritime Organisation[47] (IMO) began to focus on maritime security.[48] Such security

[39] Douglas Guilfoyle, 'Piracy and Terrorism' in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea* (Hart 2015), 35.

[40] ibid, 46–47.

[41] Joshua Regan, 'The Piracy Terrorism Paradigm: An Interlinking Relationship' (2019) 11 *Behavioral Sciences of Terrorism and Political Aggression*, 150. For further analysis of the link between weak governance and maritime violence, see Christian Bueger, 'Learning from Piracy: Future Challenges of Maritime security Governance' (2015) 1 *Global Affairs*, 34–35.

[42] Hong and Ng (n 15), 51.

[43] Regan (n 41), 150.

[44] ibid, 150.

[45] Erica Pearson, 'Achille Lauro Hijacking' in Gus Martin (ed), *The SAGE Encyclopedia of Terrorism* (Sage Publications 2012), 8.

[46] Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011), 147.

[47] The IMO is the UN agency that seeks to promote the safety and security of international shipping.

[48] R William Johnstone, *Protecting Transportation: Implementing Security Policies and Programs* (Elsevier 2015), 108.

concerns became increasingly problematic in the twenty-first century as some terrorist groups became more sophisticated and utilised maritime violence in their tactics.[49]

In an attempt to address the conflict between freedom of navigation and maritime security, the IMO passed the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) in 1988,[50] which remains the primary legal mechanism against maritime terrorism.[51] In summary, it requires states to criminalise and prosecute actions such as hijacking, attacking ships or committing other types of violence that endanger navigation.[52] Similar to other international counter-terrorism treaties, the SUA focuses on apprehension and conviction rather than prevention.[53] The SUA makes no distinction between piracy and maritime terrorism.[54] While most UN member states have signed the SUA (accounting for nearly 95% of world shipping), several important states such as Indonesia, Malaysia and Somalia are not signatories.[55] Such states experience a high level of maritime violence within their waters[56] but fear that the SUA will undermine their sovereignty.[57]

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[49] Victor Asal, Justin V. Hastings and Karl Rethemeyer, 'Maritime Insurgency' (2020) 34 *Terrorism and Political Violence*, 9.

[50] *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (10 March 1988) 1678 U.N.T.S I-29004.*

[51] Karim (n 28). 63.

[52] *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (10 March 1988) 1678 U.N.T.S I-29004* (n 51). Articles 3-5.

[53] Ted L McDorman, 'Maritime terrorism and the International Law of Boarding of Vessels at Sea: Assessment of the New Developments', *The Oceans in the Nuclear Age : Legacies and Risks: Expanded Edition* (Brill 2014), 241.

[54] Guilfoyle (n 39), 46.

[55] International Maritime Organisation, 'Status of Treaties' (2021) <https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/StatusOfTreaties.pdf> accessed 19 November 2021.

[56] Hong and Ng (n 15), 56.

[57] Adam J Young and Mark J Valencia, 'Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility' (2003) 25 *Contemporary Southeast Asia*, 277.

While the SUA was welcomed, after 9/11, seafarers soon found themselves facing new threats, particularly the increased threat of maritime terrorism. A prominent fear was that Weapons of Mass Destruction (WMDs) could fall into the hands of terrorists, leading to the 2005 protocol to the 1988 SUA.[58] The Protocol revised the SUA to cover areas such as the carriage of WMDs and terrorist actions,[59] but the focus is on flag state consent to conduct boardings, which reduces its effectiveness.[60] While a welcome development, the SUA reaffirms the exclusivity of flag state jurisdiction[61] and offers no constabulary role for states to board, search, or arrest persons or ships engaged in terrorism.[62] Furthermore, its applicability relies on ambiguous language, which undermines its utility in counterterrorism.[63] Another development was the International Ship and Port Facility Security (ISPS) Code, which was a global effort led by the US Coast Guard.[64] ISPS's execution relies on cooperation between state and non-state actors to improve security among vessels subject to SOLAS.[65] However, the ISPS does not apply to cargo ships of less than 500 gross tonnage,[66] and so fails to address the danger posed by smaller crafts that are often used in maritime

[58] Aleeza Moseley, 'The Implementation of International Maritime security Instruments in CARICOM States' (United Nations-Nippon Foundation 2009), 22.

[59] *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (01 November 2005) 1823 U.N.T.S A-29004* (2005), Art 3.

[60] Hong and Ng (n 15). 57.

[61] *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (10 March 1988) 1678 U.N.T.S I-29004* (n 50), Art.9.

[62] José Luis Jesus, 'Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects' (2003) 18 *International Journal of Marine and Coastal Law*, 391.

[63] Guilfoyle (n 39), 47-48.

[64] Bruce Stubbs and Scott Truver, 'Towards a New Understanding of Maritime Power' in Andrew TH Tan (ed), *The Politics of Maritime Power: A Survey* (Routledge), 11.

[65] International Maritime Organisation, *International Ship and Port Facility Security Code and Solas Amendments 2002* (IMO 2003), 4.

[66] ibid, Art. 3.1.

terrorism.[67] Another important instrument is the Proliferation Security Initiative (PSI) was adopted in 2003 to address the trafficking of WMDs.[68] The PSI has been signed by over one hundred states but does not create new laws.[69] Rather it relies on existing laws and while it does not create legally binding obligations on states, the PSI is a useful tool in combating maritime terrorism,[70] given its multinational dimension. Together these instruments recognise maritime terrorism as a global problem that can only be addressed through international cooperation.[71] Nonetheless, these various legal instruments remain inadequate.

Apprehending terrorists on the high seas is both difficult and legally complex, given that unlike acts of piracy, there is no universal jurisdiction conferred on acts of terrorism.[72] Furthermore, the SUA does not authorise the seizure of terrorist vessels unlike pirate vessels, limiting its effectiveness.[73] This is likely due to the lack of a universal definition on what a terrorist is,[74] complicated by the increasing convergence between piracy and maritime terrorist activity.[75] The lacuna within which maritime counterterrorism exists is compounded because authority to intercept a vessel does not automatically involve the authority to detain the vessel, its crew or its

[67] Klein (n 46), 306.

[68] U.S. Department of State, 'Proliferation Security Initiative' (2016) <https://2009-2017.state.gov/t/isn/c10390.htm> accessed 19 November 2021.

[69] Arms Control Association, 'The Proliferation Security Initiative (PSI) At a Glance' (2020) <https://www.armscontrol.org/factsheets/PSI> accessed 19 November 2021.

[70] McDorman (n 53), 242-243.

[71] Pat Burke, 'Global Maritime security – Maintaining Public Order of the Oceans' [2015] *Defence Forces Review*, 66.

[72] Klein (n 46), 147.

[73] *Convention on the Law of the Sea (10 December 1982) 1833 U.N.T.S. 397.* (n 23), Art. 105.

[74] Guilfoyle (n 39), 44.

[75] Hong and Ng (n 15), 54.

cargo.[76] As most maritime violence takes places within territorial waters, the arrest and prosecution of perpetrators is the responsibility of the coastal state.[77] As such, the coastal state could even be held responsible for failing to take action against maritime terrorism within its waters.[78] However, without coastal state consent, foreign warships lack jurisdiction over maritime violence, including maritime terrorists,[79] occurring within territorial waters (even if the same violence would be seen as piracy if it occurred on the high seas).[80] States jealously guard their sovereignty, and will usually be unwilling to cede jurisdiction, even to combat maritime terrorism.[81] Furthermore, maritime violence most often takes place in areas of weak governance.[82] Another complicating factor is that fragile states are overwhelmingly located in the Global South.[83] Due to colonialism, these states have had recent experience of foreign domination and fear erosion of their sovereignty under the guise of supranational cooperation.[84] This is an issue in South-East Asia where several terrorist groups with substantial maritime capabilities operate and where maritime attacks usually occur within territorial or archipelagic waters.[85] This poses a threat to seafarers being able to exercise their freedom of navigation and demonstrates the need to address maritime terrorism to ensure maritime security.

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[76] Winston McMillan, 'Something More Than a Three-Hour Tour: Rules for Detention and Treatment of Persons at Sea on U.S. Naval Warships' [2011] *The Army Lawyer*, 39.

[77] Young and Valencia (n 57), 270.

[78] Karim (n 28), 98.

[79] Article 100 of UNCLOS requires states to cooperate against piracy on the high seas, while Article 101's definitions are limited to the high seas. See *Convention on the Law of the Sea (10 December 1982) 1833 U.N.T.S. 397.* (n 23), Arts.100-101.

[80] Such violence within territorial waters is not deemed "piracy" but rather, "sea-robbery". See Urbina (n 1), 325-326.

[81] Klein (n 46), 304.

[82] See (n 41).

[83] Fund for Peace, *Fragile States Index Annual Report 2021* (2021), 7-8.

[84] Thomas G Weiss, *What's Wrong with the United Nations and How to Fix It* (Polity Press 2016), 22.

[85] Hong and Ng (n 15), 53-55.

V Addressing Maritime-Insecurity and Freedom of Navigation

Maritime-insecurity poses a grave threat to seafarers and their freedom of navigation but addressing it is mired in controversy. Without coastal state consent, the main way for a state to address maritime violence in the territorial waters of another state would be via a UN Security Council (UNSC) Resolution. Chapter VII of the UN Charter empowers the UNSC to authorise military action.[86] This could be used to respond to maritime violence in the territorial waters of a state unable or unwilling to respond. Likewise, the UNSC remains an area that could have a key role to play in countering maritime violence, by enabling international action without flag states ceding their exclusive jurisdiction.[87] However, UNSC requires unanimity among its five permanent members (P5) who have their own agendas. This means the UNSC's response to crises remains ad-hoc and subject to the P5's self-interest.[88] Nonetheless, the UNSC remains a keystone in international security, and is unique in enjoying legitimacy for authorising the use of force without the host state's consent. A prime example is Operation Atalanta, whereby the EU deploys an anti-piracy naval operation off the coast of Somalia under UNSC authorisation.[89] However, while Operation Atalanta initially authorised Member States to enter Somali

[86] *Charter of the United Nations (1 U.N.T.S. XVI, 1945)*. Article 41.

[87] Klein (n 46), 325.

[88] Aidan Hehir, 'The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect' (2013) 38 *International Security*, 137-138.

[89] Security Council Report, 'Somalia: Anti-Piracy Resolution' (*Security Council Report*, 2021) <https://www.securitycouncilreport.org/whatsinblue/2021/12/somalia-anti-piracy-resolution-3.php> accessed 2 April 2022.

territorial waters to suppress piracy,[90] in March 2022, this was not renewed.[91] Likewise, Operation Atalanta is enacted to counter piracy and is therefore of limited utility as a framework for tackling the more contentious issue of terrorism.

One possibility is extending universal jurisdiction over piracy to include maritime terrorism.[92] Given the increasing conflation between terrorism and maritime piracy, this is a potential option.[93] Permitting states' exclusive jurisdictional interests to exist alongside the promotion of maritime security via collective rules is feasible.[94] This could assist weak states in state and capacity building through addressing the importance of state governance in maritime-insecurity.[95] However, opening the capacity of states to prosecute terrorism in the name of maintaining freedom of navigation risks opening a Pandora's Box of legal problems. For example, in 2017 Japan passed anti-terrorism legislation that deems protesting near Japanese whaling ships as terrorism.[96] Consequently, marine conservation protesters risk arrest and imprisonment as terrorists by Japan, even for protests conducted in international waters.[97] Mandating states to detain or prosecute terrorists enters dubious legal territory given the lack of international agreement on

[90] Efthymios Papastavridis, 'EUNAFOR Operation Atalanta off Somalia: The EU in Unchartered Legal Waters?' (2015) 64 *The International and Comparative Law Quarterly*, 542.

[91] EU NAVFOR, 'EU NAVFOR Atalanta Statement on the UNSC Resolution on Fighting Piracy Off the Coast of Somalia Non-Extension Announcement' (*EU NAVFOR*, 2022) <https://eunavfor.eu/news/eu-navfor-atalanta-statement-unsc-resolution-fighting-piracy-coast-somalia-non-extension-announcement> accessed 2 April 2022.

[92] Jesus (n 62), 399.

[93] Guilfoyle (n 39), 52.

[94] Klein (n 46), 327.

[95] Young and Valencia (n 57), 280-281.

[96] Ben Doherty, 'Sea Shepherd Says It Will Abandon Pursuit of Japanese Whalers' (*The Guardian* 29 August 2017). <https://theguardian.com/environment/2017/aug/29/sea-shepherd-says-it-will-abandon-pursuit-of-japanese-whalers> accessed 2 April 2022.

[97] Urbina (n 1), 404.

what exactly a terrorist is. This is compounded by the fact most states are unlikely to want to pursue questionably named "terrorists" like marine conservation protesters in the interests of states like Japan.

A further issue with extending state jurisdiction on the high seas is that some states see the lawlessness of the high seas as useful in counter-terrorism. A prime example is the US, which sequesters terrorist suspects on board American warships on the high seas, enabling the US to detain and interrogate them while evading humanitarian[98] and domestic law.[99] Using the length of sea passages as a way to prolong interrogations would appear to go against American federal law, which deems delay for the purpose of interrogation as the "epitome of delay".[100] However, terrorist suspects' attempts to get their statements made during detention at sea deemed inadmissible have thus far been rejected in American federal courts.[101] The fact that some states benefit from the high seas' relative lawlessness remains a further obstacle to countering maritime terrorism, because they have a stake in retaining the current legal system's ineffectiveness on the high seas.

One potential response to ensuring freedom of navigation and combatting maritime-insecurity without eroding state sovereignty is political rather than legal. As highlighted above, maritime violence off the coast of Indonesia is compounded by a lack of funding to conduct naval patrols, especially given that Indonesia comprises over 18,000 islands.[102] In such cases, aid could be provided to acquiescing states in the form of funding and providing them with the naval vessels and maritime training enabling them to conduct their own naval patrols. This would be of enormous utility, protecting freedom of navigation by aiding coastal states to tackle maritime violence without impeding their sovereignty. This model has been used before: after Ireland

[98] See McMillan (n 76), 35-36.

[99] Meghan Claire Hammond, 'Without Unnecessary Delay: Using Army Regulation 190-8 to Curtail Extended Detention at Sea' (2016) 110 *Northwestern University Law Review*, 1305-1306.

[100] *Corley v United States, 556 US 303 (2009).*

[101] *United States v Ahmed Salim Faraj Abu Khatallah, 314 F Supp 3d 179 (DDC 2018).*

[102] Axbard (n 6), 158-159.

acceded to the European Economic Community (EEC) in 1973, its navy consisted of a single offshore patrol vessel and three aged minesweepers, which had extremely limited range.[103] When the EEC adopted a Community-wide 200 mile Exclusive Economic Zone in 1976,[104] Ireland's existing navy was entirely inadequate for patrolling Ireland's waters and were unable to tackle maritime smuggling of weapons and explosives to paramilitaries in Northern Ireland.[105] Consequently, EEC funding was granted to enable Ireland to expand and modernise its fleet to permit operational effectiveness.[106] Financial assistance for states' self-help has a precedent for addressing maritime security and freedom of navigation while supporting state sovereignty. However, while such a system is legally useful in that it enables states to improve their own maritime security without risking the erosion of their sovereignty via foreign interference, the political and economic aspects of such a system is another matter. Such a system of financial aid to would likely require significant oversight by an external body to prevent corruption, which creates its own difficulties in terms of foreign involvement in a state's internal affairs. Key in the Irish example is the EEC's existing model for financial assistance that is unavailable for many developing states. Regional organisations such as the African Union or Association of Southeast Asian Nations could be explored as possible vehicles to provide financial assistance to promote their members' maritime security.

[103] Tom MacGinty, *The Irish Navy: A Story of Courage and Tenacity* (The Kerryman Ltd 1995), 168-169.

[104] The EEC adopted a 200 mile Exclusive Economic Zone across its waters in 1976, before UNCLOS and its EEZ limits came into being. See: Council of the European Communities, *Council Resolution of 3 November 1976 on Certain External Aspects of the Creation of a 200-Mile Fishing Zone in the Community with Effect from 1 January 1977* [1976] OJ C105/1.

[105] Aidan McIvor, *A History of the Irish Naval Service* (Irish Academic Press 1994), 145.

[106] ibid.

VI Conclusion

An unfettered approach to freedom on the high seas is problematic in an era of international terrorism and globalised commerce. Such tension between freedom and security on the seas is not a unique development, with twentieth-century states already having realised that "absolute *Mare Liberum*" was untenable and maritime freedom required regulation in order to safeguard its enjoyment by all.[107] However, further action on this is difficult, because it is unlikely there will be any ceding of coastal or flag state sovereignty in the near future, and states will continue to guard their jurisdictional rights over their citizens and flagged vessels.[108] Such divergent interests on the exercise of jurisdiction is a key issue for maritime security on the high seas

Simply expanding states' sovereignty over adjacent waters would be a poor attempt to safeguard freedom of navigation since many states lack effective enforcement mechanisms for the waters already under their jurisdiction.[109] Furthermore, maritime security traditionally relied on state enforcement within defined waters, which is now problematic given the ongoing disputes over maritime boundaries in South-East Asia, complicating the issue of legal jurisdiction.[110] Maritime security has traditionally relied on state enforcement within defined waters but this has proved problematic in South East Asia, notably in the South China Sea.[111] Nonetheless, perhaps the best method to address this is by providing financial and technical assistance to sovereign states. This would strengthen their ability to conduct maritime patrols and combat maritime terrorism without the political controversy of

[107] Michael A Becker, 'The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea' (2005) 46 *Harvard International Law Journal*, 170.

[108] Burke (n 71), 71.

[109] Hong and Ng (n 15), 55.

[110] Young and Valencia (n 57), 270.

[111] Benjamin K Wagner, 'Lessons from Lassen: Plotting a Proper Course for Freedom of Navigation Operations in the South China Sea' (2016) 9 *Journal of East Asia and International Law.*

encroaching on states' sovereignty under international law, especially in Global South nations.

Just as states once compromised on freedom of navigation in the high seas in order to address the threat of piracy, they must now accommodate the need to combat maritime terrorism.[112] This balancing act will remain an area of controversy for the near future.

[112] Jesus (n 62), 400.

GLOBAL PLASTICS GOVERNANCE: OPPORTUNITIES AND CHALLENGES FOR ITS IMPROVEMENT FROM A LIFE CYCLE PERSPECTIVE

Giorgia Carratta* and Liv Jaeckel♣

Despite being an alarming and widespread environmental issue, plastic pollution is still lacking an adequate response from the international community. The interconnection between upstream human activities and downstream environmental consequences has recently been recognized as a crucial element to consider for the prevention and minimization of plastic pollution. Production, consumption, and waste management have only recently begun to come into focus. Moreover, plastic pollution has long been framed as a marine issue and the role played by other ecosystems, such as freshwater ones, has been widely underestimated. This article explores the relevant international legal framework by adopting a life cycle perspective. In particular, it highlights the opportunities and challenges existing instruments offer at each stage of the plastic life cycle: production and manufacturing, consumption, waste management and pollution. In parallel, the authors identify key aspects that could be covered by the upcoming 'plastic treaty' under the auspices of the United Nations Environment Assembly (UNEA). With

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a view to strengthening global plastics governance, it is argued that amending existing legal instruments is as crucial as adopting a new ad-hoc treaty.

Keywords: environment, international law, microplastics, plastic life cycle, plastic pollution

I. INTRODUCTION

'The difficulty of governing plastic has been rising as production accelerates, consumption globalizes, pollution sources diversify and international trade obscures responsibility'.[1]

There are still many uncertainties about the exact scale of plastic accumulation in the environment.[2] Nevertheless, increasing evidence has emerged over time on the many negative consequences of this type of pollution on ecosystems. Entanglement, toxicological effects via ingestion, suffocation, starvation, and alteration of the metabolism functions are only part of the lethal and sub-lethal consequences recently observed in wildlife.[3]

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1 Peter Dauvergne, 'Why is The Global Governance of Plastic Failing the Oceans?' (2018) 51 Global Environmental Change 22 (emphasis added).

2 Kennedy Bucci et al., 'What is Known and Unknown about the Effects of Plastic Pollution: A Meta-Analysis and Systematic Review' (2020) 30 Ecological Applications 2 <https://esajournals.onlinelibrary.wiley.com/doi/abs/10.1002/eap.2044> accessed 16 July 2023.

3 Stephanie Avery-Gomm et al., 'Linking Plastic Ingestion Research with Marine Wildlife Conservation' (2018) 637-638 Science of The Total Environment <https://doi.org/10.1016/j.scitotenv.2018.04.409> accessed 16 July 2023. Jesse F. Senko et al., 'Understanding Individual and Population-level Effects of Plastic Pollution on Marine Megafauna' (2020) 43 Endangered Species < https://doi.org/10.3354/esr01064> accessed 16 July 2023. G.G.N. Thushari and J.D.M. Senevirathna, 'Plastic Pollution in the Marine Environment' (2020) 6 Heliyon e04709. Pengui Li et al., 'Characteristics of Plastic Pollution in the Environment: A Review' (2021) 107 Bulletin of Environmental Contamination and Toxicology <https://doi.org/10.1007/s00128-020-02820-1> accessed 16 July

Additionally, plastic debris is suspected to behave as a transporter of species from one ecosystem to the other with potential risks in terms of biodiversity.[4] Although more research is needed, current evidence suggests that human health is also under threat.[5] Small plastic particles are of particular concern. These *micro-* and *nanoplastics* (MNP) range respectively from 0,001 to 5 millimeters and from 0,001 to 0,1 micrometers.[6] Microplastics are usually

2023. Christian Laforsch et al., 'Microplastics: A Novel Suite of Environmental Contaminants but Present for Decades' in Franz-Xaver Reichl and Michael Schwenk (eds) *Regulatory Toxicology* (Springer, 2021).

[4] See e.g. Giorgio Smiroldo et al., 'Anthropogenically Altered Trophic Webs: Alien Catfish and Microplastics in the Diet of Eurasian Otters' (2019) 64 Mammal Research <https://doi.org/10.1007/s13364-018-00412-3> accessed 16 July 2023. Duofei Hu et al., 'Microplastics and Nanoplastics: Would They Affect Global Biodiversity Change?' (2019) 26 Environmental Science and Pollution Research <https://doi.org/10.1007/s11356-019-05414-5> accessed 16 July 2023.

[5] For instance, in 2014 a study of the University of Ghent discovered that every human consumes up to 11,000 microscopic fragments of plastic every year eating seafood. Lisbeth Van Cauwenberghe and Colin R. Janssen, 'Microplastics in Bivalves Cultured for Human Consumption' (2014) 193 Environmental Pollution. In 2021, small plastic fragments were detected in human placenta. Antonio Ragusa et al., 'Plasticenta: First Evidence of Microplastics in Human Placenta' (2021) 146 Environment International 106274. In 2022, the first study quantifying polymer mass concentrations in human whole blood was published. Heather A. Leslie et al., 'Discovery and Quantification of Plastic Particle Pollution in Human Blood' (2022) 163 Environment International 107199. See also e.g. Leah Shipton and Peter Dauvergne, 'Health Concerns of Plastics: Energizing the Global Diffusion of Anti-Plastic Norms' (2021) 65 Journal of Environmental Planning and Management 11 < https://doi.org/10.1080/09640568.2021.1957796 > accessed 16 July 2023.

[6] This classification is still debated. Nanna B. Hartmann et al., 'Are We Speaking the Same Language? Recommendations for a Definition and Categorization Framework for Plastic Debris' (2019) 53 Environmental Science & Technology 1039. See also Yanina K. Müller et al., 'Microplastic Analysis-Are We Measuring the Same? Results on the First Global Comparative Study for Microplastic Analysis in a Water Sample' (2020) 412 Analytical and Bioanalytical Chemistry. It should also be noted that, since smaller plastics generally fall under the field of application of most of the regulations on plastic pollution, the word *plastic* will be used whenever a distinction based on the size is not relevant in the context of our analysis.

referred to as *primary* microplastics, when directly released in the environment in the form of small particles, as an effect of laundering of synthetic clothes, abrasion of tires through driving, or as intentional additives to personal care and hygiene products;[7] and as *secondary* microplastics, when they originate from larger plastic materials degrading in the environment under the influence of solar UV radiation, wind, currents, and other environmental factors.[8] More efforts are needed to deepen our understanding of the sources, fates, effects, and risks of microplastics.[9] Overall, research suggests that the environmental impact of plastic pollution is worsened by the coaction with other stressors such as different pollutants, climate change, ocean acidification, and overexploitation of marine resources.[10] Plastic production is projected to triple by 2050, raising concerns that some effects of plastic pollution could become irreversible.[11] As a wide-ranging phenomenon, plastic pollution also has socio-economic implications.[12] On the one hand, the over-accumulation of plastic in the environment tends to result in income losses, *inter alia*, in tourism, fishery, and shipping, in addition to the costs generated by health-related issues.[13]

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[7] See 'Microplastics: Sources, Effects and Solutions' (European Parliament News) <https://www.europarl.europa.eu/news/en/headlines/society/20181116STO19217/microplastics-sources-effects-and-solutions> accessed 16 July 2023.

[8] Bethanie Carney Almroth and Håkan Eggert, 'Marine Plastic Pollution: Sources, Impacts, and Policy Issues' (2019) 13 Review of Environmental Economics and Policy 317.

[9] Science Advice for Policy by European Academies (SAPEA), 'A Scientific Perspective on Microplastics in Nature and Society' (2019).

[10] Nicola J. Beaumont et al., 'Global Ecological, Social and Economic Impacts of Marine Plastic' (2019) 142 Marine Pollution Bulletin 189.

[11] Agenda Industry, 'The New Plastics Economy Rethinking the future of plastics' (2016) World Economic Forum 36. Villarrubia-Gómez et al., 'Marine Plastic Pollution as a Planetary Boundary Threat – The Drifting Piece in the Sustainability Puzzle' (2018) 96 Marine Policy 213.

[12] Joanna Vince and Britta Denise Hardesty, 'Plastic Pollution Challenges in Marine and Coastal Environments: from Local to Global Governance' (2017) 25 Restoration Ecology 123.

[13] Thushari (n 3).

Ecosystem recovery is another economic burden to be considered (e.g. carrying out clean-up activities).

Without any doubt, an improved plastics economy could contribute to the achievement of at least four of the seventeen Sustainable Development Goals (SDG): SDG 6 'Clean water and sanitation', SDG 11 'Sustainable cities and communities', SDG 12 'Responsible consumption and production' and SDG 14 'Life below water' – embedded in the United Nations Agenda for Sustainable Development.[14] As a result, plastic pollution has become a crucial element in the international political agenda.[15] In 2014, the United Nations Environment Assembly (UNEA) adopted Resolution 1/6 on 'Marine Plastic Debris and Microplastics' which stressed the need to apply a precautionary principle to plastic pollution, supported scientific research in the field and urged state authorities to establish action plans to tackle marine litter.[16] Subsequently, UNEA established an Ad Hoc Open-Ended Expert Group (AHEG) and commissioned it a study on the existing strategies of plastics governance.[17] In the resulting document, published in 2017, the AHEG promoted two options as 'technically and politically feasible' and potentially 'effective' - namely (i) 'revising and strengthening the existing [legal] framework', and (ii) establishing 'a new global architecture with a multi-

[14] A/RES/70/1, United Nations General Assembly, Resolution 70/1. Transforming Our World: the 2030 Agenda for Sustainable Development. 25.09.2015.

[15] UNEP/EA.1/10, United Nations Environment Assembly of the United Nations Environment Programme, Resolution 1/6. Marine Plastic Debris and Microplastics, 02.09.2014.

[16] Principle 15 of the Rio Declaration, Rio Declaration on Environment and Development of 13 June 1992, 31 ILM 876 (1992). Article 191 TFEU, European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01.

[17] UNEP/EA.3/INF/5, United Nations Environment Assembly of the United Nations Environment Programme, 'Combating Marine Plastic Litter and Microplastics: An Assessment of the Effectiveness of Relevant International, Regional and Subregional Governance Strategies and Approaches'.

layered governance approach, including a new international legally binding instrument'.[18]

At the fifth session of UNEA (March 2022), an International Negotiating Committee (INC) was finally established with the aim of developing a legally binding instrument on plastic pollution, including in the marine environment.[19] The first and second rounds of negotiations took place, respectively, in Uruguay from 28 November to 2 December 2022 (INC-1) and in France from 29 May to 2 June 2023 (INC-2). Despite a clear recognition of the negative effects of plastic pollution, these meetings revealed diverging perspectives on the prospected scope, objectives, structure, core obligations, control measures, voluntary approaches, and national action plans under the upcoming treaty. During the INC-2, the delegates finally started the discussion of substantial matters based on an options paper prepared by the UNEA Secretariat,[20] after overcoming an initial impasse around the provisional application of the draft rules of procedure agreed upon in Uruguay.[21]

[18] UNEP/AHEG/2018/1/6, United Nations Environment Assembly of the United Nations Environment Programme, Report of the first meeting of the ad hoc open-ended expert group on marine litter and microplastics.

[19] UNEP/EA.5/Res.14, United Nations Environment Assembly of the United Nations Environment Programme, Resolution 5/14. End of Plastic Pollution: Towards an International Legally Binding Instrument.

[20] UNEP/PP/INC.2/4, United Nations Environment Programme, Potential Options for Elements towards an International Legally Binding Instrument, based on a Comprehensive Approach that Addresses the Full Life Cycle of Plastics as Called for by United Nations Environment Assembly Resolution 5/14.

[21] UNEP/PP/INC.1/3, United Nations Environment Programme, Draft Rules of Procedure for the Work of the Intergovernmental Negotiating Committee to Develop an International Legally Binding Instrument on Plastic Pollution, including in the Marine Environment.

Regardless the latest developments, the current legal framework is still unable to meet the expectations of the international community.[22] As of writing, there is no binding international instrument whose primary objective is to address the plastic crisis. Instead, the uncoordinated coexistence of a multitude of legal instruments, whose field of application is often unclear, compromises the effectiveness of the current plastics governance. Horizontally, different areas in international law are equally relevant: for instance, the law of the sea, international watercourses law as well as biodiversity law, chemical law, waste- and wastewater law. Vertically, several levels of governance should be coordinated: international law, regional law (e.g., EU regulation), and national and local measures. Notably, this lack of a shared understanding of plastic pollution has encouraged a sectorial decision-making process at all levels of governance. In the EU, for instance, plastic-related matters are regulated separately (e.g., waste management, single-use plastic items, packaging, and others), even if soft law facilitates a certain level of coherence.[23]

Against this background, there is still no clear consensus among legal scholars on how international environmental law should equip itself to deal

[22] See e.g. Elizabeth A. Kirk and Naporn Popattanachai, 'Marine Plastics: Fragmentation, Effectiveness and Legitimacy in International Lawmaking' (2018), 27 Review of European, Comparative and International Environmental Law 222. Peter Dauvergne (n 1).

[23] The following are the most relevant soft law instruments: European Commission, Communication from the Commission, the European Green Deal, COM(2019) 640 final; European Parliament, New Circular Economy Action Plan, European Parliament resolution of 10 February 2021 on the New Circular Economy Action Plan (2020/2077(INI)), P9_TA(2021)0040; European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Strategy for Plastics in a Circular Economy, COM(2018) 28 final; European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Pathway to a Healthy Planet for All EU Action Plan: Towards Zero Pollution for Air, Water and Soil, COM(2021) 400 final.

with the issue of plastic pollution. Some authors see the adoption of a new binding instrument on plastic pollution as a promising opportunity,[24] while others have stressed the potential of non-binding approaches. Among these, McIntyre (2020) highlights the strengths of 'informal governance initiatives characteristic of transnational environmental law'.[25] Raubenheimer et al. (2018) point to the need to combine voluntary and mandatory measures.[26] Others promote a multi-level model of governance to tackle global plastic pollution.[27] Moreover, a few scholars have focused their attention on the legal implications of microplastic pollution.[28] It should be noted that, in

[24] See e.g. Nils Simon and Maro Luisa Schulte, 'Stopping Global Plastic Pollution: The Case for an International Convention' (2017) 43 Heinrich Böll Stiftung Ecology. Stephanie B. Borrelle et al., 'Opinion: Why We Need an International Agreement on Marine Plastic Pollution' (2017) 114 Proceedings of the National Academy of Sciences of the United States of America 9994. Elizabeth A. Kirk (n 22). Peter Dauvergne (n 1).

[25] Owen McIntyre, 'Addressing Marine Plastic Pollution as a 'Wicked' Problem of Transnational Environmental Governance' (2020) 25 Environmental Liability: Law, Policy and Practice 282.

[26] Karen Raubenheimer et al., 'Towards an Improved International Framework to Govern the Life Cycle of Plastics' (2018) 27 Review of European, Comparative & International Environmental Law 3 <https://doi.org/10.1111/reel.12267> accessed 16 July 2023.

[27] See e.g. Joanna Vince (n 12). João Pinto da Costa et al., 'The Role of Legislation, Regulatory Initiatives and Guidelines on the Control of Plastic Pollution' (2020) Frontiers in Environmental Science <https://doi.org/10.3389/fenvs.2020.00104> accessed 16 July 2023. Peter Stoett, 'Plastic pollution: A Global Challenge in Need of Multi-Level Justice-Centered Solutions' (2022) 5 One Earth 6 <https://doi.org/10.1016/j.oneear.2022.05.017> accessed 16 July 2023.

[28] See e.g. Nicole Brennholt et al., 'Freshwater Microplastics: Challenges for Regulation and Management' in Martin Wagner and Scott Lambert (eds), *Freshwater Microplastics - Emerging Environmental Contaminants?* (Springer 2018). João Pinto da Costa, 'Micro-and Nanoplastics in the Environment: Research and Policymaking' (2018) 1 Current Opinion in Environmental Science & Health <https://doi.org/10.1016/j.coesh.2017.11.002> accessed 16 July 2023. Peter Dauvergne, 'The Power of Environmental Norms: Marine Plastic Pollution and the Politics of Microbeads' (2018), 27 Environmental Politics 4 <https://doi.org/10.1080/09644016.2018.1449090> accessed 16 July 2023. Denise M. Mitrano and Wendel Wohlleben, 'Microplastic Regulation Should Be More

academia, marine plastic pollution has long been framed as the most relevant topic.[29] More recently, many have suggested broadening the scope of legal intervention to cover the full life cycle of plastics.[30] In line with this approach, embraced also by UNEA in Resolution 5/14,[31] this article addresses the following questions: how is the international legal framework applicable to the plastic life cycle currently structured? In which direction is it desirable for it to evolve?

In our view, there is no space for choosing between amending the existing legal instruments and adopting a new one. In the attempt to regulate the full life cycle of plastics on a global scale, the two strategies should coexist and support each other. In the next section, the concept of 'life cycle' will be shortly introduced in the context of today's plastics economy. Then, in the following sections, an analysis of existing legal instruments will be provided throughout the main phases of the plastic life cycle - production and manufacturing, consumption, waste management and plastic pollution. For each of these, evidence will be provided about the fact that, notably, the modification of current regimes and the establishment of a new one would serve different functions, and cover different areas, with a view to improve the current plastics governance. Although our main focus is international

Precise to Incentivize Both Innovation and Environmental Safety' (2020) 11 Nature Communications 5324.

[29] See e.g. Joanna Vince (n 12). Elizabeth A. Kirk (n 22). Oluniyi Solomon Ogunola et al., 'Mitigation Measures to Avert the Impacts of Plastics and Microplastics in the Marine Environment (A Review)' (2018) 25 Environmental Science and Pollution Research <https://doi.org/10.1007/s11356-018-1499-z> accessed 16 July 2023. Owen McIntyre (n 25).

[30] See e.g. Karen Raubenheimer (n 26). Giulia Carlini and Konstantin Kleine, 'Advancing the International Regulation of Plastic Pollution beyond the United Nations Environment Assembly Resolution on Marine Litter and Microplastics' (2018) 27 Review of European, Comparative & International Environmental Law 3 <https://doi.org/10.1111/reel.12258> accessed 16 July 2023. Tobias D. Nielsen et al., 'Politics and the Plastic Crisis: A Review throughout the Plastic Life Cycle' (2019) 9 WIREs Energy and Environment 1 <https://wires.onlinelibrary.wiley.com/doi/10.1002/wene.360> accessed 16 July 2023.

[31] UNEP (n 19).

law, we also mention regional and national legal instruments, where appropriate.

II. The Life Cycle of Plastics: Overview

In the last decades, the concept of life cycle has been increasingly used in social sciences, including in economics and law. Life cycle assessments have proven particularly useful to uncover the environmental consequences of a product or service from production to disposal, and to establish measures to minimize them in a cost-effective way.[32] As a result, this concept has gained a role as a key tool to support decision-making in public and private institutions.[33] Although we do not intend to conduct an analysis of the plastic life cycle, this methodological framework remains suitable for investigating the effectiveness of the relevant international legislation. In general terms, plastics are at the center of a transformation from raw materials to consumer products, to waste, to potential litter in the environment - usually referred to as plastic pollution. Greatly simplified here, each stage of the plastic life cycle presents many risks for leakage of synthetic items, or fragments of them, into the environment. Fortunately, numerous are also the options to

[32] See e.g. Walter Klöpffer, 'Life cycle Assessment: From the Beginning to the Current State' (1997) 7 Environmental Science and Pollution Research. Göran Finnveden et al., 'Recent Developments in Life Cycle Assessment' (2009) 91 Journal of Environmental Management 1 <https://doi.org/10.1016/j.jenvman.2009.06.018> accessed 16 July 2023. Annekatrin Lehmann et al., 'Policy Options for Life Cycle Assessment Deployment in Legislation' in Guido Sonnemann and Manuele Margni (eds), *Life Cycle Management. LCA Compendium – The Complete World of Life Cycle Assessment* (Springer, 2015).

[33] For instance, the European Commission identified Life Cycle Assessment (LCA) as the "best framework for assessing the potential environmental impacts of products". It stressed that environmental policies should tackle not only large point sources of pollution (e.g., industrial emissions and waste management), but also [consumption] products by looking at the whole of a product's lifecycle, including the use phase. European Commission. (2003, June 18). Communication from the Commission to the Council and the European Parliament, Integrated Product Policy, Building on Environmental Life-Cycle Thinking.

prevent plastic pollution, considering its strict interconnection with human decisions and related behaviors.[34]

Present and future decision-making processes on plastic pollution can be effective only when considering the interests of plastic-related businesses. In the 1950s, 2 million tons of plastic per year were produced worldwide. Since then, the production rate has increased exponentially, reaching 381 million tons in 2015.[35] Today a plethora of plastic items are on the market. Despite the dominance, in terms of quantity, of packaging, other economic sectors remain relevant: building and construction, automotive, electronic equipment, textile, and agriculture.[36] A few players in the petrochemical segment and countless converters, recyclers, and plastics machinery manufacturers all constitute the plastic industry. The negative consequences of plastic pollution, also in economic terms, are increasingly evident.[37] Therefore, it is desirable for companies to start conducting their operations in a more sustainable manner.

Consumers may also impact the fate of plastic products through their purchasing preferences. Although this environmental issue causes growing concern, research shows that consumption choices have not changed significantly.[38] Obstacles to a behavioral shift include misconceptions about

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[34] Sabine Pahl et al., 'Human Perceptions and Behaviour Determine Aquatic Plastic Pollution' in Friederike Stock, George Reifferscheid, Nicole Brennholt, and Evgeniia Kostianaia (eds), *Plastics in the Aquatic Environment - Part II* (Springer 2020).

[35] R. Geyer et al., 'Production, use, and fate of all plastics ever made' (2017) 3 Science Advances e1700782 <https://www.science.org/doi/epdf/10.1126/sciadv.1700782> accessed 16 July 2023.

[36] PlasticsEurope, 'Plastics – The Facts 2020 An Analysis of European Plastics Production, Demand and Waste Data' (2020) <https://plasticseurope.org/knowledge-hub/plastics-the-facts-2020/> accessed 16 July 2023.

[37] The following study has estimated a US$ 1.5 trillion per year loss only considering the damage caused to oceans in terms of their capacity to provide ecosystem services. Nicola J. Beaumont (n 10).

[38] See e.g., Lesley Henderson and Christopher Green, 'Making Sense of Microplastics? Public Understandings of Plastic Pollution' (2020) 152 Marine

biodegradability and composability, routinized activities and strong habits, knowledge gaps such as on disposal of plastic items and alternative products, and the transfer of responsibility to businesses and policymakers.[39] As for microplastic pollution, studies on the knowledge and perceived risks by the general public are still scarce.[40] Since a change in social practices may be encouraged by effective lawmaking, a closer give-and-take between behavioral scientists and policymakers is desirable to shape broad and long-term strategies.

Waste management is another relevant stage in the plastic life cycle offering various avenues for legal intervention. Waste management is generally referred to as the set of scientific techniques allowing the collection, transportation, processing, recovery, and disposal of any type of waste, including plastic.[41] The main methods to handle plastic waste lawfully are recycling, thermal destruction (pyrolysis and incineration), and landfilling.[42] The reduction of plastic waste generated is the priority to restore our

Pollution Bulletin 110908. Sea Circular, 'Perceptions on Plastic Waste: Insights, Interventions, and Incentives to Action from Businesses and Consumers in South-East Asia' (2020).

39 Lea Marie Heidbreder et al., 'Tackling the Plastic Problem: A Review on Perceptions, Behaviors, and Interventions' (2019) 668 Science of the Total Environment 1077. Luca Marazzi et al., 'Consumer-based Actions to Reduce Plastic Pollution in Rivers: A Multicriteria Decision Analysis Approach' (2020) Plos One e0236410 <https://doi.org/10.1371/journal.pone.0236410> accessed 16 July 23.

40 GESAMP, 'Sources, Fate and Effects of Microplastics in the Marine Environment: A Global Assessment' (2015) <http://www.gesamp.org/publications/reports-and-studies-no-90> accessed 16 July 2023.

41 Christopher Igwe Idumah and Iheoma C. Nwuzor, 'Novel Trends in Plastic Waste Management' (2019) 1 SN Applied Sciences 1402 <https://doi.org/10.1007/s42452-019-1468-2> accessed 16 July 2023.

42 The World Bank has estimated that globally 37% of solid waste is dumped or landfilled, 33% ends up in open dumps, 19% is recycled or composted, and 11% is incenerated. Silpa Kaza et al., 'What a Waste 2.0: A Global Snapshot of Solid Waste Management to 2050' (2018) <https://openknowledge.worldbank.org/handle/10986/30317> accessed 16 July 2023.

ecosystems and give relief to wildlife.[43] However, good practices at the end-of-life of plastic products can also make a difference in minimizing plastic pollution. Over the last few decades, the Global North has exported significant amounts of plastic waste to the Global South. According to data collected by the UN Comtrade Platform, Japan, the U.S. and France were in 2020 among the largest net exporters of scrap and waste plastics while the largest net importers were Thailand, Indonesia and Vietnam.[44] In 2017, the Chinese government decided to scale back the country's role in global plastic waste management and restrict imports to its 'National Sword' policy.[45] As a consequence, plastic waste trade streams have largely been diverted to Southeast Asia over the last few years.[46] Should more countries take the Chinese example, a further transformation of global plastic waste management will undoubtedly follow.

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[43] Vince (n 12).

[44] In 2020, net exports for the three largest exporting countries, Japan, and the US were respectively: +818,764 tons, +206,422 tons, and +189,233 tons. Germany, a major exporter in previous years, did not report any data. Net imports for the three largest importing countries, Thailand, Indonesia and Vietnam, were respectively: -65,487 tons, -138,009 tons, and -291,699 tons. UN Comtrade Database, UN Statistical Office, <https://www.statista.com/chart/18229/biggest-exporters-of-plastic-waste-and-scrap/> accessed 16 July 2023. Some authors tend to resize the relevance of plastic waste trade to the plastic issue. They highlight that 'ca. 3 million tonnes plastic waste exported' is a significant amount but 'it pales into insignificance in the context of the 90 million tonnes mismanaged worldwide as a result of lack of waste collection'. Ed Cook et al., 'Plastic Waste Exports and Recycling: Myths, Misunderstandings and Inconvenient Truths' (2022), 40 Waste Management & Research 10, <https://doi.org/10.1177/0734242X221132336> accessed 16 July 2023.

[45],OECD, 'Global Plastics Outlook. Economic Drivers, Environmental Impacts and Policy Options' (2022), p. 83-100. See also, Amy L. Brooks et. al., 'The Chinese Import Ban and its Impact on Global Plastic Waste Trade' (2018) 4 Science Advances 6. Wang C. at al, 'Structure of the Global Plastic Waste Trade Network and the Impact of China's Import Ban' (2020), 153 Resources, Conservation and Recycling. Trang Tran et al., 'The Impact of China's Tightening Environmental Regulations on International Waste Trade and Logistics' (2021) 13 Sustainability 2.

[46] Ibid.

Even if international law were to improve its effectiveness in addressing the early stages of the plastic life cycle, plastic pollution would remain a problem due to the extensive environmental damage already incurred. Plastic pollution extends beyond marine environments and even affects the atmosphere.[47] Recent estimates indicate that an annual influx of 4.4–12.7 million metric tons of plastic waste enters the marine environment each year.[48] While it is important not to overlook the impact of plastic pollution on seas and oceans in decision-making processes, it is equally important to address the issue in other affected areas.[49] Notably, rivers have been identified as significant pathways for plastic pollution, with only 10 international watercourses accounting for 90 per cent of the overall riverine input.[50] Our analysis primarily focuses on international waterways law and the law of the sea; nevertheless, we hope that regulatory efforts will expand to encompass a broader range of ecosystems as scientific understanding of the sources, pathways, and fate of plastic debris in the environment deepens.

We have introduced the main phases of the plastic life cycle: production and manufacturing, consumption, waste management and plastic pollution. In the subsequent sections, we will examine the primary deficiencies of international environmental law concerning each phase, propose potential amendments, and identify the key aspects the upcoming plastic treaty should

[47] See e.g. 'No Mountain High Enough: Study Finds Plastic in 'Clean' Air' (The Guardian) <https://www.theguardian.com/environment/2021/dec/21/no-mountain-high-enough-study-finds-plastic-in-clean-air> accessed 16 July 2023. See also Angelica Bianco and Monica Passananti, 'Atmospheric Micro and Nanoplastics: An Enormous Microscopic Problem' (2020) 12 Sustainability 7327.

[48] Jenna R. Jambeck et al., 'Plastic waste inputs from land into the ocean' (2015) 347 Science 768.

[49] It is also estimated that 94% of plastic entering the ocean ends up on the sea floor. Chris Sherrington et al., 'Leverage Points for Reducing Single-Use Plastics' (2017) Background report. Eunomia Research & Consulting Ltd.

[50] Christian Schmidt et al., 'Export of Plastic Debris by Rivers into the Sea' (2017) 51 Environmental Science & Technology 12246. See also Martín C.M. Blettler et al., 'Freshwater Plastic Pollution: Recognizing Research Biases and Identifying Knowledge Gaps' (2018) 143 Water Research <https://doi.org/10.1016/j.watres.2018.06.015> accessed 16 July 2023.

address. By doing so, we aim to demonstrate that amending existing international instruments relating to plastic waste is just as essential as adopting a new international agreement.

III. Plastic Production and Manufacturing

The current international legal framework suffers from a lack of any specific rule on plastic production and manufacturing. The Stockholm and the Rotterdam Conventions are the only two treaties indirectly addressing this stage of the plastic life cycle. Both these binding agreements establish rules on the production and use of dangerous chemicals, some of which are either constituents of plastic items or essential "ingredients" in production and manufacturing processes.[51] In particular, the Stockholm Convention on Persistent Organic Pollutants sets rules to ban, restrict, and minimize the production and use of covered substances.[52] The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade aims to facilitate informed decision-making by countries regarding the import-export of hazardous chemicals through a prior informed consent (PIC) procedure.[53] The provisions in the treaties are limited in scope to a specific class of chemicals, leaving several

[51] Karen Raubenheimer and Alistair McIlgorm, 'Can the Basel and Stockholm Conventions Provide a Global Framework to Reduce the Impact of Marine Plastic Litter?' (2018) 96 Marine Policy 285.

[52] Convention on Persistent Organic Pollutants (Stockholm Convention) (Stockholm) of 22 May 2001, in force 17 May 2004; 40 ILM 532 (2001). See also, <http://www.pops.int/TheConvention/Overview/tabid/3351/Default.aspx> accessed 16 July 2023.

[53] Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) (Rotterdam) of 10 September 1998, in force on 24 February 2004. See, Health and Environment Alliance (HEAL), 'Turning the Plastic Tide: the Chemicals on Plastic that Put Our Health at Risk' (2020) <https://www.env-health.org/wp-content/uploads/2022/03/HEAL_Plastics_report_v5.pdf accessed 16 July 2023. See also e.g. Atiq Zaman and Peter Newman, 'Plastics: Are They Part of the Zero-Waste Agenda or the Toxic-Waste Agenda?' (2021) 4 <https://doi.org/10.1186/s42055-021-00043-8> accessed 16 July 2023.

types of plastics outside their scope. Nonetheless, the international community appears willing to seize the opportunities presented by these legal instruments. In January 2022, the Persistent Organic Pollutants Review Committee (POPRC) suggested amending the Stockholm Convention to include six more chemicals under its scope. Among these, medium-chain chlorinated paraffins (MCCPs, CAS 85535-85-9), long-chain perfluorocarboxylic acids (LC-PFCAs), their salts and related compounds, and UV-328 (CAS 25973-55-1) are contained in various plastic materials. Moreover, following decisions BC-13/11 and SC-8/15, the regional centers of the Basel and Stockholm Conventions have begun cooperating to deliver joint technical assistance to public and private entities on marine plastic pollution and microplastics.[54] In our opinion, such efforts should be further strengthened to ensure better environmental protection under these existing regimes. Member States could consider applying stricter rules to the plastic-related chemicals already covered as well as incorporating additional ones within the scope of the Stockholm and Rotterdam Conventions. Furthermore, close cooperation between the Rotterdam and Basel Conventions regarding trade in hazardous waste and chemical waste should be encouraged.[55]

Despite the contribution of these potential amendments, further action is needed at the international level. In recent years, companies are increasingly switching from a 'production, use and dispose of' paradigm to a modified

[54] A list of activities related to plastic waste, marine plastic litter and microplastics undertaken by the Basel Convention regional and coordinating centers and the Stockholm Convention regional and sub-regional centers has been presented at the COPs from 29 April to 10 May 2019 in Geneva. The relevant working documents are UNEP/CHW.14/INF/29 and UNEP/CHW.14/INF/29/Add.1 respectively.

[55] After the Joint Conference 'Clean Planet, Healthy People: Sound Management of Chemicals and Waste', held in Geneva in May 2019, the adoption of harmonized measures on the trade of hazardous substances and waste is perceived as a compelling need. See <http://www.brsmeas.org/2019COPs/Overview/tabid/7523/language/en-US/Default.aspx> accessed 16 July 2023.

scheme focused on 'design, use, re-design, and re-use'.[56] Several startups have been promoting innovative technological solutions to combat plastic pollution, creating an unprecedented business opportunity.[57] Simultaneously, some of the more traditional companies have adopted measures such as codes of conduct, third-party certifications, ecolabelling, voluntary reporting, and compliance audits. Corporate Social Responsibility, generally defined as the voluntary integration of social and environmental purposes into a business plan,[58] is a widespread form of corporate self-governance that can have a positive impact plastic pollution.[59] At the regional and national levels, 'Extended Producer Responsibility' policies have compelled businesses to take responsibility for the end-of-life of plastic items they place on the market.[60] Corporate-oriented strategies are promising because of their adaptability, responsiveness, and potential transboundary effects.[61] In this context, the upcoming plastic treaty represents a unique opportunity. Ambitious provisions should compel

[56] See e.g. Micah Landon-Lane, 'Corporate Social Responsibility in Marine Plastic Debris Governance' (2018) 127 Marine Pollution Bulletin 310. Hanna Dijkstra et al., 'Business Models and Sustainable Plastic Management: A Systematic Review of the Literature' (2020) 258 Journal of Cleaner Production 120967.

[57] Hanna Dijkstra et al., 'In the Business of Dirty Oceans: Overview of Startups and Entrepreneurs Managing Marine Plastic' (2021) 162 Marine Pollution Bulletin 111880. See also e.g. Marcus Eriksen, Martin Thiel, Matt Prindiville, Tim Kiessling, 'Microplastic: What Are the Solutions?' in Martin Wagner and Scott Lambert (eds), *Freshwater Microplastics - Emerging Environmental Contaminants?* (Springer, 2018).

[58] Andrew Crane et al. (eds), The Oxford Handbook of Corporate Social Responsibility (OUP Oxford, 2008).

[59] Landon-Lane (n 56).

[60] Oluniyi Solomon Ogunola (n 29). See also, Secretariat of the Convention on Biological Diversity and the Scientific and Technical Advisory Panel - GEF, 'Impacts of Marine Debris on Biodiversity: Current Status and Potential Solutions' (2012) CBD Technical Series No. 67 <https://www.cbd.int/doc/publications/cbd-ts-67-en.pdf> accessed 16 July 2023.

[61] Owen McIntyre, 'Transnational Environmental Regulation and the Narrativization of Global Environmental Governance Standards: The Promise of Order from Chaos?' (2018) 10 Journal of Property, Planning and Environmental Law 92.

countries to regulate plastic production and manufacturing, encouraging companies to eliminate unnecessary plastic products, produce only what is necessary, prioritize the use of bio-based raw materials over fossil-based ones, increase the incorporation of recycled materials in their production cycle, improve the transparency of industrial processes, with a focus on chemicals, and prevent the dispersion of microplastics.[62] In addition, a technical platform could be created to bring together operators from different economic sectors to agree on best practices and eco-design standards.

IV. Plastic Consumption

Although the international community has acknowledged the need for more sustainable plastic consumption,[63] there is a lack of binding tools specifically targeting consumers at the international level. At the EU level, several measures were recently approved within the so-called 'Plastic Strategy'. Established in 2018 as part of the Circular Economy Action Plan, the EU's Plastic Strategy aims to transform plastic items' production, use, and management across the 27 Member States.[64] Notably, the Single-Use Plastics Directive[65] and the Packaging and Packaging Waste Directive[66] have

[62] Karen Raubenheimer and Niko Urho, 'Possible Elements of a New Global Agreement to Prevent Plastic Pollution' (2020) Nordic Council of Ministers.

[63] In the UNEA Resolution "Marine plastic litter and microplastics" (UNEP/EA.4/RES.6), State Members decided to stress 'the importance of more sustainable management of plastics throughout their life cycle in order to increase sustainable consumption and production patterns […]'.

[64] See 'Plastic Strategy' (European Commission) <https://ec.europa.eu/environment/strategy/plastics-strategy_en> accessed 16 July 2023.

[65] European Commission. (2019, June 5). SUP Directive. Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment.

[66] European Commission. (1994, December 20). European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste. European Commission. (2015, April 29). This legal instrument has been recently amended by the so-called "Plastic Bags Directive" (Directive (EU) 2015/720 of the

changed plastic consumption patterns. Last year, the European Commission further evaluated the potential introduction of additional measures.[67] At the national level, regulations are structured to either disincentivize or incentivize certain behaviors relating to plastic consumption. Disincentives include levies and taxes,[68] while the most common incentive-based measures are deposit-refund systems, encouraging consumers to return plastic containers to retailers to obtain a monetary reward.[69] Several studies have confirmed the widespread acceptance of these measures by consumers.[70] A more straightforward way to obtain a reduction in plastic consumption is

European Parliament and of the Council of 29 April 2015 amending Directive 94/62/EC on packaging and packaging waste).

[67] European Commission, 'Scoping study to assess the feasibility of further EU measures on waste prevention and implementation of the Plastic Bags Directive' (2022), <https://op.europa.eu/en/publication-detail/-/publication/3f3ee30e-7cc5-11ec-8c40-01aa75ed71a1/language-en> accessed 16 July 2023. Moreover, in March 2022, the European Commission unveiled a directive proposal that seeks to empower consumers in the transition towards sustainability by enhancing their protection against unfair practices and improving access to information (European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information).

[68] For instance, in Portugal, thanks to a tax on plastic bags, an impressive reduction in the number of plastic bags used pro capita was observed (from 2.25 to 0.59). Graça Martinho et al., 'The Portuguese Plastic Carrier Bag Tax: The Effects on Consumers' Behavior' (2017) 61 Waste management 3.

[69] In the USA and Australia, recent findings demonstrate a lower level of coastal debris in areas where this type of incentive was established. Quamar Schuyler et al., 'Economic Incentives Reduce Plastic Inputs to the Ocean' (2018) 96 Marine Policy 250.

[70] Johane Dikgang and Martine Visser, 'Behavioural Response to Plastic Bag Legislation in Botswana' (2012) 80 South African Journal of Economics 123. Johane Dikgang et al., 'Elasticity of Demand, Price and Time: Lessons from South Africa's Plastic-Bag Levy' (2012) 44 Applied Economics. Wouter Poortinga et al., 'The Introduction of a Single-Use Carrier Bag Charge in Wales: Attitude Change and Behavioural Spillover Effects' (2013) 36 Journal of Environmental Psychology 240. Gregory Owen Thomas et al., 'The English Plastic Bag Charge Changed Behavior and Increased Support for Other Charges to Reduce Plastic Waste' (2019) 10 Frontiers in Psychology 266.

the implementation of bans.[71] For instance, in 2002, the Bangladeshi government became the first to prohibit plastic bags. A 2018 United Nations Environment Programme (UNEP) report provides a country-based overview of existing bans.[72] In recent years there has also been a widespread effort to phase out microplastics. In 2015, the Microbead-Free Waters Act in the U.S. banned plastic microbeads in a wide range of cosmetic products.[73] In 2017, a restriction proposal on intentionally-added microplastics was submitted to the European Chemicals Agency (ECHA) under the REACH regulation.[74] In August 2022, the draft amendment to Annex XVII was finalized by the European Commission.[75] On 27 April 2023, EU countries endorsed with their vote this text. At the moment of writing, the scrutiny from the Council and European Parliament is the last step missing before adoption.[76]

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[71] To date, only in a few cases banning schemes have been unsuccessful due to ineffective monitoring systems and low acceptance by consumers. Dikgang (n 70). Adriana Jakovcevic et al., 'Charges for Plastic Bags: Motivational and Behavioral Effects' (2014) 40 Journal of Environmental Psychology 372.

[72] UNEP, 'Single-Use Plastics: A Roadmap for Sustainability' (2018) (Rev. ed., pp. vi; 6).

[73] Jason P. McDevitt et al., 'Addressing the Issue of Microplastics in the Wake of the Microbead-Free Waters Act – A New Standard Can Facilitate Improved Policy' (2017) 51 Environmental Science & Technology 6611.

[74] ECHA (2019, March 20). Restricting the use of intentionally added microplastic particles to consumer or professional use products of any kind. Annex XV Restriction report – Proposal for a restriction. Helsinki: European Chemical Agency <https://echa.europa.eu/registry-of-restriction-intentions/-/dislist/details/0b0236e18244cd73> > accessed 16 July 2023.

[75] Draft of the Commission Regulation (EU) amending Annex XVII to Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) as regards synthetic polymer microparticles, <https://echa.europa.eu/hot-topics/microplastics> accessed 16 July 2023.

[76] Interestingly, the following authors reckon that banning primary microplastics, as the ECHA is proposing, will not significantly cut the amount of microplastics in the environment. They argue that significant reductions are only achievable through better waste management of macroplastics. Denise Mitrano (n 28). Lauge

To date, the outcomes of the measures implemented at the national and regional levels have shown promising results. However, the lack of any international binding agreement targeting this phase of the plastic life cycle has prompted the development of rules in a piecemeal manner. As a consequence, the INC established at UNEA 5.2 should consider the opportunity to include provisions on plastic consumption in the forthcoming plastic treaty. Undoubtedly, rules on plastic production and manufacturing will also affect consumption patterns. However, certain aspects relating to consumption still need to be addressed. For instance, consumers could benefit from standardized certification and labelling systems, shared criteria for compostable, bio-based, and biodegradable plastics, and clear warnings for products containing microplastics.

V. PLASTIC WASTE MANAGEMENT

Despite its global dimension, plastic waste management remains largely beyond the scope of current binding international law instruments. With the exception of the Basel Convention, this stage of the plastic life cycle is primarily regulated through regional, national and local legal tools. In the EU, for instance, the Waste Framework Directive[77] and the Urban Wastewater Treatment Directive[78] set rules for, respectively, plastic waste and wastewater management. At the national level, well-defined rules and their effective enforcement can provide certainty to waste managers and

Peter Westergaard Clausen et al., Stakeholder Analysis with Regard to a Recent European Restriction Proposal on Microplastics (2020) 15 PLoS One 6 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7307934/> accessed 16 July 2023.

[77] European Commission. (2008, 19 November). Waste Framework Directive. Directive (EU) 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives.

[78] Council of the European Communities. (1991, 21 May). Urban Wastewater Treatment Directive. Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment. This Directive is relevant to the extent that wastewater represents an important pathway of macro- and microplastics, especially in urban areas.

other relevant actors.[79] Furthermore, authorities often implement penalty systems at the local level to dissuade citizens from illegally disposing household plastic waste.[80]

Although it does not focus exclusively on plastic waste, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal plays an important role in governing its management worldwide.[81] Similar to the Stockholm and the Rotterdam Conventions, this international agreement targets a well-defined list of dangerous substances, some of which are contained in plastic items. However, the ultimate objective of the Basel Convention is to minimize the displacement of waste, including plastics, from high-income countries to middle- and low-income ones. Its provisions aim to: reduce the amount of hazardous waste produced, promote environmentally sound management, and minimize transboundary movements of hazardous waste.[82] In 2019, the Conference of Parties of the Basel Convention approved the so-called Plastic Waste Amendments.[83] Pursuant to decision BC-14/12, Annex VIII and Annex II were revised to classify certain types of plastic waste as 'hazardous'

[79] UNEP/ISWA, 'Global Waste Management Outlook' (2015), <https://wedocs.unep.org/bitstream/handle/20.500.11822/9672/-Global_Waste_Management_Outlook-2015Global_Waste_Management_Outlook.pdf.pdf> accessed 16 July 2023.

[80] Brennholt (n 28).

[81] Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) of 22 March 1989, in force 5 May 1992; 1673 UNTS 126. See also Raubenheimer (n 51).

[82] Even when a transboundary movement is not prohibited, it may take place only if it represents an environmentally sound solution, if the principles of environmentally sound management and non-discrimination are observed and if it is carried out in accordance with the provisions under the Basel Convention. See, <http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx> accessed 16 July 2023.

[83] Through the decision BC-14/12, the COP added three new entry groups to the Annexes II, VIII, and IX of the Basel Convention. See, <http://www.basel.int/Implementation/Plasticwaste/PlasticWasteAmendments/FAQs/tabid/8427/Default.aspx> accessed 16 July 2023.

or 'requiring special consideration', respectively.[84] It follows that their trade is now subject to a Prior Informed Consent (PIC) procedure. Another notable achievement is the establishment of the Partnership on Plastic Waste, which brings together key stakeholders and supports them in implementing the relevant rules.[85] According to UNEP, the revisions have positioned the Basel Convention, as the legal instrument offering 'the most comprehensive approach to [marine] plastic pollution'.[86] Interestingly, concerns have already been expressed regarding the amendments' effectiveness, including the need for 'a stronger law enforcement cooperation between customs and environmental protection authorities, both within and between countries'.[87] Moreover, numerous categories of plastic waste continue to be excluded from the scope of the Basel Convention.[88] From our perspective, the most contentious aspect of the Plastic Waste Amendments is the classification of certain types of plastic waste included under entry group B3011 (those 'destined for recycling in an environmentally sound manner (ESM)' and 'almost free from contamination and other types of wastes') as 'waste presumed to be not hazardous'.[89] The omission of such a broad category from the application of strict rules under the Basel Convention risks leading to plastic waste mismanagement. Furthermore, if the conditions for this entry group, such as 'environmentally sound manner recycling' and 'almost

[84] Respectively, new entry group A3210 and Y48.

[85] Through decision BC-14/13, the COP decided to establish the Partnership and its working group, adopted the terms of reference for the Partnership, and requested the working group to implement its workplan for the biennium 2020–2021. See, <http://www.basel.int/Implementation/Plasticwaste/PlasticWastePartnership/tabid/8096/Default.aspx> accessed 16 July 2023. See also, 'The United Nations Basel Convention's Global Plastic Waste Partnership: History, Evolution and Progress'.

[86] UNEP (n 17).

[87] Sabaa Ahmad Khan, 'Clearly Hazardous, Obscurely Regulated: Lessons from the Basel Convention on Waste Trade' (2020) 114 Cambridge University Press Scholarly Journal < DOI:10.1017/aju.2020.38> accessed 16 July 2023.

[88] Ibid.

[89] In Annex IX, waste presumed to not be hazardous is listed. As such, it is not subject to the PIC procedure. See, < http://www.basel.int/Implementation/Plasticwaste/PlasticWasteAmendments/FAQs/tabid/8427/Default.aspx> accessed 16 July 2023.

free from contamination', are not adequately defined, they can introduce a higher level of uncertainty for waste operators. Despite the important progress made in recent years, there is still room for improvement in the current legal framework.[90]

Against this backdrop, the contribution of the new plastic treaty to plastic waste management could be fundamental. Numerous barriers to effective action have been identified by experts: for instance, the variety of waste types, including e-waste,[91] down-cycling, the exclusion of informal waste pickers from decision-making processes, and the lack of adequate infrastructure in many locations worldwide.[92] As plastic production is expected to grow further in the coming years, waste management may face additional obstacles concerning governance, stakeholder engagements, financing, and technology.[93] A promising approach could consist in the adoption, implementation, and enforcement of international rules based on the waste hierarchy principles.[94] A mechanism providing technical and financial support to Member States should also be established. This

[90] For instance, in the attempt to encourage the implementation of the Basel Convention, as amended, the COP14 asked for updating the Technical Guidelines on the Environmentally Sound Management of Plastic Waste, through decision BC-14/13.

[91] See e.g. Sabaa Ahmad Khan, 'E-products, E-waste and the Basel Convention: Regulatory Challenges and Impossibilities of International Environmental Law' 25 Review of European, Comparative and International Environmental Law 2. Veena Sahajwalla and Vaibhav Gaikwad, 'The Present and Future of E-waste Plastics Recycling' (2018) 13 Current Opinion in Green and Sustainable Chemistry https://doi.org/10.1016/j.cogsc.2018.06.006 accessed 16 July 2023.

[92] Mari Williams et al., 'No Time to Waste: Tackling the Plastic Pollution Crisis Before It's Too Late' (2019), Teddington: Tearfund.

[93] Ibid. See e.g. Oliver Drzyzga and Auxiliadora Prieto, 'Plastic Waste Management, a Matter for the 'Community'' (2019) 12 Microbial biotechnology 66. Duo Pan et al., 'Research Progress for Plastic Waste Management and Manufacture of Value-Added Products' (2020) 3 Advanced Composites and Hybrid Materials 443.

[94] Raubenheimer (n 62).

mechanism should aim to enhance domestic waste treatment systems while considering local circumstances.[95]

VI. Plastic Pollution and Environmental Protection

Considering the severe impact of plastic pollution on the environment, the relevance and applicability of environmental law also need to be investigated. At the international level, at the time of writing, there is no dedicated binding instrument specifically aimed at protecting ecosystems from plastic pollution. However, such pollution tends to fall under the more general definition of 'pollution' provided by numerous environmental treaties. When plastic pollution affects an ecosystem or its components covered by an international agreement, state authorities already possess enforceable legal tools. Nevertheless, the 'indirect' coverage provided by the environmental treaties discussed in this paragraph has several implications. Firstly, any ecosystem falling outside the scope of existing legal instruments will receive no consideration, despite being potentially exposed to plastic pollution. Secondly, the implementation of preventive measures against plastic pollution can become challenging. Thus, the existing legal instruments appear inadequate, and the effectiveness of international environmental law is under scrutiny as it is currently structured.[96]

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[95] Under the Basel Convention, a soft-law mechanism (the Household Waste Partnership), was established in 2017 to provide technical assistance worldwide, supporting all countries to benefit from already available solutions for environmentally sound management, including issues such as separation at source, collection, transport, storage, recycling, energy recovery and final disposal <http://www.basel.int/Default.aspx?tabid=7994> accessed 16 July 2023.

[96] See e.g. Edith Brown Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 The Georgetown Law Journal 675 <https://core.ac.uk/download/pdf/70375508.pdf> accessed 16 July 2023. John K. Setear, 'Learning to Live with Losing: International Environmental Law in the New Millennium' (2001) 20 Virginia Environmental Law Journal 1. Martin Jänicke and Helge Jörgens, 'New Approaches to Environmental Governance' in Arthur P.J. Mol, David A. Sonnenfeld, Gert

In adopting a plastics treaty, the main tasks for the international community will likely be to (i) ensure the implementation and enforcement of existing environmental regulations; (ii) enhance coverage of land-based sources of plastic pollution within existing regimes; and (iii) improve the coordination of newly adopted rules with those already in place. Simultaneously, there is space for binding measures that address *primary* microplastic pollution in the environment.[97] Before shifting our attention to the international protection of freshwater and marine ecosystems, it is important to mention another treaty relevant to plastic pollution: the Convention on Biological Diversity (or 'CBD').[98] The Convention itself establishes that 'States have, in accordance with the Charter of the United Nations and the principles of international law, […] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.[99] This provision could apply to plastic pollution where it is demonstrated that the consequences of plastic debris, especially on aquatic environments, pose a

Spaargaren (eds.) The Ecological Modernisation Reader: Environmental Reform in Theory and Practice (Routledge, 2009).

97 The occurrence of primary microplastics would not decrease as a direct effect of a reduction in macroplastic flows, as is the case for secondary microplastics. To date, relevant measures have been enacted only in domestic jurisdictions. See e.g. Michaela Young, 'Then and Now: Reappraising Freedom of the Seas in Modern Law of the Sea' (2016) 47 Ocean Development and International Law 165. Joanna Vince and Britta D. Hardesty, 'Governance Solutions to the Tragedy of the Commons That Marine Plastics Have Become' (2018) Frontiers in Marine Science <https://doi.org/10.3389/fmars.2018.00214> accessed 16 July 2023.

98 Convention on Biological Diversity of 22 May 1992, in force 29 December 1993; 1760 UNTS 79, 31 ILM 818 (1992).

99 Article 3 of the Convention on Biological Diversity: 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.

threat to biodiversity.[100] Moreover, microplastics are specifically mentioned in the Annex 'Voluntary Practical Guidance on Preventing and Mitigating the Impacts of Marine Debris on Marine and Coastal Biodiversity and Habitats' to the Resolution CBD/COP/DEC/XIII/10, which addresses the impacts of marine debris and anthropogenic underwater noise on marine and coastal biodiversity.[101] In December 2022, at COP 15, 188 countries adopted a Kunming-Montreal Global Biodiversity Framework, which sets four long-term goals and 23 action-oriented targets to be achieved by 2050 and by 2030, respectively.[102] Target 7, which aims to 'reduce pollution risks and the negative impact of pollution from all sources, to levels that are not harmful to biodiversity and ecosystem functions and services', emphasizes the need to prevent, reduce, and work towards eliminating plastic pollution, among other measures.

1. International Watercourses

Multilateral treaties aimed at preventing, minimizing and controlling pollution in international watercourses were first adopted in the 1960s.[103] Over the past decades, some common principles have emerged. The well-established sovereign right of a riverine state to exploit the resources of an international watercourse is generally counterbalanced by the responsibility to ensure that the activities carried out within its territory or under its

[100] Secretariat of the Convention on Biological Diversity, CBD Technical Series No. 83, 'Marine Debris: Understanding, Preventing and Mitigating the Significant Adverse Impacts on Marine and Coastal Biodiversity'.

[101] Member States have been asked to 'assess whether different sources of microplastics and different products and processes that include both primary and secondary microplastics are covered by legislation, and strengthen, as appropriate, the existing legal framework […]' < https://www.cbd.int/doc/decisions/cop-13/cop-13-dec-10-en.pdf> accessed 16 July 2023.

[102] CBD/COP/15/L.25, Conference of the Parties to the Convention on Biological Diversity, Kunming-Montreal Global biodiversity framework Draft decision submitted by the President. 18.12.2022.

[103] Laurence Boisson de Chazournes, 'Fresh Water in International Law' (2013), Oxford University Press, p. 118-9.

jurisdiction do not harm the environment of other states or territories beyond national jurisdiction.[104] Furthermore, an environmental impact assessment must be undertaken before proceeding with any activity that could adversely impact the environment of another country.[105]

More recently, international watercourses law has been strengthened by the adoption of two agreements with a universal vocation: the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (also called 'Watercourses Convention')[106], and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (also known as 'Water Convention').[107] Both of them are theoretically applicable to plastic pollution. In Part IV of the Watercourses Convention, pollution in international watercourses is targeted and defined as 'any detrimental alteration in the composition or quality of the waters of international watercourses which results directly and indirectly from human

[104] U.N. Doc. A/Conf.48/14/Rev.1(1973), Declaration of the United Nations Conference on the Human Environment of 16 June 1972 (Stockholm Declaration); 11 ILM 1416 (1972). Principle 2 of the Rio Declaration: 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'. Principle 21 of the Stockholm Declaration: 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.

[105] This was also confirmed by the ruling of the International Court of Justice (ICJ). See, Pulp Mills on the River Uruguay case (Argentina v. Uruguay) paras. 204-5, pp. 351-5. See also Costa Rica v. Nicaragua cases, para. 104.

[106] Convention on the Law of the Non-Navigational Uses of International Watercourses of 21 May 1997, in force 17 August 2014; UNTS 2999.

[107] Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention) of 17 March 1992, in force 6 October 1996; UNTS 1936 (1992); ILM 1312 (1992).

conduct'.[108] The Convention provides that States 'shall, individually and, where appropriate, jointly, prevent, reduce and control the pollution of an international watercourse that may cause *significant harm* to another watercourse States or their environment'.[109] Whenever plastic pollution occurs in rivers, it appears to fulfil the criteria in Art. 21(1) of the Watercourses Convention. However, it could be argued that the risks posed by plastics are still subject to debate within the scientific community, making it difficult to establish the requirement of "significant harm" under this provision.[110] Nonetheless, the obligation under Article 20, requiring watercourse States to '[…] individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses', remains applicable.[111] This provision represents an important advancement as it calls on riparian States to protect riverine ecosystems, including through international cooperation, and not only based on a mere prohibition of transboundary harm.[112] An ecosystem approach is also incorporated in Article 23 which addresses the 'Protection and Preservation of the Marine

[108] Art. 21(1) of UNWC: 'For the purpose of this article, "pollution of an international watercourse" means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct'.

[109] Art. 21(2) of UNWC: 'Watercourse States shall, individually and, where appropriate, jointly, prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection' (emphasis added).

[110] Boisson de Chazournes (n 103), p. 120.

[111] Art. 20 of the Watercourses Convention: 'Watercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses'.

[112] ILC Commentary to the Draft Articles, ILC, Report of the International Law Commission on the Work of its Forty-Sixth Session, II(2) Yearbook of the International Law Commission (1994), p. 124.

Environment' and formally recognizes the role of international watercourses in preventing pollution at sea.[113]

The obligations under the Water Convention seem even more promising when referring to global plastics governance. In the Preamble, it is recognized that national and international measures are necessary to 'prevent, control and reduce the release of hazardous substances into the aquatic environment […], as well as pollution of the marine environment, in particular coastal areas, *from land-based sources* (emphasis added)'. In line with this objective, riparian states are required to cooperate in protecting transboundary waters and other geographic areas influenced by such waters, including the marine environment.[114] Additionally, Article 3 on 'Prevention, Control and Reduction' promotes the application of the ecosystem approach as a key strategy for sustainable management of aquatic natural resources.[115] Although the Water Convention focuses on the protection of transboundary rivers and international lakes, it acknowledges the significant role played by land-based human activities, which are crucial in the context of plastic pollution. As a result, this treaty can potentially provide broader protection

[113] Art. 23 of the Watercourses Convention: 'Watercourses States shall, individually and, where appropriate, in cooperation with other States, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards'.

[114] Art. 2(6) of Water Convention: 'The Riparian Parties shall cooperate on the basis of equality and reciprocity, in particular through bilateral and multilateral agreements, in order to develop harmonized policies, programmes and strategies covering the relevant catchment areas, or parts thereof, aimed at the prevention, control and reduction of transboundary impact and aimed at the protection of the environment of transboundary waters or the environment influenced by such waters, including the marine environment'.

[115] Art. 3(1) of Water Convention: 'To prevent, control and reduce transboundary impact, the Parties shall develop, adopt, implement and, as far as possible, render compatible relevant legal, administrative, economic, financial and technical measures, in order to ensure, *inter alia*, that: (i) Sustainable water-resources management, including the application of the escosystems approach, is promoted'.

compared to the Watercourses Convention.[116] However, adopting bi- and multilateral agreements remains essential for effectively implementing the provisions of the Water Convention.[117]

2. The Marine Environment

Similar to international watercourses law, the law of the sea is well-suited to cover plastic pollution. The United Nations Convention on the Law of the Sea (or 'UNCLOS') often referred to as the 'constitution of the seas'[118], includes provisions that pertain to the pollution of the marine environment. In Article 1(4) of UNCLOS, the term 'pollution of the marine environment' is defined as follows:

> 'the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which result or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, a hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of seawater and reduction of amenities'.[119]

By mentioning estuaries, this provision makes explicit the interconnection of freshwater and marine environments. In broader terms, UNCLOS is the only international treaty with an obligation broad enough to cover all

[116] Boisson de Chazournes (n 103), p. 33. According to the author, this could depend on the fact that for the UNECE Water Convention 'the number of negotiating parties was smaller, and that the issues of water management at stake in the UNECE region concern mainly the protection of water quality and of related ecosystems'.

[117] Linda Finska and Julie Gjørtz Howden, 'Troubled waters – Where is the bridge? Confronting marine plastic pollution from international watercourses' (2018) 27 Review of European, Comparative & International Environmental Law 3 https://doi.org/10.1111/reel.12257 accessed 16 July 2023.

[118] United Nations, 'Ocean: the Sources of Life, UNCLOS 20th Anniversary (1982 – 2002)' <https://www.un.org/depts/los/convention_agreements/convention_20years.htm> accessed 16 July 2023.

[119] United Nations Convention on the Law of the Sea (UNCLOS) (Montego Bay) of 10 December 1982, in force 14 November 1994; 1833 UNTS 3.

sources of marine pollution.[120] Arguably, this regime also has its limitations. Given that it does not provide any technical rules,[121] each member state must adopt domestic rules to clarify the content of its *due diligence* obligations, which may lead to discrepancies from country to country.[122] Furthermore, in case of non-compliance by a state Party, other states have limited capacity to claim a violation, although the treaty does have a refined compliance mechanism at the International Tribunal of the Law of the Sea.[123]

The 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (also known as the 'London Convention'),[124] uses similar wording as in UNCLOS to address pollution, focusing however more on the effects rather than the reasons behind pollution.[125] The London Convention and its Protocol prohibit dumping

[120] Art. 194(1) UNCLOS: 'States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment *from any source* (emphasis), using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection'.

[121] Stathis Palassis, 'Marine Pollution and Environmental Law' (2011) Federation Press.

[122] As it is structured, the treaty is difficult to implement as 'the precise measures that States need to take to meet their obligations may be unclear and the time frames in which such obligations are to be met may be equally unclear if not non-existent'. Elizabeth A. Kirk, 'Noncompliance and the Development of Regimes Addressing Marine Pollution from Land-based Sources' (2008) 39 Ocean Development & International Law 235.

[123] Aleke Stöfen-O'Brien, 'The International and European Legal Regime Regulating Marine Litter in the EU' (2015) Vol. 6. Nomos Verlag, p. 104.

[124] Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Protocol) (London) of 7 November 1996, in force 24 March 2006; 36 ILM 1 (1997).

[125] Art. 1(10) of the Protocol: '"Pollution" means the introduction, directly or indirectly, by human activity, of wastes or other matter into the sea which results or is likely to result in such deleterious effects as harm to living resources and marine ecosystems, hazards to human health, hindrance to marine activities, including fishing and other legitimates uses of the sea, impairment of quality for use of sea water and reduction of amenities'.

any type of waste at sea, including plastics. However, in the context of plastic pollution, the focus on marine pollution from vessels, aircraft, platforms, and other man-made structures at sea is necessary but insufficient, since plastic pollution mainly originates from land-based sources.[126]

The 1973 International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1997 (or 'MARPOL') establishes the link between 'the introduction of anthropogenic materials at sea and their environmental impact in its definition of 'harmful substance'.[127] MARPOL represents a crucial legal regime: indeed, Annex V, as revised and entered into force in 2018, prohibits the discharge of certain types of garbage from ships, including 'all plastics'.[128] Over 150 countries have signed the amendment to Annex V so far. Unfortunately, the application of MARPOL is restricted to vessel-based pollution. Furthermore, how to ensure state compliance with MARPOL and the London Convention is still unclear. Given the attention paid to both potential ('likely to result') and already-occurred deleterious effects of pollution, UNCLOS, MARPOL, and the London Convention all adopt a preventive approach. At the same time, they also tend to focus almost exclusively on the marine environment. In our view, it is essential for international decision-makers to place greater emphasis on addressing plastic pollution originating from land-based sources. Possibly, the effectiveness of the aforementioned legal tools against plastic pollution would increase if they all explicitly included plastic waste

[126] The hoped-for reduction of dumping at sea would put further pressure on waste management systems. Stöfen-O'Brien (n 122), p. 153.

[127] Protocol relating to the 1973 International Convention for the Prevention of Pollution from Ships (London Protocol) (London) of 17 February 1978, in force 2 October 1983; 340 UNTS 184. Art. 2(2) of MARPOL: 'Harmful substance means any substance which, if introduced into the sea, is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea, and includes any substance subject to control by the present Convention'.

[128] Resolution MEPC.201(62), Amendments to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, Revised MARPOL Annex V, 15.07.2011.

management within their scope of application. The adoption of the plastic treaty could be an opportunity to deal with the shortcomings of the current legal framework.

VII. Conclusion

The adoption of the UNEA Resolution in March 2022 has marked a 'historical' change in the understanding of the plastic pollution issue by decision-makers.[129] After a long consensus-building process, the international community is finally committed to the establishment of a new regime addressing 'plastic pollution, in marine and in other environments, […] together with its impacts through a full life-cycle approach'. While it is clear that, as also stated in a recent report by the Nordic Council of Ministers, 'a new agreement for plastics must go beyond simply closing gaps in the current international policy framework',[130] the current international legal framework can still be effective if appropriately amended cover every stage of the plastic life cycle. In our opinion, the international community should design and establish an effective international agreement on plastics while making the best of existing legal tools. These two strategies do not appear to be mutually exclusive. Instead, each one is strategic to address different critical aspects in the production, consumption, and waste management of plastic products as well as in the case of plastic pollution. In this vein, overlaps in the renewed international legal framework can be avoided through the coordination of future rules and principles with those already in force. In addition, the expertise gained through voluntary

[129] The UN-Secretary General António Guterres has defined this document as 'the most important environmental deal after the Paris Agreement'. See, <https://www.firstpost.com/world/un-passes-historic-resolution-to-end-plastic-pollution-what-does-it-mean-why-this-is-a-need-of-the-hour-10430181.html> accessed 16 July 2023.

[130] Raubenheimer (n 62).

measures should also be built upon in terms of awareness-raising, monitoring and reporting.[131]

The twofold approach advocated here can have numerous advantages. While protecting other environmental compartments from plastic pollution is important, the existing international agreements such as UNCLOS, the London Convention, the MARPOL Convention, the Watercourses Convention, and the Water Convention already cover marine and freshwater ecosystems. In this case, implementing and enforcing existing regulations is the main challenge.[132] Looking at the earlier stages of the plastic life cycle, upstream and middle-stream measures in force leave many issues unsolved. The Basel, Stockholm and Rotterdam Conventions ensure some coverage. The first contains rules to control the transboundary movements of plastic waste and ensure environmentally sound waste management in receiving countries. The second and third address the production and use of certain chemicals. Their scope could be expanded to prioritize waste minimization, rather than environmental recovery, on a global scale.

At the same time, the upcoming plastic treaty has the potential to offer a more comprehensive regulation to plastic pollution. It should promote sustainable production and consumption of plastic items, improve waste treatment systems, and encourage effective domestic plastic waste management. Furthermore, the treaty should address environmental protection strategies and the impact of microplastics and other small plastic particles on a wider range of ecosystems. From a broader perspective, the

[131] The authors have mostly focused in this paper on binding instruments of international law. In fact, in the last decades soft-law has played an essential role in building consensus around this issue. See e.g. the 1995 Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, the 2011 Honolulu Strategy and the Global Partnership of Marine Litter, the 2017 G20 Action Plan on Marine Litter.

[132] See e.g. Arie Trouwborst, 'Managing Marine Litter: Exploring the Evolving Role of International and European Law in Confronting a Persistent Environmental Problem' (2011) 27 Utrecht Journal of International and European Law 4.

adoption of a plastic treaty will hopefully offer a solution to existing institutional deficiencies in global plastics governance, such as the lack of internationally agreed targets, a timeline, and mechanisms for monitoring, reporting, and assessing ongoing efforts, especially in the context of relative scientific uncertainty.[133] New provisions at the international level should also be coordinated with regional, national, and local measures.[134]

Discussions regarding the structure and content of a potential plastic treaty are currently underway. At present, an agreement combining mandatory and voluntary elements seems to be the most likely option: state parties would count on some flexibility to achieve the agreed-upon goals, but they would also be accountable in case of non-compliance with minimum requirements.[135] It seems clear that a problem as complex as plastic pollution requires the integration of more than one strategy. As argued here, existing instruments may prove as necessary as the treaty in the making.

[133] For instance, the following authors think that the attention paid to plastic pollution is distracting policy-makers from much more serious issues such as climate change and overfishing. Richard Stafford and Peter J.S. Jones, 'Viewpoint – Ocean Plastic Pollution: A Convenient but Distracting Truth?' (2019) 103 Marine Policy <https://doi.org/10.1016/j.marpol.2019.02.003> accessed 16 July 2023.

[134] Vince (n 12). See also e.g. João Pinto da Costa (n 27). Although looking at the other levels of governance could have been interesting, the authors have decided to focus, in this paper, primarily on international law.

[135] Raubenheimer (n 62). See also Simon (n 24).

NEW VOICES

TWO KINDS OF SYSTEMIC CONSISTENCY IN INTERNATIONAL LAW

Henrique Marcos*

The systemic view of international law has grown in popularity in recent decades. Even central authors who endorse the fragmentation of international law have recognised it as a legal system. Despite its popularity, however, some unresolved issues still obscure the systemic view. If international law is a system, does that mean it has no rule conflicts? Or is it that a system can handle these conflicts in a way that preserves legal consistency? In this respect, this article aims to contribute to a better understanding of international law as a legal system by rationally reconstructing the concept of consistency in international law. To make its argument,

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this research distinguishes rules from statements, as well as the consistency of rulesets (R-consistency) from the consistency of statement sets (S-consistency). With this differentiation, this article then explains how the internal logic of international law allows subjects to derive an S-consistent set of legal consequences even if the ruleset of international law is R-inconsistent.

Keywords: International Law; Legal Systems; Rule Conflicts; Legal Logic; Legal Reasoning

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I. INTRODUCTION

'International law is a legal system.'[1] Thus concludes the International Law Commission (ILC). With this clear statement, the ILC closes its study on the 'fragmentation' of international law by adopting a systemic view. This view recognises that international law rules interact with and should be interpreted in light of other rules. As a legal system, international law is not

[1] International Law Commission, 'Conclusions of the Study Group of the International Law Commission on the Fragmentation of International Law' (2006) UN Doc A/CN.4/L.702 para 14.

a random collection of rules. Rather, its rules are interconnected in meaningful ways.

The systemic view of international law has grown in popularity in recent decades. Even Koskenniemi, one of the strongest supporters of the fragmentarian view,[2] argued in a paper published in the first issue of the European Journal of Legal Studies (EJLS) that international law is a unified system as there is no 'special regime' outside of it.[3] There are also passionate allies of the systemic view who have always disagreed with the idea that international law is fragmented. Dupuy is a good example. In an article published in that same issue of the EJLS,[4] he portrayed systematicity and fragmentation as opposites. Dupuy argued that the fragmentation debate is misguided and that efforts should be directed towards understanding the increasing complexity of the international legal system. He maintained that the expansion of international law has not resulted in its fragmentation. Instead, the international legal order is systemic, unified, and consistent due to the significant interrelationship among its rules.

Questions concerning the systemic character of international law are deeply rooted in legal scholarship, and most international lawyers have a general idea of what it means to think of international law as a system. Nonetheless, there are still unresolved questions that obscure the systemic view. If international law is a system, does that mean it has no rule conflicts? Or can the system handle these conflicts in a way that preserves legal consistency? These questions do not have a definite answer, and different lawyers may offer different responses based on their interpretations of international law.

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[2] For an in-depth analysis of Koskenniemi's fragmentarian views, see Sean D Murphy, 'Deconstructing Fragmentation: Koskenniemi's 2006 ILC Project' (2013) 27 Temple International & Comparative Law Journal 293.

[3] Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 European Journal of Legal Studies 8.

[4] Pierre-Marie Dupuy, 'A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law' (2007) 1 European Journal of Legal Studies 25.

Nevertheless, further research can still help develop and refine the systemic view of international law by providing clarity to its conceptual components.

This article aims to contribute to the scholarship by examining the concept of consistency, demonstrating how international law can be viewed as a system despite potential rule inconsistencies. This research identifies two types of consistency: R-consistency and S-consistency. R-consistency pertains to rulesets. A ruleset is R-consistent if it cannot lead to rule conflicts. In turn, S-consistency relates to statement sets, which are S-consistent if all statements can be simultaneously true. This article contends that even if international law's ruleset is not R-consistent, subjects can still draw S-consistent conclusions about the legal consequences of international law rules.[5]

This study engages in a philosophical analysis of legal concepts, particularly the concept of consistency. As such, it is not a doctrinal study of how international lawyers typically use and understand consistency. Rather than providing a descriptive account of consistency, this research 'rationally reconstructs' it. It conceives of consistency in ways that may differ from everyday usage to provide a coherent account of international law's systemic nature. To allow for this reconstruction, the article uses tools developed by contemporary research on legal logic and legal reasoning. Specifically, the present research is inspired by logical models for reason-based decision-making.[6] Such a reason-based perspective is beneficial when addressing rules and underlying legal reasons, because it allows agents to consider opposing reasons before arriving at a conclusion.

As to this article's structure, section II addresses the fragmentation and the systematicity of international law. Section III discusses the different directions of fit of rules and statements. Section IV explains the distinction

[5] For a more detailed conceptualisation of consistencies, see Henrique Marcos, *Consistency in International Law* (PhD Thesis, Maastricht University; University of São Paulo, 2023).

[6] Jaap Hage, *Reasoning with Rules* (Springer 1997).

between R- and S-consistency and shows how to derive S-consistent outcomes from an R-inconsistent ruleset and section V concludes this study.

II. Between Fragmentation and Systematicity

Scholars have long debated whether international law constitutes a legal system, with Hart famously arguing that it is not a legal system as it more closely resembles the pre-legal order of primitive social groups.[7] Although Hart's views on international law are now considered outdated,[8] the concerns he raised still echo. This is particularly due to differences between international and domestic law, especially in terms of (de)centralisation. In this respect, in 2000, the ILC published a first report on the fragmentation of international law.[9] Authored by Hafner, this report raised concerns that the growth in international regulations could lead to contradictions within international law, resulting in legal uncertainty for its subjects.[10]

The risks pointed out in the 2000's ILC report prompted the United Nations General Assembly to request the ILC to further work on the topic of fragmentation. In 2006, the ILC released its second and final report on the subject.[11] This report was written by Koskenniemi, who had previously published on the topic. For instance, in a 2002 publication with Leino, Koskenniemi drew on Hart's description of international law as a mere set of rules that did not constitute a legal system.[12] In that paper, Koskenniemi and Leino noted that the dream of a 'constitutional community' of states was

[7] HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 232–236.

[8] M Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2010) 21 European Journal of International Law 967.

[9] International Law Commission, 'Risks Ensuing from Fragmentation of International Law' (2000) UN Doc A/55/10.

[10] ibid 143–144.

[11] International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) UN Doc A/CN.4/L.682 and Add.1.

[12] Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553, 558.

divorced from political and legal reality.[13] In fact, their conclusion was that fragmentation could not be a risk to international law's systemic character because international law had never been a true legal system in the first place.[14]

Yet, the ILC concluded in its second report that international law is a legal system.[15] The Commission argued that international law's decentralised nature alongside its regulatory expansion had led to rule conflicts as rules are incessantly introduced without any coordination.[16] Nonetheless, the ILC also affirmed that international law is not a disjointed collection of rules as there are legal techniques available for outlining how rules interact with one another.[17] In fact, after the publication of the second report, it seems that Koskenniemi himself changed his views on the systemic character of international law: 'Law is a whole […]. You cannot just remove one of its fingers and pretend it is alive. For the finger to work, the whole body must come along.'[18]

On the one hand, some scholars view international law as both fragmented and systemic, with some referring to it as a 'fragmented legal system.'[19] On the other, certain authors firmly insist that fragmentation and systematicity are mutually exclusive.[20] This divergence on the relationship between fragmentation and systematicity has led to a disjointed understanding of these concepts in international law. For analytical precision, however, it is

[13] ibid.
[14] ibid 559.
[15] International Law Commission (n 1) para 14.
[16] International Law Commission (n 11) para 5 f.
[17] ibid 485 f.
[18] Koskenniemi (n 3).
[19] For example, see A Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis' (2005) 74 Nordic Journal of International Law 27; K-H Ladeur, 'Constitutionalism and the State of the "Society of Networks": The Design of a New "Control Project" for a Fragmented Legal System' (2011) 2 Transnational Legal Theory 463.
[20] As section I pointed out, Dupuy is an author who sees systematicity and fragmentation as opposites.

crucial to work with well-defined concepts. The following paragraphs will provide these definitions.

According to the ILC's reports, fragmentation is a result of the decentralised expansion of international law.[21] Despite the importance of institutions like the United Nations, international law still lacks a central authority to coordinate rulemaking. Also, contemporary international law has expanded its scope to encompass diverse areas such as human rights, environmental protection, and international trade. Its institutions have also multiplied, including thematic and regional organisations as well as various courts and tribunals. This has led to a growth in the number of international legal rules organised into special regimes, including human rights law, environmental law, and trade law. Conflicts often arise between rules from different special regimes and general international law rules, threatening the consistency of the international legal order. This scenario is known as the fragmentation of international law.

Systematicity refers to the characteristic of elements organised in a set and structured as a system. According to Losano, there are two types of systems: external and internal.[22] An external system is an outward organisation imposed on certain elements. For example, a system that organises books by their authors' names does not reveal any intrinsic relationship between these books. In contrast, an internal system comprises interconnected components that operate under a specific rationality or logic to ensure consistency between them. For instance, a multi-volume encyclopaedia with cross-referenced entries can be seen as operating within an internal system. When discussing the systemic nature of international law, the focus is on internal systems. Lawyers seem more interested in whether international legal rules

[21] International Law Commission (n 1) para 4 f.; International Law Commission (n 15) para 5 f.

[22] Mario G Losano, *Sistema e Struttura nel Diritto*, vol 2 (Il Novecento) (Giuffrè 2002) s I.

have an inherent systemic relationship rather than if an order of classification can be imposed on these rules.[23]

According to Losano's definition of an internal system, there are two necessary conditions for a ruleset such as international law to be considered a legal system: *(i)* it must be a unified set of rules *(ii)* that functions according to an internal logic.[24] The reason is that if a system does not function as a unified entity, we may be dealing with multiple systems rather than just one. Similarly, if the elements of a system have no logical inter-relationship, then they are merely a collection of unrelated components bundled together, rather than a true system. In this regard, unity and internal logic are necessary for the existence of a legal system, even if they may not be sufficient on their own. For instance, some authors believe a system must also be 'complete', but other authors argue that legal systems are necessarily 'incomplete.'[25] Despite these differing views, most agree that a legal system must be unified and operate under some internal logic, even if the terminology used to describe these elements varies.[26] In this article, we will focus solely on the two widely accepted elements and set aside the discussion on the (in)completeness of legal systems.

The idea that the international legal system is unified is easy to understand. International law is a single ruleset made up of several rule subsets — special regimes. These special regimes are still part of international law, so their rules are still international law rules. Rules that are part of international law but do not comprise elements of any special regimes are rules of general international law. The ILC follows this view, as it recognises that the label

[23] On the intrinsic character of systematicity, see Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 Modern Law Review 1, 16.

[24] Losano (n 22) s I.

[25] For an overview, see Eugenio Bulygin, 'Carlos E. Alchourrón and the Philosophy of Law' (2015) 1 South American Journal of Logic 345, 350–351.

[26] For example, Bobbio, speaks of 'coherence' instead of 'consistency.' Norberto Bobbio, *Teoria Generale Del Diritto* (G Giappichelli 1993) 201 f.

of special regime has 'no value per se' given that 'no legal regime is isolated from general international law.'[27]

By contrast, the internal logic of international law is more complicated. Delmas-Marty refers to a logic that enables 'ordered pluralism' to overcome 'the contradiction between the one and the many.'[28] Benvenisti explains that international law is 'arranged within a hierarchy, composing together a coherent logical order.'[29] Similarly, Menezes claims that '[international law] is an autonomous normative legal order, conceived in a logical system, with its own characteristics and elements.'[30] Dupuy provides a compelling explanation of how international law's internal logic operates.[31] Contrary to ideas of fragmentation, he explains that the international legal order is systemic due to its formal and material unity. Formal unity results from the application of special rules on law-making, interpretation, adjudication, and normative hierarchy. Material unity stems from the substance and content of specific rules of general international law. We can understand these two unities as resulting from the effective functioning of international law's internal logic, which safeguards its consistency and helps subjects interpret international law even in the face of the complex challenges posed by its decentralised expansion.

There is tension between fragmentation and systematicity. While fragmentation portrays international law as prone to rule conflicts and inconsistency, systematicity contends that despite such complications, international law remains consistent due to its internal logic. In recent years, some authors like Peters have become increasingly confident in the

[27] International Law Commission (n 15) paras 21, 193, 254.

[28] Mireille Delmas-Marty, *Ordering Pluralism* (Hart 2009) 12–13.

[29] Eyal Benvenisti, 'The Conception of International Law as a Legal System' (2008) 50 German Yearbook of International Law 393.

[30] Wagner Menezes, 'International Law in Brazil' (2017) 103 Bulletin of the Brazilian Society of International Law 1237.

[31] Pierre-Marie Dupuy, 'L'Unité de L'Ordre Juridique International' (2002) 297 Cours Général de Droit International Public 9.

effectiveness of systemic techniques in safeguarding the consistency of international law, suggesting that we 'bid farewell to fragmentation.'[32] Interestingly, Peters cites the *MOX Plant* cases which were previously used by Koskenniemi as evidence of fragmentation,[33] as an example of how these techniques help maintain consistency. Specifically, Peters claims that *MOX Plant* contributed to the development of the environmental precautionary principle and delineated the jurisdictions of international courts, including the European Court of Justice and the International Tribunal for the Law of the Sea. [34]

The evidence supporting the systemic character of international law is compelling. However, the concerns raised by the ILC's reports on fragmentation remain persistent.[35] The decentralised nature and the continuous expansion of international law do in fact make it vulnerable to rule conflicts and inconsistency. Nonetheless, its internal logic somehow maintains its consistency as a legal system. In this regard, merely changing the terminology to refer to international law as a 'fragmented legal system' does not resolve this apparent contradiction. To effectively address this question, we need to better understand how the internal logic of international law maintains consistency despite the potential for conflicts and inconsistency. The following sections aim to provide such an explanation. Briefly, there are two types of consistency at play: the consistency of rulesets and the consistency of statement sets (R- and S-consistency). To appreciate the importance of differentiating between these

[32] Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 International Journal of Constitutional Law 671, 696.

[33] Koskenniemi (n 3); Koskenniemi (n 23).

[34] Peters (n 32) 696.

[35] Sivan Shlomo Agon, 'Farewell to the F-Word? Fragmentation of International Law in Times of the COVID-19 Pandemic' (2021) 72 University of Toronto Law Journal 1.

types of consistency, we must first discuss the distinction between rules and statements.

III. Directions of Fit

This section discusses the different directions of fit between rules and statements and how they relate to facts.[36] A fact is any situation that happens or event that takes place. For example, if the event that Uganda supported irregular forces in the Democratic Republic of the Congo (DRC) took place, then that is a fact.[37] In this context, statements are sentences that attempt to describe facts. If they can do so, then they are true. If they do not, they are false. So, if we say, 'Uganda supported irregular forces in the DRC', and that is a fact, then what we said is true. If we say, 'Germany is a permanent member of the Security Council' and that is not a fact, then what we said is false. In this way, statements have a word-to-world direction of fit, which means that statements try to fit the world.

Rules (including 'norms' and 'principles') go in the opposite direction. Rules have a world-to-word direction of fit. Rules do not try to describe the facts in the world. Instead, their endeavour is to shape the world by leading to new facts. Thus, it is possible to affirm that 'rule-based facts' are facts that take place because of rules.[38] For example, the fact that states are obligated to make reparations for wrongful acts is only a fact since there is an international law rule on state responsibility making it so.[39] Let us call this rule 'R1.' Note that it is only because of R1 that Uganda is obligated to make

[36] On directions of fit, see John Searle, *Making the Social World* (Oxford University Press 2010).

[37] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2022] ICJ Reports 1.

[38] Jaap Hage, *Foundations and Building Blocks of Law* (Eleven 2018) 86 f.

[39] International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10 para 42 f.

reparations to the DRC for supporting irregular forces in the territory of this state.

It is important to note that legal rules are more flexible than statements. While statements automatically fit (or do not fit) the facts in the world, rules only lead to new facts when they apply to cases. To properly perceive this difference, we must bear in mind that law, like prudence and morality, comprises the social practices that dictate to subjects what they ought to do and what ought to happen by giving subjects reasons for acting.[40] Therefore, the only way to truly understand how the law works is to realise there is a normative purpose that legal rules must serve. In essence, the normative reasons provided by the law influence the application of rules, rendering them particularly significant for our purposes.

By adopting a reason-based perspective, we can say that a rule applies to a case (which is equivalent to saying that a court ought to apply that rule to a case) when the reasons for applying that rule outweigh the reasons for not applying it.[41] By contrast, a rule does not apply when the reasons for applying it are weaker than the reasons against applying it. We can understand rule application and how rules lead to (rule-based) facts by examining the subtle distinction between a rule being 'applicable' and a rule 'applying' to a case. This difference can more easily be seen by looking at the conditions-consequence formulation of a rule. For example, R1 can be formulated as:

> R1: 'state X has committed a wrongful act against state Y → X is obligated to make reparations to Y.'

In the formulation above, 'X' and 'Y' are placeholders for states such as Uganda and the DRC. The '→' ties in this rule's conditions (on the left) to its consequences (on the right). When a case meets the conditions of a rule, this rule becomes applicable to that case. As a result, if R1's conditions are met by a specific case in which Uganda commits a wrongful act against the

[40] Gerald J Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 The Journal of Legal Studies 165.

[41] Marcos (n 5) ch 3.

DRC, then R1 is applicable to this case (for ease, let us call it the 'DRC v Uganda case'). Meanwhile, a rule applies when its consequence is imposed on a case, thus leading to a new rule-based fact.

As pointed out above, from this reason-based perspective, a rule only applies if the reasons for applying it outweigh the reasons against it. From this same point of view, we can say that the fact that a rule is applicable to a case — like the fact that R1 is applicable to the DRC v Uganda case — is a reason for this rule to apply. Since R1 is applicable to the DRC v Uganda case and assuming that there are no more reasons to take into account, R1 applies to this case. If R1 applies to the DRC v Uganda case, this rule's consequence is imposed on this case, making it a rule-based fact that Uganda is obligated to make reparations to the DRC.

Most of the time, rules apply to cases to which they are applicable. However, this reason-based approach allows for the non-application of applicable rules.[42] For instance, a rule may not apply to a situation if doing so would go against the reason that rule was made.[43] Although a 'no vehicles in the park' rule is applicable, it does not prohibit an ambulance from entering a park to respond to an emergency. Likewise, a court could decide that even though R1 is applicable, it does not apply to the DRC v Uganda case if Uganda had exculpatory reasons.[44] Suppose that in an alternative DRC v Uganda case, not only had Uganda committed wrongful acts against the DRC, but the DRC had also committed wrongful acts against Uganda. The fact that both parties had committed wrongdoings against one another could result in R1's non-application. If we conclude that the reasons for R1's application do not outweigh the reasons against it, then R1 does not apply in this case, even if

[42] ibid.

[43] Lon L Fuller, 'Positivism and Fidelity to Law' (1958) 71 Harvard Law Review 630, 664 f.

[44] Ademola Abass, 'Consent Precluding State Responsibility: A Critical Analysis' (2004) 53 International & Comparative Law Quarterly 211.

it is applicable. If R1 does not apply, its consequence is not imposed. As a result, Uganda would not be obligated to make reparations to the DRC.

IV. R- AND S-CONSISTENCY

1. *Two Kinds of Consistency*

As introduced in section I, S-consistency is the consistency of statement sets, and R-consistency is the consistency of rulesets. Since statements attempt to describe facts of the world, it can be affirmed that a set of statements is S-consistent if all of them can be true simultaneously. For example, the statements 'Uganda injured the DRC' and 'Uganda did not injure the DRC' are S-inconsistent because Uganda either did or did not injure the DRC, but not both.[45] Meanwhile, the statements 'Uganda injured the DRC' and 'Uganda must make reparations to the DRC' are S-consistent because they can be concomitantly true.

Truth and falsity are not relevant when it comes to R-consistency because rules are not true or false. Rule conflicts, in contrast, are worth analysing. Two or more rules conflict when they are both applicable to a case and, if applied simultaneously, they would impose incompatible consequences. Rule consequences are incompatible when they are facts that cannot occur together. In other words, rule-based facts led by conflicting rules cannot be facts simultaneously. To understand this, consider the following rulesets S1 and S2:

> S1: {R1: 'state X has committed a wrongful act against state Y → X is obligated to make reparations to Y'; R2: 'state X has committed an act of aggression against state Y → X's act against Y is wrongful'}
>
> S2: {R3: 'state X has discriminated between like products → X is prohibited from discriminating between these products'; R4: state X has discriminated

[45] The logical rule of non-contradiction posits that contradictory statements cannot be true at the same time. Dave Barker-Plummer and others, *Language, Proof, and Logic* (2nd edn, Center for the Study of Language and Information 2011).

between like products to protect wildlife → X is permitted to discriminate between these products'}

Note the difference between these two rulesets. S1 does not lead to conflicts. An act of force can be both an act of aggression and wrongful, and the guilty state can be obligated to make reparations for its wrongdoing — these are all compatible. Therefore, there is no conflict between rules R1 and R2. Hence, S1 is R-consistent. Conversely, S2 leads to conflicts.[46] Trade law rule R3 and environmental law rule R4 will conflict in any case where a state discriminates between like products with the goal of protecting wildlife. If R3 and R4 both apply to the same case, it would mean that a single state is both permitted and prohibited to discriminate against a particular product. The incompatibility is that someone can either be prohibited or permitted to do something, but not both simultaneously.[47]

Consider the following scenario to help elaborate this explanation. Imagine that the United States of America (US) discriminates against Asian shrimp products in favour of importing similar shrimp products from other continents. Even though the end product is the same, the shrimp from other continents is caught using fishing nets that prevent sea turtles from being entrapped. Unfortunately, Asian producers still use nets that trap and kill turtles. Assume that the US genuinely wants to protect sea turtles in this case (let us call it the 'Shrimp-Turtle case')[48] and that this discrimination is not arbitrary or unjustified. Thus, both R3 and R4 are applicable to the Shrimp-

[46] S2 is inspired on the discussion of process or procedure method distinctions. See María Alejandra Calle Saldarriaga, 'Sustainable Production and Trade Discrimination: An Analysis of the WTO jurisprudence' (2018) 11 Colombian Yearbook of International Law 221.

[47] Prohibitions and permissions are incompatible under non-contradiction. See Sven Ove Hansson, 'The Varieties of Permission' in Dov M Gabbay and others (eds), *Handbook of Deontic Logic and Normative Systems* (College Publications 2013).

[48] This hypothetical scenario draws inspiration from the real-life 'Shrimp-Turtle' case of the World Trade Organization. However, the example presented in this paper is a modified and simplified version of the actual case, used solely for the purpose of illustration. See: *United States — Import Prohibition of Certain Shrimp and Shrimp Products* [1998] WTO Doc WT/DS58/AB/R.

Turtle case as this case matches their conditions. But if both rules were to apply to this case, they would impose incompatible consequences: the US would be prohibited from discriminating under R3 and permitted to discriminate under R4.

2. S-Consistency out of R-Inconsistency

Given that S2 leads to conflicts, it is R-inconsistent, but that is not the end of the story. As explained in section III, there is a subtle but critical difference between applicability and application, which makes it possible for applicable rules not to apply. In this regard, consider how this article defined conflicts in terms of the incompatibility of rule consequences. Due to this definition of conflicts, conflicting rules cannot both apply to the same case. After all, if these conflicting rules applied, they would lead to (rule-based) facts that, by definition, could not take place simultaneously (incompatible facts). In light of that, and since R3 and R4 are conflicting in the Shrimp-turtle case, either R3 or R4 applies to this case, but not both. This leads to the question of which rule (R3 or R4) applies.

The conflict between R3 and R4 can be addressed by using rules that set up priority relationships, such as *lex specialis,* which prioritises more specific rules over less specific ones. Under the reason-based approach, priority works as a meta-reason (a reason about reasons). The meta-reason given by *lex specialis* expresses that the reason for a more specific rule's applicability outweighs the reason for a less specific rule's applicability. Considering that 'C' is a placeholder for a case and 'R(n)' and 'R(m)' are placeholders for other rules, we can formulate *lex specialis* as:

> *Lex Specialis:* 'Rules R(n) and R(m) are conflicting in a case C, and R(n) is more specific than R(m) → R(n) has priority over R(m) in C'

Lex specialis is applicable to the Shrimp-Turtle case because there is a conflict between two rules, one of which (R4) is more specific than the other (R3). R4 is more specific than R3 because R3 is applicable to all instances of like-product discrimination. Meanwhile, R4 is only applicable to cases of like-

product discrimination to protect wildlife. Assuming there are no more reasons to consider, the conflict between R3 and R4 can now be addressed.

We must first consider whether *lex specialis* applies to this case. Since *lex specialis* is applicable to this case, that is a reason it applies. If there are no reasons against *lex specialis'* application, it can be concluded that it applies. Therefore, *lex specialis* imposes its consequence on this case by presenting a meta-reason that, in the Shrimp-Turtle case, the reasons for R4's applicability are more important than the reasons for R3's. Next, we must evaluate this meta-reason that *lex specialis* provides. If there are no reasons opposing the conclusion that R4's applicability is more important than R3's, the (meta-)reason given by *lex specialis* prevails. Thus, in the Shrimp-Turtle case, R4's applicability outweighs R3's applicability. (Note that if R3 came from a more fundamental treaty provision than R4, then another priority-giving rule, such as *lex superior,* might present meta-reasons to weigh against the ones given by *lex specialis*.)

It is now possible to weigh the reasons R3 applies against the reasons R4 applies. The information given by the paragraph above allows the inference that R4 applies and R3 does not apply in this case. Since R3 does not apply, its consequence is not imposed on this case. Accordingly, the rule-based fact of R3's consequence does not take place. In contrast, because R4 applies, its consequence is imposed on this case. As a result, the US is permitted to discriminate against similar products (shrimp) because the discrimination is intended to protect wildlife (turtles). Nonetheless, a different case could result in the opposite outcome. If US actions were not genuine but instead a disguised restriction on international trade, R4 would not be applicable. If that were the case, the reasoning would shift to the conclusion that R3 would apply, prohibiting the US from discriminating against these products.

The explanation above shows it is possible to obtain a set of legal consequences that are S-consistent from an R-inconsistent ruleset. Although S2 is R-inconsistent (as its rules, R3 and R4, can conflict), the reason-based approach allows for the non-application of applicable rules. Even if R3 and

R4 are applicable to the Shrimp-Turtle case, only R4 applied. So, in reasoning with R3 and R4, we used the R-inconsistent ruleset S2 to draft an S-consistent statement set S3. The elements of S3 are all statements that are true at the same time as they all correspond to (rule-based) facts that can coexist:

> S3: {'R3 and R4 are applicable to the Shrimp-Turtle case'; 'R4 applies to the Shrimp-Turtle case, thus imposing its legal consequence on this case'; 'R3 does not apply to the Shrimp-Turtle case, so it does not impose its legal consequence on this case'; 'given that R4 applies, the US is permitted to discriminate against similar products (shrimp) to protect wildlife (turtles)'}.

The Shrimp-Turtle case presented in this article is less intricate than practical scenarios. It has been intentionally simplified to serve as an effective illustration. Breaking down complex issues to their fundamental components allows a better understanding of them. While this particular case may not be as challenging as those encountered in real life, it exemplifies how logic can help figure out which rules apply and what legal effects these rules have in the cases at hand.

V. Final Remarks

This article has shown that it is logically possible to derive an S-consistent statement set from an R-inconsistent ruleset. This conclusion is important as it elaborates on what can be understood when analysing international law from a systemic point of view. A legal system such as international law need not be immune to conflicting rules. Instead, it needs to be able to address those conflicts. This logic has shown how conflicts can be resolved by reasoning with applicable rules and weighing reasons for and against applying these rules.

This account helps us understand how international law's internal logic contributes to the consistency and systematicity of the international legal order. Even though international law may seem like a 'fragmented legal system' riddled with rule conflicts, it is still possible for subjects to make sense

of what the international legal order expects from them by reasoning with rules. This is possible because subjects can extract S-consistent outcomes from an R-inconsistent ruleset. In other words, even if the rules of international law are not consistent with each other, it is still possible to extract a consistent outcome from them by using the logical approach developed by this article.

PLAUMANN WITHERING: STANDING BEFORE THE EU GENERAL COURT UNDERWAY FROM DISTINCTIVE TO SUBSTANTIAL CONCERN

Gerd Winter*

Direct access to the EU General Court for annulment of certain EU legal acts presupposes that the applicant is individually concerned. Longstanding case law has defined 'individually' as distinctive and unique. This formal definition has often been criticised for substantially restricting access to justice. The present contribution takes this criticism further, arguing first, that under cover of the formal criterion of distinctiveness, practices have emerged that are uncertain and inconsistent sometimes rather tending towards substantive criteria. And second, that insofar as the criterion is taken literally, it provokes the paradoxical effect that the more serious and therefore widespread the damage resulting from a legal act is, the less legal protection of rights is granted – a situation that has become virulent with climate change. For several reasons, indirect access via national remedies combined with the referral of validity questions to the European Court of Justice is no effective substitute. The article submits, based on a reflection on principles of legal protection, that individual concern should not be defined formally as distinctive but rather be defined materially as a personal and severe concern. Furthermore, the article discusses the doctrinal implications of such a new definition and shows how the risk of opening the floodgates for actions could be managed.

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Keywords: access to the EU General Court; individual concern; Plaumann; annulment action; constitutional complaint; reference for preliminary ruling; reforming access to EU courts

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INTRODUCTION

Proceedings launched by individuals aiming at the annulment of EU legal acts can in principle be brought directly to the General Court (GC). [1] Standing for such actions is regulated by Art. 263 (4) TFEU.[2] This provision distinguishes three variants of contested legal acts and related standing requirements: legal acts having an addressee who may in this quality file the action (first variant), general executive acts not entailing implementing measures that require direct but not individual concern on the side of the applicant (third variant), and other legal acts that require both direct and individual concern (second variant). Such other legal acts can be individual acts having effects on third persons and general legal acts of legislative and executive nature, the latter with the exclusion of the self-implementing ones of the third variant.

Since the Plaumann judgment of 1963 the CJEU has understood individual concern very narrowly as requiring concern that is differentiated from that of all other persons.[3] Critics of this restrictive definition have argued that it

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1 Art. 256 (1) [1] TFEU. Appeals would be heard by the European Court of Justice (ECJ) (Art. 256 (1)[2]. Terminologically it should be noted that the GC and ECJ together form the Court of Justice of the EU (CJEU) (Art. 19 TEU). I will speak of the CJEU when referring to both the GC and ECJ, and of the GC or ECJ if indicating differences of competences, opinions, or practices.

2 The paragraph reads: 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

3 ECJ Case C-25/62 *Plaumann v Commission* EU:C:1963, 217. The formula reads: 'Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.'

blocks the many persons who are personally and seriously harmed by EU legal acts from access to the GC.[4] The CJEU responded that any broadening of the definition would require a change of the treaty text and open a floodgate of actions. Any gap of direct access could be made good by actions before national courts and the possibility of referring questions to the ECJ in accordance with Art. 267 TFEU. In return, critics argued that not all member states provide adequate remedies. Still, the CJEU has persisted in its opinion. Scholars have since largely acquiesced through somewhat positivistic search for patterns in the massive body of case law. Thus, case clusters were identified, that were granted or denied standing. Notably, standing was accepted for 'closed shops' and vested interests of actors such as in anti-dumping, subsidy and competition law,[5] but denied in areas of regulation of more diffuse interests such as in environmental protection.

My impression is that commentators, be they defenders, opponents or neutral observers, agree on two observations: They believe that the distinctiveness criterion actually guides the case law (be it to their satisfaction or discontent); and they believe that the loss for those who are denied access can be tolerated, considering the indirect route to the ECJ via referral

[4] Case C-50/00 *P Unión de Pequeños Agricultores v Council of the EU* ECLI:EU:C:2002:197 Opinion of *AG Jacobs*; Matthias Kottmann, 'Plaumanns Ende: Ein Vorschlag zu Art. 263 Abs. 4 EUV', (2010) 70 *ZaöRV* 547, 563; Michael Rhimes, 'The EU courts stand their ground: why are the standing rules for direct actions still so restrictive?' (2016) 9 *Eur J Legal Stud* 103, 151-163; Paul Craig and Grainne de Búrca, *EU Law. Text, Cases and Materials* (OUP 7th ed 2020), 551-564; Ioanna Hadjiyianni, 'Judicial protection and the environment in the EU legal order: missing pieces for a complete puzzle of legal remedies', (2021) 58 *CMLR* 777-812.

[5] Koen Lenaerts, Ignaz Maselis and Kathleen Gutman, *EU Procedural Law* (OUP 2014) paras. 7.97-7.134; Craig (n 4); Albertina Albors-Llorenz, 'Judicial protection before the Court of Justice of the European Union', in Catherine Barnard, Steve Peers (eds.) *European Union Law* (OUP 3rd ed 2020), 298-303; Jonathan Wildemeersch, *Contentieux de la légalité des actes de l'Union européenne. Le mythe du droit à un recours effectif* (Editions Bruylant 2019), paras 299-306 ; Wolfram Cremer in Christian Calliess and Matthias Ruffert (eds.) *EUV. AEUV* (CH Beck 6th ed 2022), Art. 263, paras 33-53.

procedure. By contrast, my hypothesis is that 'Plaumann' does not work at all but is a disguise under which inconsistent and paradoxical, but also auspicious solutions have emerged. On the basis of this analysis an alternative interpretation of individual concern including implications for the referral procedure will be developed. Part I contains this analysis, part II a reform proposal.

The article aims first and foremost to make a conceptual contribution, which will be illustrated throughout the piece utilising the *Carvalho* case.[6] This case concerns an action that was brought by 10 families and an association who were engaged in peasant agriculture and adapted tourism, living in different regions of the EU and even in Kenya and Fiji. They claimed that they already at present suffered serious health and economic damage as a result of climate change, and that this was partly due to the greenhouse gas emissions allowed by certain EU legal acts.[7] Alleging these acts to violate their fundamental rights and certain provisions of the Paris Agreement on climate protection they applied for annulment of the relevant provisions.[8] The GC and, on appeal, the ECJ rejected the action as inadmissible holding that the plaintiff families were not individually concerned by the challenged legal acts.

[6] Case T-330/18 *Carvalho and Others v EP and Council* EU:T:2019:324 para 33 et seq; upheld on appeal by Case C-565/19 *Carvalho v EP and Council* EU:C:2021:252 para 77.

[7] These were Directive (EU) 2018/410 amending Directive 2003/87/EC on the emissions trading system (ETS), Regulation (EU) 2018/842 on contributions to climate action by Member States (CAR), and Regulation (EU) 2018/841 on emissions and removals by land use, land use change and forestry (LULUCF).

[8] See in more detail Gerd Winter, 'Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation' (2020) 9 *TEL* 137-164; the application and appeal are accessible at https://peoplesclimatecase.caneurope.org/de/downloads/.

I. Analysing direct and indirect access to the CJEU

In this part I will examine, first, how the CJEU makes use of the Plaumann formula in its case law (1.), and then, whether national remedies combined with referrals to the ECJ compensate for any gaps in direct access to the GC (2.).

1. *Direct access to the General Court*

As stated, my hypothesis is that the Plaumann formula barely has any guiding effect anymore. Although an enormous body of case law has emerged, it is far from clear how 'distinctiveness" should be understood. One way of testing its consistency is to examine whether and how distinctiveness is found in the factual world or defined by legislation. There are two different approaches, facts- and rights-based, which correspond to two different doctrinal traditions in EU Member States regarding the function of court review. This ranges from the German concept of protection of rights of the individual 'subject' of a state to the French concept of 'objective' legal oversight over administrative bodies.[9] Both approaches were accepted as equivalent in determining access to justice in environmental matters in Art. 9 (2) of the Aarhus Convention of 1998.[10] Distinctiveness would be identified in the factual interests approach by looking at the effects of the contested act, and in the rights based approach by examining if the contested act breaches an individual right.[11]

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[9] Jean-Marie Woehrling, 'Die französische Verwaltungsgerichtsbarkeit im Vergleich mit der deutschen' [1985] *Neue Zeitschrift für Verwaltungsrecht* 21, 23; Ernst Forsthoff, *Lehrbuch des Verwaltungsrechts*, (10th edn, C.H.Beck 1973), 184-194; Bernard Stirn and Yann Aguila, *Droit public francais et européen* (3rd edn, Presses de Sciences Po et Dalloz 2021), 731-740.

[10] Convention on access to information, public participation in decision-making and access to justice in environmental matters of 1998.

[11] It should be noted that in the *de facto* approach the relevant interests include not only purely factual ones (such as human well-being or financial income) but also ones that are accepted or even made a right by law (such as the right to health or

It appears that the CJEU oscillates between the two approaches. Moreover, insofar as either of the approaches is applied there is no internal consistency. This can be explained by the formal character of the distinctiveness test which has an innate trend towards substantial application thus either abandoning formality or paradoxically denying legal protection when harm is serious and wide-spread.

A. Individual concern relating to factual interests

The applicant families in *Carvalho* alleged that they were differently concerned by climate change and the EU legal acts contributing to it. Some applicants were farmers, others hotel owners. Some were harmed by drought, others by floods, by melting snow and ice, or by heat waves. More generally what distinguished them from many other professions was the fact that their livelihoods were heavily dependent on reliable weather conditions.

The ECJ denied them standing reasoning that:

> the fact that the appellants, owing to the alleged circumstances, are affected differently by climate change is not in itself sufficient to establish the standing of those appellants to bring an action for annulment of a measure of general application such as the acts at issue.[12]

The court thus accepted that the applicants were differently affected, but this did not lead it to grant standing. *Prima facie* this violates the judicial syllogism because the rule 'if there is a difference in concern, then there is standing', applied to the fact 'there is a difference in concern', logically commands to grant standing. However, by adding that the fact (difference in concern) is

land property). But such legal basis stems from general laws that are not specifically related to the regulatory problem at stake. This problem is dealt with by that legal act (such as an environmental or business regulation) the implementation of which is the object of court review. In the rights-based approach this legal act would be examined as a potential source for individual rights.

[12] Case C-585/19 *Carvalho v EP and Council* (n 6) para 41.

'in itself' not sufficient the court inserted into the rule an additional condition. But it did not explain what that is.

One way to find that criterion might be a look at the case of the fishing company *Jégo-Quéré v the European Parliament and Council*.[13] In that case an EU regulation restricting fisheries was challenged for adverse effects on the applicant. The company argued that it was singled out from all other actors potentially concerned because it was the only one fishing in the regulated zone that was affected by the prescribed minimum net opening which was to let the protected species, young hake, escape but was too wide to catch the company's target fish, whiting. One would expect that this is a clear case of 'peculiar attributes" or 'differentiating circumstances" in the sense of the Plaumann formula.[14] But the ECJ declined propounding another criterion which is that the company was only an example of a type, i.e. an actor affected 'in the same way as any other economic operator actually or potentially in the same situation."[15] This is understandable in respect of legal logic since in terms of the applicable general legal act, all the individuals concerned (and even if there is only one of them) are only cases of application of an abstract-objective type.[16] But by applying such criterion the court switches from factual effects to legal evaluation. It therefore dismisses the factual approach contradicting its own cherished Plaumann formula.

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[13] Case C-263/02 P *Jégo-Quéré* ECLI:EU:C:2004:210 paras 4-6.

[14] See above fn 3.

[15] Case C-263/02 P *Jégo-Quéré* (n 13) para 46. See as further instances ECJ Case C-583/11 P *Inuit Tapiriit Kanatami v EP and Council* EU:C:2013:625 para 73 ('any trader'); Case T-16/04 *Arcelor v EP and Council* ECLI:EU:T:2010:54 para 107 ('any other operator or […] producer'); Case C-244/16 P *Industrias Químicas v Commission* EU:C:2018:177 para 91 ('objective quality as importer').

[16] Cf. Ota Weinberger, *Rechtslogik* (2nd edn, Duncker & Humblot 1989), 252: 'If a general norm proposition commands that every subject x has the duty to realize p, then the single subject xi of the quantification universe has this duty [...].' (my translation from German)

Of course, the purely factual identification of 'peculiar attributes" and 'differentiating circumstances" could open the often-feared floodgate for actions because in the real world a myriad of differences exist. In an attempt to avoid this the CJEU sometimes looks for particularly grave effects on concerned persons. For instance, in state aid law, a company that has 'conclusively shown' that the aid may 'substantially' affect its 'position on the [...] market'[17] was accepted as individually concerned, and likewise in anti-dumping law a company whose 'business activities depend to a very large extent on those imports and are seriously affected by the contested regulation'[18], as well as in merger law a company whose 'position in the market […] provide it with a sufficient basis to justify the description of potential competitor".[19] Upon closer scrutiny this orientation implies that the comparative view imbedded in the formal 'distinctiveness' test vanishes and a substantial orientation that looks at severity for the individual actor creeps in. 'Plaumann' thus loses its determinative influence.

Still, the court has not developed criteria against which the seriousness of concern can be measured. This may be due to the fact that the court does not fully engage in the substantial concept. Compare, for instance, the severity of the impact on the farmers in *Carvalho*, who claimed that their land is becoming uncultivable as a result of climate change, with the exporters of photocopiers to the EU in *Nashua Corp,* the profit of which was reduced from estimated average 14,6 % to 5 % as calculated aim of the contested EU antidumping regulation.[20] The farmers were not considered to be individually affected, but the exporters of photocopiers were. The applicants in *Carvalho* who were existentially harmed would have been a perfect example for severe harm, but to accept that would have implied

[17] Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757, para 55; see similar ECJ Case C-169/84 Cofaz ECLI:EU:C:1986:42 para 28.

[18] Case C-358/89 *Extramet* ECLI:EU:C:1992:257 para 17.

[19] Case T-114/02 *Babyliss v Commission* ECLI:EU:T:2003:100 para 106.

[20] Joined Cases C-133/87 and C-150/87 *Nashua Corp. v Council*, ECLI:EU:C:1990:115, [1990] ECR I-767 para 17.

abandoning the construct of 'any other economic operator'. In contrast, if the formal approach with its focus on singular effects is retained, the paradox emerges that the more catastrophic and wide-spread such effects are, the less legal protection is granted.[21] More appropriate criteria must be found. Such criteria will be discussed in part II.

B. Individual concern relating to rights

An alternative construction of standing is to understand 'individual concern" not as effects on factual interests but as infringement of individual rights.[22] When applying this approach, two steps must be taken: the individual right must be derived from legislation, and it must be alleged to have been violated. Such an individual right will be based on the act, be it of ordinary, constitutional or international law, against which the contested act is assessed. Such rights can provide a *status negativus* in the sense that the authority must desist from an action, or a *status positivus* in the sense that it must take an action.[23] For instance, in cases concerning subsidies, a

[21] It should be noted that such extreme though wide-spread effects may not only result from general legal acts, as it was in *Carvalho*, but can also arise from individual acts (or their omission), a major example being *Danielsson v Commission*. A resident of Tahiti, Ms Danielsson, applied at the GC for an interim measure ordering the Commission to prohibit France to test an atomic bomb the fall-out of which would hit her island. The President of the GC, Antonio Saggio, rejected the application on the perplexing ground that while the applicants might suffer personal damage this would not distinguish them individually since any person residing in the area in question could be affected. ECR T-219/95 R *Danielsson v Commission* [1995] ECR 3052, para. 71. See Art. 158 Rules of Procedure of the GC for the competence of the GC President. The French government was well aware of the disastrous consequences. See Sébastien Philippe, Tomas Statius, *Toxique: Enquête sur les essais nucléaires francais en Polynésie* (Presses Universitaires de France 2021).

[22] Forsthoff (n 9)

[23] Forsthoff (n 9) 184-186. While in the interest based concept of standing is just a question of court procedure, in the rights based approach the right is considered to materially shape the relationship between the individual and the public authority (i.e. to desist from or to do something) and to be procedurally armoured

competitor may positively claim that the Commission shall order repayment, or a beneficiary may negatively claim that the Commission desists from such order. Often the pertinent law does not expressly establish a right. Then, interpretation of the text is needed exploring whether it aims at serving the general public interest or – in addition - the interests of individuals benefitting from it.[24]

The CJEU has on occasion interpreted laws as protecting individuals and thereby creating rights for them. This is clearly the case when the persons and facts in question are listed by name or are otherwise clearly identifiable in that act. An example of this is *BRF SA, SHB Comércio de Alimentos SA* where the applicants were listed directly in an EU regulation as being entitled to import meat and challenged a subsequent act delisting them.[25] Such cases are rare, however, and the CJEU usually must determine through interpretation whether provisions are general or individualizing. For instance, in *Extramet,* the ECJ, accepting standing, regarded as individualising the rather abstract rule that an anti-dumping duty may be imposed if dumping causes material injury to an existing branch.[26] By contrast, in *Jégo-Quéré* the ECJ, denying standing, qualified as abstract-objective the quite specific regulation of fishcatch from a limited area south of Ireland, the size of vessels, hours at sea, and minimum net openings.[27]

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by a right to seek court review. See on the related doctrinal controversy Hans Heinrich Rupp, *Grundfragen der heutigen Verwaltungsrechtslehre* (Mohr/Siebeck 1965) 146-272.

[24] Such reasoning is rooted in German law where the norm that aims at protecting individuals is called Schutznorm (protective norm). For an exemplary case see BVerwG Case 4 C 74/78, BVerwGE 68, 58 (60).

[25] Case T-429/18 *BRF SA, SHB Comércio de Alimentos SA v Commission,* ECLI:EU:T:2020:322 para 48.

[26] Case C-358/89 *Extramet* (n 18) paras 15-16; similar for trade arrangements between EU and overseas territories Case T-47/00 *Rica Foods v Commission* EI:T:2002:7, paras 41-42, and for anti-subsidy measures Case 191/82 *Fediol v Commission* [1983] ECR 2914 para 31.

[27] Case C-263/02 P *Jégo-Quéré* (n 13) paras 4 and 5.

While these examples concern material rights, there is a longer tradition dealing with procedural rights. Thus, in the European Coal and Steel Community (ECSC) heavy industry and their associations were entitled to bring actions (Article 33 (2) ECSC Treaty) as a closed shop of players who cooperated or competed with each other. When the European Economic Community (EEC) extended its primary clientele to any economic branch, legal standing was narrowed by the requirement of direct and individual concern (Art. 173 (2) ECT). The ECJ and later also the GC considered as individually concerned those who were in some way formally acknowledged as participants in the relevant decision-making procedure, thus forming a closed class. This applies, for example, in competition law to those companies that had applied for measures to prevent cartels or abuse of a dominant position.[28] In the area of state aid law, it applies instead to those who are considered parties in the control procedure[29], while in the area of anti-dumping to those who can apply for proceedings to be carried out.[30] In fisheries law it applies to those who participate in the setting of catch quotas via their regional fisheries councils (RACs).[31]

With the turn towards the 'Europe of the citizens', initiated by the then Commission President Jacques Delors and realised by both the Single European Act of 1987 and the Maastricht Treaty of 1992, the club model became inappropriate. The closed shop of cooperating and competing players is not isolated. It has a significant impact on third parties who claim consumer protection, environmental protection, healthy working conditions, social security, gender equality and so on. Since these persons tend to be affected in greater numbers rather than individually, the club or closed class model excludes them, even though they are often affected at least as severely as the club members.

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[28] Recognised since Case 26/76 *Metro v Commission* [1977] ECR 1876, para. 13. See further Lenaerts/Maselis/Gutmann (n 5), para 7.43.

[29] Case C-521/06 P *Athinaiki Techniki v Commission* EU:C:2008:422, para 36.

[30] Case 191/82 *Fediol v Commission* [1983] ECR 2914, para 29.

[31] Case C-355/08 P *WWF-UK v Council* EU:C:2009:286, paras 44-45.

One might expect in this situation, that distinctiveness would be accepted as a reason for standing at the very least if the invoked individual right – be it material or procedural – were a fundamental right.[32] However, the CJEU has been hesitant to accept this. In *Carvalho,* the claimants, in addition to alleging harm as factual concern, submitted that the contested climate legislation interfered with their fundamental rights to health, occupation and property. The ECJ responded that 'the claim that the acts at issue infringe fundamental rights is not sufficient in itself to establish that the action brought by an individual is admissible.'[33] The court thereby accepted that the applicants' fundamental rights might have been infringed, but, as was the case with the interest-based approach, the court again added an 'in itself', apparently having an additional condition in mind, which it did not disclose.

Arcelor v EP and Council might provide an answer as to what this additional condition is. The applicant, a steel producer, alleged that the EU emissions trading scheme infringed its fundamental rights to property, occupation and equal treatment.[34] The court acknowledged that fundamental rights must be observed by legislation but when testing standing it looked at the effects of the contested act on the applicant's economic situation inquiring if they distinguished the applicant from other enterprises, finding that they did not because many other companies were also affected. This means, however, that the court switched from the rights-based to the interest-based approach which considers the factual effects of the contested act. Had it continued with the rights-based approach, the court would have had to acknowledge that distinctiveness is given with the very existence of a right of an individual person. The inquiry in this case into the factual effects is thus inconsistent with a rights-based approach.

There may be some merit to the concern that a rights-based approach to the granting of standing, in which right holders are individualised per se, could

[32] Cf. Paul Craig, *EU Administrative Law* (OUP 2006) 346.
[33] Case C-565/19 Carvalho v EU (n 6), para 48.
[34] Case T-16/04 *Arcelor v EP and Council* (n 15) para 75.

flood the GC with cases. Some filtering criteria must be found, but they need to provide access in cases of grave concern, regardless of whether few or many persons are affected. Imagine a legal act with direct expropriatory effect on numerous persons, such as, for instance, the annulment of patents for certain products, the closure of an environmentally hazardous business branch[35], or the driving ban for a type of combustion engine, all regulations that imaginatively may in future emerge to mitigate climate change. Should the persons affected be excluded from legal protection, simply because there are many of them? Criteria reasonably tailoring access will be discussed in Part II.

2. National action plus referral to the ECJ: a substitute for direct access?

In response to allegations of gaps in direct access to the GC, the CJEU has pointed to the possibility of national legal protection, arguing that together the domestic and the EU levels form a complete system of remedies and procedures.[36] Anyone wishing to challenge an EU legal act could seek legal protection before national courts, which might then refer a pertinent question to the ECJ, and is obliged to do so if it is a court of last instance.[37] This response was also reiterated by the GC in *Carvalho*.[38]

Several objections have been raised against this view. First, national law does not always provide appropriate remedies. In response, the ECJ refers in general to the duty of the member states under Art. 5 TEC (now – somewhat

[35] This consequence had been alleged by the applicant in *Arcelor* (n 15) although the interference did not consist of an explicit prohibition of activity but of a cost burden. This difference would of course have to be examined at the merits stage.

[36] Case C-50/00 P *Unión de Pequenos Agricultores* ECLI:EU:C:2002:462, para 40. The system also includes the incidental testing under Art. 277 TFEU of a legislative act in actions challenging an executive act based on the same.

[37] ECJ Case C-263/02 P *Jégo-Quéré* (n 13), para 30.

[38] Case T-330/18 *Carvalho and Others v EP and Council* (n 6), para 53. The ECJ did not return to the issue on appeal (Case C-565/19).

more specified - Art. 19 (1) (2) TEU) to provide appropriate remedies.[39] However, it evades any verification whether this really happens.[40] This is understandable, because national remedies are often anchored in the respective legal history and culture, which cannot be easily evaluated and possibly set aside by the ECJ. But this does not alter the fact that appropriate remedies are lacking.[41] Second, the direct action before the GC is better suited to dig into factual issues than the preliminary procedure before the ECJ, which concentrates on legal questions. The ECJ has largely refused to address this problem. In *Carvalho*, for instance, the claim that the EU climate protection acts were insufficient to reduce greenhouse gas emissions would have required in depth evidential inquiry.[42] More generally, and seldomly considered: Art. 6 (3) TEU should be consulted as transmission belt requiring

[39] ECJ Case C-50/00 P *Unión de Pequenos Agricultores* (n 36), para 42. The ECJ has recently strengthened its push to allow standing for national actions indirectly challenging EU legal acts (see ECJ Case C-873/19 DUH ECLI:EU:C:2022:857); but this only concerns acts of environmental law and actions of NGOs, not of individuals.

[40] Ibid para 43; Case C-263/02 P *Jégo-Quéré* (n 13), paras 31-33.

[41] It is true that some authors have proposed constructs for national remedies that would enlarge access to references to the ECJ. Wildemeersch (fn 5) paras 716-749 derives from Art. 19 TFEU a conclusive obligation of the member states legislators and courts to establish a declaratory action on the validity of an EU legal act; similarly, Bernhard Wegener, 'Rechtsstaatliche Mängel und Vorzüge der Verfahren vor den Gemeinschaftsgerichten' (2008) *Europarech*t Beiheft 3, 45 et seq, proposes an application for declaration that a legal relationship based on the EU legal act is non-existent due the latter's nullity. But these constructs will hardly be accepted by national courts.

[42] It is true that the ECJ does have the right to investigate those facts that are relevant for judging the validity of the contested legal act, but is rarely proceeds accordingly, see Lenaerts/Maselis/Gutman (n 5), para 24.23. For an example see Case C-616/17 Blaise, ECLI:EU:C:2019:800, in which the court when assessing the authorisation of Glyphosate only addressed legal issues although the true problem was the factual basis of the risk assessment. For further examples and an outspoken critique see Case C-352/19 P *Région de Bruxelles-Capitale v Commission*, ECLI:EU:C:2020:588, Opinion of AG *Bobeck*, paras 137-147, and Case C-177/19 P *FRG v Ville de Paris u.a.,* ECLI:EU:C:2021:476, Opinion of AG *Bobeck* para. 108.

that Art. 263 (4) TFEU must be read in the light of the European Convention on Human Rights (ECHR), and more specifically its Art. 34 which establishes the principle of access to justice in cases of violations of human rights.

In addition to these well-established critiques, it is also worth considering that the detour via national procedures causes useless delays and additional costs. Particularly whenever the complaint exclusively addresses the validity of the contested EU legal act, not the modalities of its implementation.[43] This was salient in *Carvalho*, because the applicants, if denied access to the GC, were remanded to file actions in 27 member states forcing a reduction quota on each of them so that the sum could equal the envisaged EU-wide reduction. Furthermore, referrals to the ECJ cannot be expected and may even be inadmissible whenever the contested EU legal act only aims at a minimum harmonisation. Minimum harmonisation means that member states can go further. In *Carvalho,* the remaining member states' competence resulted from the very content of the challenged three legal acts as well as from Art. 193 TFEU, considering that the acts were based on Article 192 TFEU. In such cases, domestic courts will be asked to decide whether the member states are obliged to go further, such as reducing emissions deeper than required by EU law. The courts will routinely have to answer this question by applying national constitutional law, in particular national fundamental rights, hence not the rights found in the EU Charter of Fundamental Rights.[44]

[43] *AG Jacobs* (n 4) paras 41-42. In the related judgment, the ECJ only partially addresses the objections of AG Jacobs, in a manner that appears disrespectful to me.

[44] Interpreting the applicability of the CFR on member states measures related to EU secondary law, the ECJ distinguishes between minimal harmonisation where the member states retain their genuine competences and regulatory regimes where they are given powers by Union law to take implementing measures. The CFR is applicable in the second situation, but not the first. See Joined Cases C-609/17 and 610/17 *Terveys* ECLI:EU:C:2019:981 paras. 49-50. See further Richard Král and

There are thus several well-established reasons why national referrals do not constitute a realistic substitute for direct access to the GC. As a matter of fact, there have been no referrals for review of EU climate change to date and they have commonly not even been considered.

How to cope with the gap will be discussed in part II.

II. Reinterpreting individual concern

The mantra-like recital of the Plaumann formula has disguised how the case law has developed its own criteria. These criteria however lack methodological consistency. They also tend to replace the formal test of distinctiveness by a substantial test of seriousness of concern, which, while commendable, is not yet sufficiently circumspective, raising concerns about unequal treatment of potential claimants, and refuses legal protection the more massive and wide-spread adverse effects are. In this section, I will propose a different understanding of individual concern basing this on core principles that should guide judicial protection. I will first outline the relevant principles (1.), propose a definition of individual concern (2.), examine aspects of its practical application (3.) and explain how such direct access to the GC could be coordinated with indirect access to the ECJ (4.).

1. *Principles of access to judicial review*

Several principles may be considered pertinent in the determination of who should have standing before a court, but I consider the following five to be particularly important in the case of access to the CJEU: legal certainty, judicial protection of rights, separation of powers, multilevel subsidiarity, and equal treatment. I will introduce them in turn and shortly indicate their effects on the findings of my analysis.

Petr Mádr, 'On the (in)applicability of the EU Charter of Fundamental Rights to national measures exceeding the requirements of minimum harmonisation directives' (2021) 46 *ELR* 81.

A. Legal certainty

Legal certainty is not explicitly stated in the treaties but inherent in the rule of law (Art. 2 TEU). It is also supported by the principle of consistency of the legal order which is binding also for the EU judiciary (Art. 13 TEU). In *Heinrich* the ECJ formulated it to require that 'Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.'[45] My analysis of the case law has made it clear that the methodological ambiguity of the distinctiveness criterion prevents individuals from ascertaining their rights to legal protection and thus defies legal certainty.

B. Judicial protection of rights

The most important principle certainly is the guarantee of effective judicial protection. It ensures access to EU or Members States courts for the protection of rights guaranteed by EU law. This principle is enshrined in Art. 47 (1) CFR and Art. 19 para 1(2) TFEU. Since Art. 47 (1) CFR and Art. 263 (4) TFEU are both rules of primary law, they should be interpreted in concordance with each other.[46] The question then is whether the distinctiveness criterion infringes on Art. 47 (1) CFR insofar as it blocks access to justice for individuals that suffer personal and serious harm. The answer depends on the definition of 'rights' 'guaranteed by the law of the Union'. The term 'rights' certainly embraces individual rights expressly or implicitly established by law. In addition, interests – at least those accepted by law – should also be included in the term.[47] Considering this, legally

[45] Case C- 345/06 (Heinrich) ECLI:EU:C:2009:140, para 44.

[46] See the somewhat laconic observation of AG Jacobs in Case C-263/02 P *Commission v Jégo-Quéré* ECLI:EU:C:2003:410 para 45 that 'it clearly follows from the Court's judgment in Unión de Pequeños Agricultores that the traditional interpretation of individual concern, because it is understood to flow from the Treaty itself, must be applied regardless of its consequences for the right to an effective judicial remedy." (My emphasis)

[47] Hans D. Jarass, *Charta der Grundrechte der Europäischen Union* (3rd edn, CH Beck 2016) Art 47 paras 6-8.

accepted interests and legally established rights can hardly be excluded from judicial protection simply because they are not distinctively affected in the narrow Plaumann sense.

It is true that when applying the principle of judicial protection, account must be taken of the scarcity of judicial resources, or of what is called judicial economy. While that consideration is not explicitly mentioned in the treaties it is implied in the very institution of the EU judiciary that the flooding with actions of the EU courts must be avoided. However, other than sometimes insinuated by the CJEU[48] it has no prevalent status but assists in giving the legal protection principle concrete shape. As will be explained there are procedural tools that help to ensure this.

C. Separation of powers

According to the principle of separation of judicial, legislative and executive powers, courts should practice judicial self-restraint because the legislative and the executive branches dispose of more direct democratic legitimation. One should nonetheless acknowledge that courts contribute some genuine legitimation by providing a forum for reasoned argumentation and independent, unbiased deliberation that differs from political and administrative decision-making patterns.[49] Considering this, my impression is that courts are unable to fully fulfil their function when individual concern is identified by formal comparison rather than substantive reflection.

D. Multilevel subsidiarity

Although subsidiarity as laid out by Art. 5 TEU does not apply to the competencies of the judiciary, its basic idea can also be used as guidance for

[48] Cf the frequent expression of fear that without the Plaumann doctrine Art. 263 (4) would become meaningless. See cites (n 12) and (n 32).

[49] See on legitimation through principled reasoning Ronald Dworkin, *Taking rights seriously* (Harvard UP 1978), 22-31, 184-205, and on legitimation through deliberative proceedings see Jürgen Habermas, *Faktizität und Geltung* (Suhrkamp 1992), 272-291.

the relationship between national and EU courts.[50] While subsidiarity is most often understood as limiting EU competences[51], it also has an enabling aspect as expressed in the Latin notion of 'subsidium' (like in 'subsidy'). In that line the principle encourages the EU to make use of competences when objectives 'can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level' (Art. 5 (3) TFEU). Relying on this activating aspect of the subsidiarity principle I submit that the gaps found in the 'complete system' of direct and indirect access to the EU judiciary are reasons for facilitating direct access to the GC.

E. Equal treatment

The right to equal treatment (Art. 20 CFR) also applies to the judiciary (Art. 51 (1) CFR). It appears that the generous acceptance of standing for actors in competition cases encroaches upon the equality principle when compared with the reluctance to grant standing in other areas, including environmental cases. The prevention of action flooding may be considered as justification of differentiation but one can ask why it should be 'necessary' (Art. 51 (1) CFR) to accept the risk of flooding in competition cases but not in other cases, and especially in environmental ones which are at least as urgent. Moreover, unequal treatment can also be seen in the conditions of access to the reference procedure. Persons alleging invalidity of an EU legal act have different chances to reach the ECJ depending on the standing rules of their Member State. This may lead to litigation strategies that shop for those fora that are most open for individual or class action. Open Member States like the Netherlands or Ireland may even become a hub for such actions.

[50] Konrad Walter, *Rechtsfortbildung durch den EuGH* (Duncker & Humblot 2009), 260.

[51] Idem, 261 et seq.

2. Individual concern redefined

My core suggestion for a way forward is that individual concern should be defined not as distinct but as a personal and severe concern. This has already been proposed by several other commentators.[52] My contribution is to have based it on new aspects of analysis, relate it to a number of principles of legal protection, and explain its practical implications in more detail.

In conceptual terms, the change of definition involves a change from a formal to a material criterion. This means that the individualisation of concern is not to be found in distinctiveness but rather in severity of adverse effects. The formal concept compares affected persons and looks for uniqueness of harm. It cares for those who stand out. In contrast, the material concept looks for personal harm and evaluates this in relation to a person's ordinary life conditions. By requiring this to be personal it excludes action for others. By requiring it to be severe it concentrates on those who are not just cursorily but seriously affected, such as if their health is impaired, their employment endangered, their land devastated, etc. It may well be that in order to determine levels of severity comparisons with other persons' fates are helpful, but such exercise will only be 'distinctiveness light', not uniqueness in the restrictive Plaumann sense.

Admittedly, the notions 'personal' and 'severe' entail interpretation and thus discretion for the judge. But that can be fettered by considerations to be developed by court case law. After all, courts of the many national legal orders that apply the two criteria have been able to perform this task.[53] Some more concrete implications of the proposed definition will now be discussed. This will be done with particular regard to actions challenging those measures that have effects on a multitude of persons. Such measures can be

[52] Outstanding AG Jacobs (n 4) paras 59-99. See also Craig/de Búrca (n 4); Cremer (n 4) para 53; Winter (n 8) 159.

[53] See, e.g., national reports on France, Italy and Sweden in Umweltbundesamt (ed.) *The legal debate on access to justice for environmental NGOs*, Texte 99/2017.

individual acts (concerning effects on third parties) as well as general executive and legislative acts.

3. Personal and severe concern concretised

The following questions appear to be crucial for putting the concept in more concrete shape:

- Should 'individual concern' be based on an interest or a right? (A)
- Should standing for actions contesting legislative acts be treated restrictively? (B)
- Should 'individual concern' be substantial or procedural? (C)
- How should a multitude of individual actions be dealt with? (D)

A. Should 'individual concern' be based on an interest or a right?

States relying on rights-based standing appear to be more restrictive than states with the interest-based approach.[54] Indeed, standing would be denied if the relevant legal norm solely aims at the protection of the general interest while it may de facto have severe effects on personal interests. However, the rights-based approach can also be more permissive. Notably, in relation to procedural rights it can happen that rights of participation are legally granted without a material interest being affected, such as if the general public is entitled to comment on a project. My suggestion is that EU courts should continue to apply both concepts. But the two should be clearly defined and interrelated in the following manner:

- *Interests as 'concern'*

Member state legal systems that rely on interests do nevertheless not grant standing in case of any interference with an interest but require that certain

[54] See national report on Germany in Umweltbundesamt (2017) (n 53). On the UK see Carol Harlow, Richard Rawlings, *Law and Administration* (CUP 2nd ed 2006) 548-574.

qualifying conditions must be given. A variety of criteria are employed in that respect such as that the affected interest must be 'substantial' or 'legally accepted', and/or that the interference must be 'personal', 'specific', 'direct', 'sufficient', 'legitimate' etc.[55] These different notions can be condensed to the very two suggested here: personal and severe concern.[56] As already stated, personal concern shall mean that the claimant must be affected him/herself. He/she can therefore not bring an 'altruistic' action on behalf of others.[57] Severe concern can be divided into two steps: that the affected interest is significant and the kind of interference serious. For instance, human health is certainly a significant interest but only seriously harmed if a disease is caused.

As already stated, the CJEU has to some extent already adopted the substantive orientation of 'individual concern' without characterising it as abandoning Plaumann.[58] The move towards open replacement of Plaumann would therefore not be a radical step as it is sometimes perceived. Another advantage of the reformed definition is that personal and severe concern can be related to the factual effects of the contested act. The difficult question how the individualisation of concern is to be expressed by the relevant act would not arise.

The new definition would also have a beneficial effect on the inner-administrative complaint procedure concerning environmental law cases.

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[55] For France: 'affectation suffisamment spécial', 'directe et certaine' (C.E. 29. März 1901, Casanova, Rec. 333); for England and Wales: 'sufficient interest' (Supreme Court Act 1981 ch. 54 sec. 31 (3); for Spain: 'un derecho o interés legitimo' (Art. 19 para 1 (a) Ley 29/1998 reguladora de la Jurisdicción Contentioso-administrativa); for Poland: 'legal interest' (Art. 50 § 1 Act on Administrative Court Proceedings). For examples of related court case law in various European countries see *GA Cosmas* Opinion of 23.9.1997 in Case C-321/95 P (Greenpeace v Commission), ECLI:EU:C:1997:421, para 105.

[56] On concepts referring to a legal or legitimate basis of interests see n. 11.

[57] This is only conceded in legal systems which allow for an *actio popularis*, such as in Portugal (see Art. 55 (1) (f) with Art. 9 (2) Code of Administrative Procedure of Portugal).

[58] Text to n 17-19.

The procedure has previously only been accessible for NGOs but was recently opened for individuals. In order to be entitled to file a complaint, applicants must 'prove that their rights have been impaired as a result of the alleged violation of environmental law and that they are directly affected by such impairment in comparison with the public'. [59] The reference to rights signals a rights-based construction of standing, whereas 'directly affected [...] in comparison with the public' sounds a bit like a codification of Plaumann but is open for fresh interpretation.

- *Rights as 'concern'*

In a rights-based concept it should be made transparent how rights are identified. As explained above, their source would be the act which is applied to assess the validity of the contested act. An individual right is easy to identify if it is named as such, like in the case of the right of access to information.[60] In most cases, however, rights must be construed by interpretation of legal texts. As mentioned above[61], in German law the so-called protective norm test (Schutznormtest) serves as a hermeneutic tool. Traditionally, the test was applied restrictively but under the influence of the CJEU the protective scope was extended to groups or classes of individuals.[62] In this open form the protective norm test may also serve as a tool of

[59] Insertion of an Article 11(1a)(a) into Regulation (EC) No 1367/2006 by Article 1(3) of Regulation (EU) 2021/1767, [2021] OJ L 356, 8.10.2021, p. 1.

[60] Art. 15 (3) TFEU and Art. 2 (1) Regulation (EC) 1049/2001, [2001] OJ L 145, 31.05.2001, p. 42.

[61] BVerwG (n 24).

[62] See e.g. Case C-237/07 *Janecek* ECLI:EU:C:2008:447 paras 35-39 where the court was satisfied with 'public health' in general as protective scope of the air quality standards; the decision was accepted by BVerwG Case 7 C 21.12, BVerwGE 147, 312, para 46. See also ECJ Case C-535/18 *IL et al. v Land Nordrhein-Westfalen* ECLI:EU:C:2020:391 paras 130-132 where the court found the general protection of groundwater to provide legitimate users of groundwater with subjective rights; the decision was accepted by BVerwG Case 9 A 5.20, BVerwGE 170, 378 paras 43-45. See also BVerwGE 119, 329 (333-334) for including the precautionary principle into the protective scope of the law although hitherto precaution was categorised as serving the public interest, not individuals.

identifying rights established by EU law. While such a right is first and foremost material in the sense of structuring the relationship between the individual and the government, it is armoured by a procedural right to seek judicial protection against government failure.[63] The procedural right can be qualified by criteria that aim at filtering access to courts, including personalisation and seriousness of the violation of the right. Overall, the applicant must give reasons that the right exists, that she belongs to the holders of the right, and that her right is seriously interfered with.

Particular reflection on direct access to the GC is apposite when an EU legal act is alleged to interfere with a fundamental right. Fundamental rights first and foremost guide legislators in the sense that they place limitations and requirements on the creation of ordinary legal acts, including the creation of subjective rights. However, as said, Art. 263 (2) TFEU by referring to the treaties as applicable norms does acknowledge that direct access to the GC must be possible also for actions alleging the violation of fundamental rights. The question is then what filters could prevent that every slight negative effect on a fundamental right can be submitted to the GC. I believe the same criteria can be used as those proposed for rights based on ordinary law: the applicant must substantiate that the scope of a fundamental right is affected, that he or she is a holder of the right individually or as part of a group or class, and that the right is severely interfered with. Still, two more preconditions may be added reflecting the subsidiary character of fundamental rights. First, applicants should be required to first search regular legislation for rights and only if that is fruitless rely on fundamental rights.[64] Second, as interferences with fundamental rights can be justified for reasons of public interests or of other persons' fundamental rights, applicants should be required to substantiate that no such proportionate reasons exist.

[63] See for this distinction text to n 9.

[64] On the related discussion in German law see Ferdinand Kopp, Wolf-Rüdiger Schenke *VwGO* (27th edn, Beck 2021), § 42 paras 117-123.

B. Should standing for actions contesting legislative acts be treated restrictively?

Some legal systems provide a direct action that allows individuals to challenge the constitutionality of legislative acts. Others only provide indirect court review, such as through incidental checking by ordinary courts or by referral to a constitutional court.[65] This means there is no common principle of member state traditions concerning a direct constitutional action against legislative acts. Contrastingly, the EU treaties did introduce such action, albeit in a peace-meal and maybe not profoundly reflected way. This happened because 'acts' in the sense of Art. 263 (4) TFEU came to also include legislative acts[66], and the possible pleas under Art. 263 (2) TFEU include the 'infringement of the treaties', a term that came to embrace the CFR. A constitutional complaint before the ECJ does not exist. Proposals for a related reform was discussed in the Constitutional Convent but finally rejected. Any new design was left to be developed by the CJEU based on the wording of Art. 263 (4) TFEU.[67]

Within that framework it may be claimed that a Plaumann-like narrow interpretation of individual concern regarding legislative acts suggests itself for reasons of the separation of powers.[68] This principle advises that law-making in the interest of the general public is relegated to the democratic political sphere while legally determined individual cases are for the judiciary. One might question whether the institutional edifice of the EU can really be understood as being based on the traditional division of powers,

[65] For an overview see *AG Jacobs* (n 4) para 89.

[66] Case C-583/11 *Inuit Taipiri Kanatami v EP and Council* (above fn 15) para 56. The development was propelled when the ECJ recognised that the action for annulment also lies against acts of the EP, see Case 294/83 *Les Verts v EP*, ECLI:EU:C:1986:166, ECR 1986, 1357 paras 20-26.

[67] The statement of the then ECJ President Iglesias may have been influential in this direction: : "It seems to us that it is preferable to protect fundamental rights in the framework of existing remedies." (Secretariat of the European Convention, Final report of the discussion circle on the Court of Justice of 25 March 2003, CONV 636/03, para 22).

[68] Approving *AG Kokott*, Opinion in ECJ C-583/11 P *Inuit Taipiri Kanatami v EP and Council* (n 15) para 38.

and even if that principle was applied to the EU level as well, it remains to be seen what precise effects it would have on legal standing. In any case it would not legitimise or call for the narrow version of the Plaumann formula. After all, according to Art. 51 CFR, fundamental rights apply to all EU institutions and thus also to those possessing direct democratic legitimacy. Parliamentary preponderance is therefore perfectly compatible with a more open interpretation of individual concern.

C. Should 'individual concern' be substantial or procedural?

There is no doubt that individual concern can be found in the infringement of substantive interests or rights. Concerning procedural interests or rights, the situation is more complicated. On the member states level, concepts vary depending on the value states place on procedure. In the English tradition, for example, procedural requirements set by statute or natural justice are considered an essential component of reasonable decisions with a value in and of itself. This means that procedural failure in principle renders decisions unlawful.[69] In the German tradition, by comparison, the compatibility of decisions is determined by the material standards of the relevant law. This implies that procedures are considered to serve as tools for substantive legality implying that procedural failure is of relevance only if the applicant proves that also a material right of hers is affected.[70]

Within this conceptual field of tension, CJEU case law on member state administrative procedures can be categorised as tending towards the English

[69] Jonathan Forsythe, William Wade, *Administrative Law* (12th edn, OUP 2021), 405-407.

[70] BVerwG Case IV C 50.71, BVerwGE 44, 235 (239); BVerwG Cases 7 C 55 and 56.89, BVerwGE 85, 368 (373-375);cf. Eberhard Schmidt-Assmann, 'Der Verfahrensgedanke im deutschen und europäischen Verwaltungsrecht', in Wolfgang Hoffmann-Riem, Eberhardt Schmidt-Aßmann, Andreas Voßkuhle (eds) *Grundlagen des Verwaltungsrechts* (2nd edn, CH Beck 2012), 497 (paras 64-65).

'eigenvalue' concept.[71] By contrast, concerning EU administrative procedures, the CJEU is still influenced by the closed shop or club model.[72] However, since the development of the EU to a community of citizens, the range of interests for which procedural positions should be acknowledged must be extended beyond a club of economic actors. In what way this should be done is first of all a question to be answered by the legislator. In any case, however, the CJEU will have to develop criteria for fair and effective participation of both interested and affected parties. For instance, it could build on the distinction between the participation of the public and the public concerned that is common in environmental licensing procedures such as in environmental impact assessment.[73]

Furthermore, it has to be clarified to what extent participation rights lead to review only with regard to the procedural mistakes or also with regard to the substantive legality of the contested act. In *Eurofer,* the ECJ opted for the first view.[74] By contrast, Art. 9 (2) of the Aarhus Convention provides full review even if the failure alleged at the admissibility stage is only procedural.

D. How could a multitude of individual actions be dealt with?

The proposed definition of individual concern will make many persons eligible for standing if the adverse effect is massive. This causes the risk that the courts will be flooded with actions. However, case law could be developed to concretise the severity of concern. Substantive and procedural means would be available. In substance, there are various heuristic dimensions that may be drawn on, including: degrees of harm (superficial, serious, lasting, reversible, etc.), legitimate expectations (vested interests vs

[71] See e.g. Case C-72/12 *Altrip* EU:C:2013:712, paras 52-53 on the question of irrelevance of procedural failure.

[72] Text to n 28-31.

[73] Article 6 (2) and (3) Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, [2012] OJ 2012 L 26/1

[74] Case T-381/11 *Eurofer v Commission* EU:T:2012:273, para 35.

newcomers), cognition (degree of certainty of harm), causality (cause – effect – intervening factors), and time (imminent vs future interference).

Furthermore, various means and circumstances already exist that reduce court case-loads, including: even if many persons are severely affected, only a few will really have the courage to publicly expose themselves as claimants; NGOs that support an action usually select exemplarily affected persons for lawsuits; the filing of lawsuits is bound to deadlines, in the EU this means putting together facts and legal arguments within 2 months after the entering into force of the challenged legal act; proceedings are costly; the GC can by order decide that an action is bound to fail without any further steps in the proceedings;[75] the GC can join a high number of similar lawsuits or deal with them through model proceedings; questions once decided are usually not brought up again; an action is inadmissible if subject to *res iudicata;* and finally and importantly, the number of the GC judges has since 2015 been increased from one to two per member state.[76]

Even more effective than these procedural tools would be if actions brought by associations – also known as collective actions or class actions – were accepted. Such actions could bundle cases by individuals affected and thus reduce the caseload for the CJEU. However, according to standing case law such actions are only admitted under one of three circumstances which are if the association had particular participation entitlement in the pertinent decision-making procedure, if the association's own rights were encroached upon, or if its members were individually concerned themselves.[77] All of these requirements reflect the singularity criterion of the Plaumann formula. They obviously do not fit the type of action in the interest of collectives.

The action brought by associations would be useful not only if there is a great number of similar individual concerns but also if individuals are under

[75] Art. 126 Rules of Procedure of the General Court.

[76] Art. 48 Statute of the CJEU.

[77] Standing case law, see, for example, Case T-173/98 *Unión de Pequeños Agricultores v Council*, ECLI:EU:T:1999:296, ECR 1999, II-3359, para 47.

risk only stochastically.[78] A case in point is the probability of a disaster caused by climate change. It is predictable with high confidence that such disaster will occur within a certain time span, but not precisely where that will happen.

It is true, that concerning environmental policy, EU law has somewhat facilitated legal recourse by associations. Regulation (EC) 1367/06 provides non-governmental environmental protection organisations with the possibility of an intra-administrative appeal against individual decisions, which, following the intervention by the Aarhus Compliance Committee,[79], was recently extended to general executive acts.[80] However, this is of little help for the access to court review. Only the decision of the executive EU institution on the complaint can be challenged while the original decision becomes final. It is then up to the executive institution whether to revoke or modify the same.[81] Moreover, the inner-administrative complaint procedure remains closed concerning legislative acts. This is due to the fact that the reform was entirely aimed at alignment with the Aarhus Convention, in particular its Art. 9 (3), which is not applicable to legislative acts.

All in all, the CJEU cannot permanently ignore the need for collective interests to have access to court review. In this respect, only standing for an action by NGOs can help. Individual concern would then be interpreted to extend to an NGO that fulfils certain organisational conditions, and the statutory aim of which is affected by the contested law.

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[78] In *Greenpeace* the GC dismissed the application referring to the Plaumann formula, but could have raised the question if the collective nature of the interests affected by the project did not suggest to admit a class action. See: Case T-585/93 *Greenpeace v Commission* [1995] ECR II-2209 paras 51, 59-66.

[79] Advice of the Aarhus Convention Compliance Committee ACCC/M/2017/3 and ACCC/C/2015/128 accessible at https://unece.org/env/pp/cc/accc.m.2017.3_european-union and https://unece.org/env/pp/cc/accc.c.2015.128_european-union. Accessed 17 April 2023.

[80] Amendment of Article 2(1)(g) and (h) of Regulation (EC) No 1367/2006 by Article 1(1) of Regulation (EU) 2021/1767, [2021] OJ L 356, 8.10.2021, p. 1,

[81] Case T-177/13 *TestBioTech v Commission,* ECLI:EU:T:2016:736, paras 41-46.

E. Reference procedure

Since EU legal acts are mainly executed by the member states, but partly also by the EU, it has to be decided at which level which legal remedies should be made available. In this respect, the CJEU propagates the concept of a complete system of remedies divided between the two levels, assigning an important role to the preliminary reference procedure in reaction to the narrowness of the Plaumann formula. However, as critique - including this contribution – has proven, access to national courts and referral procedures is not adequately ensured, and the system defended by the CJEU has serious gaps.

Looking for explanations for why the CJEU defends the system approach playing down its gaps, one is tempted to see a hidden agenda. It may be that in the realm of individual actions, the ECJ aims at acquiring a function as constitutional court. The GC would then primarily be a court for the review of executive action or inaction by EU institutions while the ECJ itself would be responsible for the review of EU legislative acts. However, as the ECJ cannot be approached directly by individuals, it must wait for referrals from national courts. In order to promote that agenda, it urges member states to liberalise standing rules before national courts[82] and at the same time narrows direct access to the GC by the restrictive interpretation of individual concern.[83] If this assumption is correct, however, such an agenda is not supported by the present constitutional order. That order assigns to the GC the role of a court for EU citizens who shall have direct access to legal protection, including, if upcoming, the test of constitutionality of all EU legal acts.

[82] See e.g. Case C-432/05 *Unibet* ECLI:EU:C:2007:163 para 42; Case C-873/19 DUH (n 39).

[83] Such narrow interpretation is not only practiced concerning 'individual concern' but also concerning 'direct concern' in the context of self-executing general executive acts. This too has the effect of hindering direct access to the GC shifting actions to national courts and the possibility of referrals to the ECJ. See the related critique of *AG Bobeck* (n 42).

It is therefore appropriate to look for a concept that does not one-sidedly narrow direct access to the GC but objectively strives for best legal protection in the multilevel structure of the EU. Such a concept could be derived from the above-mentioned subsidiarity principle including its activating aspect. In that line my suggestion is that the competence of national or EU jurisdiction should be distributed according to the *sedes materiae*, or the main seat of the legal problem.

When the implementation of the EU legal act is carried out by the member states, and the problem is located within the implementation itself, *sedes materiae* is located at the national level. In these cases, the CJEU should be seen as an instance of harmonisation of national court practices. This harmonisation function justifies why the ECJ can be called upon for the authentic interpretation of EU legal acts (Art. 267 TFEU) and why in relation to national courts it has a monopoly of annulment of such acts. *Sedes materiae* also explains that, when interpreting direct concern within the meaning of Art. 263 (4) TFEU, the CJEU focuses on whether the legal act by itself changes the legal position of those concerned and leaves no discretion for any implementing measure.[84]

On the other hand, when the implementation is carried out by the member states, but the problem comes from the EU legal act itself, *sedes materiae* is located at the EU level. If the EU legal act itself is considered null and void and this question determines the dispute, no adequate clarification of the problem can be expected from domestic litigation. Then the reference to national legal protection is a superfluous detour unreasonably burdening the parties and the national judiciary.[85]

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[84] Standing case law, see, for example, as an application in environmental law, Case C-321/95 P *Greenpeace v Commission* [1998] ECR I-1651.

[85] A telling example is the case brought to the Irish High Court by Friends of the Irish Environment (FIE) challenging a Council Regulation that fixes the fishing opportunities for certain fish stocks. As the Court noted, the primary purpose of the application was to secure a reference to the ECJ as to the legality of the

This idea has indeed been recognised by the opening up of the third variant of Art. 263 (4) TFEU, the removal of individual concern as requirement for standing in case of self-enforcing executive acts. At the moment however, this has been done only very formally, by making the direct action abstractly dependent on the absence of implementing measures instead of looking at the substantial *sedes materiae.* National legal action is also unhelpful when applicants do not question the implementing act but rather the underlying legislative act. In *Carvalho,* for example, the applicants could have waited for the yearly decision of member states fixing the quantity of emission allowances to be allocated to the companies participating in the emissions trading system. However, as those quantities are precisely predetermined by the pertinent EU Directive, the national court would have had no room for its own factual or legal checking of the member state's decision. National action contesting the member state's decision if available at all would therefore have been superfluous and circuitous.

In conclusion, the *sedes materiae* concept warns against restricting direct access in view of the disappointing auspices of referrals. Direct access must be enabled where national remedies involving referrals are ineffective. If direct access is refused in such cases this must be regarded to constitute a breach of the guarantee of effective judicial remedy under Art. 47 CFR. That is a strong argument in favour of defining 'individual concern' more broadly, and most appropriately as personal and serious concern.

Regulation (judgment of 8 February 2022, Case [2022] IECH 64, no. 3). One could extend the logic of sedes materiae to the case where the EU legal act is implemented by the Commission or the Council. If the problem lies in the manner of implementation, the GC of course is the proper instance to review. However, the GC is also competent if the problem lies in the legal act itself. It therefore is both an administrative and constitutional court. Should that be changed and referral from the GC to the ECJ or even direct access to the ECJ be introduced this would certainly require a textual change of the relevant treaty provisions.

F. Interpretation competence and its textual limits

The interpretation of 'individual concern' as personal and serious has raised the question if that would transcend the competence of the CJEU as a court. The CJEU took position on that question at various occasions including in *Carvalho* in which the applicants had strongly argued in favour of reinterpretation along the lines elaborated in this article. The ECJ stated as follows:

> the appellants cannot ask the Court of Justice to set aside such conditions, which are expressly laid down in the FEU Treaty, and, in particular, to adapt the criterion of individual concern as defined by the judgment in Plaumann, in order that they may have access to an effective remedy.[86]

Thus, the Court expressed that it had no authority to adjust 'Plaumann' because that would mean changing the text of the treaty. But the applicants did in no way ask the Court to set aside the text of the TFEU. To imply that appears to amount to a breach of the procedural right to be heard.

Nonetheless, the court might think 'Plaumann' is stonewalled as a matter of primary law. It might infer this from the drafting history of the treaties. At Lisbon, the TFEU, took over the wording for Art. 263 (4) from the draft Constitution, so the drafting history of the latter can be referred to when interpreting the former. The focus on standing in debates on the draft Constitution was on the situation that general executive acts which, without implementing acts, directly change the legal situation of affected persons cannot be challenged by them for lack of uniqueness of concern. The reference to national legal protection would be unsatisfactory because in the absence of a challengeable implementing act, those affected would have to breach the legal act provoking a sanction against which they could appeal to a national court, which could then refer the question of the validity of the legal act to the ECJ.[87] In order to avoid this unacceptable detour, the

[86] Case C-565/19 *Carvalho v EP and Council* (n 9) para 76, corresponding to standing jurisprudence, cf Case C-297/20 *P Sabo* ECLI:EU:C:2021:24 paras 33-34.

[87] See the concise account of that dubious consequence by AG Jacobs (n 4) para 43.

requirement of individual concern was removed for general executive acts (called regulatory acts) which do not entail implementing measures.[88]

However, these considerations were rather ad hoc, they did not build on a thorough analysis of the shortcomings of the system of legal protection.[89] It cannot be concluded from them that the CJEU was barred from continuing playing its genuine role as interpreter of primary law. It is more correct to infer that the Convention addressed one specific problem that was virulent at the time, but left other problems to be addressed by further jurisprudence.[90] According to the final report of the Secretariat of the European Convention, the discussion group on the Court of Justice followed members who favoured to adopt – as the President of the Court had suggested - a restrictive approach in relation to proceedings by private individuals against legislative acts (where the condition 'of direct and individual concern' still applies) and a more open approach as regards

[88] See, *inter alia*, Case C-244/16 P *Industrias Químicas v Commission* (n 28) paras 39-42.

[89] See the summary of the negotiations by Kottmann (n 4) 547 (560). Cf. also the very summary character of the Cover Note from the Praesidium to the Convention on the Court of Justice and the High Court, CONV 734/03, p. 20, accessible at https://www.europarl.europa.eu/meetdocs_all/committees/conv/20030520/734000en.pdf, Accessed 17 April 2023.

[90] As a side note I believe that it would basically have been better if the third variant of Art. 263 (4) TFEU had not been introduced at all. With the deletion of 'individual concern', the struggle about individual concern is now infecting the remaining criterion of direct concern, and, paradoxically, in a way that liberalises distinctiveness. See Joined Cases C-622 to 624/16 P *Scuola Elementare Maria Montessori v European Commission and others*, EU:C:2018:873 para 50 and Case C-461/18 P *Changmao Biochemical Engineering* EU:C:2020:979 paras 62-77, as commented by Roberto Caranta, 'Knock, and it shall be opened unto you: Standing for non-privileged applicants after Montessori and for a Commission anti-dumping regulation' (2021) 58 *CMLR* 163-186 (esp. 174). More generally, the introduction of the 3rd limb has solved only one problem, and this too radically, leaving the other problems unsolved. Instead, the fora of the Convention and in the Lisbon negotiations should have encouraged the CJEU to reconsider with a fresh mind what individual concern should mean.

proceedings against regulatory acts.[91] Only the CJEU can break with this cautious attitude which blocks evolutionary reconsideration.

In other areas the CJEU has not been shy to interpret indeterminate legal concepts very freely and sometimes even against the clear wording. As widely known, prominent examples include: *van Gend*, in which the ECJ derived subjective rights of market participants from the then Art. 12 EECT, although the provision clearly spoke of interstate rights and obligations[92], *Grad*, in which the ECJ assumed the direct effect of directives, although Art. 189 (3) EEC clearly required national transposition of directives.[93] Other examples are *Francovich*, in which the ECJ created an entirely new legal basis for member state liability for failure in transposing directives[94], and – closer to the question of standing – *Les Verts,* in which the ECJ allowed actions for annulment against acts of the European Parliament, contrary to the wording of then Art. 173 (1) EEC.[95] In contrast, it seems arbitrary for the CJEU to suddenly deny its competence of interpretation in the case of Art. 263 (4) TFEU and its application to violations of fundamental rights.

On the contrary, it can even be stated that it is the CJEU that seizes a role of authorship of the treaty when presenting the restrictive interpretation as the only possible one. With the term individual concern, the TFEU introduced an indeterminate legal concept, the interpretation of which was entrusted to the CJEU. The court cannot therefore pretend that there are no other options for interpretation.

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[91] Secretariat of the European Convention, Final report of the discussion circle on the Court of Justice of 25 March 2003 (CONV 636/03), para 22. For the statement of President of the Court, Gil Iglesias, see n 67.

[92] Case 26/62 *van Gend en Loos* [1963] ECR 2 pp. 24-27.

[93] Case 9/70 *Grad* [1970] ECR 826, para 5; see the detailed reasoning by *AG Roemer*, in Case 9/70 (Grad) [1970] ECR 1070, opinion by AG Rozmze pp. 848-850.

[94] Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5403, paras 33-40.

[95] Case 294/83 *Les Verts v EP* [1986] ECR 1357, paras 20-26.

Conclusion

For almost 60 years now, individual concern, which is the precondition for standing of individuals applying at the GC for annulment of EU legal acts, has been defined by the CJEU as distinctive concern. The present analysis offers three major findings:

First, a closer look at the pertinent case law reveals that the criterion has little guiding effect. Under its cover judicial practice has generated a variety of other criteria but without combining them to a structure. Unclarities persist as to whether the relevant concern is a factual interest or a subjective right. Insofar as factual interests are considered as relevant it is unclear why they shall become irrelevant if belonging to a type of concern. Insofar as subjective rights are used, criteria on how to derive rights from determinative acts are missing. If rights are drawn from fundamental rights, it is unclear what special conditions should apply in order to base standing on them. Overall, these unclarities have put potential applicants in a situation of legal uncertainty.

Second, to the extent that standing has nevertheless been granted, the criteria applied have been of substantive character, albeit under cover of the formal rhetoric of distinctiveness. Insofar as a comparative perspective has been applied, distinctiveness has only been used in a light version. The CJEU has rather looked at particularly burdensome effects but not required them to be unique.

Third in other cases the formula has been applied with rigour leading to denial of standing. In consequence this has created deprivation of judicial protection for many persons who were personally and severely concerned. Moreover, when adverse effects are of a catastrophic nature – such as by climate change - the paradox emerges that the more serious and widespread the damage is, the less judicial protection is granted.

The resulting gaps in direct access cannot be made good by national actions combined with referrals to the ECJ. The national remedies may pose

unacceptable hurdles or not be available at all, the referral procedure is badly suited for evidential proceedings about complex facts, and referrals are not admissible when national courts decide whether a member state shall go further than a minimally harmonising EU act.

It seems that the dogmatic invocation of the Plaumann formula has kept the CJEU from reconsidering the legal principles that should guide the design of direct and indirect access to the CJEU. This article identified the following principles as the most important to be jeopardised by the Plaumann-based case law: Legal certainty, judicial protection of rights, separation of powers, coordination of the EU and member states levels of judicial functions, and non-discriminatory access to courts. Considering this, I submit – as others have already done - that individual concern should be defined not as distinct but as personal and severe concern. This involves a change from a formal to a material criterion. The individualisation of concern is not found in formal distinctiveness but rather in the substance of adverse effects. Requiring concern to be personal excludes action for others, and the requirement that concern must be severe concentrates judicial protection on those who are not just cursorily affected. With this approach the court will still in some cases conduct severity comparisons with other persons' situations, but such exercise will only apply distinctiveness 'light', not uniqueness in the restrictive Plaumann sense.

Concerning the referral procedure under Article 267 TFEU I recommend proceeding according to the *sedes materiae* principle, conducting legal procedures at the seat of the main problem. If the main problem lies in the national implementation of a legal act, national legal protection is appropriate and referral to the ECJ has a harmonising function; if it exclusively lies in the legal act itself, national legal protection is a useless detour and direct action should be permitted. Still, the *sedes materiae* criterion cannot be used to introduce additional admissibility requirements without the text of the treaties being changed, but it serves as a good reason to define individual concern more openly, namely as personal and serious concern,

with a view to facilitate direct access to the GC. Concerning the doctrinal reorientation corresponding to these proposals it was argued that this would be within CJEU's judicial competence. It would neither exceed the textual limits nor disregard the historical background of Art. 263 (4) TFEU.

I close this contribution with three remarks on a more theoretical level. First, the substantive definition of individual concern would allow and urge the CJEU to take position on massive adverse effects like climate change and resume competence that, after *Carvalho,* has wandered to the European Court of Human Rights (ECtHR). This court is now confronted with a number of cases which were relinquished to the Grand Chamber,[96] a move that indicates the importance the ECtHR attaches to climate change effects.

Second, the hurdles erected before judicial protection have kept the CJEU from developing the fundamental rights doctrine further. With more open doors, the traditional focus of fundamental rights as shields against governmental interference (called negative obligations) can be sided by developing rights further as swords protecting societal interests (called positive obligations). Such doctrinal evolution is much needed if the EU wishes to be a Union of citizens and not only of the market.

Third, and as a final reflection one may wonder whether the resistance of the CJEU, and in particular of the ECJ is truly a matter of argumentation or rather a simple exercise of power, considering the thought provoking definition of power proposed by Karl W. Deutsch as being 'the ability to afford not to learn'.[97] The question is then: if the court refuses to learn, what factors have influenced its power and thus its ability and affordance to continue not to learn? Obviously, that is rather an issue not for legal doctrine but for sociological study – which is beyond the present contribution.

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[96] *Duarte Agostinho v Portugal and 32 Others,* ECtHR App. no 39371/20; *Verein KlimaSeniorinnen Schweiz and others v Switzerland*, App. no. 53600/20; Carème c France, App. no. 7189/21. [Cases are ongoing at the time of writing].

[97] Karl W. Deutsch, *The nerves of government. Models of political communication and control* (The Free Press 1966), 111.

General Articles

Returning to the Origins of Multilevel Regulation: The Role of Historical ADR Practices

Dr. Barbara Warwas*

The article engages with the recent studies on multilevel regulation. The starting point for the argument is that contemporary multilevel regulation—as most other studies of (postnational) rulemaking—is limited in its analysis. The limitation concerns its monocentric approach that, in turn, deepens the social illegitimacy of contemporary multilevel regulation. The monocentric approach means that the study of multilevel regulation originates in the discussions on the foundation of modern States instead of returning to the origins of rules before the nation State was even created, which is where the actual social capital underlying (contemporary) rules can be found, or so I wish to argue.

My aim in this article is to reframe the debate. I argue that we have an enormous reservoir of history, practices, and ideas ready to help us think through contemporary (social) legitimacy problems in multilevel regulation: namely all those practices which preceded the capture of law by the modern State system, such as historical alternative dispute resolution (ADR) practices.

Keywords: multilevel regulation, rulemaking, ADR, historical ADR practices, social legitimacy

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I. INTRODUCTION

Increasingly, there have been discussions about law as a driver of social change, innovation and sustainability. Law, especially private law, has always been responsive (for better or worse) to societal, economic, and technological challenges. Today, however, those challenges seem even more prevalent and urgent due to the complexity of contemporary regulatory processes, meaning the multilevel rulemaking by different State and non-State actors. The complexity stems from the rapidly changing economic and business models (e.g., circular economy or knowledge economy), the intricacy of global challenges (e.g., global pandemics), and the role of new technologies, including artificial intelligence, in different sectors. All this requires a more polycentric, inclusive approach to rulemaking. Polycentricity is here understood as a multilevel network of State and non-State actors who shape the rulemaking within specific sectors together.[1] Increasingly, the goal of this polycentric rulemaking is to promote sustainability by serving those whose interactions are being regulated: citizens.[2]

There is a broad and deep academic discussion regarding the interplay between rulemaking involving different actors at different levels in this rapidly changing reality. This debate concerns a variety of core concepts regarding the relationship between private and public law, the nature of law

[1] On the development of the concept of polycentricity and its pros and cons, see Paul D Aligica and Vlad Tarko, 'Polycentricity: From Polanyi to Ostrom, and Beyond' (2011) 25 Governance: An International Journal of Policy, Administration, and Institutions 237. My understanding of polycentricity in the context of multilevel regulation is further explained in section II.1 'The Development of the Concept of Multilevel Regulation' below.

[2] See, for example, Tilburg University, 'Connecting Organizations: Private, Fiscal and Technology-Driven Relations in a Sustainable Society (Signature Plan)' <https://www.tilburguniversity.edu/about/schools/law/departments/pbll/research-test/connecting-organizations> accessed 24 August 2022; ERC Starting Grant, Principal Investigator: Dr. Marija Bartl, 'Law as a Vehicle for Social Change: Mainstreaming Non-Extractive Economic Practices (N-EXTs)' <https://www.nonextractivefuture.eu> accessed 24 August 2022.

and legal pluralism, globalisation and privatisation, to mention just a few.[3] Most recently, there have been studies on postnational rulemaking addressing the increasing role of non-State actors in regulatory processes.[4] Within this literature, scholars have developed the concept of multilevel regulation.[5] Although there is no uniform definition of multilevel regulation, it can be summarised as the network of rules, actors, and practices at national, regional, international, and global levels, by placing the 'new' non-State actors in multilevel regulatory processes in the spotlight.[6] The Hague University of Applied Sciences developed a research group to exclusively study multilevel regulation.[7] This article sets the framework for

[3] See, for example, Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law Without a State* (Aldershot; Brookfield, USA: Dartmouth 1997); Michel Rosenfeld, 'Rethinking the Boundaries between Public Law and Private Law for the Twenty First Century: An Introduction' (2013) 11 International Journal of Constitutional Law 125; William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009).

[4] See Elaine Fahey (ed), *The Actors of Postnational Rule-Making: Contemporary Challenges of European and International Law* (Routledge 2017); Beate Sissenich, 'Postnational Rulemaking, Compliance, and Justification: The New Europe' (2008) 6 Perspectives on Politics 143.

[5] See, for example, Nupur Chowdhury and Ramses A Wessel, 'Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?' (2012) 18 European Law Journal 335; Andreas Follesdal, Ramses A Wessel and Jan Wouters (eds), *Multilevel Regulation and the EU: The Interplay Between Global, European and National Normative Processes* (Brill Nijhoff 2008).

[6] Barbara Warwas, 'Inaugural Speech of Dr. Barbara Warwas as Lector in Multilevel Regulation at The Hague University of Applied Sciences: Returning to the Origins of Multilevel Regulation' 9–10 <https://www.thehagueuniversity.com/docs/default-source/documenten-onderzoek/lectoraten/multilevel-regulation/booklet-inaugural-lecture-barbara-warwas.pdf?sfvrsn=4cd068c1_4> accessed 12 August 2022. For different scholarly understandings and definitions of multilevel regulation, see section II.1 on 'The Development of the Concept of Multilevel Regulation' below.

[7] For more information about the research group see <https://www.thuas.com/research/research-groups/multilevel-regulation> accessed 16 February 2023. Some parts of this article are taken directly from my previous work including in

the research agenda of this group, including the general argument underlying our studies and recommendations for future research. Hence, I focus more on hypotheses and preliminary evidence to be explored in future research rather than offering conclusive findings. In view of this, in this article, I take a somewhat experimental and exploratory approach to the study of multilevel regulation. I point to the need for a new, broader and more inclusive societal approach to the rapidly changing contemporary regulatory processes, including the rethinking of the current historical perspective of multilevel regulation.

The starting point for the argument is that contemporary multilevel regulation--as most other studies of (postnational) rulemaking--is limited in its analysis. The limitation concerns its monocentric approach that, in turn, deepens the social illegitimacy of contemporary multilevel regulation. The monocentric approach means that the study of multilevel regulation originates in the discussions on the foundation of modern States instead of *returning* to the origins of rules before the nation State was even created, which is where the actual social capital underlying (contemporary) rules can be found, or so I wish to argue.

My aim in this article is to reframe the debate. I argue that we have an enormous reservoir of history, practices, and ideas ready to help us think through contemporary (social) legitimacy problems in multilevel regulation: namely all those practices which preceded the capture of law by the modern State system such as historical ADR practices. That is, the dominant conceptual framework of today, **that multilevel regulation originates in States representing formal rules, is misleading**. Instead, we need to think in terms of a wider historical framework: historical ADR practices representing social values, then State, and then multilevel regulation. In other words, instead of a two-step conceptual framework for multilevel

Warwas, *Inaugural Speech* (ibid) and the internal documents concerning the research group at The Hague University, such as the Annual Plan of the Research Group Multilevel Regulation of 2019, 2020, and 2021-22, unpublished.

regulation, we need to adopt a three-step conceptual framework by including the historical ADR practices as the origins of States and State-made rules and subsequently also of multilevel regulation. Such a broad approach will help us to address the social legitimacy gap in contemporary multilevel regulation.

The article is organised as follows. In the first part of the article, I focus on describing the problem with contemporary multilevel regulation. In the second part of the article, I propose to rethink the historical context of the origins of multilevel regulation. In the third part of the article, I turn to normative arguments regarding the potential of historical ADR practices in contemporary multilevel regulation. Recommendations for future research and conclusions follow.

II. THE PROBLEM

This section begins with an explanation of the concept of multilevel regulation. Furthermore, I discuss the limitations of contemporary studies of multilevel regulation, the relationship between multilevel regulation and the new solutions incorporated therein to address the contemporary limitations of multilevel regulation, and the main puzzle.

1. *The Development of the Concept of Multilevel Regulation*

Multilevel regulation can be defined as the networks of rules, actors, and practices that regulate professional and private lives of citizens around the globe, as well as legal, public, and social affairs at national, regional, international, and global levels. In the section below, I explain the relevance and complexity of such networks for contemporary society and professional practice. Towards the end of this section, I proceed with a review of literature on multilevel regulation to point out its limitations.

Regarding the network of rules, almost every single aspect of human behaviour is subject to hard rules (often referred to as 'laws' or 'public regulation') or soft rules (often referred to as 'private regulation'), with hard

rules bearing legal obligations that can be enforced in courts, and soft rules concerning non-binding (voluntary) rules, principles, or standards.[8] Use of the Internet and social media, safety of food and drinkable water, waste disposal, employment relationships, social interactions all are subject to rules and regulations, often without people even realising it. The Covid-19 pandemic demonstrated this breadth of laws and regulations (often called 'measures') particularly clearly, including the interplay between those two, in private and professional spheres.[9]

The network of actors making rules today is broader than was the case for most of modern human history. Roughly speaking, from the Treaty of Westphalia and the spread of the first modern constitutions, rulemaking has always been associated with States.[10] In the words of Hooghe and Marks 'in modern times, the ship of government became the ship of state'.[11] Indeed, rulemaking has been associated with the orthodox 'features' of modern States such as coercive powers, administrative functions, and--as democratic ideas became more prevalent--principles such as the rule of law, accountability, transparency, and access to justice.

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[8] For the sake of consistency, I refer in this article to rules in the meaning of hard rules coming from State actors and to regulations as all forms of private regulation by private actors. Multilevel regulation encompasses a tangle of rules and regulations, by both public and private actors, and is also referred to as 'rulemaking'.

[9] For a discussion on complex governance including legality problems in view of the Covid-19 pandemic see a blog post (being a summary of a webinar of the same title): Jan van Zyl Smit, 'Power and the COVID-19 Pandemic: Beyond the Separation of Powers?' (*RECONNECT*, 24 March 2021) <https://reconnect-europe.eu/blog/power-and-the-covid-19-pandemic-beyond-the-separation-of-powers/> accessed 24 August 2022.

[10] In this article, I mean the modern-State system roughly as being the period from the Treaty of Westphalia onwards.

[11] Liesbet Hooghe and Gary Marks, 'A Postfunctionalist Theory of Multilevel Governance' (2020) 22 The British Journal of Politics and International Relations 820, 821.

In time, the discussion of who makes rules expands into actors other than States. This concerns international and regional organisations such as the European Union (EU), the United Nations (UN) or the World Trade Organisation (WTO) (which still derive their authority from States), and increasingly also so-called 'non-State' actors such as multinational companies, non-governmental organisations (NGOs), standardisation bodies (for example, the International Standardisation Organisation setting 'ISO standards' including for child seats for cars, formats for date and time, or currency codes), experts, media, civil society organisations promoting youth and citizens' participation in rulemaking, and many more. As one commentator observes, 'now, all you need to create rules is a well-organised group of people and a website'.[12] It is a sarcastic but accurate remark, speaking to the increasing polycentricity of contemporary regulatory actors. Multilevel regulation has been developed to address and critique this polycentricity.

Regarding the level of regulation, all regulatory actors and rules have spread to national, regional, and international levels. Due to the fact that different types of rules are made by different actors, we no longer focus only on national (State-led) rulemaking. Contemporary multilevel regulation moves 'upwards to the supranational level, downwards to subnational jurisdictions and sideways to public/private networks' and contemporary multilevel practices are often performed at all those levels, the distinction being somewhat blurred.[13]

In summary, while in the past rulemaking was seen as monocentric—with its main centre in the State—multilevel regulation has been developed as a

[12] Maurits Barendrecht, David Raič, Ronald Janse, Sam Muller, 'Trend Report Rulejungling. When Lawmaking Goes Private, International and Informal' (HiiL 2012) 3.

[13] Liesbet Hooghe and Gary Marks, 'Types of Multi-Level Governance' (2001) 5 European Integration online Papers (EIoP) online publication, 4; Liesbet Hooghe and Gary Marks, 'Unraveling the Central State, But How? Types of Multi-Level Governance' (2003) 97 American Political Science Review 233.

polycentric field, meaning that more actors than only States are involved in making rules that are dispersed at national, regional, international, and global levels.[14] For example, in the field of food safety, multilevel regulation can be described in the following way. At the national level, the safety of food is regulated by manufacturers (to be understood as food producers) and national authorities such as the Food and Consumer Product Safety Authority in the Netherlands.[15] At the regional level, there are applicable standards developed by the EU through its General Food Law. At the international level, there is the UN's work in the field of food safety (in particular, relating to the Sustainable Development Goal 2). Finally, at the global level, there exist global food standards developed by the Codex Alimentarius Commission.

These complex regulatory processes have been increasingly studied by legal scholars, who directly or indirectly refer to them as 'multilevel regulation'. In the literature review section below, I briefly present the emerging studies of multilevel regulatory processes (rulemaking) beyond the State involving non-State actors. In those studies, rulemaking concerns the interplay between regulations developed by private actors and formal rules originating in States, hence they attempt to illustrate the increasing polycentricity of multilevel regulation. Ultimately, however, all those studies adopt a State-centric approach to the origins of multilevel regulation. In other words, they are constantly oriented towards States and/or (public) law when explaining the emergence of the phenomenon of multilevel regulation. For example, Nupur Chowdhury and Ramses Wessel define multilevel regulation as follows:

'Multilevel regulation is a term used to characterise a regulatory space, in which the process of rule making, rule implementation or rule enforcement

[14] On the development of the concept of polycentricity and its pros and cons, see Aligica and Tarko (n 1).

[15] 'The Website of Netherlands Food and Consumer Product Safety Authority' <https://english.nvwa.nl> accessed 24 August 2022.

is dispersed across more than one administrative or territorial level amongst several different actors, both public and private. The relationship between the actors is non-hierarchical and may be independent of each other. Lack of central ordering of the regulatory lifecycle within this regulatory space is the most important feature of a multilevel regulation.'[16]

This definition of multilevel regulation at first glance points to some important features of multilevel regulation such as the necessary non-hierarchical relationships between regulatory actors at different administrative levels and the lack of central ordering.[17] At the same time, however, the further analysis of the concept of multilevel regulation by the authors in their article suggests that multilevel regulation will always have 'direct or indirect reference to formal legal processes' at different regulatory levels as it only covers the activities that 'would directly or indirectly have a legal effect'.[18] Moreover, the authors derive their definition of multilevel regulation from the concept of regulatory space by Hancher and Moran, which still has the State as a traditional regulatory entity as its starting point, even though it assumes that the regulatory power moves away from the State, public authority.[19]

In *Multilevel Regulation and the EU: The Interplay Between Global, European and National Normative Processes,* Andreas Follesdal, Ramses Wessel, and Jan Wouters also focus on the concept of multilevel regulation, trying to grasp complex relationships between different regulatory orders involved, especially in the context of the EU, together with their impact on legitimacy and legal protection that the multilevel rulemaking should offer.[20]

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[16] Chowdhury and Wessel, *Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?'* (n 5) 346 (citations omitted).

[17] Ibid 346–347.

[18] Ibid 346.

[19] Ibid 347.

[20] Follesdal, Wessel and Wouters, *Multilevel Regulation and the EU: The Interplay Between Global, European and National Normative Processes* (n 5).

Linda Senden discusses the emergence of 'alternative' forms of regulation in the EU, including soft law, self-regulation, and co-regulation, as instruments of diversification of European regulation originally seen as rooted in more traditional, top-down regulatory actions of the EU, which Senden calls 'command-and-control legislation'.[21] This traditional approach by the EU largely resembles the coercive powers of States, specifically their legislative authorities.

At the global, transnational level, scholars such as Fabrizio Cafaggi discuss the concept of transnational private regulation (TPR), which investigates the increasing shift from the national (domestic) to the global level and from public to private actors in regulatory processes.[22] TPR can be seen, inter alia, in food safety, forestry management, or trade, where private actors such as the Forest Stewardship Council set private standards to be complied with voluntarily (with the reservation that once private regulatory regimes join in, compliance with private standards becomes mandatory subject to legal sanctions).[23] Here again, Cafaggi's notion of TPR develops from a State-centric understanding of regulatory power.

The work of Paul Verbruggen on private regulation concerns questions of the enforcement of TPR and most recently of the constitutionalisation of

[21] Linda AJ Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?' (2005) 9 Electronic Journal of Comparative Law online version.

[22] Fabrizio Cafaggi, 'A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement' (2014) EUI Working Paper LAW 2014/2015 <https://cadmus.eui.eu/handle/1814/33591> accessed 19 October 2022; Barbara Warwas, 'The Application of Arbitration in Transnational Private Regulation: An Analytical Framework and Recommendations for Future Research' (2020) Zoom-out 73 Questions of International Law 33.

[23] Cafaggi, *A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement* (n 22) 10–11; Fabrizio Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38 Journal of Law and Society 20, 22; Warwas, *The Application of Arbitration in Transnational Private Regulation: An Analytical Framework and Recommendations for Future Research* (n 22) 33.

private regulation denoting an interplay between private law and private actors on one side and the fundamental principles of law on the other side.[24] Those questions regarding constitutionalisation of private regulation, especially at the EU level go to the heart of multilevel constitutionalism developed by Pernice and De Witte and discussed by Chowdhury and Wessel when explaining their definition of multilevel regulation, which yet again is rooted in more traditional discussions on national constitutionalism.[25]

Rebecca Schmidt has worked on the private-public cooperation in TPR where she explores how private actors interact with international organisations including the International Labor Organisation.[26] Among other things, Schmidt examines the questions of authority and legitimacy in the context of the regulatory frameworks beyond State yet still largely focusing on the State-sanctioned organisations alongside private actors.

Finally, there has been some important work by Hans Micklitz on European regulatory private law (ERPL) through which it is hypothesised that ERPL has emerged as a new legal order representing its own values in the European legal sphere in contrast to the more traditional, nationally oriented private law.[27] What all those studies have in common is that they embed the discussions on multilevel regulation in the discussion of State as a traditional

[24] Paul Verbruggen, *Enforcing Transnational Private Regulation. A Comparative Analysis of Advertising and Food Safety* (Edward Elgar 2014); Paul Verbruggen, 'Private Food Safety Standards, Private Law, and the EU: Exploring the Linkages in Constitutionalization' in Marta Cantero Gamito and Hans-Wolfgang Micklitz (eds), *The Role of the EU in Transnational Legal Ordering: Standards, Contracts, and Codes* (Edward Elgar 2020).

[25] Chowdhury and Wessel, *Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?* (n 5) 349.

[26] Rebecca Schmidt, *Regulatory Integration Across Borders. Public–Private Cooperation in Transnational Regulation* (Cambridge University Press 2018).

[27] Hans-W Micklitz, 'The Internal vs. the External Dimension of European Private Law - A Conceptual Design and a Research Agenda' (2015) EUI Working Paper LAW 2015/35, European Regulatory Private Law Project (ERPL-13) <https://cadmus.eui.eu/handle/1814/36355> accessed 19 October 2022.

source of regulatory authority and legitimacy. This State-centric approach entails serious limitations to the study of contemporary multilevel regulation.

2. *The Limitations of Contemporary Studies of Multilevel Regulation*

In this section, I argue that the study of contemporary multilevel regulation does not sufficiently express the necessary polycentricity it is designed to reflect on. This, in turn, largely undermines the social legitimacy of contemporary multilevel regulation.

Regarding the lack of polycentricity, despite the complex network of rules, actors, and multilevel practices, formal rules originating in States are still a starting (and end) point in the study of multilevel regulation. Even when non-State actors engage in rulemaking, scholars often speak about them as 'new' actors that 'started to appear on the scene', even if some of those actors--such as multinational companies--were established decades ago.[28] Similarly, when analysing the ways through which non-State actors make contemporary rules, scholars often speak about how private actors complement public rulemaking, which entails some form of delegation of authority from public (State) to private (non-State) actors, and not the other way around.[29] This also refers to the usual vocabulary used by scholars such as 'postnational' through which it is implied that States lost their prominence in the academic and practical discourse to the new players (again, non-State

[28] Barendrecht and others (n 12) 3: 'This changed when international organisations started to appear on the scene; it changed even more dramatically in the age of globalisation, where private, informal and international rulemaking is becoming more and more prevalent. Now, all you need to create rules is a well-organised group of people and a website. Such a body can set rules for others and try to gain legitimacy, often with rather minimal control by national lawmakers.'

[29] Even when private actors exercise regulatory powers autonomously, such as in the TPR regimes studied by Cafaggi, there is always a discussion about the 'reallocation of authority' from public to private actors and from national to international or transnational. See Cafaggi, *New Foundations of Transnational Private Regulation* (n 23) 20–21; Senden, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?* (n 21).

actors).[30] Finally, scholars often speak about the lack of trust in the 'new' non-State actors who 'try to gain legitimacy', understood in the orthodox manner, as the system of checks and balances generated by a modern State and largely focused on legal power as a source of regulatory authority.[31] Consequently, the study of multilevel regulation is a very technical and monocentric field and the 'public', formal, and legal aspects of multilevel regulation are its dominant 'faces'.

This translates into problems with the social legitimacy of contemporary multilevel regulation. By 'social legitimacy' I mean (1) trust by citizens in institutions (be they public or private) in which the rules and regulations applicable to citizens originate, (2) the actual understanding (or the lack thereof) of rules and regulations by citizens, and finally (3) a 'meaningful participation of citizens in rulemaking'.[32] In this sense my understanding of social legitimacy proposed in this article is broader than the one developed in the context of State-centred multilevel regulation, where social legitimacy is still safeguarded by features of a modern State such as the need for public authorities to observe the rule of law, or the need for checks and balances rooted in public accountability and transparency of modern State-sanctioned institutions.[33] Those are certainly important characteristics but they are top-down, understood through the perspective of democratic legitimacy of a system, not through a more bottom-up, citizen-driven understanding of social values underlying the rulemaking processes. Rather, my understanding of social legitimacy goes to the core of rulemaking *for* and *with* the people, hence to the core of social values as seen by citizens.

[30] See, generally, the discussions on the 'new' actors in postnational rulemaking in: Fahey, *The Actors of Postnational Rule-Making: Contemporary Challenges of European and International Law* (n 4); Chowdhury and Wessel, *Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?* (n 5) 357.

[31] Barendrecht and others (n 12) 3.

[32] Ibid 5.

[33] See generally Senden, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?* (n 21) s 2.4.

Although those social values are certainly hard to be addressed universally, they find their roots in the theory of social capital that goes to the core of human interactions based on relational trust.[34] I return to this term later, in sections II.4, III, and IV. Let me now focus on the lack of social legitimacy in contemporary multilevel regulation.

First, regarding public trust, figures show that this is in decline in both Europe and in the US. Specifically, I refer here to the Edelman Trust Barometer Global Report 2017 ('the Report'), analysed by Hosking, which focused on public trust in four societal institutions: government, business, NGOs, and the media.[35] Although not directly linked with legal regulatory processes, the Report suggests that both public and private actors who are leading in contemporary multilevel regulation (such as the four mentioned above) face similar problem of distrust by citizens, which is quite relevant for the present discussion. The most recent version of the Edelman Trust Barometer Global Report of 2022 also points to the distrust as the society's default emotion and to the role of government and media in fuelling a cycle of distrust.[36] It can be hypothesised that the actions' of private actors (e.g., businesses) and public actors (e.g., governments) are seen by citizens as interconnected within multilevel regulation, which has effects on the overall perceptions of distrust in multilevel regulation as a whole by those citizens.

This leads to the second aspect of social legitimacy of multilevel regulation, the one relating to the actual understanding of rules and regulations by citizens. It seems that rules made by States and State-sanctioned institutions are increasingly seen by citizens and professionals, especially professionals

[34] This understanding reads in line with Putnam's theory of social capital. Robert D Putnam, *Bowling Alone. The Collapse and Revival of American Community* (Simon & Schuster Paperbacks 2000).

[35] Geoffrey Hosking, 'The Decline of Trust in Government', *Trust in Contemporary Society* (BRILL 2019) online version.

[36] 'Edelman Trust Barometer. Global Report.' (2022) <https://www.edelman.com/sites/g/files/aatuss191/files/2022-01/2022%20Edelman%20Trust%20Barometer%20FINAL_Jan25.pdf> accessed 18 October 2022.

that translate those rules at local levels, as impractical. In many State-sanctioned institutions – as well as regional and international organisations including the UN, the EU, and the WTO – rules, policies, and regulations are made by highly specialised experts who speak a language that is too sophisticated and complex for a non-specialist to understand. The complex rulemaking by international institutions and organisations – and the technocracy inherent in their actions – make it hard for professionals and citizens to understand the purpose of the rules and policies they need to apply in individual cases.

The third concern with social legitimacy of contemporary multilevel regulation relates to the need for more civic participation in regulatory processes. There are limited studies in the field of multilevel regulation that support this claim, mostly because the contemporary studies of multilevel regulation are still quite monocentric, as demonstrated in the literature review above.[37] However, if we expand the analytical scope to include the literature on the participation gap in global governance—and there are good conceptual reasons why we should do so—there is a wealth of evidence to support this argument.[38] The literature on the participation gap in global governance concerns, among other things, calls for more polycentricity and collective action in climate governance, the need for more democratic participation in global governance be it by citizens or NGOs, to mention a

[37] For the somewhat isolated calls for a 'meaningful participation of citizens and end-users' in regulatory processes, see Barendrecht and others (n 12) 5.

[38] Global governance and multilevel governance are not the same concepts, but at least in regard to the particular point at hand there are good reasons for treating them alike. For example, some scholars argue that global governance can be seen as a form of multilevel governance. See Michael Zürn, '51 Global Governance as Multi-Level Governance' in David Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford University Press 2012); the definition of which is in turn often used interchangeably with the definition of multilevel regulation, as demonstrated by Chowdhury and Wessel in: Chowdhury and Wessel (n 5) 341. The overlap between those concepts and definitions allows to expand the conceptual framework of analysis into the literature on global governance and the participation gap in this section.

few bottom-up actors, or a multistakeholder model of global governance.[39] Those claims seem to translate into the select academic postulates for the meaningful involvement of citizens in multilevel regulation, which appear even more timely now due to the most recent emergence of the complex regulatory and business models requiring sustainable solutions for their end users, namely citizens.[40] On a more activist level, citizens (including youth movements) increasingly seek to have a say in the regulation of local and global challenges. In the field of climate change regulation, citizens point to the inability of politicians, (local) governments, and private actors (such as multinational companies) to take responsible and collaborative actions to cut local emissions in different sectors or to protect wildlife and nature. The recent judgment of 26 May 2021 by The Hague District Court in the so-called Shell climate case demonstrates that citizens and civil movements can significantly shape regulatory policies.[41] The case was brought against Royal Dutch Shell on behalf of over 17,000 Dutch citizens (alongside a few environmental groups) and resulted in the Court's order for Shell to reduce CO_2 emissions by 45% by 2030.[42] Despite the success of this legal action, the involvement of civil society in regulatory processes appears to be still rather limited.

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[39] Elinor Ostrom, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change' (2010) 20 Global Environmental Change 550; Saskia Sassen, 'The Participation of States and Citizens in Global Governance' (2003) 10 Indiana Journal of Global Legal Studies 5; Dana Brakman Reiser and Claire R Kelly, 'Linking NGO Accountability and the Legitimacy of Global Governance' (2011) 36 Brooklyn Journal of International Law 1011; Jan Aart Scholte, 'Multistakeholderism: Filling the Global Governance Gap' (Global Challenges Foundation 2020).

[40] See Barendrecht and others (n 12); ERC Starting Grant, Principal Investigator: Dr. Marija Bartl (n 2); Tilburg University (n 2).

[41] Jan Jakob Peelen and Dieuwke Kist, 'The Shell Climate Case; a Precedent Setting Judgment?' (1 June 2021) <https://www.dentons.com/en/insights/alerts/2021/june/1/the-shell-climate-case-a-precedent-setting-judgment> accessed 24 August 2022; *Shell Climate Case* [2021] Rechtbank Den Haag/The Hague District Court C/09/571932 / HA ZA 19-379.

[42] Peelen and Kist (n 41).

In sum, the above examples show one common thread: the insufficiency of contemporary multilevel regulation due to a widespread lack of social legitimacy of the contemporary formal rules centred on States. What is even more puzzling is that if we flip the coin and look at the 'new solutions', the picture also looks rather dire, for many of the same reasons.

3. *Are the 'New Solutions' Working? On the Relationship Between Multilevel Regulation and ADR*

Multilevel regulation entails the use of different regulatory tools developed mostly by private, non-State actors in the context of public regulation. I call these private tools 'new solutions' through which the polycentricity of contemporary multilevel regulation is supposed to be emphasised, (paradoxically) to address the (social) illegitimacy of contemporary multilevel regulation. One example of such 'new solutions' is ADR. The discussion below will show that—although ADR has been popularised to increase the legitimacy of multilevel regulation—eventually it did not succeed. Analysis of the sources of this failure will lead us towards an understanding of the puzzle underlying this article.

A. What Is ADR, When Was It Popularised & Why Did It Not Work?

ADR refers to any means of solving disputes outside of the court room.[43] One popular example of ADR is arbitration, in which two or more parties submit their disagreement to a private arbitrator, who then determines the result in the form of a binding award. Another is negotiation, which means that parties negotiate the result among themselves. Yet another example is

[43] In fact, a clear-cut definition of ADR does not exist. On that note see Barbara Warwas, 'The State of Research on Arbitration and EU Law: Quo Vadis European Arbitration?' (2016) EUI Working Paper LAW 2016/23 <https://cadmus.eui.eu/handle/1814/44226> accessed 19 October 2022; Barbara Warwas, 'Current State of the Scholarship on Arbitration and EU Law: From Absolute Exclusion to Cautious Inclusion' (2018) 15 Transnational Dispute Management online publication, s 1.3; Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart 2012).

mediation, in which a neutral third party helps with negotiations and communications between disputing parties. There are other examples of ADR, including facilitation, early neutral evaluation, conciliation, expert determination, executive tribunal/mini trial, and mediation-arbitration (med-arb), to mention a few. What all those processes have in common is that they are *legal processes* developed, practised, and studied in the context of *access to justice*.

ADR was popularised in 1970s in the US in the context of a debate over access to justice. ADR was reintroduced in the modern American justice system as a solution to issues with the administration of justice expressed by Roscoe Pound, one of the most prolific legal scholars in American history. In view of this, the ADR referred to in this section is to be understood as modern ADR.[44] In 1976, then-Chief Justice of the US Supreme Court Warren E. Berger convened the 'National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice' known today as the 'Second Pound Conference'.[45] Although the conference itself was organised after the death of Roscoe Pound, it was based on his life-long legacy: criticism of the formal justice systems which Pound saw as needlessly archaic and complicated, serving only to feed the competitiveness of lawyers rather than uphold the rule of law, a phenomenon he called 'the sporting theory of justice'.[46]

In the 1970s, Pound's ideas inspired some practical steps to improve the American justice system. The first step was the so-called 'multidoor

[44] Please note that given that there is no uniform definition of ADR and that different types of ADR can share similar characteristics in practice, I distinguish here the term 'modern ADR' only to differentiate it from the historical ADR practices explained in section III below. Those two types of ADR are then stylised for the purpose of the argument developed in this article.

[45] Lara Traum and Brian Farkas, 'The History and Legacy of Pound Conferences' (2017) 18 Cardozo Journal of Conflict Resolution 677, 684.

[46] Ibid 681–682.

courthouse' reform by Harvard Law Professor Frank Sander.[47] Although having limited applicability today, the reform reintroduced ADR in the context of American litigation. The multidoor courthouse concept assumed that the court serves as a resource centre offering information and advice to disputants on the most appropriate dispute resolution process to be determined on a case-by-case basis, including discussions through the community centre, mediation, or arbitration.[48]

Around the same time in Europe, prominent Italian jurist Mauro Cappelletti was drafting his seminal work on access to justice. In his 'Florence Access to Justice Project', Cappelletti (together with Bryant Garth) saw the role for ADR and the so-called privatisation of justice as part of the broader access to justice movement, which was supposed to increase States' and citizens' welfare.[49] Some commentators view Cappelletti's approach to access to justice and the public sector as 'activist, redistributive, democratizing, public-service-minded' meaning bringing justice to people as a form of

[47] Levin Russell and A Leo Wheeler (eds), *The Pound Conference Perspectives on Justice in the Future: Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (West Publishing Co St Paul Minnesota 1979); Gladys Kessler, Linda J. Finkelstein, 'The Evolution of a Multi-Door Courthouse' (1988) 37 Catholic University Law Review 577, 577-578.

[48] Carrie Menkel-Meadow, 'The History and Development of "A" DR (Alternative/Appropriate Dispute Resolution)' (*Völkerrechtsblog*, 1 July 2016) <https://voelkerrechtsblog.org/the-history-and-development-of-a-dr-alternativeappropriate-dispute-resolution/> accessed 24 August 2022.

[49] Bryant G Garth and Mauro Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review 181; Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56 The Modern Law Review 282; Barbara Warwas, 'Access to Privatized Consumer Justice: Arbitration, ADR, and the Future of Value-Oriented Justice' in Loïc Cadiet, Burkhard Hess and Marta Requejo Isidro (eds), *Privatizing Dispute Resolution: Trends and Limits* (Nomos 2019) 335.

communitarian action, and we may claim that this is how he also perceived the potential of ADR to unburden courts and 'do justice' to citizens.[50]

In the 1970s, ADR was seen on both sides of the Atlantic as a refreshing alternative to overloaded and procedurally complex public court proceedings. ADR was then perceived as tool for achieving the public good, aiming to increase the legitimacy of public justice systems through which the whole welfare state system could be preserved.

This enthusiasm has faded. ADR has become just another legal tool to increase the workload (and profit) of lawyers. Indeed, in many respects, the problems have become worse. In the US, the process of 'vanishing trials' has continued, and ADR has been criticised for favouring multinational corporations and more powerful disputants.[51] In the EU, a new legal framework for ADR was implemented in 2015 that promoted ADR and online dispute resolution in the context of the EU internal market.[52] But ADR was incorporated into public, formal frameworks of justice and was

[50] Ugo Mattei, 'Access to Justice. A Renewed Global Issue?' (2007) 11.3 Electronic Journal of Comparative Law 1, 2.

[51] On vanishing trials and ADR see for example Thomas J Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"' (2004) 1 Journal of Empirical Legal Studies 843; Jessica Silver-Greenberg and Michael Corkery, 'In Arbitration, a "Privatization of the Justice System"' *New York Times* (1 November 2015) <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> accessed 24 August 2022; Jessica Silver-Greenberg and Robert Gebeloff, 'Arbitration Everywhere, Stacking the Deck of Justice' *New York Times* (31 October 2015) <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?auth=login-email&login=email> accessed 24 August 2022.

[52] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

treated as yet another formal (legal) tool serving elite lawyers rather than citizens.[53]

Hence, although in the 1980s ADR was seen as one of the 'new solutions' to increase the legitimacy of State-made rules generally speaking, it did not succeed as planned. Today when we hear about ADR from academics and professionals, we only hear about it in a narrow way, in the context of access to justice or court proceedings.[54] This is often a critical discussion pertaining to similar problems of the illegitimacy and technocracy of ADR rules as presented above, in the context of contemporary multilevel regulation.[55] ADR is not seen by citizens as a legitimate means of solving social issues, because it has been 'consumed' by the public system that is seen as serving the elites, or at least representing the adversarial principles of formal justice systems that are detached from the actual needs of citizens. The same problem concerns education in the field of ADR. Arbitration, negotiation, or mediation – although increasingly appearing in university curricula – are treated as specialised fields, reserved for a very small group of lucky students

[53] See European Commission, 'COM(2019) 425 Final. Report on the Application of Directive 2013/11/EU of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes' 9, which revealed the general perception by consumers of ADR as a tool developed by and serving traders often being biased towards the latter (a similar perception has been revealed the other way around, by traders towards consumer ADR).

[54] Stefan Wrbka, *European Consumer Access to Justice Revisited* (Cambridge University Press 2015); Jaroslav Kudrna, 'Arbitration and the Right to Access to Justice: Tips for a Successful Marriage' (*NYU Journal of International Law and Politics Online Forum*, 27 April 2020) <http://nyujilp.org/wp-content/uploads/2013/02/Jaroslav-Kudrna-Arbitration-and-Right-of-Access-to-Justice-NYU-JILP-Feb-2013.pdf> accessed 24 August 2022; Warwas, *Access to Privatized Consumer Justice: Arbitration, ADR, and the Future of Value-Oriented Justice* (n 49); 'Global Pound Conference Series' <https://imimediation.org/research/gpc/> accessed 19 October 2022.

[55] See for example Norbert Reich, 'A "Trojan Horse" in the Access to Justice – Party Autonomy and Consumer Arbitration in Conflict in the ADR-Directive 2013/11/EU?' (2014) 10 European Review of Contract Law 258.

who happen to make it into a tight-knit arbitration practice of white-collar lawyers.

In summary, arbitration and ADR are seen as litigation-like processes, relevant to perhaps 1% of citizens. Yet recall why ADR was introduced into formal State systems: it was intended to fix the State's incapacity to provide welfare and justice to all, and hence, to emphasise the social function of ADR. Paradoxically then, the whole social function of ADR promised by Pound has not been realised.

But ADR goes far beyond formal law and access to justice debates. ADR has been used by communities throughout history not only to prevent and solve disputes, but also to preserve social harmony and peace, ensuring sustainable community growth even before States were created. As such, ADR goes to the core of multilevel regulation and thus informs all rules and processes that regulate human interactions today.

4. *The Puzzle Restated*

The foregoing discussion leads us to the main puzzle underlying this article. On the one side, we have multilevel regulation, which is not seen as legitimate or practical by citizens and professionals due to States' and State-sanctioned institutions' incapacity to address an array of social and practical problems as mentioned in section II.2. On the other side, most attempts at change (such as the modern ADR movement) fail, because they do not meet the formal vision of State-sanctioned rules, which is still a dominant vision of multilevel regulation. From each perspective, the other side looks illegitimate and inefficient – and there is some truth to both. But the very nature of this comparison makes the improvement of multilevel regulation impossible.

Part of the problem, I argue, is how we have been thinking about contemporary multilevel regulation, its origins, and its social capital.[56] By

[56] By 'we' I mean here legal scholars and practitioners.

social capital, I mean a shared understanding of rules and values through which citizens connect with society, and professionals connect with professional practice. These include (relational) trust, cooperation, and reciprocity, just to mention a few.[57]

The problem is that today we rarely look at rules in isolation from their legal function. And we rarely *return* to the origins of rules before the nation State was even created, which is where the actual social capital underlying rules can be found. What I propose to do is to reframe the debate, which will hopefully allow us to think about multilevel regulation and ADR in a new and productive way. Put another way, Pound was right in his critique, but too limited in the scope of his analysis.

Here we arrive in the second step of the argument: what is the wider historical perspective? I argue that we have an enormous reservoir of history, practices, and ideas ready to help us think through contemporary legitimacy problems: namely all those practices that preceded the capture of law by the modern State system. That is, the dominant conceptual framework today: the State representing formal rules and then multilevel regulation is misleading. Instead, we need to think in terms of a wider historical framework: that is, historical ADR practices representing social values, then State, and then multilevel regulation.

Which brings me to the third, normative step. I argue that we can learn a lot about what multilevel regulation is today, and how it could be improved, by going back to those historical ADR practices.

In a nutshell: by *returning* to the origins of rules before (and under) nation States through the study of historical ADR practices in its various forms, we can try to improve contemporary multilevel regulation. Before sketching proposals in this regard in section IV, let us now move towards an analysis

[57] Again, the concept of social capital is largely based on Putnam's social capital theory, with an important twist concerning the need for an even broader perspective, turning us back to human interactions in pre-modern societies. Compare: Putnam (n 34).

of the function of ADR before nation States and multilevel regulation, in early societies.

III. RETHINKING THE HISTORICAL CONTEXT: A BRIEF HISTORY OF ADR IN EARLY SOCIETIES AND THE ORIGINS OF MULTILEVEL REGULATION

As stated in the Introduction, this article takes an experimental approach to the study of multilevel regulation. In this vein, in the section below, I take a very large step back from the theoretical debates on contemporary multilevel regulation described in the literature review above, exploring the potential of historical ADR practices for contemporary rulemaking.[58]

The history of ADR can be traced back to the practices of early societies. When we look at ancient history, the roots of ADR can be found in Confucian philosophy, which promotes social harmony based on diversity rather than individual perceptions of justice.[59] According to Jay Folberg, mediation was used frequently in Ancient China, in line with the Confucian approach to dispute resolution which emphasised 'moral persuasion and agreement, not […] sovereign coercion'.[60] Similarly, the traditional African philosophy and community dispute resolution systems like Ubuntu and Gacaca promote grassroots solutions to advance dialogue, peace, and restitution. Here, the prominent role is for community elders who either facilitate a dialogue within the community to end a dispute or make

[58] Regarding the terminology, the term ADR did not exist in pre-Westphalian times but I use it here anachronistically for the sake of consistency. The purpose of this section is to point to the functions of ADR before nation States and this is why I refer to ADR here as 'historical ADR practices.' Those practices cover the timeframe from ancient history until early modern times in line with the historical approach in the article that the modern State roughly originates in the Treaty of Westphalia. In this section, I present only select examples of historical ADR practices. More systematic research is needed to further explore the argument underlying this section of the article.

[59] Menkel-Meadow (n 48).

[60] Jay Folberg, 'A Mediation Overview: History and Dimensions of Practice' (1983) Mediation Quarterly 3, 4.

decisions on their own with a view on the values and goals of the community as a whole.[61]

In a similar vein, Jay Folberg emphasises the historical role of 'moots' or neighbourhood meetings led by a 'notable man' acting as a mediator to facilitate interpersonal disputes in different parts of Africa.[62] ADR has also been historically used in Nordic countries. In pre-modern times, most disputes of different types (legal, administrative, interpersonal) were solved through a local assembly called 'ting' operating through 'consensual negotiation of local people' which was a form of a decision-making process.[63] Some authors have already identified similarities between those conflict resolution practices in Norway and their late-modern variants.[64] Hence, conciliation boards rooted in the regulation of 1795 composed of laymen and dealing with civil cases, defamation, marital disputes, and debt (among the others) are still operational in Norway solving around 80,000 cases per year.[65] Another example concerns the citizens of the Dutch Republic (Leiden) of the sixteenth century who could choose from a variety of dispute resolution means to advance societal bonds and ensure social cohesion. This concerned the aldermen's Commission for Neighbourly Disputes and the civil guard, among others.[66]

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[61] Ibid.

[62] Folberg (n 60) 4.

[63] Kaijus Ervasti, 'Past, Present and Future of Mediation in Nordic Countries' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018) 226.

[64] Ibid 226–227; Pia Tellervo Letto-Vanamo and Ditlev Tamm, 'Adjudication or Negotiation - Mediation as a Non-Modern Element in Conflict Resolution' in Anita Roenne, Lin Adrian and Linda Nielsen (eds), *Fred, forsoningn og maegling : Festskrift til Vibeke Vindeloev* (Jurist- og Økonomforbundets Forlag 2017).

[65] Ervasti (n 63) 226–227.

[66] Griet Vermeesch and Aries Van Meeteren, 'In Hope of Agreement: Norm and Practice in the Use of Institutes for Dispute Settlement in Late-Seventeenth-Century Leiden', *The Uses of Justice in Global Perspective, 1600-1900* (Routledge 2019), specifically 147-151.

In the literature, the development of commercial arbitration is strongly linked to its use by medieval merchants, who aimed to create a private internal system of dispute resolution that could correspond to the basic principles of natural justice.[67] To this extent, commercial arbitration also came to support the medieval *lex mercatoria* (law of merchants) through which private commercial norms could be enforced.[68] We learn about the resolution of trade disputes through arbitration from as early as Marco Polo's caravans and in disputes between Greek and Phoenician traders.[69] This continues in medieval times, where arbitrators solved trade disputes based on commercial usage rather than black letter laws.

Moving forward to the seventeenth century, arbitration was used by various communities as a means of informal communitarian justice based on trust. The communities using arbitration were rather diverse, with participation from various religious, geographical, ethnic, or commercial communities.[70] As noted by Auerbach, the rule for the application of non-judicial dispute resolution was rather simple: the tighter the community, the higher the involvement of ADR based on trust and the lesser the involvement of lawyers and adversarial procedures.[71] Also, the nature of arbitration differed when used in the seventeenth century. Arbitration was used as a procedural (yet informal) tool—developed outside the law by the traders themselves—to further preserve communitarian values. For business communities, those values involved *participation*, meaning the individual affiliation of traders with the broader community of traders and the relevant arbitral institution,

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[67] This and the following paragraph are directly reproduced from my previous work in Warwas, *The Application of Arbitration in Transnational Private Regulation: An Analytical Framework and Recommendations for Future Research* (n 22) 36-38 with further references.

[68] Ibid.

[69] Daniel Centner and Megan Ford, 'A Brief History of Arbitration' *American Bar Association* (19 September 2019) <https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2018-19/summer/a-brief-history-arbitration/> accessed 19 October 2022.

[70] Jerold S Auerbach, *Justice Without Law?* (Oxford University Press, USA 1984) 19.

[71] Ibid.

performance understood as the voluntary preservation of communitarian values by individual traders, and *moral sanctions* serving as the informal enforcement means of both arbitral awards and the shared communitarian values of traders.[72] Notably, arbitrators and arbitral institutions functioned not only as decision-makers and administrators of the early individual disputes but also as guarantors of the social legitimacy of the then business exchange among traders.[73]

Arguably, ADR (including arbitration) in its original, historical forms served more noble or communal goals, rather than the one-to-one resolution of a dispute; it aimed at not only resolving but also preventing the (escalation of) disputes to achieve social harmony and preserve the very existence of early communities.[74] Consequently, it can be further argued that the historical ADR did not only serve dispute resolution or adjudicatory functions, but it also operated as a form of regulation of early communities.[75] As such, the historical ADR practices can be characterised as sets of informal procedures, collaborative skills, and models of social organisation based on relational trust, participation, and informal enforcement systems and together representing the social capital that is currently missing from contemporary multilevel regulation.[76]

Only afterwards did we see the legalisation and professionalisation of communitarian practices. Together with the development of the modern

[72] Barbara Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses* (Springer 2016) 168.

[73] Ibid 155–185.

[74] Menkel-Meadow (n 48).

[75] I thank the reviewer for proposing this language.

[76] Please note that although I distinguish here some characteristics of historical ADR as opposed to modern ADR, this is done in a generalised manner for the purpose of clarifying the main argument developed in this article. That being said, some characteristics of historical ADR can be seen also in modern ADR and vice versa. More systematic research, which I propose in section V, is needed to distinguish more specific characteristics of ADR falling within those categories together with their impact on contemporary multilevel regulation.

State, 'modern systems of justice' started resembling the more medieval trials of ordeal, where disputants were plunged into water, giving an opportunity for God to determine the righteous party, rather than relying on communitarian ADR.[77] According to Carrie Menkel-Meadow, this means that the State and its formal rules of justice began focusing on winners and losers, rather than social harmony promoted through historical ADR.[78] This can also be seen in the modern mainstream models of mediation called 'pragmatic models' that promote individualistic approach to problem solving directed towards settlement in an individual dispute rather than more socially oriented functions of mediation.[79] Hence, modern ADR can be characterised by its more individualistic, adversarial functions in one-on-one disputes as opposed to the more social functions of ADR in its historical variant.

To summarise, we can conclude that historical ADR existed before the formalisation of rules. As such, it can be perceived as the origins of contemporary multilevel regulation. What is more, historical ADR practices embody the social capital that is now missing from contemporary multilevel regulation. If we return to those historical ADR practices and study their role in maintaining social and communitarian harmony in early societies and the traces of those practices in modern ADR and multilevel regulation, we can potentially improve contemporary multilevel regulation by increasing its social legitimacy.[80]

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[77] Menkel-Meadow (n 48).

[78] Ibid.

[79] William Ury and Roger Fisher, *Getting to Yes: Negotiating an Agreement without Giving In* (Houghton Mifflin 1981); Michal Alberstein, 'Forms of Mediation and Law: Cultures of Dispute Resolution' (2007) 22 Ohio State Journal on Dispute Resolution 321, 326–29.

[80] This is not a purely speculative point. Take, for example, the new concept of a "restorative city", referring to "a process that aims to shape both community life as well as urban space through the lens of restorative justice philosophy, values, and standards." Anna Matczak, 'What Is a Restorative City?' (2021) 43 Archives of Criminology 399, 399. Here, the restorative practices lying at the core of the concept of the "restorative city" are based on the strong societal importance of

IV. The potential of historical ADR practices for increasing the social legitimacy of contemporary multilevel regulation

As noted, because modern ADR has been reintroduced into contemporary multilevel regulation as a legal tool, it has traditionally been considered a highly specialised field reserved only for lawyers and businesses. But law is not the only field where ADR is used today.

ADR, especially in its pre-modern, societal variant, is increasingly relevant in the everyday lives of citizens, professional practice, and also for addressing profound social or political challenges. This trend is widespread and increasing, and it reflects the evolving need for more polycentric, democratic, and inclusive rulemaking in line with new models of sustainable society and economy as mentioned in the Introduction.

The following examples show how ADR can help us move away from States and reconnect with non-State actors who use their (historical) social capital to make multilevel regulation socially informed and legitimate.

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restorative justice values for regulating and building both community life and governance structures within cities. As such, using the concept of a "restorative city" relies on the importance of respectful and trusted relationships in the neighbourhoods, participatory processes that include residents, and the close involvement of all relevant rulemaking stakeholders in the city. The concept of the "restorative city" is treated as something new and cutting-edge, and in many regards it is. However, these ideals and practices have a striking resemblance to the historical ADR as discussed in this article. As such, they demonstrate how an understanding of historical ADR could help to increase trust in institutions, the understanding of citizens of rules that apply to their daily conduct, and the meaningful participation of those citizens in rulemaking, by opening up a world of historical practical knowledge and insights. The question remains to what extent modern societies, which are increasingly heterogeneous, can, in fact, rely on shared communal values—that lie at the core of historical ADR—in their various interactions today (such as those within the restorative cities). This question will need to be tested and answered in future research on this topic. I thank the reviewer for this remark.

1. *ADR and the Everyday Activities of Citizens*

As noted, ADR has recently been introduced by authorities such as the EU, or private companies, such as online platforms. Because of globalisation, the daily activities of citizens transcend national borders. E-commerce platforms registered in one country can have branches all over the world; companies such as Alibaba, Amazon, or Zalando, often use ADR to address customer complaints over products and related small claims.[81] ADR can be used in the context of disputes relating to delayed, cancelled or otherwise disrupted flights. EU residents using air carriers registered in the EU and participating in ADR programmes can submit their contractual disputes to ADR (or online dispute resolution, if they bought a ticket online).[82] The problem is

[81] The applicable ADR/ODR schemes and platforms differ depending on the location of the consumer and trader. See the complaint system based on negotiation used by Alibaba: 'How Does Alibaba.Com Help If I Have Submitted the Offline Dispute Case?' (*The website of Alibaba: Help Center for Buyer.*) <https://service.alibaba.com/page/knowledge?pageId=128&category=100008350 0&knowledge=20111775&language=en> accessed 24 August 2022; and the references to the EU's ADR and ODR platform by Amazon.de: 'Help & Customer Service: About the Online Dispute Resolution Platform (ODR)' (*The website of Amazon.de*) <https://www.amazon.de/-/en/gp/help/customer/display.html?node Id=G9NMDH46UFNMFNKN> accessed 24 August 2022; and the references to the EU's ADR and ODR platform by Zolando.ie: 'Standard Terms and Conditions (T&Cs) for Orders Placed Online at Www.Zalando.Ie' (*The website of Zolando.ie*) <https://www.zalando.ie/terms/> accessed 24 August 2022.

[82] This is in line with the EU's regulatory framework under Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR); 'Out-of-Court Procedures for Consumers' (*Your Europe*) <https://europa.eu/ youreurope/citizens/consumers/consumers-dispute-resolution/out-of-court-procedures/index_en.htm> accessed 24 August 2022.

that citizens have little knowledge of and trust in those 'publicly sponsored' systems and use them rather scarcely.[83] That is the critical insight.

The constructive insight is that ADR has enormous potential in the context of citizens' lives. Take, for example, (community) mediation or negotiations that can address misunderstandings with neighbours or even family conflicts.[84] Those negotiations proceed according to different cultural models, in which different people emphasise different social values, such as taking control of problems, trust building, restoration, and moving things forward. For example, the neighbourhood mediation in the Netherlands with its long tradition in the form of the aldermen's Commission for Neighbourly Disputes was revived in 1990s and is used today by 88% of municipalities across the Netherlands.[85] This form of mediation emphasises such principles as participation and responsibility of neighbours for the prevention and resolution of their own disputes, advancement by neighbours of social cooperation models with local stakeholders (e.g., police, welfare workers, and municipal employees) and overall safety in the neighbourhood.[86] In sum, ADR practices, once reconnected with their early social and cultural models can be used to help to improve the quality of lives

[83] See European Commission (n 53) 9.

[84] For the analysis of the concept of community mediation including its history see Timothy Hedeen and Patrick G Coy, 'Community Mediation and the Court System: The Ties That Bind' (2000) 17 Conflict Resolution Quarterly 351.

[85] To the knowledge of the author, no study so far identified linkages between the aldermen's committee and the contemporary neighbourhood mediation in the Netherlands. However, due to the preliminary resemblances of those initiatives, I propose that those linkages should be studied in future research. On neighbourhood mediation see 'The Website of the Centre for Crime Prevention and Safety, Neighborhood Mediation (in Dutch)' <https://hetccv.nl/onderwerpen/buurtbemiddeling/buurtbemiddeling-in-nederland/> accessed 29 August 2022.

[86] 'The Website of the Centre for Crime Prevention and Safety, Neighborhood Mediation (in Dutch), 25 Years of Neighborhood Mediation' <https://hetccv.nl/fileadmin/Bestanden/Onderwerpen/Buurtbemiddeling/InfoGraphic_25jaarBuurtbemiddeling.pdf> accessed 29 August 2022.

of many citizens empowering them with social tools to solve their problems on their own.

2. *ADR and Professional Practice*

On a more organisational level, many contemporary organisations – including companies, international organisations, and universities – hire ombudspersons to solve internal disputes, use ADR as a model for organisational change in management structures (so-called change management), or even invest in their own conflict management systems, known as dispute system design. Moreover, if we look at the historical ADR practices of early communities that existed before States (that is, examining how those communities were organised around shared values) we can see similar patterns of organisational behaviour and compliance in many contemporary professional communities. Take, for example, organisations dealing with Internet governance, such as the Internet Corporation for Assigned Names and Numbers (ICANN) (and other private regulators), or even the history of the Internet itself, which was built on shared values of technology specialists and programmers.[87] The point is that ADR can help the contemporary professional practice improve collaborative behaviour and increase compliance by placing social capital at the core of those goals. Yet again, professionals and professional communities do not have enough knowledge of ADR, which prevents it from being used effectively.

At a more individual level, ADR skills correspond to the twenty-first century skills of adaptive and forward-looking professionals who are in high demand in the labour market today. Although it is hard to provide an exhaustive list of all skills of ADR professionals, the core skills can be listed as follows: active listening, good communication skills, ability to generate trust, capacity to

[87] See, for example, ICANN's multistakeholder model in: 'Find Your Place at ICANN' (*ICANN*) <https://www.icann.org/community> accessed 24 August 2022. For the history of the Internet see: John Naughton, 'The Evolution of the Internet: From Military Experiment to General Purpose Technology' (2016) 1 Journal of Cyber Policy 5.

deal with and manage emotions, ability to focus on interests and values rather than positions, and a collaborative attitude.

Those skills are required in many professions. Obviously, ADR skills are required for mediators, arbitrators, and negotiators but also for social workers and municipal employees, psychologists, historians, anthropologists, cultural and communications experts, and many more. There are also practitioners whose professional and organisational culture indirectly follows (historical) patterns of ADR, such as private regulators – including the already mentioned community of Internet regulators, ICANN – employees of companies, or management. When we research those actors and how they connect with their social capital based on (historical practices) of ADR, we can use ADR to refocus the study of multilevel regulation from States to non-State actors and build more collaborative multilevel regulation for (future) practitioners.

3. *ADR and Social and Political Challenges*

It should not be surprising that ADR has been used to solve political conflicts for centuries. We hear about negotiation or mediation quite often when it comes to discussing political agendas, establishing international or regional organisations, ending political relationships, dealing with civil conflicts, or negotiating peace treaties and ending wars. For example, between 1946 and 2015 mediation was used to solve around 50% of civil and inter-State conflicts.[88] Some countries officially promote social harmony through

[88] Andra Curutiu, 'Mediation in an Armed Conflict: The UN Mediation Support Unit' (*MLR Student Projects Blog*, 26 June 2020) <https://mlrstudentprojects.squarespace.com/blog/2020/6/26/mediation-in-an-armed-conflict-the-un-mediation-support-unit> accessed 24 August 2022; Christian Nünlist, 'Mediation in Violent Conflict' 1 <https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/CSSAnalyse211-EN.pdf> accessed 24 August 2022.

mediation, sometimes even in unusual ways such as through TV shows, as is the case in China.[89]

Increasingly, and this is a rather novel development, ADR is also used to address serious social (or socio-political) challenges such as family conflicts, administrative procedures in the context of migration, the marginalisation of youth from disadvantaged communities, peacekeeping, or racial discrimination in the context of the Black Lives Matter movement. More specifically, ADR – which has been frequently used in the context of divorce proceedings – has recently been encouraged to address family violence.[90] ADR is also increasingly used – still mostly as a pilot – in refugee camps.[91] Here, ADR has great potential in helping to reduce the current social gap in domestic violence programmes and administrative migration procedures that are largely based on patriarchal and formal principles, often favouring the oppressors and State authorities rather than the weaker parties.

Some authors suggest that ADR, when used in divorce proceedings involving domestic violence, can help reshape the whole fundaments on which formal divorce proceedings still take place.[92] ADR can offer reparatory language (calling abused women or men 'survivors' rather than 'victims') and alternative principles to help abused women or men get through the divorce in a forward-looking manner, using reconciliation techniques. Similar guiding principles relate to the increasing use of ADR in refugee camps, where mediators are seen as facilitators rather than representatives of State authorities.

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[89] Lauriane Eudeline, 'China Promotes Harmony within the Country through Mediation TV Shows' (*MLR Student Projects Blog*, 12 June 2020) <https://mlrstudentprojects.squarespace.com/blog/2020/6/12/china-promotes-harmony-within-the-country-through-mediation-tv-shows> accessed 24 August 2022.

[90] Dafna Lavi, *Alternative Dispute Resolution and Domestic Violence: Women, Divorce and Alternative Justice* (Routledge 2020).

[91] See the ODR app for refugees: 'The ODR 4 Refugees' (*ODR Europe*) <http://www.odreurope.com/odr4refugees> accessed 24 August 2022.

[92] Lavi (n 90).

Also, since the 1980s ADR, in a form of peer mediation, has been used in about 25% of American schools to help pupils address their conflicts and develop their collaborative skills.[93] When it comes to the use of ADR in the context of peacekeeping, the founders of a project on social mediation have been working on its use for social transition within the Cypriot socio-political reality.[94] Regarding racial discrimination, most recently, different ADR bodies issued calls for funding to develop programmes promoting better dialogue through ADR between citizens and governmental authorities, including the police.[95]

Certainly, there are risks that ADR will also be used to the disadvantage of said individuals, and researchers and practitioners need to be well aware of those risks. Therefore, we need a systematic study of ADR practices to monitor their development and formulate best practices in the context of socio-political challenges.

4. *General Relevance of ADR Today*

The abovementioned examples are only select cases of the potential use of ADR in the daily activities of citizens and local communities, in the workplace and classroom, and in regard to contemporary social and political problems. In sum, my normative claim is that historical ADR practices can help us to: (1) increase the inclusiveness of multilevel regulation by shifting from its traditional monocentric (State-dominant) focus into a polycentric (multi-actor) focus; (2) draw models of collaboration for professional practice; and (3) reconnect with the social values lying at the core of multilevel regulation, equipping citizens and representatives of different

[93] 'Peer Mediation Online' <http://www.peermediationonline.org/peer-mediation-online-about.html> accessed 24 August 2022.

[94] See the project on 'Social Mediation in Practice' <https://www.social-mediation.org> accessed 24 August 2022.

[95] 'AAA-ICDR Foundation Responds to Need for Conflict Resolution Amid Pandemic and Racial Injustice' (*AAA-ICDR Foundation*) <https://www.aaaicdrfoundation.org/grants> accessed 15 July 2021.

vulnerable groups with effective means of solving social and political problems.

V. RECOMMENDATIONS FOR FUTURE RESEARCH

Based on my main argument that contemporary multilevel regulation is informed by historical ADR practices, I identify the following three lines for future research.

(1) increasing the diversity of contemporary multilevel regulation;

(2) drawing collaboration models for professional practice;

(3) reconnecting with the social values lying at the core of multilevel regulation.

Below I consider each in turn, including specific research questions aimed at investigating if, and if so how, concretely (historical) ADR informs multilevel regulation.

1. *Increasing the Diversity of Contemporary Multilevel Regulation Through Historical ADR Practices*

Commonly, multilevel regulation is seen as originating in States, and the role of private actors in multilevel regulation is subordinate to the legal functions of States and the democratic principles associated with States. Moreover, private actors are often seen as endangering multilevel regulation because they are not equipped with similar democratic safeguards as States and State-sanctioned entities. As demonstrated in section II.2 on 'The Limitations of Contemporary Studies of Multilevel Regulation', while there is some evidence for this kind of criticism, it is limited, predictable, and not particularly constructive.[96] I propose a different approach that starts with the

[96] For example, in section IV.2 I demonstrated the dual critical and constructive perspective regarding the application of ADR to the everyday activities of citizens. On the one hand, there are certain critical approaches to the use of modern ADR

following hypothesis: private, non-State actors who use ADR or ADR-like techniques are equipped with the tools necessary to *improve* traditional multilevel regulation. This is because they have ready-made solutions to reconnect multilevel regulations with the communitarian values lying at their core such as collaboration, participation, and personal trust. Studying those actors and their (historical) ADR techniques and values is necessary to increase the polycentricity and inclusiveness of multilevel regulation. The following are some research questions that could be studied (also with students) within **research line 1**:

- Which non-State actors shape multilevel regulation through ADR and in what fields?
- What are the historical ADR practices in those fields?
- Do those actors in fact increase the diversity and inclusiveness of multilevel regulation through ADR, contributing to its improvement, or rather endanger it?

2. *Drawing Collaboration Models for Professional Practice Based on Historical ADR Practices*

This research line investigates ways in which public authorities (municipalities, governments, judges, to mention a few) can *cooperate* with private actors in policy and rulemaking by learning from differences rooted in private and public regulation, mostly through (historical) ADR practices. The research aims to offer practical solutions on how to effectively bridge the work of private and public actors in the field of multilevel regulation, applying it in the broadly understood workplace so as to exploit the

including for instance the distrust by citizens to ADR in the context of e-commerce platforms. This is an important perspective that needs to be further studied in future research. At the same time, ADR can be beneficial in other aspects of citizens' lives, as well as in the context of various professional fields, and social and political challenges. In view of all those benefits, the criticism of ADR and its use by private actors, even though justifiable in specific situations, seems generally limited.

advantages of both systems, helping practitioners in their daily professional practice. Workplace is to be understood at both the organisational and individual level, investigating cooperative governance structures and cooperative behaviour of individuals involved in those structures. The following are some research questions which could be studied (also with students) within **research line 2**:

- Which new governance structures (cooperation frameworks) can be developed to connect private and public actors in the field of multilevel regulation, and how (e.g., through experimentation and innovation)?
- What professional values and skills are relevant for increasing cooperation and compliance in the workplace today?
- How can we draw from historical ADR values to increase cooperation and compliance in the workplace today?

3. *Reconnecting with the Social Values Lying at the Core of Multilevel Regulation Through Historical ADR*

Most recent developments in the field of dispute resolution are progressing without citizens and representatives of vulnerable groups even realising they exist, except as an intermittent and unwelcome surprise. The lack of public awareness of the increasing role of ADR in everyday activities and in important socio-political issues hinders the effectiveness of ADR. This line of inquiry aims to disseminate knowledge on ADR to the public through research, public events, and practical toolkits. The following are some research questions that could be studied (also with students) within **research line 3**:

- How does ADR affect the everyday lives of citizens and representatives of vulnerable groups?
- What are the risks and benefits of using ADR for citizens and representatives of vulnerable groups?

- How to increase the use of ADR by citizens and representatives of vulnerable groups, equipping them with effective means of solving social problems and reconnecting them with multilevel regulatory structures?

VI. Conclusions

In this article, I took a somewhat experimental and exploratory approach to contemporary multilevel regulation with a view to the increasing need for multilevel regulation to reflect the rapidly changing contemporary regulatory processes that call for more social legitimacy. Such an approach also implied a proposal for a wider historical perspective to multilevel regulation, through which we can try to rethink the social origins of contemporary rules and regulations and learn for our contemporary times.

In conclusion, I have argued in this article that, although multilevel regulation has been designed to move away from States in the study of how rules are made, it is still largely focused on States. And States are increasingly seen by citizens and practitioners as inefficient, mostly because the formal rules coming from them are lacking the social capital that should lie at the core of multilevel regulation.

Part of the problem is how we have been thinking about contemporary multilevel regulation, its origins, and its social capital. Today, we rarely look at rules in isolation from their legal function, and we rarely *return* to the origins of rules – particularly rules that were created before the nation State was even formed. This largely affects the social legitimacy of contemporary multilevel regulation. I have argued that since ADR existed before the formalisation of rules, it can be perceived as an origin of contemporary multilevel regulation.

Furthermore, I have argued that if we return to those early ADR mechanisms and study their historical role in maintaining social and communitarian harmony in early societies, we can try to improve multilevel regulation by

increasing its social legitimacy and by making it more inclusive, and in fact polycentric. We can use ADR to refocus the study of multilevel regulation from States onto non-State actors, build more collaborative and practical multilevel regulation for (future) practitioners, and create more socially informed multilevel regulation for citizens and vulnerable groups. The article contained proposals for future research in line with these arguments.

General Articles

The Polysemy of Gender Discrimination in the IACtHR Jurisprudence: Towards the Elimination of Structural Gender Discrimination Through Transformative Reparations*

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An earlier draft of this article has been presented at the workshop 'Gender in law and courts: uneasy encounters?' held at the European University Institute of Florence on November 8th, 2019. We are grateful to the organizers Giovanna Gilleri, Sophia Ayada and Matilda Merenmies and the participants for their feedback. We also are indebted to Humberto Sierra and Isabel Jaramillo for their stimulating conversations, and Sonia Boulos and Emanuela Lombardo for thorough comments that allowed us to improve our first draft. We finally thank anonymous reviewers for helpful suggestions and recommendations. This research has been funded by the research project 'Teorías de la justicia y derecho global de los derechos humanos' (PID2019-107172RB-I00) and 'Human rights at the intersection of gender and migration' (RYC-2017-23010), both funded by the National Research Agency of the Spanish Ministry of Science (MCIN/AEI/10.13039/501100011033). A previous version of this study has been published in Spanish. We thank the Editorial Committee of Andamios: Revista de investigación social for granting the permission to publish in English this revised and extended version of MariaCaterina La Barbera and Isabel Wences, 'La discriminación de género en la jurisprudencia de la Corte Interamericana de Derechos Humanos' (2020) 17 Andamios: Revista de investigación social 59, https://doi.org/10.29092/uacm.v17i42.735.

This article focuses on the jurisprudence of the Inter-American Court of Human Rights (IACtHR) on structural gender discrimination and transformative reparations. It dwells on feminist legal and political analysis on the multiple meanings of gender discrimination and distinguish three feminist categories –that have been incorporated in the International Human Rights Law– that respectively focus on the disadvantaged group ('women approach'), the discriminatory structure that produces disadvantage ('gender approach'), and the combined effects of different grounds of discrimination ('intersectionality approach'). The article is novel for its use of the polysemy of gender discrimination as a lens to analyze strengths and weaknesses of three emblematic cases of the IACtHR: González et al. ('Cottonfield') v. México, Atala Riffo v. Chile, and Gonzales Lluy et al. v. Ecuador. Our analysis shows that the IACtHR refers to different meanings of gender discrimination in the interpretation of the facts, on the one hand, and in the reparation and non-repetition measures, on the other. Our findings allow us to suggest that the pathway to strengthen the role of the Inter-American Court towards the elimination of gender structural discrimination is to issue transformative reparations that include the reforms of the legal and institutional gender-blind framework that maintain and reproduce such discrimination. This study is not only relevant for the Inter-American systems but also for the European Court of Human Rights and the African Court on Human and People's Rights that can use the IACtHR jurisprudence as a model.

Keywords: Gender discrimination; structural gender discrimination; intersectionality; Inter-American Court of Human Rights; reparations and non-repetition measure

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I. INTRODUCTION

Statistics show that Central and South America, Caribbean, and Mexico constitute the least gender equal region in the world.[1] In this region, unemployment is 'a problem that particularly affects women'.[2] The majority of the female population either lack their own income, or their salaries are lower than minimum wage. 94 percent of those who engage in paid care work, which is usually under precarious conditions, are women; of these, 24 percent are poor and 63 percent do not have social security. 50 percent of women with children under seven years old find themselves outside of the labor market. [3]

[1] Comisión Económica para América Latina y el Caribe, 'Desigualdad distributiva' (CEPAL 2016) <cepal.org/es/infografias/desigualdad-distributiva> accessed August 1st, 2023.

[2] Comisión Económica para América Latina y el Caribe, 'Segundo informe anual sobre el progreso y los desafíos regionales de la Agenda 2030 para el Desarrollo Sostenible en América Latina y el Caribe' (CEPAL 2018), p 66, <https://repositorio.cepal.org/bitstream/handle/11362/43415/5/S1800380_es.pdf> accessed August 1st, 2023.

[3] Comisión Económica para América Latina y el Caribe, 'Consolidar políticas integradas de cuidado: Un imperativo de igualdad' (CEPAL 2016). <cepal.org/es/infografias/consolidar-politicas-integradas-cuidado> accessed August 1st, 2023.

Multiple barriers exist preventing women's equal participation in decision-making. Although certain countries have shown progress,[4] at the end of 2021, only Honduras had a female head of government; women parliamentarians were only 30.7 percent of elected representatives and – despite the public commitment to create gender-balanced cabinets– the percentage of female ministers only increased to 27.1 percent.[5] Moreover, the ministerial portfolios headed by women continue in most cases to be related to social affairs, family, culture, and the environment, showing the enduring impact of gender stereotypes in the division of productive and reproductive roles.[6] The judicial branch scores even lower as, on average in the region's national high courts, only two out of seven judges are women.[7] Even the Inter-American Court of Human Rights (hereinafter IACtHR) reached gender balance in 2022 for the first time.[8] Throughout its four-decade history, only eight women judges have integrated the Court and only two of them have become presidents.[9]

Also with regards to the most severe forms of inequality, sexual violence and femicide, Central and South America, Caribbean, and Mexico is one of the

[4] For example, on June 1st, 2021, women occupied 58.8 percent of ministerial posts in Nicaragua, 52 percent in Costa Rica, and 42.1 percent in Mexico. In parliaments, women accounted for 48,4 percent in Nicaragua, 48, 2 percent in Mexico and 46,2 percent in Bolivia. See UN Women, 'Women in Politics' (UN 2021) <unwomen.org/en/digital-library/publications/2021/03/women-in-politics-map-2021> accessed August 1st, 2023.

[5] Ibid.

[6] Political harassment is also a threat to achieving women's equality and autonomy. See the Declaration on Political Harassment and Violence Against Women, adopted in 2015 as a follow up of the Convention of Belém do Pará.

[7] Comisión Económica para América Latina y el Caribe, 'Democracia paritaria' (CEPAL 2016) <cepal.org/es/infografias/democracia-paritaria>, accessed August 1st, 2023.

[8] In January 2022, three women judges joined the Court for the period 2022-2027. For the first time since its creation, the Inter-American Court of Human Rights has today a gender balanced composition.

[9] The Inter-American Court selection is based on the candidatures offered by the States that, by not offering gender-balanced lists of candidates, violate Article 8 of CEDAW.

deadliest region in the world.[10] The highest rates of femicide are found in Honduras (227 killed women in 2020, 4.7 per 100,000 women), the Dominican Republic (132 killed women in 2020, 2.4 per 100,000 women), El Salvador (73 killed women in 2020, 2.1 per 100,000 women), Brazil (1738 killed women in 2020, 1.6 per 100,000 women), Bolivia (113 killed women in 2020, 2.0 per 100,000 women) and Mexico (948 killed women in 2020, 1.4 per 100,000 women).[11]

Against this scenario, this article focuses on the role of the Inter-American Court of Human Rights in eliminating gender discrimination and violence through transformative reparations. Our starting point is that gender violence is not the result of random individual bad behaviors, but deeply rooted in structural relations of gender inequality.[12] From this perspective, criminal measures are essential to address individual violations, punish culprits, and provide reparations to victims. However, since the approval of the Convention for the Elimination of all Forms of Discrimination

[10] UN Development Program and UN Women, 'From Commitment to Action: Policies to End Violence Against Women in Latin America and the Caribbean' (UNPD 2017) <latinamerica.undp.org/content/rblac/en/home/library/womens_empowerment/del-compromiso-a-la-accion--politicas-para-erradicar-la-violenci.html> accessed August 1st, 2023. See most recent data available on femicide from 21 countries in the region at Comisión Económica para América Latina y el Caribe 'Observatorio de Igualdad de Género de América Latina y el Caribe' (CEPAL 2020) <https://oig.cepal.org/en/indicators/femicide-or-feminicide>, accessed August 1st, 2023. See also Comité de América Latina y el Caribe para la Defensa de los Derechos de las Mujeres y CLADEM 'Investigación sobre la interrelación y los vínculos entre la violencia sexual y la muerte de niñas y adolescentes en la región de América Latina y el Caribe (2010-2019)' (CLADEM 2021) <https://cladem.org/investigaciones/wp-content/uploads/2021/12/Investigacion-completa-.pdf>, accessed August 1st, 2023.

[11] Ibid.

[12] United Nations, 'Ending violence against women: From words to action. Study of the Secretary-General' (UN 2006) <unwomen.org/sites/default/files/Headquarters/Media/Publications/UN/en/EnglishStudy.pdf>, accessed August 1st, 2023.

(CEDAW) in 1979,[13] International Human Rights Law recognizes that criminal measures are insufficient to eliminate the causes of structural inequality.[14] A comprehensive approach must address the social structures gender discrimination and violence are anchored in, including education, language, media, political representation, institutional organization, and distribution among care and paid work. We align with scholars arguing that, when causes of discrimination are systemic, seeking structural transformation 'is both a necessary and legitimate task for an international human rights tribunal'.[15]

In the last decade, the Inter-American Court has been making significant strides by recognizing that discrimination and violence against women both have structural causes that systematically produce human rights violations.[16] The Court also recognizes that the effects of human rights violations cannot always be repaired by payment of just satisfaction. On the basis of Article 2 of the American Convention on Human Rights (ACHR), the Court can order the respondent State – within the margin of appreciation of each

[13] Convention on the Elimination of all forms of Discrimination Against Women, New York, 1979.

[14] Rashida Manjoo, 'Introduction: reflections on the concept and implementation of transformative reparations' (2017) 21 The International Journal of Human Rights 9.

[15] Ruth Rubio-Marín and Clara Sandoval, 'Engendering the reparations jurisprudence of the Inter-American court of human rights: The promise of the cotton field judgment' (2011) 33 Human Rights Quarterly 1062, p 1091.

[16] See for instance Miguel Castro Prison v. Peru (2006), the emblematic Cottonfield case (2009), the Advisory Opinion requested by Costa Rica (2017) regarding Gender identity and equality and non-discrimination of same-sex partners or the recent cases Women Victims of Sexual Torture in Atenco v. Mexico (2018) and López Soto v. Venezuela (2018). See Enza Tramontana, 'Hacia la consolidación de la perspectiva de género en el Sistema Interamericano: avances y desafíos a la luz de la reciente jurisprudencia de la Corte de San José' (2011) 53 Revista IIDH 141; Laura Clérico and Celeste Novelli, 'La violencia contra las mujeres en las producciones de la comisión y la Corte Interamericana de Derechos Humanos' (2014) 12 Estudios Constitucionales 15.

State[17]– to reform domestic legislation in order to guarantee the rights and freedoms protected under the American Convention on Human Rights. The Inter-American Court awards reparations that include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[18] In particular, the non-repetition measures aim at going beyond the individual violation and preventing the repetition of the same type of violations.[19] Non-repetition measures often are orders to reform legislation 'to remedy a structural wrong that the Court has recognized in its examination of a case'.[20] The Inter-American Court is a pioneer in arguing that non-repetition measures must have a 'transformative vocation' with corrective and not just restorative purpose. Although its function is to repair individual human rights violations, when these result from structural discrimination, the IACtHR argues that the context needs to be taken into special consideration.[21] Although few examples of effective execution mechanisms exist,[22] the Court has gained general acceptance among American States. Scholarly consensus exists on the importance of the

[17] H. Sofía Galván Puente, 'Legislative measures as guarantees of non-repetition: a reality in the Inter-American Court, and a possible solution for the European Court' (2009) 49 Revista IIDH 69.

[18] Douglass Cassel, 'The expanding scope and impact of reparations awarded by the Inter-American Court of Human Rights' (2004) 27 Hastings International and Comparative Law Review 91.

[19] Galván Puente, supra note 17.

[20] Judith Schonsteiner, 'Dissuasive measures and the 'society as a whole': A working theory of reparations in the Inter-American Court of Human Rights' (2007) 2 International Human Rights Law 127, p 149.

[21] See Ruth Martinón and Isabel Wences, 'Corte Interamericana de Derechos Humanos y pobreza. Nuevas incursiones a la luz del caso Hacienda Brasil Verde' (2020) 20 Anuario Mexicano de Derecho Internacional 169.

[22] Only a small number of States have modified domestic legislations in execution of IACtHR's judgments. See Galván Puente, supra note 17, p 89. See also Santiago A. Canton 'Reparations and Compliance with Reports and Judgments in the Inter-American System' (2007) 56 American University Law Review 1453, p 1455; James L. Cavallaro and Stephanie Erin Brewer, 'Reevaluating regional human rights litigation in the Twenty-First Century: The case of the Inter-American Court' (2008) 102 American Journal of International Law 768.

IACtHR jurisprudence in transforming the institutional culture in the region.[23] Since gender equality is one of the Sustainable Development Goals (SDGs) that the UN seeks to achieve before 2030, resistances to execution on behalf of some respondent States should not pre-empt efforts to search for cooperation of international organizations with national actors. The collaboration of the political, legislative, judicial powers with the media, civil society, and academia is required.

This article aims to contribute to existing scholarship on structural gender discrimination by analysing how the Inter-American Court uses the concept of gender discrimination in its jurisprudence. Within the polysemy of gender discrimination, we distinguish three meanings –'women', 'gender' and 'intersectionality'– that we use as lenses to analyze the case-law, highlighting strengths and weaknesses of the IACtHR jurisprudence. The first part of the article elaborates on the theoretical and practical implications of using 'women', 'gender' and 'intersectionality' as conceptual categories in law and policies, especially focusing on the development of international human rights law. With the aim of bridging the gap among theory and praxis, the second part of the article utilizes this theoretical framework to analyze three emblematic cases: *González et al. ('Cottonfield') v. México*, *Atala Riffo v. Chile,* and *Gonzales Lluy et al. v. Ecuador*.

[23] Galván Puente, supra note 17, p 84. See also Pablo Santolaya and Isabel Wences (eds). La América de los Derechos (Centro de Estudios Políticos y Constitucionales 2016); Armin Von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi and Flávia Piovesan (eds), Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune (Oxford University Press 2017). Armin Von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi and Pablo Saavedra (eds), Cumplimiento e impacto de las sentencias de la Corte Interamericana de Derechos Humanos y del Tribunal Europeo de Derechos Humanos. Transformando realidades (Max Planck Institute 2019); Digno Montalván-Zambrano e Isabel Wences (eds), La justicia detrás de la Justicia. Ideas y valores políticos en la Corte Interamericana de Derechos Humanos (Marcial Pons 2023).

Our analysis shows that the IACtHR applies these different approaches to gender discrimination in the interpretation of the facts through contextualization and the identification of the human right violation at stake on the one hand, and in reparation and non-repetition measures, on the other. Our findings allow us to suggest a pathway to consolidate the Court's key role in the American region to eliminate structural gender discrimination through transformative reparations. Our main point is that structural gender discrimination should be addressed through legal and institutional reforms. For this reason, our study is not only relevant within the Inter-American system, but also for the European Court of Human Rights and the African Court on Human and People's Rights that can follow the IACtHR jurisprudence as a model.[24]

II. THE POLYSEMY OF GENDER DISCRIMINATION

The category of gender is not unisonous, nor is the meaning of gender equality. Since its origin, feminist scholarship and activism engaged in intense debates on the definition of this key concept for feminist theory and action.[25] Although such debates have been defined as one of the strengths of feminism,[26] it is worth recalling that it is a critical theory that seeks social change. Multiple meanings are thus attributed to gender not only in theoretical debates but also when putting the gender perspective in social, political and legal practice. Moreover, actors and institutions construct

[24] After the Declarations of San Jose and Kampala, the three regional human rights courts agreed to cooperate to produce a Joint Law Report containing the leading decisions delivered by each court. For more information see the webpage corteidh.or.cr/tablas/tres-cortes/index.html and the joint reports at echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/regionalcourts&c=.

[25] Joan Scott, 'Gender: A Useful Category of Historical Analysis' (1986) 91(5) American Historical Review 1053; Butler, J. *Bodies that Matter: On the Discursive Limits of 'Sex'* (Routledge 1993); Mary G. Dietz, 'Current Controversies in Feminist Theory' (2003) 6 Annual Review of Political Science 399.

[26] Judith Butler, 'Contingent foundations: Feminism and the question of postmodernism' in Sheyla Benhabib, Judith Butler, Drucilla Cornell, & Nancy Fraser (eds), *Feminist contentions: A philosophical exchange* (Routledge 1994).

multiple meanings of gender equality not only in law and policy adoption but also when interpreting the legal and political texts in relation to the context and the specific cases at stake.[27] Yet, opaqueness and embeddedness of gender norms create 'sticky' legacies that are difficult both to change and research.[28] We argue that the multiple meanings of gender equality need to be analytically distinguished to fully understand their effect in the praxis. Following Kantola and Lombardo,[29] we distinguish between three approaches: the 'women approach' – the focus on the disadvantaged group, the 'gender approach' – the focus on the discriminatory structure that produces disadvantage, and the 'intersectionality approach' – the focus on the combined effects of different grounds of discrimination. We draw on Carol Bacchi's[30] and Mieke Verloo's[31] research to analyze the different meanings of gender discrimination used by the Courts in the judicial decision. We distinguish between the diagnosis –or the interpretation of the facts, analysis of the context, and identification of the human rights violation at stake– and the prognosis –or the reparations and non-repetition measures. The next section bridges the gap between theory and praxis by presenting the theoretical framework which will be used to analyze the selected IACtHR case-law in the following section.

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[27] Verloo, M., *Multiple Meanings of Gender Equality: A Critical Frame Analysis of Gender Policies in Europe* (CPS Books 2007).

[28] Waylen, Georgina (ed). *Gender and informal institutions* (Rowman & Littlefield 2017).

[29] Johanna Kantola and Emanuela Lombardo, *Gender and political analysis* (Palgrave 2017). See also MariaCaterina La Barbera and Emanuela Lombardo 'Towards equal sharing of care? Judicial implementation of EU equal employment and work–life balance policies in Spain' (2019) 38 Policy and Society 626; Rebecca Tildesley, MariaCaterina La Barbera and Emanuela Lombardo, 'What use is the legislation to me? Contestations around the meanings of gender equality legislation and its strategic use to drive structural change in university organizations' (2023) Gender, Work and Organization, <https://doi.org/10.1111/gwao.13039>, accessed August 1st, 2023.

[30] Carol Bacchi, 'Policies as gendering practices: Re-viewing categorical distinctions' (2017) 38(1) Journal of Women, Politics and Policy 20.

[31] Verloo, supra note 27.

1. *The 'Women Approach', or the Focus on the Disadvantaged Group*

The 'women approach' mainly consists in an asymmetrical focus on women as a disadvantaged group. It implies addressing differences between women and men, linked both to biological (for example, pregnancy, lactation, sexual and reproductive health) and social factors (for example, underrepresentation in the workforce and decision-making, overrepresentation in care work). Preventing women's exclusion from the labor market, political institutions, and decision-making, are the main focus. Feminist scholars have argued that political theory, public policy, and the law – based on purportedly neutral models – reinforce and maintain discrimination against women.[32] Thus, measures such as positive actions aimed at minimizing discrimination or compensating for disadvantages are favored, such as work-life balance policies targeting women, equal pay, and gender quotas.

These theoretical developments have been reflected in International Human Rights Law, in particular in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The adoption of a specific international convention to protect women's rights transformed the way of conceiving human rights.[33] The CEDAW Committee clarifies that the Convention does not guarantee different rights to women but establishes the specific measures and actions that States should adopt to guarantee human

[32] Susan M. Okin, Women in western political thought (Princeton University Press 1979); Frances Olsen, 'The myth of state intervention in the family' (1985) 18 University of Michigan Journal of Law Reform 835; Ellen Kennedy and Susan Mendus (eds) Women in western political philosophy: Kant to Nietzsche (St. Martin's Press 1987); Catherine MacKinnon, Toward a feminist theory of the state (Harvard University Press 1989); Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' in Margaret Davies and Vanessa Munro (eds) The Ashgate Research Companion to Feminist Legal Theory (Ashgate 2013).

[33] Charlotte Bunch 'Women's rights as human rights: Towards a re-vision of human rights' (1990) 12 Human Rights Quarterly 486; Christine Chinkin, 'Violence against women: The international legal response' (1995) 3 Gender & Development 2; Rebecca J. Cook and Simone Cusack, Gender Stereotyping: Transnational Legal Perspectives (University of Pennsylvania Press 2010).

rights to women, removing *de iure* and *de facto* obstacles that hinder its effective protection.[34]

CEDAW provided a detailed and comprehensive roadmap to achieving gender equality that includes the elimination of legal obstacles that prevent women's access to rights and freedoms; the recognition of the specific women's needs, including sexual and reproductive rights; the elimination of stereotypes that perpetuate discrimination against women; the adoption of positive actions to compensate for historic discrimination and grant access to institutions from which women have traditionally been excluded both *de jure* and *de facto;* and the transformation of society through education with a gender perspective.

CEDAW establishes that 'States Parties condemn discrimination against women in all its forms, [and] agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women'.[35] The Convention requires ratifying States to review periodically national legislation, jurisprudence and administrative memos in order to eliminate norms which harm women through direct or indirect discrimination.[36]

[34] The CEDAW Committee explains that 'women's biologically determined permanent needs and experiences should be distinguished from other needs that may be the result of past and present discrimination against women by individual actors, the dominant gender ideology, or by manifestations of such discrimination in social and cultural structures and institutions'. See CEDAW Committee, General Recommendation n. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, para 11.

[35] CEDAW, supra note 13, Article 2.

[36] Although important reforms have been made in South and Central America, de iure limitations of women's access to rights still exist in the region. For example, women cannot mine or work at night in Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama and Uruguay; cannot register a business in Suriname; cannot request a passport or choose the place of residence in Haiti. See World Bank, Women, Business and the Law 2019 (The World Bank 2019); Karla Hora Miriam Nobre, Claudia Brito and Soledad Parada, 'ATLAS de las mujeres rurales de América Latina y el Caribe' (FAO 2017)

Finally, CEDAW requires courts to protect against discriminatory actions or omissions of authorities (for example, judges or police), private organizations, companies or individuals.[37] The first key advance of CEDAW is the asymmetrical focus on women as a group experiencing disadvantages. The second one is the establishment of actions for minimizing discrimination and compensating the disadvantages caused by discriminatory attitudes, behaviors, and social structures that are recognized as socially constructed. The third key advance is the explicit transformative aim of the Convention.[38]

In the American region, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known as the Convention of Belém do Pará, indicates that violence against women is 'a manifestation of the historically unequal power relations between women and men'[39] and recognizes that the right of every woman to a life free of violence includes the right to be free from all forms of discrimination. Article 7 stipulates:

<fao.org/3/i7916s/i7916s.pdf> accessed August 1st, 2023. Important reforms are related to indirect discrimination, exclusion of women from certain types and modalities of work, equal pay, domestic workers's rights, maternity and equal sharing of care (ONU Mujeres and Secretaría General Iberoamericana 'Análisis de legislación discriminatoria en América Latina y el Caribe en materia de autonomía y empoderamiento económico de las mujeres' (SEGIB 2018) p 8 <segib.org/wp-content/uploads/LeyesDiscriminatoriasEmpoderamientoEconomicoMujeres1.pd > accessed August 1st, 2023.

[37] CEDAW supra note 13, Article 2.

[38] See CEDAW Committee, supra note 34, para 10: 'The position of women will not be improved as long as the underlying causes of discrimination against women, and be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns'.

[39] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará), Preamble"

> The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:
>
> […]
>
> (b) apply due diligence to prevent, investigate and impose penalties for violence against women;
>
> (c) include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary.[40]

Despite its transformative effects in redistribution, recognition and participation[41], focusing on women as a disadvantaged group entails one main limitation: it pays insufficient attention to the structures that generate women's discrimination. The 'women approach' is well-suited to identify the exclusion of women from the labor market, political and legal institutions, and decision-making with the aim of integrating them. However, this approach does not allow an in-depth transformation of these discriminatory structures which produce and maintain those disadvantages.[42] In other words, it attacks the symptoms, but it does not question the causes. Placing women outside of history and social structures, the 'women approach' ignores, in the words of Simone de Beauvoir, how 'one becomes a woman' within and through those structures.[43]

[40] Ibid, Article 7.

[41] Nancy Fraser, Justice Interruptus: Critical Reflections on the Postsocialist Condition (Routledge 1997).

[42] Kantola and Lombardo, supra note 29; Sandra Fredman 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712, p 722.

[43] Chandra T. Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1988) 30 Feminist Review 61, p 80.

2. *The 'Gender Approach', or the Focus on the Discriminatory Structure that Produces Disadvantage*

The 'gender approach' focuses on the discriminatory social structure that affects women. It views gender discrimination as a structural rather than an individual problem,[44] and targets the hierarchical relationships that systematically place women on the subordinate side of the social order. This implies that the political and social institutions produce or maintain gendered power relations.[45] The 'gender approach' pursues a transforming goal of the social and institutional structures that produce and maintain gender inequality. It focuses on the roles associated with femininity and masculinity and warns that rather than being natural and universal attributes, they are contextual social constructions.[46] It differentiates between socially constructed roles and biological needs, questioning the traditional separation between productive and reproductive work.[47] By tackling the cause of the asymmetric relations of privilege and power between men and women, it seeks to dismantle them.

The 'gender approach' aims at eradicating stereotypes and prejudices that affect women's enjoyment of rights and freedoms. In legal terms, using the 'gender approach' means addressing those written and unwritten norms that *de facto* impair women's access to goods, rights, and opportunities. The

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[44] Iris M. Young, 'Structural injustice and the politics of difference' in Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman (eds) Beyond intersectionality: Law, power and the politics of location (Routledge 2009). MariaCaterina La Barbera, 'La vulnerabilidad como categoría en construcción en la jurisprudencia del Tribunal Europeo de Derechos Humanos: límites y potencialidad' (2019) 62 Revista de Derecho Comunitario Europeo 235.

[45] Joan Wallach Scott, 'Gender: A useful category of historical analysis' (1986) 91 The American Historical Review 1053.

[46] Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' in Margaret Davies and Vanessa Munro (eds) *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013).

[47] Okin, supra note 32; Nancy Fraser, *Unruly practices: power, discourse, and gender in contemporary social theory* (University of Minnesota Press 1989).

'gender approach' recognizes that, if these obstacles are not removed, the law and public policies perpetuate and reinforce existing social inequalities.

Despite the wide variety of perspectives, at least three common aspects characterize the 'gender approach'.[48] First, the understanding that gender is a social structure that includes reproduction, care, and sexuality,[49] traditionally considered 'personal matters'. The 'gender approach' enables the understanding that the public versus private dichotomy is fictitious and grounds the well-known revindication that 'the personal is political'.[50] Second, the comprehension that gender is the result of complex social relations that construct femininity and masculinity as opposites and complementary through the attribution assignment of roles, attitudes, desire, and expectations. In contrast with the traditional vision of feminine and masculine roles as biologically grounded, gender is recognized as a context-dependent social structure.[51] Third, the questioning of unequal social relations with the aim of transforming gender roles in equal terms. The 'gender approach' calls for recognizing that gender discrimination can only be effectively addressed by considering gender as a collective problem of power relations that requires public intervention to bring about social transformation towards a more just society.[52]

Such theoretical developments have been progressively included in International Human Rights Law. Since its adoption forty years ago, the CEDAW and its Committee clarified that the recognition of equality before the law and the elimination of formal obstacles are insufficient. CEDAW

[48] Kantola and Lombardo, supra note 29.

[49] Andrea Dworkin, *Our Blood: Prophecies and Discourses on Sexual Politics* (Harper & Row 1976); Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (Verso 1970).

[50] Carole Pateman, 'Feminist critiques of the public/private dichotomy' in Stanley I. Benn and Gerald F. Gaus (eds) *Public and private in social life* (St. Martin's Press 1983). Olsen, supra note 32.

[51] Nina Lykke, *Feminist Studies: A Guide to Intersectional Theory, Methodology and Writing* (Routledge 2010), p 93.

[52] Kantola and Lombardo, supra note 29, p 27.

requires addressing the structural dimension of gender inequality by correcting baseline disadvantages. This is achieved through special measures, guaranteeing women's 'voice' as well as counteracting prejudices, stigmatization, and stereotypes.[53] The Convention recognizes that the distinction between public and private is fictitious and that States must intervene in arenas traditionally considered as a private realm – such as reproduction, care responsibilities and domestic violence.[54] This eliminates the 'cultural patterns which define the public realm as a man's world and the domestic sphere as women's domain'.[55] These collective patterns are 'invisible' if a 'gender approach' is not adopted,[56] creating the environment in which both direct and indirect individual discrimination and violence (whether physical, psychological, or sexual) takes place.

Overcoming the merely formal dimension of equality, CEDAW connects substantive equality[57] with its transformative dimension.[58] By aiming at eradicating the social, cultural, and institutional structures that systematically produce and maintain discrimination, it recognizes equality as a transformative project for the society as a whole. CEDAW requires States to modify social and cultural patterns that determine prejudices and practices based on sexist stereotypes that restrict women's access to work, social participation, and decision-making[59]. States are called to undertake 'a real transformation of opportunities, institutions and systems so that they are no

[53] Fredman, supra note 42, p 727.
[54] CEDAW, supra note 13, Introduction.
[55] Ibid.
[56] Eva Giberti and Ana María Fernández (eds), *La mujer y la violencia invisible* (Sudamericana 1989).
[57] CEDAW, supra note 13, Article 4.
[58] Fredman, supra note 42; Elena Laporta Hernández 'Desde la Convención sobre la Eliminación de todas las Formas de Discriminación de la Mujer a la igualdad transformativa en España' in MariaCaterina La Barbera and Marta Cruells (eds) *Igualdad de género y no discriminación en España, evolución problemas y perspectivas* (Centro de Estudios Políticos y Constitucionales 2016).
[59] CEDAW, supra note 13, Article 5.

longer grounded in historically determined male paradigms of power and life patterns'.[60]

CEDAW recognizes that achieving substantive equality requires to change the unjust *status quo*; to transform social structures that undervalue women based on gender stereotypes; and to eliminate the obstacles that effectively impede equal representation for women. States parties have the obligation to address the persistence of gender-based stereotypes that affect women, not only through individual actions but also through legislation, political institutions and social structures.[61] Different spheres of action are identified: political representation and officeholding in governments, private business, and the economic sector;[62] and the social and cultural patterns, including sexist language and objectification of women's bodies in media;[63] formal education at all levels and continuous education and training at workplace and professional development;[64] employment, including the right to equal opportunities, equal pay, and maternity leave.[65]

The main limitation of the 'gender approach' is that it assumes gender as a uniform structure and defines women as a coherent, homogeneous, 'pre-social' collective with common objectives.[66] Gender is conceived 'as if all women were white',[67] middle class, healthy, heterosexual, and citizens of the country where they live. This approach is both essentialist and exclusionary. By assuming that a 'Woman' essence (in the singular form) exists, the 'gender approach' identifies gender as the only form of discrimination against

[60] CEDAW Committee, supra note 34, para 10.
[61] Ibid., paras 7 and 10.
[62] CEDAW, supra note 13, Article 3 and 7.
[63] CEDAW, supra note 13, Article 5.
[64] CEDAW, supra note 13, Article 10.
[65] CEDAW, supra note 13, Article 11.
[66] Iris M. Young, 'Gender as Seriality: Thinking about Women as a Social Collective' (1994) 19 Signs 713.
[67] Gloria Hull, Patricia Scott and Barbara Smith (eds), *All the women are white, all the blacks are men, but some of us are brave: Black women's studies* (The Feminist Press 1982), p 123.

women. It is essentialist because it reduces the unequal access to resources, options, rights, and freedoms experienced by women to gender only.[68] It is exclusionary because it leaves out of its scope those women who suffer multiple and interconnected forms of discrimination and fall into the cracks of the legal systems.[69]

3. *The 'Intersectionality Approach', or the Focus on the Combined Effects of Different Grounds of Discrimination*

The focus on the intersection of gender with other grounds of discrimination is known as intersectionality. Intersectionality looks at women's social positions through a 'matrix of domination'[70] in which numerous forms of subordination interconnect.[71] It addresses such an interaction and questions 'essentialism in all its forms',[72] challenging the reduction of multiple discrimination to a problem of arithmetical sum.[73] The 'intersectionality approach' calls to explore how gender intersects with other grounds of discrimination, producing specific discriminations that cannot be protected through segmented antidiscrimination law.

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[68] MariaCaterina La Barbera, 'Intersectionality and its journeys: from counterhegemonic feminist theories to law of European multilevel democracy' (2017) 8 Investigaciones Feministas 131.

[69] Kimberlé Crenshaw, 'Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality' (2010) 46 Tulsa Law Review 151, p 158.

[70] Patricia Hill Collins, *Black Feminist Thought. Knowledge, consciousness, and the politics of empowerment* (Routledge 1990).

[71] Floya Anthias and Nira Yuval-Davis, 'Contextualizing Feminism: Gender, Ethnic and Class Divisions' (1983) 15(1) Feminist Review 62; Mohanty, supra note 43; MariaCaterina La Barbera, 'Intersectional-gender and the Locationality of Women in Transit' in Glenda Bonifacio (ed) *Feminism and Migration: Cross-Cultural Engagements* (Springer 2012).

[72] Avtar Brah, *Cartographies of Diaspora: Contesting Identities* (Routledge 1996), p 156.

[73] Spelman, E. *Inessential Woman: Problems of Exclusion in Feminist Thought* (Beacon 1988); Angela Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42(3) Stanford Law Review 581.

Coined in 1989 by Kimberlé Crenshaw, the term intersectionality originally referred to the interconnection of discriminations experienced by African American women on the grounds of racialization, class stratification, and gendered social structures.[74] Further developments transformed intersectionality into a powerful category of analysis and tool for action not only for African American women, but also for other particularly vulnerable individuals and collectives like indigenous[75] or migrant women.[76] The 'intersectionality approach' calls nowadays for addressing also other protected categories, such as ethnic and national origin, disability, religion, health, socioeconomic status, age, and sexual orientation[77] as well as the articulation of the multiple forms of domination enmeshed in the 'colonial/modern gender system'.[78]

Intersectionality challenges single-issue and additive approaches that consider intersecting discrimination as the sum of separable factors.[79] Understanding gender discrimination from an intersectional perspective reveals that gender inequality affects women differently depending on their

[74] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex' (1989) 1 University of Chicago Legal Forum 139.

[75] Karina Bidaseca, 'Mujeres blancas que buscan salvar a las mujeres color café de los hombres color café' (2011) 17(8) Andamios. Revista de investigación social 61; Sylvia Marcos, 'Descolonizando el feminismo' in Verónica Renata López Nájera (ed) *De lo poscolonial a la descolonización. Genealogías latinoamericanas* (UNAM 2018).

[76] MariaCaterina La Barbera, 'A Path Towards Interdisciplinary Research Methodologies in Human and Social Sciences: On the Use of Intersectionality to Address the Status of Migrant Women in Spain' (2013) 9 The International Journal of the Humanities 193.

[77] Kimberlé Crenshaw, 'Gender-related aspects of race discrimination', Background paper for Expert Meeting on Gender and Racial Discrimination, November 21st, 2000, Zagreb, Croatia (EM/GRD/2000/WP.1).

[78] María Lugones, 'Heterosexualism and the Colonial/Modern Gender System (2007) 22 Hypatia 186.

[79] La Barbera, supra note 58; MariaCaterina La Barbera, Julia Espinosa-Fajardo, and Paloma Caravantes, 'Implementing intersectionality in public policies: key factors in Madrid City Council, Spain' (2022) Politics & Gender, <https://doi.org/10.1017/S1743923X22000241>, accessed August 1st, 2023.

level of education and income, ethnicity, nationality, age, health, and sexual orientation. Being older, indigenous, migrant, African American, or LBTI, as well as belonging to an ethnic or religious minority, living in poverty, or having a disability expose an individual to situations of particular vulnerability. For example, a racialized migrant woman who is lesbian does not experience gender discrimination in the same way as a white, heterosexual woman who is a citizen of the country she resides in. Similarly, a man with a disability belonging to an ethnic minority needs special measures to remedy the suffering of intersecting discrimination.[80]

Intersectionality is an essential tool for human rights lawyers that allows them to recognize the particular vulnerability of those exposed to rights violations because of their subordinate position in more than one structure of systemic discrimination, intersecting with the others. It aims at identifying the forms of discrimination that the segmented antidiscrimination law makes invisible and leaves unprotected. Intersectionality is a key interpretative category to address the specific procedural position of claimants at the crossroad of different protected categories.[81] The 'intersectionality approach' is based on the inseparability and interconnection of human rights proclaimed in the Universal Declaration of Human Rights.[82]

In the last decade, the developments of feminist scholarship and activism on intersectionality have been integrated in the International Human Rights

[80] MariaCaterina La Barbera, Julia Espinosa-Fajardo, Paloma Caravantes González, Sonia Boulos, Ghufran KhirAllah, Laura Cassain and Leticia Segura Ordaz, Hacia la implementación de la interseccionalidad: El Ayuntamiento de Madrid como caso de estudio (Aranzadi 2020).

[81] La Barbera, supra note 58; La Barbera, supra note 44; MariaCaterina La Barbera and Marta Cruells, 'Towards the Implementation of Intersectionality in the European Multilevel Legal Praxis: B. S. v Spain' (2019) 53 Law & Society Review 1167.

[82] Johanna E. Bond, 'International intersectionality: A theoretical and pragmatic exploration of women's international human rights violations' (2003) 5 Emory Law Journal 71.

Law. The United Nations declares the need to intensify efforts to ensure equal enjoyment of all human rights for all women who face multiple barriers due to color, ethnicity, age, language, culture, religion or disability.[83] The CEDAW Committee recognizes that intersectionality is a key concept for understanding the scope of international obligations of States parties. States must recognize and prohibit intersecting forms of discrimination and their combined negative impact on women's lives.[84] The Committee on the Elimination of Racial Discrimination recognizes that considering gender and racial discrimination separately erases the combined effects that particularly affect Afro-American, indigenous, and migrant women.[85] The Convention on the Rights of Persons with Disabilities recognizes the specific discrimination suffered by women and girls with disabilities and the need to adopt special measures to counteract it.[86]

Yet, international legislation often reduces intersectionality to 'multiple discrimination'.[87] Examples in the American region are found in the Inter-American Convention against All Forms of Discrimination and Intolerance (Article 1.3 and 11)[88], and the Inter-American Convention against Racism,

[83] Beijing Declaration and Platform for Action, Article 32.

[84] CEDAW Committee, General Recommendation n. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para 18.

[85] CERD Committee, General Recommendation n. 25, Gender Related Dimensions of Racial Discrimination, para 1.

[86] Convention on the Rights of Persons with Disabilities, Article 6.

[87] La Barbera, supra note 68.

[88] Article 1.3: 'Multiple or aggravated discrimination is any preference, distinction, exclusion, or restriction based simultaneously on two or more of the criteria set forth in Article 1.1, or others recognized in international instruments, the objective or result of which is to nullify or curtail, the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties, in any area of public or private life'; Article 11: 'The States Parties undertake to consider as aggravating those acts that lead to multiple discrimination or acts of intolerance, i.e., any distinction, exclusion, or restriction based on two or more of the criteria set forth in Articles 1.1 and 1.3 of this Convention'.

Racial Discrimination and Related Forms of Intolerance. Our study relies on Hancock's[89] distinction among multiple –which accounts for two or more axes of discrimination– and intersectional approaches to discrimination –that considers the interaction between the different axes of inequalities and seeks to explore the relationships among them as an open empirical question related to the specific context. We argue that using intersectionality and multiple discrimination as synonyms is misleading because the latter relies on the conceptualization of equality strands as parallel[90] and assumes an additive approach, based on the incremental conceptualization of vulnerability as the sum of different factors of discrimination as opposed to the mutual constitution of inequalities.[91] This additive approach encourages an unproductive 'Oppression Olympics' whereby groups compete for attention and resources[92] or the creation of 'risk groups' that the 'intersectionality approach' questions form its origin.[93]

The limitations of the 'intersectionality approach' are mainly three. The first one is related to the segmentation of antidiscrimination law and bodies that do not offer adequate protection for individuals who experience interconnected forms of discrimination.[94] Moreover, the prevailing ideology of antidiscrimination based on segmented categories prevents law practitioners from adequately addressing complex situations of

[89] Ange-Marie Hancock 'When multiplication doesn't equal quick addition: Examining intersectionality as a research paradigm' (2007) 5(1) Perspectives on Politics 63.

[90] Ashlee Christoffersen, 'The Politics of Intersectional Practice: Competing Concepts of Intersectionality' (2021) 49(3) Policy & Politics 573.

[91] Hill Collins, P., Black Feminist Thought. Knowledge, consciousness, and the politics of empowerment (Routledge 1990).

[92] Hancock, supra note 86.

[93] Sarah Rudrum, 'An Intersectional Critical Discourse Analysis of Maternity Care Policy Recommendations in British Columbia' in Olena Hankivsky (ed) An Intersectionality-Based Policy Analysis Framework, (Simon Fraser University 2012).

[94] Sarah Hannett, 'Equality at the Intersections' (2003) 23 Oxford Journal of Legal Studies 65.

discrimination suffered by victims.[95] The second limitation is related to the conceptual assimilation of intersectionality to the notion of 'multiple discrimination'. For example, both the Inter-American Convention against All Forms of Discrimination and Intolerance, and the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance refer to multiple layers of discrimination, but they do not consider the co-constitutive interactions between them. Finally, the third limitation is related to the disputed function of intersectionality in judicial decisions. A tendency exists to understand intersectionality as a tool to grant greater compensation when more than one ground of discrimination is identified. However, intersectionality is not about 'winning the Olympics of the most oppressed',[96] but providing adequate reparations considering the different grounds of discrimination that determined the specific rights violation.

With the aim of advancing the research on transformative reparations issued by international human rights courts, the following section of this article analyzes how the Inter-American Court refers to the polysemy of gender discrimination in three selected judicial decisions. In its analysis, the article will discuss the judicial decisions of: *González et al ('Cottonfield') v Mexico* (2009), *Atala Riffo and* Daughters *v Chile* (2012) and *Gonzales Lluy et al v Ecuador* (2015). The analysis in the next section shows how the Court interprets the polysemy of gender. We focus on the meanings of gender discrimination used when interpreting the facts and when issuing reparations, seeking to uncover which meaning was used in each part, to reveal the inconsistencies among those, and to make visible the practical effects that they produce. Although for analytical reasons we separated the 'women', 'gender' and 'intersectionality' approaches, we argue that these dimensions of gender discrimination should be considered jointly by the courts to identify i) the discriminated group, ii) the causes of discrimination,

[95] Nitya Iyer, 'Categorical Denials' (1993) 19 Queen's Law Journal 179; La Barbera and Cruells, supra note 81.

[96] Hancock, supra note 89.

and iii) the interaction with other factors of discrimination that exposes certain individuals or collectives to intersecting inequalities.

III. The Polysemy of Gender Discrimination in the IACtHR Jurisprudence

1. *González et al. ('Cottonfield') v. Mexico*

The IACtHR considers *Cottonfield* [97] one of its most emblematic cases on gender discrimination.[98] This decision represents a key progress in strengthening a gender perspective both in the interpretation of the facts and the identification of the human right violation at stake and in the non-repetition measures. It is a leading case in the identification of gender violence as a result of structural discrimination and in issuing reparation measures aimed at social transformation. The case was brough before the Inter-American Court because the kidnapping, sexual abuse, and murder of Claudia Ivette González, Esmeralda Herrera Monreal, and Laura Berenice Ramos –perpetrated by non-State actors[99]– was not diligently investigated nor persecuted by Mexico, leaving the crimes unpunished.[100]

In the definition of the dispute, the Court refers to gender as a discriminatory social structure that generates systematic violations of women's rights.[101] *Cottonfield* recognizes that the extreme violence suffered by the victims is the bloodiest manifestation of the structural gender discrimination that

[97] González et al ('Cottonfield') v Mexico, Preliminary Objections, Merits, Reparations and Costs, judgment of November 16th, 2009, Series C n. 205.

[98] IACtHR, 40 años protegiendo derechos (Corte Interamericana de Derechos Humanos 2018).

[99] Partial acknowledgement of the responsibility of the state is declared, as well as the violation of the following articles of the American Convention on Human Rights: 4.1 (Right to Life), 5.1 and 5.2 (Right to Integrity and Humane Treatment), 7.1 (Right to Personal Liberty), 8.1 (Right to a Fair Trial), 19 (Rights of the Child) and 25.1 (Right to Judicial Protection), as well as Articles 1.1 and 2; additionally, Article 7.b and 7.c of the Convention of Belém do Pará.

[100] Cottonfield, supra note 97, para 149.

[101] Cottonfield, supra note 97, paras 164, 129-134 and 450.

persists in Mexico. The Court argues that the crimes were perpetrated in a context marked by a 'culture' of discrimination against women[102]. The Court explicitly refers to structural discrimination and states:

> The Court concludes that, since 1993, there has been an increase in the murders of women, with at least 264 victims up until 2001, and 379 up to 2005. However, besides these figures, which the Tribunal notes are unreliable, it is a matter of concern that some of these crimes appear to have involved extreme levels of violence, including sexual violence and that, in general, they have been influenced, as the State has accepted, by a culture of gender-based discrimination which, according to various probative sources, has had an impact on both the motives and the method of the crimes, as well as on the response of the authorities. In this regard, the ineffective responses and the indifferent attitudes that have been documented in relation to the investigation of these crimes should be noted, since they appear to have permitted the perpetuation of the violence against women in Ciudad Juárez. The Court finds that, up until 2005, most of the crimes had not been resolved, and murders with characteristics of sexual violence present higher levels of impunity.[103]

The special consideration of the context is a step forward towards the recognition of the structural rather than individual dimension of gender violence.[104] In *Cottonfield*, structural discrimination affected not only the motives and mode of the crimes, but also the institutional response.[105] Following the CEDAW[106] and the Convention of Belém do Pará[107]

[102] Ibid, para 164.
[103] Cottonfield, supra note 97, para 164.
[104] See Martinón and Wences, supra note 21.
[105] See also Veliz Franco et al v Guatemala (2014) –which events 'occurred in a structural context of gender violence and impunity in which there is also strong discrimination against women that has repercussions for the criminal process on the homicide of the victim'– and Velázquez Paiz et al v Guatemala (2015) –which events took place in a context of increased homicidal violence against women that was known by the state.
[106] CEDAW, supra note 13, Article 1.
[107] Belém do Para, supra note 40, Article 1.

definitions of discrimination against women,[108] *Cottonfield* considers that the discrimination against women includes any difference in treatment based on sex that, even unintentionally, places women at disadvantage and impairs their full recognition of and access to human rights, both in the public and private spheres.

Structural gender discrimination conditioned implicitly or explicitly, both informal institutional practices, the language and the reasoning of the State agents involved in the case. According to the Court, 'the creation and use of stereotypes becomes one of the causes and consequences of gender violence'.[109] It recognizes that both legislation and the *modus operandi* of the institutional actors are not neutral and that, in absence of a 'gender approach', they reproduce gender stereotypes and maintain the existing discriminatory structures. The IACtHR identifies gender violence at stake as the direct outcome of gender stereotypes and women's subordination.[110] *Cottonfield* is a pioneer not only for the identification of the structural causes of violence, and the responsibility of the State for non-State actors' violations, but also for the transformative measures issued to guarantee the non-repetition of the violation. In its decision, the Court explains that when violations occur in a context of structural discrimination, the restoration of the prior situation and elimination of the effects produced by the violation is not sufficient. The IACtHR clarifies that reparations must have the

[108] CEDAW, Article 1: 'For the purposes of the present Convention, the term discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

[109] Cottonfield, supra note 97, para 401. Similarly, Velásquez Paiz et al v Guatemala, para 180; Ramírez Escobar et al v Guatemala, para 294.

[110] In para 394, the Court refer to the Belém do Pará Convention that identify violence against women as 'a manifestation of the historically unequal power relations between women and men' and recognizes that the right of every woman to a life free of violence includes the right to be free from all forms of discrimination.

purpose of transforming the structural causes of violence identified, having not only restorative but also corrective effects[111].

The IACtHR orders three types of reparations. First, it orders the State to adopt measures to comply with due diligence in cases of violence against women. This involves adopting an adequate legal framework for police investigations and judicial proceedings, with effective implementation through policies and administrative procedures, that allow effective protection of women. Second, it tackles the gender stereotypes of institutional actors and orders the State to implement training courses on i) gender and human rights, ii) gender perspective in conducting preliminary investigations and judicial proceedings related to discrimination, violence and homicides perpetrated against women, and iii) overcoming stereotypes on the social role of women.[112] The Court establishes that training courses should target politicians, public prosecutors, judges, members of the military, and officials providing services and legal assistance to crime victims. Third, the Court seeks not only restorative but also corrective effects.

> The Court recalls that the concept of 'integral reparation' (*restitutio in integrum*) entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused. However, bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State (supra paras. 129 and 152), the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable. Similarly, the Tribunal recalls that the nature and amount of the reparations ordered depend on the characteristics of the violation and on the pecuniary and non-pecuniary damage caused. Reparations should not make the victims or their next of kin either richer or poorer and they should be directly proportionate

[111] Cottonfield, supra note 97, para 450.
[112] Ibid, para 541.

> to the violations that have been declared. One or more measures can repair a specific damage, without this being considered double reparation.[113]

It also orders educational programs from a gender perspective for the population at large with the aim of transforming the 'culture' of discrimination against women.[114]

By aiming to integrate women in criminal investigations, the Court adopts a 'women approach' that focuses on women as a disadvantaged group. The Court argues that gender equality must be guaranteed by eliminating risk factors and strengthening institutional response when cases of violence against women occur.[115] The 'women approach' is well-suited to make women visible in criminal investigations, but it does not allow an in-depth transformation of the gender-blind legal institutions that reproduce discrimination against women.[116] It modifies the tip of the iceberg, but it does not attack the causes of gender violence.

On the other hand, *Cottonfield* adopts an essentialist approach and considers the victims only as women. By failing to undertake an 'intersectionality approach', it ignores that the victims were indigenous women working in the *maquilas*. By ignoring the intersection of gender discrimination with other grounds of discrimination, the non-repetition measures do not consider the relevance of the intersection of gender with ethnicity, poverty, and labor exploitation in the *maquilas* as determining factors of the special vulnerability of the victims.[117] *Cottonfield* therefore leaves out the multiple

[113] Ibid, para 450.
[114] Ibid, para 543.
[115] Cottonfield, supra note 97, para 258. See also Favela Nova Brasília v Brazil, para 243; V.R.P., V.P.C. et al v Nicaragua, para 153.
[116] Kantola and Lombardo, supra note 29; Sandra Fredman 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712, p 722.
[117] Laura Clérico and Celeste Novelli, 'La inclusión de la cuestión social en la perspectiva de género: notas para re-escribir el caso Campo Algodonero sobre violencia de género' (2016) 67 Revista de Ciencias Sociales 453.

and interconnected forms of discrimination of indigenous *maquila* worker women that suffered violence.[118]

Despite having adopted a 'gender approach' in the interpretation of the facts, the IACtHR does not address the legal and institutional norms that produce unequal access for women to goods, rights, and opportunities. It also ignores that the law and public policies perpetuate and reinforce existing social disadvantages. *Cottonfield* identifies training for institutional actors and education for the population at large as the only measures to transform the structural dimension of discrimination. By reducing the ordered legal reforms to criminal investigations, the Court misses a key opportunity to indicate legal reforms required to eradicate the structural gender discrimination that causes gender violence.[119]

To pursue this goal, the IACtHR should have identified the legal and institutional reforms required. Since the Court's interpretation of the facts relies on the 2006 CEDAW Committee's report on Mexico, it could have followed the CEDAW report also when ordering the legal and institutional reforms required to eliminate all forms of discrimination against women in Mexico. The CEDAW Committee indicates several measures to be adopted, including the coordination of States of the Republic of Mexico to adopt law and policies on gender equality by amending existing laws to make effective the access to human rights by women. Such measures can include increasing the number of women in managerial positions and establishing mechanisms to ensure women's access to basic education and health services.[120] These

[118] Kimberlé Crenshaw, 'Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality' (2010) 46 Tulsa Law Review 151, p 158.

[119] Rubio-Marín and Sandoval, supra note 15.

[120] See Recommendation 27: 'The Committee calls on the State party to give priority to women in its poverty eradication strategy, with special attention to women in rural and indigenous areas; in this context, measures and specific programmes should be adopted to ensure that women fully enjoy their rights on an equal footing in the areas of education, employment and health, with special emphasis

measures can satisfy women's basic needs by allowing them to participate on equal footing in decision-making concerning the labor rights of women in the *maquila* industry (or duty-free factory); and through protecting women from all forms of discrimination, particularly indigenous women in rural areas.

2. *Atala Riffo and Daughters v. Chile*

The Inter-American Court of Human Rights considers *Atala Riffo*[121] a leading case on LGBTI rights.[122] The case is pioneer because it considers gender and sexual orientation as discriminatory social structures. The Court reviewed the decision of the Chilean justice system to grant custody of Karen Atala's daughters to their father, because of her homosexuality. Upon separation from her husband, the couple had agreed that the applicant should maintain custody over their three daughters. When she declared to be engaged in a same-sex relationship, however, the Chilean court withdrew custody, supposedly to prevent risks to her daughters' physical and emotional development stemming from her sexual orientation.[123]

Following its established jurisprudence, the IACtHR reiterates the States' obligation to abstain from actions that directly or indirectly aim at

on joint work with non-governmental organizations and on women's participation not only as beneficiaries, but also as agents of change in the development process'. CEDAW Committee, 'Consideration of reports submitted by States Parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women. Sixth periodic report of States parties: Mexico, CEDAW/C/MEX/6 (OHCHR 2006) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW percent2FC percent2FMEX percent2F6&Lang=en> accessed August 1st, 2023.

[121] Atala Riffo and Daughters v Chile, Merits, Reparations and Costs, judgment of February 24th, 2012, series C n. 239.

[122] IACtHR, supra note 98.

[123] The Inter-American Court declares violations of Art. 8.1 (Judicial Guarantees), 11.2 (Protection of Honor and Dignity), 17.1 (Protection of the Family), 19 (Rights of the Child) and 24 (Equality Before the Law) in relation to Article 1.1. of the IACtHR.

generating situations of discrimination, including on the ground of sexual orientation.[124] The Court argues that the expression 'any other social condition' contained in Article 1(1) of the Convention should be interpreted in light of the evolution of contemporary international law.[125] It builds upon numerous resolutions of the General Assembly of the Organization of American States aimed at protecting against discriminatory treatments based on sexual orientation and gender identity.[126] The Inter-American Court also considers that 'requiring the mother to limit her lifestyle options implies using a traditional concept of women's social role as mothers'.[127] *Atala Riffo* adopts a 'gender approach' when identifying the human rights violation at stake. It recognizes gender as a discriminatory social construction and points to the stereotypes that determine the assignment of gender roles in care responsibilities as its cause. It also relies on an 'intersectionality approach' when referring to age, sexual orientation and gender identity, among others.[128] The Court quotes the CEDAW Committee General Recommendation n. 28 mentioning that 'the discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, sexual orientation and gender identity'[129]. By referring to CEDAW Committee's inclusion of sexual orientation into the prohibited categories for discrimination, the IACtHR aligns with CEDAW in recognizing that gender discrimination may affect women differently. As a result, states must legally recognize such intersecting forms of discrimination and their

[124] See Advisory Opinion AO-24/17 of November 24th, 2017.

[125] Atala Riffo, supra note 121, para 85.

[126] Ibid, para 86. The Court also refers to decisions by the European Court of Human Rights; the resolutions of the Universal Human Rights System; and the Committee on Economic, Social, and Cultural Rights, which classified sexual orientation as one of the prohibited categories of discrimination

[127] Atala Riffo, supra note 121, para 140.

[128] CEDAW Committee, General Recommendation No. 27 on older women and protection of their human rights, para 13.

[129] Atala Riffo, supra note 121, para 89.

compounded negative impact pursuing policies and programs designed to eliminate them.[130]

When issuing reparation measures, *Atala Riffo* elaborates further the concept of 'comprehensive reparation', explaining that reparations must produce both restorative and corrective effects to promote structural changes,[131] providing State compensation for damages and adopting effective guarantees of non-repetition. Seeking to transform the social structure that produce LGBTI discrimination, the Court ordered non-repetition measures that include training courses on i) human rights, sexual orientation, and non-discrimination, ii) the protection of the LGBTI rights, and iii) the elimination of homophobic stereotypes. The training courses target public officials at the regional and national levels and, particularly, judicial officials of all areas and levels of the judicial branches.[132]

Although the IACtHR relies on a 'gender approach' in the identification of the violation, when issuing the non-repetition measures, it focuses on the disadvantaged group and fails to recognize that the interconnected discriminatory social structures are reproduced and maintained through legal institutions. Similarly, to *Cottonfield*, *Atala Riffo* also fails to identify the need to reform the legal and institutional framework that sustains gender subordination on the basis of gender and LGBTI stereotypes. Among the non-repetition measures, the IACtHR ordered Chile to implement training courses to sensitize the public institution personnel towards the LGBTI rights and to include the LGBTI collective in the existing institutions –that have traditionally been exclusionary– but leaves those institutions unaltered. Non-repetition measures also ignore the interconnection of gender, motherhood and sexual orientation. The 'intersectionality approach' is missing from the non-repetition measures because they leave out of the scope those who suffer interconnected forms of discrimination and, because

[130] CEDAW Committee, supra note 84, para 18.
[131] Atala Riffo, supra note 121, para 267.
[132] Ibid, para 271.

of that, fall into the cracks of the institutional organization.[133] An 'intersectional approach' could have helped the Court to consider the combined effects of intersecting discriminations and advance, in a substantive way, towards the transformation of structural discriminations.

In line with our previous argumentation, we argue that the IACtHR should rely on the reports offered by the CEDAW as tools to identify the legal and institutional reforms required to eliminate gender discrimination at the intersection of other forms of discrimination. The 2012 recommendation of the CEDAW Committee to Chile could have helped to identify the structural reforms needed. In this report, Chile was called upon to adopt a comprehensive strategy targeting women, men, girls, and boys to overcome the 'machismo culture' and discriminatory stereotypes regarding the roles and responsibilities of women and men in the family and in society, reforming legislation on sexual health, equal pay and pension, and matrimonial property.[134] It also recommended addressing intersecting forms of discrimination affecting women with disabilities, indigenous women, afro-descent and migrant women as well as lesbian, bisexual, transgender, and intersex women.[135] In this decision, the Court missed a key opportunity to transform the interconnected structures of discrimination and advance toward substantive equality. Firstly, the Court failed to order reforms of legislative and institutional frameworks maintaining the sexual division of labor, care, and the essentialized view of motherhood. Secondly, the Court ignored the intersection of gender discrimination with homophobia and LGBTI stereotypes.

[133] Kimberlé Crenshaw, 'Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality' (2010) 46 Tulsa Law Review 151, p 158.

[134] CEDAW Committee, 'Concluding observations of the Committee on the Elimination of Discrimination against Women: Chile, CEDAW/C/CHL/CO/5-6' (OHCHR 2012) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW percent2FC percent2FCHL percent2FCO percent2F5-6&Lang=es> accessed August 1st, 2023.

[135] Ibid.

3. *Gonzales Lluy et al. v. Ecuador*

Gonzales Lluy[136] is pioneer because it is the first IACtHR case that explicitly incorporates an 'intersectionality approach'.[137] It is the first IACtHR decision that considers gender at the intersection with other grounds of discrimination. The case concerns the negligent HIV transmission to a three-year-old girl, Talía Gabriela Gonzales Lluy. The rights violated were both directly linked to HIV as well as to the discrimination of her family members at the workplace and in the neighborhood. They were forced to move from one place to another because of prejudices around HIV. Despite the specific situation of vulnerability related to the state of despair, uncertainty, and insecurity for the entire family, Ecuador did not adopt any measure to guarantee the applicant and her family's rights and prevent discrimination. The IACtHR found Ecuador responsible for violations of the right to life, personal integrity, and health through failure to regulate, monitor, and supervise the provision of services in private health centers, the right to education, and the right to fair trial.

Although living with HIV is not a disability *per se*, the circumstances surrounding the applicant and her family placed them in a situation of

[136] Gonzales Lluy et al v Ecuador, Preliminary Objections, Merits, Reparations and Costs, judgment of September 1st, 2015, series C n. 298.

[137] Although without explicitly referring to the concept of intersectionality, since 2010 the Inter-American Court gradually developed an 'intersectionality approach' in several cases in which it recognizes the specific obstacles faced by indigenous women in access and enjoyment of human rights and, specifically, in cases of gender violence, such as Fernández Ortega et al v Mexico (2010), Para 78; Rosendo Cantú et al v Mexico (2010), para 185; Xákmok Kásek Indigenous Community v Paraguay (2010), paras 152, 233, and 234; Gelman v Uruguay (2011), paras 1, 97-98, 149, and 153; Río Negro Massacres v Guatemala (2012), para 59; Ramírez Escobar et al v Guatemala (2018) para 276; Manuela et al v El Salvador (2021), para 253; Digna Ochoa and family members v Mexico (2021), para 101. See Clérico and Novelli, supra note 16; Magdalena M. Martín Martínez, 'La discriminación interseccional en la jurisprudencia de los tribunales internacionales y su relación con los delitos de odio' in Patricia Laurenzo Copello and Alberto Daunis Rodriguez (eds) Odio, prejuicios y Derechos Humanos (Comares 2021).

vulnerability according to the Convention on the Rights of Persons with Disabilities. The Court argues that the applicant experienced intersectional discrimination for being female, HIV positive, a minor, and poor in a situation of disability.[138] These intersecting factors situated the entire family in a situation of special vulnerability that resulted in a specific form of discrimination. *Gonzales Lluy* argues that if one of those factors had not existed, the discrimination suffered by the applicant would have been different. The Court relies on the idea that HIV-related stigmatization does not affect everyone in the same way, but impacts members of vulnerable groups more severely. The IACtHR affirms that, PDD 'poverty had an impact on the initial access to health care that was not of the best quality and that, to the contrary, resulted in the infection with HIV'.[139] Poverty also reinforced barriers to access the education system and to conduct a decent life. The obstacles that the applicant suffered in accessing education and appropriate counseling regarding safe sexual relationships and maternity had a negative impact on her overall development.

In the interpretations of facts, *Atala Riffo* explicitly uses an 'intersectionality approach' that recognizes the intersection of different grounds of discrimination that produced the specific rights violations experienced by the applicant. According to the judge Ferrer Mac-Gregor Poisot, the concept of intersectionality allowed the Court to expand the Inter-American jurisprudence on the scope of the principle of non-discrimination and understand the composite nature of the causes of discrimination.[140] *Gonzales LLuy* is not an isolated case in the Inter-American jurisprudence. Since 2015, the IACtHR has referred explicitly to intersectionality as an interpretative criterion in: *I.V. v Bolivia,*[141] *Ramírez Escobar et al v Guatemala,*[142] *V.R.P.,*

[138] Gonzales Lluy et al, supra note 136, para 238.
[139] Ibid, para 290.
[140] Concurring opinion of judge Eduardo Ferrer Mac-Gregor Poisot, para 7.
[141] I.V. v Bolivia, Preliminary objections, Merits, Reparations and Costs, judgment of November 30th, 2016, series C n. 329.
[142] Ramírez Escobar et al v Guatemala, Merits, Reparations and Costs, judgment of March 9th, 2018, serie C n. 351.

V.P.C. et al v Nicaragua,[143] *Cuscul Pivaral et al v Guatemala,*[144] *Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v Brazil*,[145] *Guzmán Albarracín et al v Ecuador*,[146] *Manuela et al v El Salvador*,[147] *Digna Ochoa and family members v México*,[148] and *Bedoya Lima et al v Colombia*.[149] This is contrasted by the jurisprudence of the ECtHR which has adopted intersectionality only in one case so far.[150]

With regards to reparation, the Court ordered Ecuador to adopt a program for training health practitioners to prevent or reverse the situations of discrimination suffered by persons with HIV, particularly minors.[151] Despite having adopted an 'intersectionality approach' in the interpretation of the facts, the IACtHR focused only on one disadvantaged group, people living with HIV, when issuing the non-repetition measures, thus leaving unaddressed the intersections with gender, poverty, and disability. The Court ordered Ecuador to provide training only for professionals in the health sector and not in the education and judicial sectors.[152] Tackling these other sectors would have enabled the State to address the intersection of the rights to life, health, education, housing, education, and fair trial as

[143] V.R.P., V.P.C. et al v Nicaragua, Preliminary objections, Merits, Reparations and Costs, judgment of March 8th, 2018, serie C n. 350.

[144] Cuscul Pivaral et al. v. Guatemala, Preliminary objection, Merits, Reparations and Costs, judgment of August 23rd, 2018, serie C n. 359.

[145] Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v Brazil, Preliminary objections, merits, reparations and costs), judgment of July 15th, 2020, serie C n. 407.

[146] Guzmán Albarracín et al v Ecuador, Merits, Reparations and Costs, judgment of June 24th, 2020, serie C n. 405.

[147] Manuela et al v El Salvador, Preliminary objections, Merits, Reparations and Costs, judgment of November 2nd, 2021, serie C n. 441.

[148] Digna Ochoa and family members v Mexico, Preliminary objections, Merits, Reparations and Costs, judgment of November 25th, 2021, serie C n. 447.

[149] Bedoya Lima et al. v. Colombia, Merits, Reparations and Costs, judgment of August 26th, 2021, serie C n. 431.

[150] La Barbera and Cruells, supra note 81.

[151] Gonzales Lluy et al, supra note 136, para 386.

[152] Gonzales Lluy et al, supra note 136, para 378.

interdependent violations and provide a more effective guarantee of non-repetition. In *Gonzales Lluy* the 'intersectionality approach', in practice thus ended up reduced to 'multiple discriminations' that were segmented and treated separately.

To continue progressing towards substantive equality, international courts should issue non-repetition measures that address all the rights at stake and their intersection when they identify structural gender discrimination at the intersection with other grounds of discrimination. The CEDAW Committee's reports indicate the reforms required to make progress to eliminate gender discrimination. In its 2015 report on Ecuador, the CEDAW Committee recommended to expand the visibility of and knowledge about CEDAW among public institutions personnel to accelerate the application of laws aimed at eliminating discrimination against women and to develop a broad strategy to eliminate stereotypical patriarchal attitudes.[153] It also recommended to reinforce training on gender equality of media professionals. The CEDAW Committee called upon Ecuador to adopt measures to increase women's participation in elections and in public life, especially indigenous and Afro-Ecuadorian women; to promote women's access to formal employment; to decriminalize abortion and adopt a bill on intercultural practice in the national health system.[154] Given that the Inter-American Court recognized that living with HIV had a particularly negative impact on Talía Gonzales Lluy because she is a woman, it should have ordered structural reforms in Ecuador to eliminate gender discrimination at the intersection with other grounds of discrimination.

[153] CEDAW Committee, 'Concluding observations on the combined eighth and ninth periodic reports of Ecuador, CEDAW/C/ECU/CO/8-9/' (OHCHR 2015) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW percent2FC percent2FECU percent2FCO percent2F8-9&Lang=en> accessed August 1st, 2023.

[154] Ibid.

IV. Conclusions

The IACtHR is leading international jurisprudence on transformative reparations with corrective and not just restorative purposes, arguing that reparations must guarantee non-repetition. Our study contributes to the debate on transformative reparations of international human rights courts from a feminist perspective. Its novelty is linked to the analysis of the polysemy of gender discrimination in the interpretation of the facts and in reparations and non-repetition measures.

Our analysis shows that the IACtHR relies on sophisticated interpretations of gender discrimination based on the 'women', 'gender' and 'intersectionality' approaches. Its jurisprudence identifies the human rights violations at stake as manifestations of gender structural discrimination at the intersection with other grounds of discrimination. Specifically, *Cottonfield* includes for the first time the diagnosis of structural gender discrimination as the cause of deadly violence. *Atala Riffo* makes explicit the interconnection of gender and sexual orientation as discriminatory social structures that caused the violations of the applicant's human rights, and *Gonzales Lluy* explicitly recognized that the intersection of gender with other factors of discrimination was the source of the specific vulnerability of the victim. In the last decades, the Inter-American Court has played a key role in advancing towards gender equality in the American region and its work is a model for other international courts.

Our analysis also shows that the Inter-American Court of Human Rights does not use the same meaning of gender discrimination when interpreting the facts and when issuing reparations. In the identification of violations, the IACtHR refers not only to the disadvantaged group but also to the structural and, more recently, to the intersectional dimension of gender discrimination. Yet, when ordering measures to eliminate gender discrimination, the Court does not address all the legal and institutional reforms required to change the gendered status quo. Despite its enormous advancements, the concept of structural discrimination that the Court relies

on impairs the transformative effects of its non-repetition measures. Because the Inter-American Court of Human Rights considers gender as a social structure independent of the legal and institutional order, it orders respondent States to provide training courses and educational programs rather than legal and institutional reforms.[155] Moreover, the non-repetition measures consider gender in isolation, leaving unaltered the cracks of the legal systems through which the victims of intersecting discrimination fall.

Identifying structural gender inequality as the cause of gender discrimination and violence requires recognizing that gender-blind social and legal norms sustain discrimination. If these norms are not reformed or eliminated, discrimination will perdure. When identifying gender discrimination as the cause of human rights violations, international human rights courts should urge respondent States to comply with the requirements of the CEDAW Committee in their periodic country reports. These reports provide comprehensive guides to overcoming structural gender discrimination in each country. We align with scholars arguing that, when causes of discrimination are systemic, seeking structural transformation is not only a legitimate but a necessary task for an international human rights tribunal.[156] Moreover, non-repetition measures have to include legislative and institutional reforms to guarantee the elimination of the structural problems that the Court has recognized as the cause of the violation.

Since gender equality is one of the Sustainable Development Goals (SDGs) that the UN seeks to achieve before the end of the decade, all efforts should be made to eliminate structural discrimination in all the spheres identified by the CEDAW. Progress in this direction signifies not only wellbeing for women but for the society as a whole. Relying on the work of other human

[155] Isabel Wences and MariaCaterina La Barbera, 'Entrevista a Humberto Sierra Porto, juez de la Corte Interamericana de Derechos Humanos' (2020) 17 Andamios: Revista de Investigación Social 197, p 209.

[156] Ruth Rubio-Marín and Clara Sandoval, 'Engendering the reparations jurisprudence of the Inter-American court of human rights: The promise of the cotton field judgment' (2011) 33 Human Rights Quarterly 1062, p 1091.

rights bodies, international courts could foster the coherence of the international human right legal framework and the institutional cooperation among human rights bodies to jointly advance towards the social and institutional transformation foreseen by the 2030 Agenda.

General Articles

Represión contra Activistas o Personas Defensoras de Derechos Humanos. La Violencia de la Democracia y el Derecho

The Repression of Activists and Human Rights Defenders: The Violence of Democracy and Law

Emerson Harvey Cepeda-Rodríguez*

Human rights defenders (PDD or activists) face violence when mobilizing against impunity, environmental destruction, corruption, and gender inequality. The violence against PDD is often perpetrated by powerful groups. These groups control democratic institutions and the creation of law. Repressive laws are spreading and democratic institutions are used to erode the freedoms to express, participate and associate of PDD. The overlapping of repressive laws and violent democratic institutions creates different forms of violence. I investigate violence against PDD analysing how democratic institutions and laws are used to restrict opportunities and to lessen the effectiveness in the defense of rights. I use qualitative data on violence against PDD in 20 democracies between 2006 and 2017. The results indicate that violence against PDD is implicit in democratic institutions and laws and produces restrictions in institutional and social arenas dedicated to defending rights. This violence is manifested in three mechanisms: (1) control or legitimate elimination, (2) channeling, and (3) coercive response. These findings shed

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important light on many forms of violence against PDD that affect the integrity, intensity, and dynamism of claims and strategies of PDD.

Keywords: democracy, law, violence, human rights defenders, activists.

Las personas defensoras de derechos humanos (PDD o activistas) enfrentan la violencia cuando se movilizan contra la impunidad, la destrucción ambiental, la corrupción y la inequidad de género. A menudo la violencia contra PDD es ocasionada por grupos poderosos. Estos grupos controlan instituciones democráticas y la creación de la ley. Las leyes represivas se extienden y las instituciones democráticas son usadas para limitar las libertades de expresión, participación y asociación de las PDD. La superposición de leyes represivas e instituciones democráticas violentas crea diferentes formas de violencia. Investigo la violencia contra PDD analizando cómo instituciones democráticas y leyes son usadas para restringir oportunidades y disminuir eficacia a la defensa de los derechos. Usé datos cualitativos sobre la violencia contra PDD en 20 democracias entre 2006 y 2017. Los resultados indican que la violencia contra PDD está implícita en las instituciones democráticas y el derecho, y produce restricciones en espacios sociales e institucionales para la defensa de los derechos. Esta violencia se manifiesta en tres mecanismos: (1) control o eliminación legítima, (2) encauzamiento y (3) respuesta coercitiva. Estos resultados arrojan luz sobre diferentes mecanismos de violencia contra las PDD que afectan la integralidad, intensidad y dinamicidad de las demandas de las PDD.

Keywords: democracia, derecho, violencia, defensores de derechos humanos, activistas.

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I. Introducción

Las personas defensoras de derechos humanos o activistas (PDD) tienen pocas oportunidades para actuar libremente y de forma efectiva en la coyuntura global actual, formada por crisis que se refuerzan mutuamente y donde las agresiones contra PDD, los intereses de empresas multinacionales

y el auge de la extrema derecha configuran el margen de acción en muchos países.[1] Las PDD son aquellas que, individual o colectivamente, promueven la protección de los derechos o los objetivos de movimientos sociales.[2] La restricción de oportunidades para las PDD de actuar de forma libre y eficaz constituye violencia. Dentro de esta violencia, las agresiones físicas y psicológicas hacen parte de un conjunto más amplio de formas de violencia.[3] La violencia contra PDD es la amenaza o el uso real de agresiones, sanciones, obstrucciones y restricciones normativas e institucionales (incluso con apariencia democrática) para prevenir, canalizar, desincentivar y eliminar la

[1] Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1.

[2] La amplitud de la definición de PDD genera contradicciones porque podría ser aplicada para otros actores que son considerados opuestos a las PDD. Sin embargo, una definición amplia de PDD garantiza una mayor inclusión de PDD. Lo anterior, debido a que existe un espectro diverso de defensa de los derechos determinado por características culturales específicas de las PDD, algunas veces no cubierto por los tratados internacionales de derechos. Igualmente, para delimitar la defensa de los objetivos de los movimientos sociales como parte de las actividades de las PDD, es necesario entender a los movimientos sociales como una forma de realización de los derechos de grupos excluidos que intentan protegerse de perjuicios reales o percibidos de naturaleza social, política, económica y ambiental. En este sentido, un criterio para delimitar el calificativo de PDD es: no pueden ser consideradas PDD, las personas que a pesar de defender los derechos humanos y los objetivos de movimientos sociales, se resisten violentamente o incitan a la violencia inmediata y el odio contra otros derechos y grupos excluidos). Ver: UN General Assembly, 'Declaración sobre el derecho y el deber de los individuos, los grupos y las instituciones de promover y proteger los derechos humanos y las libertades fundamentales universalmente reconocidos 1998; Chris Bobel, '"I'm Not an Activist, Though I've Done a Lot of It": Doing Activism, Being Activist and the "Perfect Standard" in a Contemporary Movement' (2007) 6 Social Movement Studies 147; Aikaterini Christina Koula, 'The UN Definition of Human Rights Defenders: Alternative Interpretative Approaches' (2019) 5 The Queen Mary Human Rights Law Review 1, 10–13; Paul Almeida, *Movimientos Sociales. La Estructura de La Acción Colectiva* (CLACSO 2020) 113.

[3] Lynette J Chua, 'Legal Mobilization and Authoritarianism' (2019) 15 Annual Review of Law and Social Science 355, 357; Christian Davenport, 'State Repression and Political Order' (2007) 10 Annual Review of Political Science 1, 1–4.

defensa de los derechos. La violencia contra PDD puede estar presente en sistemas denominados democracias.

En este artículo, analizaré la violencia ejercida contra las PDD a través de instrumentos legales y democráticos. Esta violencia y los mecanismos que la constituyen no descansan en el aire: sus causas son los problemas o insuficiencias implícitas en la democracia y el derecho. Es el caso de conflictos de interés en los escenarios estatales de representación y herramientas institucionales democráticas sin la capacidad total de controlar la violencia. Sin negar la gravedad de la violencia contra la integridad personal (asesinatos, desapariciones forzadas, privaciones injustas de la libertad), considero que un enfoque exclusivo en esta realidad no muestra formas más sutiles de violencia que omiten, se adhieren o utilizan la ley y foros democráticos como una forma para reprimir la defensa de los derechos. Un enfoque más amplio puede mostrar la interconexión con otras amenazas que provienen de la ley, como su ineficacia, y la mala gobernanza del derecho, circunstancias que crean un "desequilibrio de poder" que se refleja en PDD que no tienen acceso a derechos y mecanismos participativos y judiciales vinculantes. Asimismo, identifico una forma situacional de observar la violencia. La violencia es "situacional" cuando se manifiesta contra reclamos y procesos específicos de defensa de los derechos. En Hungría, valores normativos (transparencia) y mecanismos legales dispuestos para proteger la división de poderes y las libertades (el proceso legislativo) son utilizados para menoscabar los derechos y deslegitimar a las PDD (ej. vigilar y restringir fondos).[4] Francia estuvo regida por poderes de emergencia entre el 2015 y 2017 que facultaban la restricción de manifestaciones.[5] Por lo tanto, leyes, procedimientos formales, la aplicación

[4] UN Committee Human Rights, 'Concluding Observations on the Sixth Periodic Report of Hungary CCPR/C/HUN/CO/6' (2018) paras 7,8,54-56.

[5] Fionnuala Ní Aoláin, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism on Her Visit to France', A/HRC/40/52/Add.49 (2018) para 24.

arbitraria de la ley y la inacción de las instituciones pueden manifestar la violencia contra las PDD.[6]

Investigaciones,[7] informes de organizaciones de la sociedad civil[8] y reportes de organismos internacionales[9] han descrito principalmente la violencia directa; esto es, asesinatos, amenazas, factores de riesgo, responsables, y perfil

[6] Antoine Buyse, 'Squeezing Civic Space: Restrictions on Civil Society Organizations and the Linkages with Human Rights' (2018) 22 International Journal of Human Rights 966.

[7] Arnim Scheidel and others, 'Environmental Conflicts and Defenders: A Global Overview' (2020) 63 Global Environmental Change 102104; Sarah Knuckey, Margaret L Satterthwaite and Adam D Brown, 'Trauma, Depression, and Burnout in the Human Rights Field: Identifying Barriers and Pathways to Resilient Advocacy' (2018) 49 Columbia Human Rights Law Review 267; Karen Bennett and others, 'Critical Perspectives on the Security and Protection of Human Rights Defenders' (2015) 19 International Journal of Human Rights 883; Amy Joscelyne and others, 'Mental Health Functioning in the Human Rights Field: Findings from an International Internet-Based Survey' (2015) 10 PLoS ONE 1; Todd Landman, 'Holding the Line: Human Rights Defenders in the Age of Terror' (2006) 8 British Journal of Politics and International Relations 123; Laurie S Wiseberg, 'Protecting Human Rights Activists and NGOs: What More Can Be Done?' (1991) 13 Human Rights Quarterly 525.

[8] Civicus, 'State of Civil Society Reports' <https://www.civicus.org/index.php/media-center/reports-publications/socs-reports> accessed 30 September 2019; Protection International, 'Annual Publications' <https://www.protectioninternational.org/
en/publications> accessed 30 September 2019; Front Line Defenders, 'Informs' <https://www.frontlinedefenders.org/es/reports> accessed 30 September 2019; Global Witness, 'Environmental Activist' <https://www.globalwitness.org/en/campaigns/environmental-activists/> accessed 30 September 2019; Forum-Asia, 'Publications' <https://www.forum-asia.org/?cat=153> accessed 30 September 2019; Chinese Human Rights Defenders, 'Research Reports' <https://www.nchrd.org/category/research-reports/> accessed 30 September 2019.

[9] NU Special Rapporteur on the situation of human rights defenders, 'Annual Reports' <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/AnnualReports.aspx> accessed 30 September 2019; Inter-American Commission on Human Rights, 'Rapporteurships Human Rights Defenders' <https://www.oas.org/es/cidh/defensores/> accessed 30 September 2019; ProtectDefenders.eu, 'Indice de Ataques y Amenazas Contra Defensores y Defensoras de Derechos Humanos' (2019) <https://www.protectdefenders.eu/es/stats.html> accessed 27 September 2019.

de las PDD. Igualmente, han sido estudiados otros tipos de restricciones impuestas a las PDD como los costos operativos, burocráticos y de financiamiento.[10] Sin embargo, existen otros mecanismos de violencia a través de los cuales se reprimen los derechos. Trabajos sobre la convivencia entre democracia, derecho y violencia son considerables y ofrecen un parámetro para identificar otros mecanismos de violencia contra las PDD. Estas investigaciones han discutido las contradicciones del derecho y la democracia que impiden que el uso de la violencia sea racional y neutral. Así, han hecho presente la función política de legitimación del derecho[11] y la democracia[12] para proteger intereses particulares. Por ejemplo, el mercado apropia y reutiliza las formas del estado de derecho para crear simulacros de orden social.[13] Davenport explica que las autoridades emplean acciones represivas para contrarrestar o eliminar la amenaza cuando perciben desafíos al *statu quo*.[14] La violencia que afecta a las PDD se activa cuando los reclamos pretenden desestabilizar determinados intereses protegidos explícitamente o encubiertamente por el derecho y la democracia.[15] Esta perspectiva aporta a

[10] Kristin M Bakke, Neil J Mitchell and Hannah M Smidt, 'When States Crack down on Human Rights Defenders' (2020) 64 International Studies Quarterly 85.

[11] Michel Foucault, *Defender La Sociedad* (Fondo de Cultura Económica 2000); Ugo Mattei and Laura Nader, *Plunder. When the Rule of Law Is Illegal* (Blackwell Publishing 2008); Anthony Giddens, 'Estados Nacionales y Violencia' [2006] Revista Académica de Relaciones Internacionales 1; Rick Ruddell and Martin Guevara Urbina, 'Weak Nations, Politicas Repression, and Punishment' (2007) 17 International Criminal Justice Review 84, 87.

[12] Alfio Mastropaolo, *Is Democracy a Lost Cause? Paradoxes of an Imperfect Invention* (ECPR press 2012) 1,237; Juan Linz, *Democracia: Quiebras, Transiciones y Retos* (Centro de Estudios Políticos y Constitucionales 2009), 117; Michael Ross, 'Is Democracy Good for the Poor?' (2006) 50 American Journal of Political Science 860.

[13] Michael Taussig, *Law in a Lawless Land. Diary of a Limpieza in Colombia* (University of Chicago Press 2003); Jean Comaroff and John Comaroff, 'Law and Disorder in the Postcolony:An Introduction' in Jean Comaroff and John Comaroff (eds), *Law and Disorder in the Postcolony* (Chicago University Press 2006).

[14] Davenport (n 3) 8.

[15] Charles Tilly, *The Politics of Collective Violence* (Cambridge Universty Press 2003).

la comprensión de la violencia intrínseca del derecho y la democracia.[16] Sin embargo, debe profundizar en cómo el derecho y la democracia manifiestan su violencia intrínseca y reducen la capacidad de las PDD.

Demuestro dos implicaciones con el análisis de violaciones que restringieron el trabajo de las PDD en 20 democracias entre 2006 y 2017. En este sentido, mi investigación adopta un enfoque que permita describir la situación de las PDD en diferentes democracias para buscar patrones comprensivos de la violencia contra PDD en diferentes países, y construir un marco teórico sobre los mecanismos de violencia contra PDD. Por un lado, la configuración de tres mecanismos para entender la violencia: (1) *control o eliminación legítima*, (2) *encauzamiento* y (3) *respuesta coercitiva*. El primer mecanismo implica el uso de la violencia contra PDD por medio de fines sociales o criterios normativos ambiguos (ej. Bien común, economía, seguridad), y la creencia de legitimidad del derecho y las instituciones. El segundo, aunque las normas cumplen con fines emancipatorios, su capacidad transformadora está limitada o controlada. La *respuesta coercitiva* se manifiesta con acciones que directamente atentan contra la vida y la integridad de activistas.

De otro lado, considero que estos mecanismos de violencia afectan los componentes de las demandas de las PDD: la integralidad, la intensidad y la dinamicidad. El primero se refiere a la articulación entre reclamos específicos y las causas profundas de la violencia. El segundo consiste en la capacidad de las acciones colectivas para alcanzar sus objetivos. Finalmente, la dinamicidad involucra las posibilidades de renovar reclamos sociales y los mecanismos de defensa de los derechos. Apoyo este argumento con la ley de las oscilaciones de Walter Benjamin. Esta ley explica que la violencia que funda el derecho también pretende conservar mediante la misma violencia el orden que

[16] Maria del Rosario Acosta-López and Esteban Restrepo-Saldarriaga, 'Estudio Introductorio. Derecho, Violencia, Crítica: Dos Variaciones Latinoamericanas Sobre Por Qué El Derecho Es Violento de Christoph Menke' in Christoph Menke (ed), *Por qué el derecho es violento (y debería reconocerlo)* (Siglo XXI Editores 2020).

establece. Incluso esta misma violencia anula la fuerza creadora que contenía. La consecuencia es la represión de las fuerzas que proponen transformaciones al orden establecido.[17] Este orden representa los valores o intereses de las fuerzas que lograron predominar al crear el derecho.

Comienzo por revisar el debate teórico sobre la convivencia entre democracia, derecho y la violencia para explicar el contexto que permite diferentes manifestaciones de la violencia contra PDD. Luego, presento el diseño de la investigación teniendo en cuenta el propósito específico de identificar mecanismos de violencia. En la sección IV presento los resultados cualitativos sobre los diferentes mecanismos de violencia que se manifiestan en normas, instrumentos democráticos y las respuestas del Estado. La sección V analiza los distintos efectos de estos mecanismos de violencia en la relación entre democracia, derecho y violencia, específicamente, en los componentes de las demandas de las PDD. Finalmente, presento las conclusiones.

II. Marco Teórico: Los mecanismos de Violencia contra las PDD y la Relación entre Violencia, Democracia y Derecho

La literatura sobre la violencia contra PDD ha reconocido que los daños a la integridad física no son los únicos mecanismos de violencia[18] y que otras formas de violencia se encuentran en normas y foros democráticos.[19] Sin embargo, debido a la dificultad de rastrear formas más sutiles de violencia en

[17] Walter Benjamin, *Para Una Critica de La Violencia y Otros Ensayos* (Taurus 1998).

[18] Scheidel and others (n 7); Alice M Nah, 'Introduction. Protecting Human Rights Defenders at Risk' in Alice M Nah (ed), *Protecting human rights defenders at risk* (Routledge 2020).

[19] Saskia Brechenmacher Thomas Carothers, *Closing Space: Democracy and Human Rights Support Under Fire* (Carnegie Endowment for International Peace 2014); Bakke, Mitchell and Smidt (n 10); Annika Elena Poppe and Jonas Wolff, 'The Contested Spaces of Civil Society in a Plural World: Norm Contestation in the Debate about Restrictions on International Civil Society Support' (2017) 23 Contemporary Politics 469; Elizabeth A Wilson, 'Restrictive National Laws Affecting Human Rights Civil Society Organizations: A Legal Analysis' (2016) 8 Journal of Human Rights Practice 329.

múltiples países, la mayoría de la literatura se ha concentrado en la violencia física o directa, como explicaré posteriormente. Igualmente, puede ser problemática la separación de los mecanismos de violencia de las causas que reposan en la democracia y el derecho. En este sentido, a diferencia de los estudios que se centran en leyes explícitamente restrictivas, un enfoque más amplio puede mostrar la ineficacia y la mala gobernanza del derecho. Dichas circunstancias crean un "desequilibrio de poder" que se refleja en PDD que no tienen acceso a derechos y mecanismos participativos y judiciales vinculantes.

Los mecanismos de la violencia contra las PDD son utilizados para identificar reclamos de derechos antes que estos se conviertan en demandas reales o movimientos sociales y, también, para limitar el potencial transformador de las herramientas disponibles para tramitar y responder a las solicitudes de las PDD.[20] Esta es la violencia más utilizada.[21] Suele estar en normas;[22] específicamente, en leyes extraordinarias que aumentan los poderes de los funcionarios para vigilar o sancionar,[23] normas que encauzan a las PDD en una dirección particular (reclamo o táctica determinada), y normas con capacidad limitada para transformar la realidad.[24] La amenaza o el uso real de agresiones, sanciones, obstrucciones y restricciones normativas e institucionales (incluso con apariencia democrática) para prevenir, canalizar,

[20] Emily H Ritter and Courtenay R Conrad, 'Preventing and Responding to Dissent: The Observational Challenges of Explaining Strategic Repression' (2016) 110 American Political Science Review 85.

[21] ibid; Sheena Chestnut Greitens, *Dictators and Their Secret Police. Coercive Institutions and State Violence* (Cambridge University Press 2016) (El estudio de los regímenes autoritarios puede identificar diferentes enclaves autoritarios o diferentes formas que sobreviven de violencia en regímenes democráticos) .

[22] Charles Tilly, 'Repression, Mobilization, and Explanation' in Christian Davenport, Hank Johnston and Carol Mueller (eds), *Repression and Mobilization*, vol 21 (University of Minnesota Press 2005).

[23] Jules Boykoff, 'Limiting Dissent: The Mechanisms of State Repression in the USA' (2007) 6 Social Movement Studies 281.

[24] Jennifer Earl, 'Political Repression: Iron Fists, Velvet Gloves, and Diffuse Control' (2011) 37 Annual Review of Sociology 261; Davenport (n 3).

desincentivar y eliminar la defensa de los derechos constituye violencia contra las PDD. Como muestran las investigaciones, dichos mecanismos se utilizan para reducir o eliminar una amenaza al poder, como la atención internacional sobre la violación del régimen internacional de derechos humanos.[25]

No obstante, la literatura sobre la violencia contra las PDD se ha enfocado en la identificación de algunas barreras legales y logísticas (por ejemplo, la prohibición del financiamiento a las PDD y obstáculos burocráticos para registrar organizaciones de derechos).[26] Complementariamente a este enfoque, profundizo en los mecanismos que distorsionan las diferencias entre la práctica legal permitida y la prohibida. Por un lado, la violencia se ejerce mediante leyes penales que protegen bienes penales ambiguos, normas que incrementan la utilización discrecional de la fuerza de autoridades estatales, y la producción de la impunidad. Por ejemplo, la detención preventiva y el monitoreo a PDD con normas flexibles relacionadas con la seguridad o el orden.[27] Siguiendo con este mecanismo de violencia, los escenarios judiciales también pueden operar con la apariencia del debido proceso para criminalizar a PDD y evitar la rendición de cuentas. Por otro lado, la violencia contra las PDD también incorpora restricciones formales e informales en el discurso de los derechos humanos y la democracia. Dentro de estas restricciones se encuentran el desconocimiento de los derechos que opera a la sombra de reformas normativas o canales democráticos, la inclusión normativa simbólica de los reclamos de las PDD o la inacción estatal, y herramientas y procedimientos normativos institucionales de defensa de los derechos sin influencia tangible e impacto. Su finalidad es limitar el espacio y las herramientas de incidencia de las PDD así como la

[25] James C Franklin, 'Human Rights on the March: Repression, Oppression, and Protest in Latin America' (2020) 64 International Studies Quarterly 97.

[26] Thomas Carothers (n 19); Bakke, Mitchell and Smidt (n 10); Wilson (n 19).

[27] Elisa Nesossi, 'Political Opportunities in Non-Democracies: The Case of Chinese Weiquan Lawyers' (2015) 19 International Journal of Human Rights 961.

articulación de su voz en los canales democráticos regulares y los procesos normativos.[28]

Una forma de entender las anteriores representaciones de violencia es identificar las insuficiencias de la democracia y las limitaciones del derecho para crear consenso y otorgar herramientas potentes a las PDD para transformar la realidad. Por ejemplo, en el caso de la fuerte influencia de empresas transnacionales en el poder político, podríamos ver la disposición o tolerancia de un régimen hacia la violencia contra una PDD que exige la rendición de cuentas de la empresas, identificando la ausencia continua de un mecanismo legal para la rendición de cuentas y la inefectividad de normas y canales participativos para institucionalizar esta rendición de cuentas.

1. *La Convivencia entre Violencia contra PDD y Democracia*

La relación entre violencia y democracia tiene lugar dentro del debate tradicional sobre las insuficiencias de la democracia.[29] En este debate están presentes las siguientes etiquetas: la democracia como "pretensión normativa"[30] o como "aparato ideológico".[31] Las insuficiencias son indicadores negativos del proceso de comunicación y consenso político, proceso que pretende asegurar la democracia y en el que actúan las PDD. Asimismo, son indicadores negativos del uso racional y legítimo de la violencia por las autoridades estatales; particularmente, si las oportunidades

[28] Conny Roggeband and Andrea Krizsán, 'The Selective Closure of Civic Space' (2021) 12 Global Policy 23.

[29] Zygmunt Bauman and Carlo Bordoni, *Estado de Crisis* (Paidós 2014); Heinrich Geiselberger, 'Preface' in Heinrich Geiselberger (ed), *The Great Regression* (Polity Press 2017).

[30] Guillermo O'Donell, 'Las Crisis Perpetuas de La Democracia' (2007) 1 POLIS 11, 33; Norberto Bobbio, *El Futuro de La Democracia* (Fondo de Cultura Económica 1986) 7; Samuel Huntington, Michele Crozier and Watanuki Joji, *The Crisis of Democracy: Report to the Trilateral Comission* (New York University Press 1975), 1–3.

[31] Noam Chomsky, *Deterring Democracy* (Hill and Wang 1992); Jürgen Habermas, *Problemas de Legitimación En El Capitalismo Tardío* (Cátedra 1999); Linz (n 12); Mastropaolo (n 12) 238.

políticas y legales disponibles para las PDD no tienen la capacidad de controlar y vetar las decisiones de las autoridades, así como de garantizar la rendición de cuentas de estas autoridades y de otros grupos con poder formal o fáctico. Entonces, considero que un contexto de violencia contra las PDD es aquél en el que existen obstáculos para evitar una comunicación política fluida y el consenso. Las siguientes insuficiencias de la democracia explican la violencia contra PDD: (1) mayores obstáculos al reconocimiento formal de visiones alternativas y necesarias sobre justicia (por ejemplo, rendición de cuentas por empresas transnacionales) o a la institucionalización férrea de nociones privadas, y (2) canales institucionales inexistentes o con bajo poder de impugnación.

Respecto a la primera insuficiencia, a nivel de las nociones de derechos que pueden institucionalizar las PDD, la literatura ha explicado los conflictos de interés en escenarios estatales de representación[32] y las decisiones que escapan del escrutinio de la sociedad.[33] De esta forma, la violencia surge cuando las demandas de las PDD no son funcionales a intereses de las personas que ocupan los espacios de poder.[34] Como señala el Relator de Naciones Unidas sobre la situación de las PDD, existe una influencia considerable de intereses

[32] David Beetham, *Unelected Oligarchy: Corporate and Financial Dominance in Britain's Democracy* (2011).

[33] Wolfang Streeck, 'La Crisis Del Capitalismo Democrático' [2011] New Left Review 5, 21; Jürgen Habermas, 'Democracy, Solidarity And the European Crisis' in Edited Anne-marie Grozelier and others (eds), *Roadmap to a Social Europe* (Friedrich Ebert Stiftung 2013) 15; Charles R Beitz, 'Global Political Justice and the "Democratic Deficit" in R Jay Wallace, Rahul Kumar and Samuel Freeman (eds), *Reasons and Recognition. Essays on the Philosophy of T.M Scanlon* (Oxford University Press 2011) 234.

[34] John E Finn, *Constitution in Crisis. Political Violence and the Rule of Law* (Oxford University Press 1991) 15 ("Pocos estados están dispuestos a arriesgar su supervivencia para garantizar libertades"); Max Weber, *Economía y Sociedad* (Fondo de Cultura Económica 1964) 650–660 (*"Las cualidades formales del derecho se desarrollan partiendo de una combinación del formalismo mágicamente condicionado y de la irracionalidad."* Una vez estos símbolos se desvanecen, la coacción se libera. El Derecho en la modernidad se desliza hacia la racionalidad científico técnica que domina: dinero y poder).

económicos en las autoridades estatales. Para el Relator, esta relación estrecha entre autoridades estatales e intereses económicos promueve normas y políticas para garantizar la rentabilidad de sectores privados, en detrimento de los derechos humanos y un mayor riesgo para las PDD que resisten estas normas.[35] Estas realidades determinan el verdadero sentido de la violencia contra las PDD: restringir la capacidad de intervenir en disputas políticamente y económicamente significativas. En consecuencia, la violencia contra las PDD pretende desaparecer la construcción de diversos significados de los derechos.[36] Como lo señala Derrida, la violencia sin límite es el desconocimiento de la obligación de reconsiderar los fundamentos del derecho con cada avance en la politización de la sociedad.[37] Arendt también explica que la violencia es una manifestación flagrante del poder originada por la incapacidad de actuar concertadamente.[38]

Igualmente, los conflictos de interés eliminan las garantías del uso racional y legítimo de la violencia. La discrecionalidad de las autoridades estatales para utilizar la violencia es cada vez mayor. La instrumentalización de foros democráticos es un medio para ampliar esta discrecionalidad. Las legislaturas, las elecciones y los espacios de participación son utilizados para manipular fuentes de descontento social o para desarrollar preferencias privadas bajo la apariencia de espacios de participación. [39] Por ejemplo, en

[35] Michel Forst, 'Situación de Los Defensores de Los Derechos Humanos Ambientales', A/71/281 (2016) para 5; Michel Forst, 'Informe Del Relator Especial Sobre La Situación de Los Defensores de Los Derechos Humanos', A/70/217 (2015) para 70.

[36] Austin Sarat and Thomas R Kearns, 'Making Peace with Violence: Robert Cover on Law and Legal Theory' in Austin Sarat and Thomas R Kearns (eds), *Law's Violence* (University of Michigan Press 1995) 228; Comaroff and Comaroff (n 13) 5.

[37] Jacques Derrida, 'Fuerza de Ley: "El Fundamento Místico de La Autoridad"' (1992) 11 Doxa, Cuadernos de Filosofía del Derecho 129, 140.

[38] Hannah Arendt, *Sobre La Violencia* (Alianza Editorial 1970), 57–108.

[39] Habermas, *Problemas de Legitimación En El Capitalismo Tardío* (n 31) 165. Habermas determina que la legitimidad se disuelve en legalidad. Las sanciones, a pesar de ser injustas, se justifican en el formalismo de procedimientos de creación

Hungría, el Grupo de Derechos de la Mujer, espacio de participación para las PDD del Grupo y Mesa de Trabajo de Derechos Humanos del Estado (Emberi Jogi Munkacsoport és Kerekasztal), no permite que las PDD tomen decisiones y, en cambio, organizaciones contrarias a los derechos de las mujeres pueden influir en esta política pública.[40] Esto ocurre debido los estrechos vínculos entre los actores estatales y los grupos conservadores.

La segunda insuficiencia de la democracia es la brecha entre los objetivos de la democracia y la realidad.[41] Por lo tanto, las herramientas para realizar un escrutinio adecuado de la violencia son limitadas.[42] En este sentido, las investigaciones han encontrado que la existencia de un catálogo de derechos,[43] la independencia judicial[44] y la disponibilidad de recursos económicos,[45] no eliminan comportamientos represivos contra PDD. Como señalan las PDD, la violencia contra las PDD no puede entenderse sin

del derecho, la facultad constitucional de las autoridades de utilizar la violencia y la creencia en la necesidad de la sanción.

[40] Roggeband and Krizsán (n 28).

[41] Boaventura de Sousa Santos, *Democracia y Transformación Social* (Siglo XXI Editores 2017) 27–29; Luigi Ferrajoli, *Poderes Salvajes. La Crisis de La Democracia Constitucional* (Trotta 2011) 52; Luigi Ferrajoli, *Democracia y Garantismo* (Editorial Trotta 2010), 110.

[42] Norberto Bobbio, *La Crisis de la Democracia*, *in* LA CRISIS DE LA DEMOCRACIA Y LA LECCIÓN DE LOS CLÁSICOS 1–20, 9 (1985)(Cada vez más la violencia privada resiste a la violencia pública) ; DE SOUSA, *supra* note 45 at 22.(La usurpación de actores poderosos de la coerción y la regulación social)

[43] Linda Camp Keith, C Neal Tate and Steven C Poe, 'Is the Law a Mere Parchment Barrier to Human Rights Abuse?' (2009) 71 Journal of Politics 644; Frank B Cross, 'The Relevance of Law in Human Rights Protection' (1999) 19 International Review of Law and Economics 87; Christian Davenport, '"Constitutional Promises" and Repressive Reality: A Cross–National Time–Series Investigation of Why Political and Civil Liberties Are Suppressed' (1996) 58 The Journal of Politics 627.

[44] Emilia Justyna Powell and Jeffrey K Staton, 'Domestic Judicial Institutions and Human Rights Treaty Violation' (2009) 53 International Studies Quarterly 149.

[45] Katheleen Pritchard, 'Comparative Human Rights: An Integrative Explanation' (1986) 15 Policy Studies Journal 1.

reconocer el contexto social, cultural, económico y político. Para estas PDD, su trabajo se ve amenazado por la falta de disposiciones legales y la ineficacia de las leyes existentes, "debido a los intereses políticos y económicos en juego".[46]

2. *La Convivencia entre Violencia contra PDD y Derecho*

Una vez exploradas las insuficiencias de la democracia que manifiestan la violencia contra PDD, es importante comprender que estas insuficiencias se entrelazan con las leyes[47] e interpretaciones oficiales de la norma. Para las autoridades estatales, utilizar la ley representa una ventaja porque se justifican en la legitimidad electoral (el legislativo), y en el cumplimiento formal de reglas procedimentales de creación de la ley. En su forma sutil, la ley da ciertos alivios sin transformar las jerarquías existentes, y evita el cuestionamiento de las desigualdades.[48] Por lo tanto, aunque la ley puede ser una herramienta para garantizar un ambiente seguro para las PDD, también debe verse como un espacio disputado por actores impulsados por mantener el poder. Para identificar los mecanismos de violencia contra PDD, considero que esta violencia proviene de normas que otorgan altos grados discrecionalidad, muchos de ellos inevitables, y de las reducidas posibilidades que tienen activistas para incidir en la creación e interpretación del derecho (desequilibrio de poder). Una forma analítica de identificar otras formas de violencia es contrastar la perspectiva tradicional que aborda las relaciones entre derecho y violencia con dos posturas que permiten ver los desequilibrios que surgen en la creación e interpretación del derecho.

Desde la perspectiva tradicional, se considera que la ley aporta criterios objetivos y sólidos para el control y uso excepcional de la violencia. Estos

[46] Forst, 'Informe Del Relator Especial Sobre La Situación de Los Defensores de Los Derechos Humanos' (n 35) paras 62 and 70.

[47] Douglas Rutzen, 'Civil Society Under Assault' (2015) 26 Journal of Democracy 28; Saskia Brechenmacher, *Civil Society under Assault* (Carnegie Endowment for International Peace 2017).

[48] Chua (n 3).

trabajos confían en que la violencia solo es permitida cuando es válida. La validez corresponde a la armonía de la violencia con los criterios que configuran el ordenamiento jurídico (valores, principios y reglas) y los procedimientos ante determinadas instituciones (legislativo y tribunales constitucionales). En este caso, la violencia contra las PDD es una ruptura entre el mensaje entregado por la norma y el comportamiento del funcionario. El trabajo"Law and Force" de Bobbio es representativo de este enfoque.[49] Bobbio argumenta que la violencia no garantiza la eficacia del derecho porque el derecho restringe la violencia. [50] En este sentido, para enfrentar la violencia contra PDD solo es necesario elaborar normas con un mayor grado de precisión y elaborar criterios de interpretación más sólidos.[51] Esta postura es valiosa en cuanto pretende sustentar la utilización de la violencia en estatutos y criterios interpretativos que limiten la discrecionalidad. Sin embargo, este argumento hace a un lado el análisis de las estructuras políticas que pueden afectar la eficacia de la normas para establecer criterios privados de validez de la norma y crear contextos hostiles para la defensa de los derechos.[52]

Se encuentran dos posturas que critican la anterior perspectiva por centrarse en la violencia contra PDD como un problema de contenido del derecho. Para la primera postura, la causa del desbordamiento de la violencia contra

[49] Norberto Bobbio, 'Law and Force' (1965) 49 The Monist 321.

[50] ibid "Ilicitud e invalidez son dos especies de válvulas que, según los casos, abren y cierran, y por tanto regulan, el flujo de la fuerza que se encuentra a disposición del poder dominante para hacer eficaces las normas pertenecientes al sistema en su conjunto".

[51] Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration and Example*, *in* LAW'S VIOLENCE 175, 177 (Austin Sarat & Thomas R. Kearns eds., 1995).

[52] Giorgio Agamben, *Homo Sacer. El Poder Soberano y La Nuda Vida I* (Pre-Textos 1998); Giorgio Agamben, *Estado de Excepción. Homo Sacer II,I* (Adriana Hidalgo Editora 2003); David Dyzenhaus, *The Constitution of Law. Legality in a Time of Emergency* (Cambridge University Press 2006); Mark Tushnet, *Authoritarian Constitutionalism* (2013) 5–9.

las PDD es el desplazamiento de criterios éticos y racionales hacia exigencias prácticas y utilitarias. Por tanto, la violencia contra activistas, más allá de ser una disfunción en los criterios legales que controlan la violencia, es la respuesta para la protección del poder y la rentabilidad económica como criterios que orientan la racionalidad actual.[53] Se despliega la violencia cuando las demandas de las PDD[54] permiten cuestionar la creencia de legitimidad en estos criterios. [55] En este sentido, Cover argumenta que es posible que autoridades encargadas de legislar e interpretar el derecho establezcan criterios de racionalidad que convivan con el dolor, el miedo y la muerte. [56] En Rusia, se introdujo una ley de difamación con el propósito de proteger el buen nombre. No obstante, esta ley es utilizada para hostigar judicialmente a las PDD que realizan críticas contra autoridades estatales.[57] Igualmente, la instrumentalización de leyes de seguridad proporciona un amplio margen a las autoridades para vigilar a las PDD. En consecuencia, la determinación de criterios de validez también tiene altos grados de discrecionalidad.

La segunda perspectiva complementa la explicación sobre la naturaleza violenta del derecho con la disolución del poder de las PDD o una inadecuada gobernanza del derecho. La consecuencia es la eliminación de la capacidad que tienen los activistas para incidir en la esfera pública mediante el derecho. En este sentido, desde el nacimiento del estado moderno, la definición de necesidades y el poder negociador de las personas es entregado

[53] Weber (n 34) 469 ("Cada vez más, la violencia política interna se objetiva en "orden jurídico estatal"... Toda la política se orienta hacia la objetiva razón de estado, hacia el pragmatismo y el fin absoluto del mantenimiento de las relaciones internas y externas de poder"); Habermas, *Problemas de Legitimación En El Capitalismo Tardío* (n 31) 165.

[54] Mauricio García-Villegas, *La Eficacia Simbólica Del Derecho. Examen de Situaciones Colombianas* (Universidad de los Andes 1993), 43.

[55] Habermas, *Problemas de Legitimación En El Capitalismo Tardío* (n 31), 162–64.

[56] Robert M Cover, 'Violence and the Word' (1986) 95 The Yale Law Journal 1601, 1612.

[57] Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 UCLA Law Review 78, 133.

a las instituciones del Estado.[58] La ley se convierte en un instrumento de conservación de los intereses de las personas que logran ocupar los espacios estatales.[59] La desposesión del poder se origina en dos momentos. Primero, la disolución del poder constituyente en poder constituido.[60] Foucault explica que el discurso y la técnica del derecho tuvieron la función de disolver la existencia de la dominación para poner de manifiesto "los derechos legítimos de la soberanía y la obligación legal de obediencia".[61]Por ejemplo, las PDD argumentan que son excluidos del debate sobre la legislación nacional sobre derechos humanos.[62] En este sentido, los mecanismos legales disminuyen la capacidad de las PDD, mientras que las estrategias extra-legales se perciben como ilegítimas e ilegales. Segundo, la pérdida de control del derecho y el poder por el Estado.[63] La violencia es más resistente al escrutinio porques sus límites y eficacia son impuestos por las mismas personas que controlan el derecho y el poder estatal.[64] Por tanto, de acuerdo a Habermas,[65] Finn[66] y Derrida,[67] es percibida como disfuncional la defensa por los derechos que amenaza los criterios que sustentan la permanencia en el poder.

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[58] Javier Giraldo, 'Democracia Formal e Impunidad En Colombia: De La Represión Al Ajuste Del Sistema Jurídico' in Antoni Pigrau Solé and Simona Fraudatario (eds), *Colombia entre violencia y derecho. Implicaciones de una sentencia del Tribunal Permanente de los Pueblos* (Ediciones Desde Abajo 2012), 151.

[59] Christoph Menke, *Law And Violence*, [2006] LAW LIT. 1, 3–5.

[60] Agamben, *Homo Sacer. El Poder Soberano y La Nuda Vida I* (n 52) 29, 57.

[61] Foucault (n 11).

[62] Forst, 'Informe Del Relator Especial Sobre La Situación de Los Defensores de Los Derechos Humanos' (n 35) paras 50–52.

[63] Bauman and Bordoni (n 29); Julieta Lemaitre, 'Law and Globalism: Law without the State' in Austin Sarat and Patricia Ewick (eds), *The Handboks the Law and the Society* (Wiley Blackwell 2015).

[64] Jürgen Habermas, '¿Cómo Es Posible La Legitimidad Por Via de Legalidad?' (1988) 5 Doxa : Cuadernos de Filosofía del Derecho 21.

[65] Jürgen Habermas, 'Derecho y Violencia, Un Trauma Alemán' [1984] Merkur 19.

[66] Finn (n 34), 4.

[67] Derrida (n 37), 176–183.

De esta forma, la violencia contra PDD se presenta de modos diferentes en la ley. Primero, la violencia se manifiesta bajo la forma de contextos institucionales y culturales de desconocimiento de las necesidades esenciales o los reclamos de las PDD. Los obstáculos para acceder a los servicios sociales básicos acentúan la vulnerabilidad de las PDD. Segundo, la violencia aparece a través de herramientas legales e institucionales con carencias para transformar el statu-quo o evitar la perpetuación de privilegios o de poder de ciertos grupos. Tercero, la violencia se evidencia en el control sobre la aplicación de la ley, que se relaciona con la creación de incumplimiento del derecho.

3. *Unidades de Observación: Mecanismos de Violencia contra PDD*

De acuerdo a los argumentos expuestos, la violencia contra activistas puede estar representada en tres mecanismos. Cada uno de estos da lugar a acciones estatales y normas de: (1) *control o eliminación legítima*, (2) *encauzamiento* y (3) *respuesta coercitiva*. Cada uno de los mecanismos de represión funciona con el avance de los reclamos y las tácticas de las PDD. En el primer paso, *control y eliminación legítima* previene el surgimiento de reclamos y procesos de movilización de las PDD. El segundo paso implica el *encauzamiento* que actúa cuando los reclamos y las tácticas de las PDD surgen públicamente. Los derechos y los mecanismos institucionales definen los reclamos de derechos permitidos, las vías para tramitar los conflictos y la fuerza otorgada a las normas que reclaman las PDD. Finalmente, el tercer paso, los funcionarios estatales y élites acuden a la *respuesta coercitiva* cuando perciben una amenaza real a sus intereses en los reclamos y las tácticas de las PDD o cuando los mecanismos de *control y eliminación legítima* y *encauzamiento* no previenen y contienen los procesos de movilización de las PDD.

Control y eliminación legítima representa normas o valores culturales que se presentan como precursoras de la seguridad, el bien común o las costumbres, que cumplen con la finalidad de prevenir la movilización. Su finalidad es la ampliación y fortalecimiento de los poderes de vigilancia y la

discrecionalidad de los funcionarios estatales para identificar a algunos PDD antes de que se movilicen o descalificar los reclamos de las PDD.[68] Entre 2005 y 2018, el 67% de los reclamos de las PDD ante la Organización de las Naciones Unidas están relacionados con la criminalización de PDD por cargos relacionados con el terrorismo o la seguridad.[69] La Unión Europea, el Reino Unido y Estados Unidos con la legislación antiterrorista vigilan a las PDD, controlan los fondos de las organizaciones de derechos y regulan las actividades de estas organizaciones.[70] Igualmente, la rendición de cuentas por la extralimitación de las funciones de vigilancia o la omisión no existe.[71] Por ejemplo, los reclamos de mujeres activistas son descalificados y silenciados por la sociedad y las instituciones judiciales.[72] Las características del control y la eliminación legítima son la discrecionalidad de los funcionarios,[73] la creación de límites borrosos entre los poderes públicos[74] y la creencia social en la legalidad de las normas y las acciones de los funcionarios estatales.[75] Los efectos son el control del espacio público de disenso, recursos discursivos para

[68] Norbert Elias, *El Proceso de La Civilización. Investigaciones Sociogéneticas y Psicogenéticas* (4th edn, Fondo de Cultura Económica 2016), 454–7.

[69] Fionnuala Ní Aoláin, 'Informe de La Relatora Especial Sobre La Promoción y Protección de Los Derechos Humanos y Las Libertades Fundamentales En La Lucha Contra El Terrorismo', A/HRC/40/5 (2019).

[70] Jeong-Woo Koo and Amanda Murdie, 'Smear Campaigns or Counterterrorism Tools: Do NGO Restrictions Limit Terrorism?', *The 59th Annual Convention of the International Studies Association* (2018); Jude Howell and Jeremy Lind, *Counter-Terrorism, Aid and Civil Society . Before and After the War on Terror* (Palgrave Macmillan 2009).

[71] Aoláin (n 69), para 66.

[72] Myra Marx Fence, 'Soft Repression: Ridicule, Stigma, and Silencing' in Christian Davenport, Hank Johnston and Carol Mueller (eds), *Repression and Mobilization* (University of Minnesota Press 2005).

[73] Penny J Green and Tony Ward, 'State Crime, Human Rights, and the Limits of Criminology' (2000) 27 Social Justice 101, 102.

[74] Thomas Poole, 'Constitutional Exceptionalism and the Common Law' (2009) 7 International Journal of Constitutional Law 247, 255.

[75] Pierre Bourdieu, 'Elementos Para Una Sociología Del Campo Jurídico', *La Fuerza del Derecho* (Siglo del Hombre Editores 2000), 206.

descalificar moralmente a las PDD[76] y la negación social de la ilegalidad de la violencia.[77]

El mecanismo *encauzamiento* limita la capacidad de los derechos y las herramientas para exigir los derechos, y canaliza el discurso de los derechos hacia fines políticos particulares. Dos realidades interrelacionadas pueden explicar esta herramienta. Primero, la ausencia de un "entorno seguro y propicio".[78] La violencia contra PDD se complementa con un marco jurídico, institucional y administrativo que dificulta el surgimiento y consolidación de las PDD mediante contextos de desconocimiento generalizado de los derechos. Segundo, las autoridades estatales realizan una escaza distribución del poder a las PDD y con frecuencia otorgan respuestas parciales a sus demandas, sin alterar el *statu quo*.[79] En la primera realidad, la violencia contra las PDD también se expresa en el incumplimiento de los derechos, que agrava los contextos de riesgo para las PDD. Consecuencias representativas son las distintas facetas de violencia contra las mujeres defensoras de derechos. La heteronormatividad y diferencias en la garantía de los derechos entre hombres y mujeres hacen más difícil para las mujeres acceder a los mecanismos de defensa de los derechos.[80]

En la segunda realidad, cuando las PDD realizan sus reclamos, el discurso jurídico y los medios para hacerlo real son más herramientas simbólicas para suplir el déficit de legitimación de los gobernantes, que instrumentos para ser implementados directamente. Earl, Holdo, Davenport y Jenkins designan

[76] Habermas, 'Derecho y Violencia, Un Trauma Alemán' (n 65).

[77] Francisco Gutiérrez-Sanín, 'The Courtroom and the Bivouac: Reflections on Law and Violence in Colombia' (2001) 28 Latin American Perspectives 56, 54,58,69.

[78] Michel Forst, 'Report of the Special Rapporteur on the Situation of Human Rights Defenders. A/73/215' (2018) paras 20, 27.

[79] García-Villegas (n 54), 43.

[80] Michel Forst, 'Informe Del Relator Especial Sobre La Situación de Las Defensoras de Los Derechos Humanos. A/HRC/40/60' (2019).

este mecanismo como la "canalización" de los reclamos.[81] Esto quiere decir condicionar al movimiento en una dirección particular, una estrategia preferida de movilización o un enfoque de derechos. Aunque el reconocimiento de los derechos debe surtir procedimientos de debate legislativo y judicial, la canalización se convierte en violencia cuando mantiene el desconocimiento de los derechos defendidos por las PDD. Lo mismo sucede cuando las herramientas normativas e institucionales no tienen la capacidad o la influencia necesaria para alcanzar la satisfacción de los derechos defendidos por las PDD o para reconocer la naturaleza estructural de las violaciones de derechos. Por ejemplo, la mayoría del diseño del sistema judicial se basa en resolver casos individuales. En palabras de una PDD en la investigación de Peña, Meir y Nah:[82] "Acompaño a las víctimas los 365 días del año. Estoy cansada, física, mental y psicológicamente, de ver la ansiedad de la gente, de la presión de los casos que no van a ninguna parte."

Tilly y Tarrow llaman al anterior mecanismo "la contención contenida". Esto es, el uso de rutinas institucionales para cooptar las demandas y tácticas de las PDD y convertirlas en tácticas institucionales y reclamos moderados.[83] El derecho y las instituciones democráticas otorgan una escala de actuación a las PDD para lograr sus objetivos.[84] La contingencia de la movilización legal es un ejemplo de "encauzamiento". Las respuestas de los tribunales ante

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[81] Markus Holdo, 'Cooptation and Non-Cooptation: Elite Strategies in Response to Social Protest' (2019) 18 Social Movement Studies 444; Davenport (n 3); Earl (n 24); J Craig Jenkins and Craig M Eckert, 'Channeling Black Insurgency: Elite Patronage and Professional Social Movement Organizations in the Development of the Black Movement' (1986) 51 American Sociological Review 812.

[82] Alejandro M Peña, Larissa Meier and Alice M Nah, 'Exhaustion, Adversity, and Repression: Emotional Attrition in High-Risk Activism' [2021] Perspectives on Politics 1.

[83] Upendra Baxi, *The Future of Human Rights* (Oxford University Press 2008); Charles Tilly and Sidney Tarrow, *Contentious Politics* (2nd edn, Oxford University Press 2015), 60–4,111.

[84] Boaventura de Sousa Santos and César Rodriguez Garavito, 'El Derecho y La Globalización Desde Abajo. Hacia Una Legalidad Cosmopolita', *El Derecho y la Globalización desde Abajo* (Antrophos 2007).

los reclamos de los derechos de las PDD generalmente resguardan intereses económicos dominantes y particulares.[85] Asimismo, las ganancias en el reconocimiento formal de los derechos pueden acelerar el declive de la utilización de otras tácticas y reclamos.[86] Aunque existe una tendencia en todo el mundo a la creación de normas para proteger y apoyar a las PDD, frecuentemente no existe voluntad política para cumplir con estas normas.[87] Por ejemplo, estados como Brasil, Honduras y México han creado leyes de protección a las PDD, pero las respuestas institucionales son limitadas (por ejemplo, no se investigan los hechos de violencia) y los recursos económicos son deficientes.

El tercer mecanismo es la *respuesta coercitiva*. Este mecanismo de violencia es la utilización de la violencia directa: asesinatos, desaparición forzada, amenazas, privaciones injustas de la libertad, desplazamiento forzado, entre otros.[88] Varios autores han encontrado que cuando las PDD utilizan tácticas no institucionales y realizan ciertos reclamos puede aumentar la violencia directa.[89] Por tanto, la percepción de amenaza en el avance en los reclamos de las PDD y el uso alternativo de tácticas enfrenta la represión directa estatal. Por ejemplo, el Relator Especial sobre la Situación de las PDD al evaluar las comunicaciones de 71 estados (entre ellos, Alemania, España, Irlanda,

[85] George I Lovell and Michael McCann, 'A Tangled Legacy: Federal Courts and Struggles for Democratic Inclusion' in Peri E Arnold and Alvin B Tillery (eds), *The Politics of Democratic Inclusion* (Temple University Press 2005).

[86] Jenkins and Eckert (n 81).

[87] Mary Lawlor, 'Final Warning: Death Threats and Killings of Human Rights Defenders. Report of the Special Rapporteur on the Situation of Human Rights Defenders' (2021).

[88] Jennifer Earl, Sarah A Soule and John D McCarthy, 'Protest under Fire? Explaining the Policing of Protest' (2003) 68 American Sociological Review 581.

[89] Donatella della Porta, *Can Democracy Be Saved? Participation, Deliberation and Social Movements* (Polity Press 2013), 17; Earl, Soule and McCarthy (n 88); Davenport (n 3).

Noruega y Suiza) explica que activistas que resisten intereses económicos tienen el mayor riesgo de ser asesinadas.[90]

III. MÉTODOS

Este artículo se apoya en un estudio comparativo de normas y acciones violentas que limitan la acción de las PDD en países denominados como democracias. Esta investigación de derecho comparado pretende ir más allá de la lectura de reglas y decisiones judiciales para reconocer normas y prácticas sociales que intervienen y transforman al derecho oficial y la democracia.[91] Incluso en los países con mayores características autoritarias, algunas instituciones democráticas funcionan. En consecuencia, países democráticos exhiben violencia contra PDD. Aunque es valiosa la perspectiva de demostrar el argumento teórico con evidencia de regímenes con mayores cualidades democráticas, también es importante explorar la diversidad de países por dos razones. Primero, encontrar problemas comunes y contrastar experiencias.[92] En todos los regímenes del mundo la existencia de instituciones políticas formalmente democráticas enmascara la dominación autoritaria.[93] Segundo, generar conceptos y marcos analíticos

[90] Michel Forst, 'Report of the Special Rapporteur on Human Rights Defenders. Situation of Human Rights Defenders' A/74/159 (2019), para 17.

[91] Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (2008) 47 International and Comparative Law Quarterly 495, 495,497. Van Hoecke y Warrington defienden un enfoque amplio del derecho comparado que reconoce la identidad cultural, así como la ideología básica común y prácticas que construyen las personas en torno al derecho.

[92] Rosalind Dixon, 'A Democratic Theory of Constitutional Comparison' (2008) 56 The American Journal of Comparative Law 947, 963; Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press 2010), 10–14.

[93] Matthijs Bogaards, 'How to Classify Hybrid Regimes? Defective Democracy and Electoral Authoritarianism' (2009) 16 Democratization 399; Larry Diamond, 'Elections Without Democracy. Thinking about Hybrid Regimes' (2002) 13 Journal of Democracy 21.

para enfrentar dilemas normativos compartidos de países diversos, particularmente, la dominación violenta que restringe y afecta a las PDD.[94]

El análisis cubre 20 países considerados democráticos. Los estudios comparativos N-small usualmente utilizan entre dos y veinte casos.[95] N-small permite identificar hechos de violencia contextuales o específicos de cada país, para luego corroborar su existencia con la comparación entre casos.[96] 20 casos fueron elegidos para elaborar patrones más comprensivos de la violencia contra PDD.[97] La selección de los países tuvo en cuenta dos criterios. El primer criterio es la selección por disimilitud. La selección por disimilitud identifica factores explicativos semejantes en diferentes casos[98]– los mecanismos explicativos de la violencia-. Aquí creé un grupo con 10 países de similitud "positiva" y otro grupo de 10 países de similitud "negativa" para tener paridad entre conjuntos de países con condiciones diferentes de democracia. La denominación de similitud "positiva" se debe a la presencia evidente en cada país del objeto principal de este estudio: violencia contra PDD. Los países del conjunto de similitud "negativa" son similares debido a que tienen cualidades democráticas y la violencia contra PDD no es notoria. La paridad entre los conjuntos evita la sobrerrepresentación de países que arrojaran un resultado positivo o de países que confirmen la existencia de violencia contra PDD. Los países de "similitud negativa" tienen la función

[94] Esin Örücu, 'Comparatists and Extraordinary Places' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies. Traditions and Transitions* (Cambridge University Press 2003).

[95] David Backer, 'Cross-National Comparative Analysis' in Hugo Van der Merwe, Victoria Baxter and Audrey R Chapman (eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (United States Institute of Peace Pres 2009); Anibal Pérez-Liñan, 'El Método Comparativo: Fundamentos y Desarrollos Recientes' [2007] University of Pittsburg.

[96] Aharon Barak, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers* (Oxford University Press 2011), 9–11.

[97] Todd Landman, 'Rigorous Morality: Norms, Values, and the Comparative Politics of Human Rights' (2016) 38 Human Rights Quarterly 1, 18.

[98] Bernhard Ebbinghaus, 'When Less Is More Selection Problems in Large-N and Small-N Cross-National Comparisons' (2005) 20 International Sociology 133, 141.

de contradecir o contrastar la existencia de diferentes mecanismos de violencia en contextos democráticos.

Segundo, en cada grupo fueron utilizados dos criterios adicionales de selección y de diferentes fuentes para garantizar mayor variación entre países, con el propósito de encontrar mecanismos de violencia explicativos más comunes. En el grupo de casos "negativos", fueron seleccionados siete países con mayores cualidades democráticas y las tres democracias con mayor influencia internacional. Los siete países con mayores cualidades democráticas en el mundo con base en los índices Freedom House,[99] Polity V[100] y Rule of Law Index.[101] Estos índices son fuentes principales de datos sobre derechos humanos para el análisis comparado.[102] La utilización de diferentes índices puede asegurar que cada uno de los países tuviera puntuaciones que cumplieran con múltiples indicadores de calidad de la democracia. Dinamarca, Noruega, Suecia, Finlandia, Holanda, Nueva Zelanda y Canadá ocupan los primeros siete lugares de países en al menos dos índices de las mejores democracias.[103] Segundo, las tres democracias con mayor influencia internacional debido a su poder económico: Reino Unido, Alemania y Francia. Estos países son valiosos para la variación porque al ser las democracias con las economías más grandes tienen procesos más autónomos de desarrollo de la democracia frente a otros países.[104] Estos países también se encuentran en los primeros 10 lugares en al menos dos índices.

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[99] Freedom House, 'Freedom in the World 2017' (2017) <https://freedomhouse.org/sites/default/files/FH_FIW_2017_Report_Final.pdf> accessed 27 July 2022.

[100] Monty G Marshall and Gabrielle Elzinga-Marshall, 'Polity V. State Fragility Index and Matrix' (2018) <http://www.systemicpeace.org/inscr/SFImatrix2018c.pdf> accessed 22 May 2022.

[101] World Justice Project, 'The Rule of Law Index' <https://worldjusticeproject.org/rule-of-law-index/global> accessed 26 November 2018.

[102] Todd Landman, *Studying Human Rights* (Routledge 2006), 70–78.

[103] Marshall and Elzinga-Marshall (n 100) 6,7; Freedom House (n 99) 18; World Justice Project (n 101).

[104] Bruno Wueest, 'Varieties of Capitalist Debates: How Institutions Shape Public Conflicts on Economic Liberalization in the United Kingdom, Germany and France' (2013) 11 Comparative European Politics 752.

En el grupo de países son "similitud positiva", fueron consultados los informes que identifican las democracias que experimentaron declives democráticos sustanciales o inclinaciones importantes hacia el autoritarismo y democracias con la mayor violencia contra PDD. Los países que experimentaron un proceso de autocratización o un retroceso democrático sustancial fueron elegidos con base en Freedom House. Estos países son importantes porque representan el resurgimiento de mecanismos tradicionales de violencia contra PDD y mecanismos actuales y refinados de represión contra las PDD. Freedom House evaluó los retrocesos democráticos en 2017 y consideró que Estados Unidos, Hungría, Polonia, República Checa y Turquía experimentaron un retroceso democrático importante.[105] Aunque estos países tengan puntajes diferentes, Freedom House explica que todos tienen puntos de inflexión importantes que justifican un escrutinio especial.[106] Turquía y Hungría, por ejemplo, enfrentaron el retroceso democrático más intenso en 2016.[107] Finalmente, los cinco países con mayores índices de violencia contra PDD con base en Front Line Defenders (México, Colombia, Honduras, Filipinas, Brasi).[108] Estos países son considerados democráticos por el Polity V.

Para la recolección de información, recopilé hechos de violencia contra PDD en los informes de Amnistía Internacional, Human Rights Watch y el US Department of State (Ver Anexo 1). Estos informes son fuentes principales para conocer violaciones de derechos humanos .[109] El período elegido comprende el año 2006 hasta el 2017. El análisis comienza en el año 2006

[105] Freedom House (n 99) 6,8,10,17.
[106] ibid 9.
[107] ibid 10.
[108] Front Line Defenders, 'Annual Report on Human Rights Defenders at Risk in 2017' (2017) <https://www.frontlinedefenders.org/sites/default/files/annual_report_digital.pdf> accessed 22 July 2022
[109] Landman, *Studying Human Rights* (n 102) 70–78.

por ser el año en que se empieza a registrar un retroceso democrático en el mundo.[110] Inicié la revisión de informes en 2017. En estos informes identifiqué la violencia contra PDD a través de violaciones a las libertades de expresión, reunión, asociación y protesta. Al mismo tiempo, estos mecanismos son completados con los resúmenes de los informes de los interlocutores de la Oficina del Alto Comisionado de Naciones Unidas para los derechos humanos en el Examen Periódico Universal. Una aclaración es importante. Aunque se realiza una selección intencionada que confirme las anteriores violaciones, esta investigación no tiene como propósito afirmar una situación generalizada de violencia contra las PDD en cada país o la negación de la existencia de figuras democráticas en cada caso. La intención es construir explicaciones sobre hechos particulares de violencia dentro de cada país que amenazan y afectan a las PDD. En consecuencia, los argumentos presentados se deben interpretar en situaciones concretas de violencia potencial o real y no para desconocer de forma general en cada país herramientas legales y democráticas acordes con los derechos de las PDD.

Finalmente, para analizar las violaciones a las anteriores libertades se utilizó la descripción múltiple.[111] Su finalidad es construir conceptos a través de la identificación de hechos sociales en documentación previamente desconocida o pendiente de problematizar.[112] Para desarrollar este método, se identificaron patrones de violencia en la literatura sobre las relaciones entre violencia, democracia y derecho y, posteriormente, estos patrones fueron contrastados con hechos de violencia comunes contra PDD en los países analizados.

[110] Larry Diamond, 'Facing Up to the Democratic Recession' (2015) 26 Journal of Democracy 141.

[111] Todd Landman, *Issues and Methods in Comparative Politics* (Routledge 2000) 18; Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 The American Journal of Comparative Law 125, 129–130.

[112] Backer (n 95).

IV. Resultados

1. *Control y Eliminación Legítima*

La revisión de los informes de Amnistía Internacional, Human Rights Watch y el US Department of State muestran diferentes fundamentos que justifican un contexto normativo que puede usarse por las autoridades estatales con la intención o con el posible efecto de restringir o resistir los reclamos de las PDD. Estos dan cuenta de al menos dos situaciones originadas por la manipulación de los sentimientos de miedo e inseguridad de la sociedad. La primera situación, leyes para prevenir el terrorismo y sobre seguridad. En este sentido, la Tabla 1 muestra que los países analizados ampliaron los poderes de vigilancia y las sanciones penales ambiguas que restringieron a la libertad de reunión y protesta en los 20 países que se estudiaron. Las referencias que soportan las amenazas normativas y los ejemplos de cómo se restringió a las PDD pueden consultarse en el Anexo 1.1 y 1.2. El segundo, relacionado con legislación expresamente violatoria de las libertades de expresión y asociación de las PDD. En cada una de estas situaciones, está presente un fortalecimiento de la discrecionalidad de las autoridades estatales para utilizar la violencia y, por lo tanto, mayores potestades de para contener los reclamos de las PDD.

Frente a la primera situación, la literatura ya ha establecido que más de 140 estados han aprobado legislación antiterrorista con el fin de restringir la financiación de PDD.[113] Sin embargo, los ejemplos expuestos en la Tabla 1 sugieren que la legislación para prevenir el terrorismo y garantizar la seguridad se ha utilizado para: 1) vigilar y recopilar información sobre PDD, 2) interrumpir manifestaciones, 3) obstaculizar el trabajo de organizaciones de PDD, y 4) desbordar la utilización de la fuerza estatal contra PDD (por ejemplo, Filipinas). Países con gran reputación democrática como Francia acudieron a estados de excepción y legislación sobre el terrorismo. Las PDD

[113] Thomas Carothers, 'Closing Space for International Democracy and Human Rights Support' (2016) 8 Journal of Human Rights Practice 358.

francesas informaron acoso administrativo contra organizaciones de derechos, la militarización y el control policial de las organizaciones de derechos para atender a personas pobres y migrantes.[114] En este caso, los fines de la norma sobre terrorismo y seguridad se combinan: 1) un estado de emergencia permanente, 2) obstrucción de las actividades de las PDD que brindan asistencia a las PDD (obligación de las PDD de presentarse varias veces al día a estaciones de policía) y 3) fuerzas de seguridad y autoridades locales que multiplican la intimidación a PDD.[115] Igualmente, la legislación para prevenir el terrorismo y seguridad creó un contexto de riesgo o afectó a las PDD con la recopilación de información y vigilancia de comunicaciones (por ejemplo, Suecia, Nueva Zelanda, Países Bajos, Canadá, Alemania, Francia, Estados Unidos y Reino Unido).

Otra característica de este tipo de normatividad que permite la violencia contra las PDD es la ambigüedad. El Informe de la Relatora Especial sobre la promoción y protección de los derechos humanos y las libertades fundamentales en la lucha contra el terrorismo, indica que la falta de una definición de terrorismo permite la designación arbitraria o maliciosa de terrorista a cualquier persona o grupo, incluidas las organizaciones de la sociedad civil.[116] La tipificación del terrorismo y la apología al terrorismo fueron utilizadas para privar la libertad de PDD que realizan manifestaciones y ejercen la libertad de expresión (Brasil, Honduras y Turquía). La mayoría de ataques contra PDD en el mundo se basaban en acusaciones judiciales de terrorismo.[117] Por ejemplo, en México, las PDD son criminalizadas y esperan largos períodos para obtener un juicio mediante el uso indebido de

[114] Jean-Marie Fardeau, 'France : 'Il Faut Relier Les Organisations plus Traditionnelles Des Droits Humains Avec Celles Issues Des Minorités Visibles' (*Civicus*, 2018) <https://www.civicus.org/index.php/fr/medias-ressources/122-news/interviews/3380-france-il-faut-relier-les-organisations-plus-traditionnelles-des-droits-humains-avec-celles-issues-des-minorites-visibles> accessed 2 January 2023.

[115] Ver Anexo 1.1 de referencias sobre Francia.

[116] Aoláin (n 69).

[117] ibid 9.

legislación penal ambigua como "alteración del orden público".[118] En casos más graves, las normas aprobaron la detención preventiva.

A. Tabla 1. Amenazas normativas que representan el control y eliminación legítima contra las PDD en países democráticos (2006 a 2017). [119]

Tipo de País	País	Tipo de Amenaza Normativa	Ejemplo
Países con mayores cualidades democráticas	Canadá	Ampliación de los poderes de vigilancia, a través del Estado de Excepción (AI , 2011) y Anti-terrorism Act (AI, 2015, 2016)	PDD informaron que las Fuerzas de seguridad han seleccionado y recopilado información sobre activistas indígenas, para evitar una "amenaza criminal".
	Dinamarca	Modificaciones normativas sobre la lucha contra el terrorismo y la ampliación del uso discrecional de la violencia (AI, 2007).	La ley autoriza a la policía a realizar detenciones administrativas y vigilar a las personas que suponen un peligro para el orden público o la seguridad. En diciembre de 2009, la policía vigiló y realizó detenciones preventivas en masa de manifestantes en la Conferencia de las Naciones Unidas sobre el Cambio Climático.
	Finlandia	Ley contra el terrorismo (USDS, 2007) y reformas constitucionales que autorizan la vigilancia de comunicaciones (USDS y AI, 2016 a 2017)	PDD informaron que las normas ampliaron los poderes de vigilancia y ponían en riesgo su intimidad. La vigilancia no está sometida a criterios de proporcionalidad.
	Noruega	Normas ambiguas sobre la utilización de la fuerza (USDS, 2006)	PDD señalaron una tendencia hacia un menor respeto de la intimidad debido a los métodos utilizados por la Policía para luchar contra el terrorismo.

[118] Michel Forst, 'Informe Del Relator Especial Sobre La Situación de Los Defensores de Los Derechos Humanos Relativo a Su Misión En México.A/HRC/37/5' (2018) paras 22–41.

[119] Fuente: Amnistía Internacional (AI), Human Rights Watch (HRW) y U.S. Department of State (USDS). Elaboración Propia.

	Nueva Zelanda	Modificaciones normativas sobre la lucha contra el terrorismo y la ampliación del uso discrecional de la violencia estatal (USDS 2006, 2007, 2008, 2009, 2014)	Según la Comisión de Derechos Humanos de Nueva Zelandia, la legislación antiterrorista contiene términos ambiguos que permiten un cierto grado de vigilancia equivalente a una injerencia injustificada en los derechos a la libertad de asociación y de expresión.
	Países Bajos	Ley contra el Terrorismo (USDS, 2006 a 2009, 2017) Ley que faculta a funcionarios estatales a declarar a organizaciones de la sociedad civil contrarias al orden público (USDS, 2006)	PDD mencionaron que fueron impuestos nuevos requisitos administrativos a organizaciones de la sociedad civil que recibían financiación extranjera. Estas normas permitían la supervisión y la posible restricción de sus actividades. Igualmente, PDD informaron que se obstaculizaron reuniones pacíficas para priorizar el orden público.
	Suecia	Ley de Vigilancia (AI, 2009)	PDD informaron que autoridades estatales habían realizado intercepción aleatoria de comunicaciones a escala masiva y que su derecho a la intimidad se había visto en peligro en múltiples ocasiones.
Democracias con mayor influencia internacional	Alemania	Normas que regulan de la libertad de reunión para garantizar el orden público (USDS, 2015) y aumentan los poderes la vigilancia de comunicaciones (USDS, 2016, 2017).	PDD denunciaron que el Gobierno recopiló información e intercambió datos con organizaciones de seguridad extranjeras sobre manifestantes durante la cumbre del G-20 en 2017.
	Francia	Ampliación de la discrecionalidad de las Fuerzas de seguridad mediante la Ley antiterrorista y los estados de excepción (AI y USDS,2006, 2015, 2016/17)	PDD que brindan asistencia a migrantes, alegaron la multiplicación de las medidas de vigilancia e intimidación en su contra por fuerzas de seguridad y autoridades locales.
	Reino Unido	Prevención del terrorismo y ampliación de la discrecionalidad de autoridades estatales para vigilar comunicaciones	Las PDD denunciaron vigilancia abierta o encubierta de los manifestantes, así como medidas preventivas y órdenes de

		(USDS, 2006; AI 2009, 2012, 2013, 2015/16)	prohibición contra la libertad de asociación y reunión.
Democracias en Declive	Estados Unidos	Normatividad contra el terrorismo (AI y HRW, 2006 a 2017)	PDD señalaron que las leyes en materia de seguridad creaban obstáculos excesivos a las actividades de las PDD: -Acceso a juicios y documentos relacionados a cuestiones fundamentales de interés público por razones de seguridad. -Programas de vigilancia que recopilan contenidos de las comunicaciones.
	Hungría	Estado de excepción (AI, 2015, 2016/17)	La adopción de normas en situación de emergencia ha permitido crear una ley que impone requisitos a las ONG de financiamiento extranjero (revelar las fuentes de finamiento) y estigmatizar a estas ONG como una amenaza a la seguridad.
	Polonia	Ley que penaliza actividades contrarias a la política gubernamental, la moral o el bien común (USDS, 2009) y 214 modificaciones normativas restrictivas (USDS, 2016)	Las PDD que luchan contra la discriminación sexual mencionaron que las manifestaciones LGBTIQ fueron prohibidas por razones de orden público.
	República Checa	Detención Preventiva (USDS, 2015)	Solicitantes de asilo son detenidos de forma rutinaria y PDD de refugiados sufrieron intimidación.
	Turquía	Paquete normativo contra el terrorismo (USDS, AI y HRW, 2014, 2015 y 2016)	"Los defensores de los derechos humanos enfrentan investigaciones criminales, detenciones arbitrarias prolongadas, cargos falsos y condenas sobre la base de una legislación antiterrorista excesivamente amplia".
Democracias con mayor violencia	Brasil	Tipificación ambigua del delito de terrorismo (AI y HRW, 2015)	"La criminalización del derecho protestar y de los defensores que ejercen este derecho, así como la representación mediática de manifestantes como sujetos

		violentos responsables del desorden público".
Colombia	Normas sobre seguridad que amplían poderes discrecionales de las autoridades (AI, 2015/16)	Permite la disolución de manifestaciones por la Policía. Asimismo, la Policía usó desproporcionadamente la fuerza.
Filipinas	Ampliación de los poderes de autoridades estatales mediante el Estado de excepción y normas de seguridad (AI, USDS y HRW,2006, 2012, 2013, 2015, 2016)	Mujeres indígenas defensoras de derechos han sido asesinadas en el contexto de las la intensificación de las operaciones de seguridad y contra-insurgencia.
Honduras	Tipificación penal ambigua (ej. Asociación ilícita, prohibición de declaraciones que afecten el orden público) (USDS, 2007) y Leyes de seguridad (HRW, 2013)	PDD "expresaron profunda preocupación por la definición del delito de asociación terrorista que, por su formulación ambigua, podría permitir una mayor criminalización de las personas defensoras de derechos humanos".
México	Leyes de Seguridad aumentaron o mantuvieron la discrecionalidad de los funcionarios para vigilar y utilizar la fuerza (AI, 2013; HRW, 2017)	PDD fueron asesinados por las Fuerzas Estatales y fueron víctimas de espionaje por parte del Gobierno.

Respecto a la segunda situación, el poder coactivo del Estado se complementó con legislación expresamente violatoria de las libertades (Hungría, Países Bajos y Alemania). Las libertades de reunión y manifestación se restringieron para proteger bienes jurídicos como el orden público. Por ejemplo, en Países Bajos, varias PDD y organizaciones de derechos fueron amenazadas por la potestad del Estado de declarar organizaciones de la sociedad civil como contrarias al orden público. Esta Ley no limitaba exclusivamente la prohibición a organizaciones designadas como terroristas en los listados de la ONU y la Unión Europea.[120] Asimismo,

[120] Ver Anexo 1.1 de referencias: US Department of State (2006).

el conjunto de normas prohíbe manifestaciones por razones de orden público (Polonia). La Tabla 1 también muestra la utilización de leyes para restringir el acceso a la información a PDD por razones de seguridad (ej. Estados Unidos). Por ejemplo, las PDD no pueden acceder al 90% de los datos gubernamentales en el mundo.[121] Las limitaciones al acceso a información pública, por ejemplo, han impedido que las PDD puedan acceder a la información en poder de los militares y relacionada con el funcionamiento de las empresas para la identificación de los responsables de las violencia contra PDD.[122] Aun así, otras normas y acciones emergieron de la revisión de informes, pero deben ser considerados con mayor atención en el futuro. Primero, normas que restringen a las PDD con base en argumentos sobre la identidad (Turquía),[123] el bien común, la moral y la política gubernamental (Polonia).[124] Por ejemplo, en Finlandia,[125] existen normas que restringen la libertad de conciencia frente al servicio militar. Los objetores de conciencia[126]contra el servicio civil alternativo al servicio militar enfrentan penas privativas de la libertad.[127] Segundo, acciones estatales conservan la impunidad de las extralimitaciones de la fuerza pública contra PDD y la impunidad de los delitos denunciados por mujeres. La impunidad afecta a las

[121] World Wide Web Foundation, 'Open Data Barometer' (2018), <opendatabarometer.org> accessed 29 November 2018.

[122] Forst, 'Report of the Special Rapporteur on Human Rights Defenders. Situation of Human Rights Defenders A/74/159' (n 90) para 84.

[123] Ver Anexo 1.1 de referencias: Informe de Amnistía Internacional (2006)

[124] Ver Anexo 1.1 de referencias: US Department of State (2014).

[125] Ver Anexo 1.1 de referencias: Informes de Amnistía Internacional (2007-2016)

[126] Los objetores de conciencia son PDD porque de forma individual o colectiva buscan la protección de su derecho a la libertad de conciencia y el derecho a la libertad de conciencia de otras personas, a través de la negación el cumplimiento a obligaciones legales que lesione convicciones intimas o el debate público de estas obligaciones.

[127] Este servicio se presta en organizaciones sin fines de lucro y el sector público, y es definido y aprobado por el personal militar.

PDD porque inhibe la defensa de los derechos, previene el éxito de los reclamos de las PDD y promueve la repetición de la violencia contra PDD.[128]

2. Encauzamiento

La Tabla 2 muestra que, aunque en la mayoría de países las PDD pueden incidir en la creación de normas sobre derechos, en algunas ocasiones estas normas: (1) no reflejan las necesidades de las PDD,[129] (2) no tienen la fuerza para realizar transformaciones, y (3) pueden ser instrumentalizadas para atacar a las PDD.[130] Las referencias que soportan las formas normativas de encauzamiento y los ejemplos de cómo se ejerció violencia contra las PDD pueden consultarse en los Anexos 1.1 y 1.3. Las normas que no reflejan las necesidades de las PDD muestran una baja influencia de las PDD en la creación de las normas y en la participación en procedimientos judiciales. Al respecto, primero, los ejemplos sugieren, el desconocimiento de las normas de participación, como en el caso de la comunidad indígena Maorí en Nueva Zelanda. Segundo, las mujeres que deciden denunciar la violencia en Finlandia, Noruega y Suecia, no tienen mecanismos judiciales apropiados para acceder a la justicia y reducir la impunidad debido a la debilidad de las instituciones encargadas de investigar. Asimismo, aunque las PDD en Colombia y Brasil tienen un mecanismo de protección, no se han reconocido sus necesidades específicas de seguridad y de participación en las instituciones que garantizan los derechos de las PDD.[131]

[128] Forst, 'Report of the Special Rapporteur on Human Rights Defenders. Situation of Human Rights Defenders A/74/159' (n 90).

[129] Keith, Tate and Poe (n 43) 33–42.

[130] Nancy Bermeo, 'On Democratic Backsliding' (2016) 27 Journal of Democracy 5; Kevin Gotham, 'Domestic Security for the American State: The FBI, Covert Repression, and Democratic Legitimacy' (1994) 22 Journal of Political and Military Sociology 203.

[131] Ver Anexo 1.3 de referencias: Oficina del Alto Comisionado de las Naciones Unidas, casos Colombia (2018) y Brasil (2022).

B. Tabla 2. Tipos de encauzamiento contra PDD en países democráticos (2006 a 2017).[132]

Tipos	País	Formas Normativas de "Encauzamiento"	Ejemplos
Normas que no reflejan las necesidades de las PDD	Brasil	La ley y los programas de protección de defensores de derechos humanos no cuentan con fondos (HRW, 2009)	Entre 2015 y 2019, Brasil fue el segundo país con el mayor número de asesinatos de PDD. El Gobierno ha disminuido gradualmente el presupuesto del Programa de Protección de las PDD. Asimismo, las PDD han sido excluidas del órgano decisorio de este programa.
	Colombia	Los decretos y programas de protección de PDD carecen de voluntad política (HRW, 2015)	Aunque existen progresos, la implementación del programa de protección enfrenta obstáculos burocráticos y no tiene en cuenta las necesidades de las PDD.
	Dinamarca	Normas sobre tratamiento hormonal y la cirugía de afirmación de género no han sido implementadas (AI, 2014, 2016).	Personas transgénero que reclaman la transición física de género han tenido que esperar durante años para lograr el reconocimiento del derecho a acceder a la cirugía.
	Filipinas	Obstaculización de un proyecto de ley que preveía la creación de un mecanismo nacional de prevención de la tortura (AI, 2016)	En 2022 no existían avances de un mecanismo nacional para prevenir la tortura y la impunidad ha contribuido a la repetición de actos de tortura y un contexto hostil para las PDD.
	Finlandia	Las políticas públicas para la protección de la mujer carecían de voluntad política (USDS, 2006 a 2013)	Mujeres víctimas que denuncian la violencia no se les garantiza el debido proceso y no tienen mecanismos de protección, debido a una respuesta "sistemáticamente insuficiente en cuanto a recursos".
	Noruega	Las políticas públicas de protección de la mujer carecían de voluntad política (AI, 2015)	Organizaciones de defensa de los derechos indicaron que "la violencia contra la mujer todavía es grave".

[132] Fuente: Amnistía Internacional (AI), Human Rights Watch (HRW) y U.S. Department of State (USDS). Elaboración propia

			Además, mencionaron una baja tasa de enjuiciamientos debido a deficiencias en las investigaciones policiales.
	Nueva Zelanda	Las recomendaciones de organismos internacionales y las normas nacionales sobre derechos de la comunidad Maorí no produjeron cambios locales (AI y USDS, 2006 a 2017)	La población Maorí que interviene en escenarios de consulta no tiene una participación significativa. Las consultas realizadas no reflejan los requisitos de la normatividad internacional.
	República Checa	Firma del Convenio del Consejo de Europa sobre Prevención y Lucha contra la Violencia contra las Mujeres y la Violencia Doméstica (AI, 2016).	En 2022, República Checa no ha tomado las medidas para ratificar el Convenio y las mujeres continúan siendo infrarrepresentadas en lo político, económico y en la esfera pública.
	Suecia	Las normas para la protección de la mujer no fueron debatidas públicamente (USDS, 2007)	La violencia contra la mujer sigue estando muy extendida, las tasas de denuncia son bajas, y la capacidad de investigación de las autoridades es limitada.
Leyes que no tienen la fuerza para realizar transformaciones	Alemania	El mecanismo nacional de prevención de la tortura carece de recursos (AI, 2013-2017)	Persistencia de la falta de mecanismos de investigación independientes y obstáculos para la realización de investigaciones eficaces de las denuncias de tortura contra la policía. Específicamente, el uso desproporcionado de la fuerza en manifestaciones.
	Francia	Limitaciones a las normas de acceso a la salud para personas trans (AI, 2013-2016)	En 2019, las organizaciones de derechos denuncian que las personas trans que reclaman el derecho a la salud enfrentan obstáculos significativos para acceder a la salud y experimentan tasas más altas de enfermedades.
	Estados Unidos	El control de los medios de vigilancia y espionaje han sido ineficaces (USA Freedom Act) (AI, 2014).	En 2021, continuaba la vigilancia de amplio alcance y todavía la ley no impedía la injerencia arbitraria e ilegal en el derecho de la intimidad de las PDD que reclaman el derecho al asilo.

	Honduras	La Ley, la jurisprudencia y los programas de protección de PDD no cuentan con fondos (USDS,2013; HRW, 2014)	La Ley de Protección para las PDD solo preveía medidas de protección física, no tenía financiación y no atacaba las causas estructurales de la violencia como: la impunidad y las deficientes condiciones necesarias para el efectivo goce y disfrute de todos los derechos.
	México	Norma de protección para las PDD carece de voluntad política (HRW, 2012; AI, 2015)	El Mecanismo de Protección para PDD constituía un avance innegable, pero su efectividad estaba limitada a la reducción progresiva de su presupuesto, la ausencia de recursos humanos y la impunidad.
	Países Bajos	La sentencia del Tribunal Europeo de Derechos Humanos sobre libertad de expresión y la protección de fuentes periodísticas no produjo cambios locales (USDS, 2015) Las recomendaciones de organismos internacionales sobre derechos de los solicitantes de asilo no produjeron cambios locales (AI, 2015)	Periodistas denunciaron el aumento de las amenazas en su contra. Los abogados que trabajan en casos de asilo son desacreditados por políticos.
Instrumentalización del discurso de los derechos	Canadá	Federal Human Rights Comission y Provisional Human Rights Commissions son utilizadas para restringir la Libertad de expression (USDS, 2008).	Grupos conservadores presentan denuncias sobre difamación contra PDD. “Los más poderosos podían interponer demandas estratégicas (...) para acallar las críticas a sus actividades”.
	Hungría	Erosión sistemática del Estado de Derecho. Las enmiendas constitucionales han sido utilizadas para restringir los derechos de las PDD (AI y USDS, 2013 a 2017)	Normas constitucionales para limitar el acceso a la información, debilitar la independencia judicial (ej. la declaratoria de nulidad de las sentencias emitidas por el Tribunal Constitucional), y sancionar las críticas contra las instituciones y autoridades, mediante la protección de la “identidad Húngara”.
	Polonia	Institucionalización de leyes contra la difamación promueven un	Las PDD enfrentaban juicios penales por ejercer su derecho

	ambiente de autocensura (AI, 2010).	fundamental a la libertad de asociación.
Reino Unido	Propuestas gubernamentales de regular los derechos humanos para restringir la competencia de la Corte Europea de Derechos Humanos ("Human Rights Act" Proposal) (AI 2014)	En 2021, el Gobierno del Reino Unido continuaba insistiendo en realizar una reforma de la Ley de derechos de 1998 para limitar el acceso al Tribunal Europeo de Derechos Humanos y la aplicación de sentencias del Tribunal .
Turquía	Erosión sistemática del Estado de Derecho. Las enmiendas constitucionales han sido utilizadas para restringir los derechos de las PDD (USDS, 2006)	Aunque el derecho a la intimidad está protegido por la Constitución, reformas constitucionales posteriores lo limitan, permitiendo en la actualidad la interceptación de comunicaciones de activistas y abogados.

De manera similar, el incumplimiento de las normas también es determinante para crear un contexto de riesgo para las PDD. Normas de protección de las PDD carecen de la voluntad política para su implementación, como en los casos de Colombia, Brasil, Honduras y México.[133] Igualmente, aunque en varios países las mujeres, comunidades indígenas y LGBTI que defienden sus derechos han logrado normas para el reconocimiento de sus derechos, sin embargo, estas normas son incumplidas (Dinamarca, Francia, Finlandia, Nueva Zelanda y República Checa). Por ejemplo, aunque el incumplimiento de las leyes relacionadas con la transición de género o de salud para personas Trans en Dinamarca y Francia puede verse como un asunto delimitado al derecho a la salud, también ha sido informado por las PDD como un obstáculo para la defensa de los derechos. Este incumplimiento hace parte de una estrategia represiva de desgaste. Las personas trans han asumido largos periodos de defensa de los derechos (2014-2017) y una gran inversión de recursos para el reconocimiento de los derechos. Durante este proceso, muchas PDD trans abandonan sus reclamos

[133] Ver Anexo 1.3 de referencias: Oficina del Alto Comisionado de las Naciones Unidas.

debido a la sensación de frustración y la ausencia de recursos. Posteriormente, aunque el Estado realice concesiones (por ejemplo, normas), aumenta los costos de la defensa de los derechos con el incumplimiento de las normas, ya que exige que la movilización se prolongue y se vea obligada a enfrentar a otros actores (por ejemplo, personal médico conservador). Al mismo tiempo, aumenta la sensación de frustración de las PDD de no lograr resultados. Otros países incumplieron las decisiones internacionales que protegían la libertad de expresión y los derechos de las comunidades indígenas (Nueva Zelanda,). En Países Bajos, la sentencia del Tribunal Europeo de Derechos Humanos sobre la protección de la libertad expresión no produjo efectos. Para 2022, las PDD de Países Bajos reportaron un aumento de las amenazas por realizar críticas a autoridades estatales.[134]

Finalmente, la instrumentalización del discurso de los de los derechos y herramientas para proteger los derechos fueron utilizados para amenazar a las PDD. En Canadá fueron utilizadas normas de protección de los derechos humanos para incorporar restricciones a los derechos. Un ejemplo son las normas sobre difamación. Las PDD en Polonia enfrentaron juicios por difamación. En Canadá, PDD solicitaron que se limitaran las facultades de las comisiones federales y provinciales de derechos humanos. Para estas PDD, la competencia de estas comisiones de conocer quejas idénticas, sin prestar atención a las demás origina que las PDD y medios de comunicación enfrenten algos costos de defensa legal hasta el agotamiento. Por ejemplo, en 2007, Maclean's Magazine enfrentó tres juicios ante tres comisiones por posibles discursos de odio anti islámicos. Para las PDD, una utilización expansiva del discurso de odio y la exigencia de enfrentar varios juicios por los mismos hechos limita la libertad de expresión.

En este sentido, también noté la utilización de estos escenarios judiciales para amenazar la participación de las PDD (demandas estratégicas contra la

[134] Ver Anexo 1.3 de referencias: Oficina del Alto Comisionado de las Naciones Unidas sobre Países Bajos (2022).

participación pública). Estas demandas tienen la finalidad de involucrar a PDD en procesos judiciales costosos para obligarlos a abandonar sus labores. Las PDD del medio ambiente en Polonia sufrieron este tipo de violencia (por ejemplo, demandas civiles y penales por difamación).[135] Asimismo, los procedimientos legislativos y enmiendas constitucionales promovieron la restricción del espacio de las PDD. En Hungría y Turquía, reformas constitucionales han limitado el acceso a la información y restringido los derechos a la intimidad y la libertad. En Turquía, el referendo constitucional de 2017 amplío el poder del ejecutivo y otorgó al presidente la facultad de nombrar a más de la mitad de los miembros de los tribunales superiores. De esta manera, algunos tribunales han criminalizado a PDD con normas ambiguas sobre terrorismo o aprobado directivas gubernamentales que restringen la defensa de los derechos humanos (por ejemplo, prohibición de grabar manifestaciones públicas).

3. Respuesta Coercitiva

Los informes de Amnistía Internacional, Human Rights Watch y US Department of State mencionan formas de respuesta coercitiva como: asesinatos, hostigamientos, lesiones a la integridad personal y la criminalización. La Tabla 3 expone algunos casos específicas en países sobre la respuesta coercitiva. Las semejanzas entre los casos sugieren que la respuesta coercitiva tuvo una presencia importante en aquellos reclamos de las PDD con un componente económico notorio. En particular, la respuesta coercitiva sobresale en los reclamos de comunidades indígenas sobre la tierra y la protección del medio ambiente cuando enfrentaban proyectos extractivos o conflictos sobre la propiedad de la tierra. Otros reclamos con componente económico afectados fueron las demandas contra políticas de austeridad y enfoques económicos dominantes. En Francia, entre marzo y septiembre de 2016 se presentaron manifestaciones para evitar la propuesta de reforma del Código del Trabajo. La propuesta permitía mayor

[135] Ver Anexo 1.3 de referencias: Oficina del Alto Comisionado de las Naciones Unidas sobre el caso de Polonia (2022) para. 23.

discrecionalidad de las empresas para despedir y aumentar el tiempo de trabajo. Los PDD, particularmente, del derecho al trabajo, realizaron protestas. La policía empleó la fuerza excesiva contra estos manifestantes. Asimismo, por medio del estado de excepción, las autoridades gubernamentales prohibieron protestas e impusieron medidas administrativas a PDD para impedir que asistieran a las manifestaciones. En estos casos de violencia, cuando fue posible identificar los actores responsables de la violencia, fueron involucradas la Policía, Fuerzas Armadas Estatales y otras autoridades estatales

C. Tabla 3. Respuesta coercitiva contra PDD (2006 a 2017). [136]

Tipo de País	País	Tipo de Reclamo	Tipo de Violencia
Países con mayores cualidades democráticas	Canadá	Derechos de las comunidades indígenas (USDS, 2006, 2017; AI, 2013, 2015)	Hostigamientos de la policía y continua discriminación.
		Inversión social y rechazo de la globalización (AI, 2011)	Agresiones físicas de la policía en las protestas contras el G-8.
		Anti- globalización.(USDS, 2010)	La policía utilizó la fuerza excesiva y arrestos arbitrarios en las protestas contra el G-20
	Dinamarca	Medio ambiente en el contexto de la Conferencia de Naciones Unidas sobre Cambio Climático (AI, 2010)	Fuerza excesiva de la policía y arrestos arbitrarios mediante la detención preventiva.
		Derecho de asilo (AI, 2015)	Detención prolongada arbitraria por autoridades migratorias.
	Finlandia	Objeción de conciencia (AI, 2015-2016)	Criminalización.

[136] En la categoría de amenazas, los estereotipos hacen parte de violencias que provienen de múltiples actores como el Estado y la Sociedad. Fuente: Amnistía Internacional (AI), Human Rights Watch(HRW) y U.S Department of State (USDS). Elaboración propia

		Derecho de asilo (AI, 2016/17)	Lesiones personales y devoluciones de solicitantes de asilo.
		Tierra de la Comunidad Sami (USDS, 2006 a 2017)	Agresiones y discriminación.
		Derechos de la comunidad LGBTI (USDS, 2012)	Agresiones.
	Noruega	Libertad de expresión (USDS, 2011)	Amenazas.
		Derecho de asilo (AI, 2016)	Devoluciones de solicitantes de asilo.
		Rechazo de operaciones militares israelíes (USDS, 2009, 2010)	Detención de migrantes protestantes.
	Nueva Zelanda	Demandas de tierra de la población Maorí (AI, 2016/17)	Agresiones, criminalización y discriminación realizada por Fuerzas Estatales.
		Derecho de asilo (AI, 2016, 2017)	Detención de solicitantes de asilo.
	Países Bajos	Derecho de asilo (AI, 2016)	Detención y devoluciones de solicitantes de asilo.
		Justicia internacional contra las políticas de Israel (AI, 2016)	Amenazas de muerte e interceptación de comunicaciones.
	Suecia	Derecho de asilo (AI, 2015)	Detención prolongada y devoluciones de solicitantes de asilo
		Derecho a la Tierra de la población Sami (AI, 2016)	Discriminación.
		Libertad de expresión (USDS, 2007)	Amenazas.
Democracias con mayor influencia internacional	Alemania	Contra políticas financieras (2007)	Fuerza excesiva de la policía en las protestas contra el G-8
		Contra políticas financieras (AI, 2011)	Fuerza excesiva de la policía y criminalización en las Protestas contra las políticas de la Zona Euro.
	Francia	Derecho al trabajo (AI, 2016)	Fuerza excesiva de la policía.

		Críticas a la OTAN (USDS, 2009)	Agresiones Físicas llevadas a cabo por la policía.
	Reino Unido	Rechazo de políticas de austeridad (AI 2011)	Fuerza excesiva de la policía (asesinato)
		Derechos de los migrantes (AI, 2016)	Detención prolongada arbitraria por autoridades migratorias.
Democracias en Declive	Estados Unidos	Objeción de conciencia del servicio militar(AI, 2006-2008,2010, 2013)	Arrestos arbitrarios realizados por la policía.
		Igualdad de derechos (AI, 2015)	Fuerza excesiva de la policía.
		Derechos de los migrantes (AI, 2006)	Arrestos arbitrarios realizados por la policía.
		Derecho al aborto (AI, 2009)	Asesinato llevado a cabo por un activista contra el aborto.
		Derechos de las comunidades indígenas frente a proyectos extractivos (Dakota) (AI, 2016-2017)	Fuerza excesiva de la Policía y agresiones físicas.
	Hungría	Derechos Humanos, respeto de la división de poderes y elecciones justas y periódicas(AI, 2013- 2017; USDS, 2015)	Campañas de difamación realizadas por el gobierno y criminalización.
		Rechazo de las políticas gubernamentales (USDS, 2006-2009)	Agresiones llevadas a cabo por la policía.
	Polonia	Rechazo de políticas de austeridad (USDS, 2015)	Fuerza excesiva de la policía (agresiones físicas).
		Derechos de la comunidad LGBTI (AI, 2014)	Amenazas de sectores de ultra-derecha.
	Turquía	Derechos Humanos, respeto de la división de poderes y elecciones justas y periódicas (AI, 2016)	Constante hostigamiento, criminalización y homicidios llevados a cabo por fuerzas de seguridad estatales.
	República Checa	Lucha contra la xenofobia (AI, 2013, 2015-2016)	Ataques informáticos y amenazas de personas de ultra-derecha.
		Derechos de la comunidad LGBTI (USDS, 2 2013)	Prohibición de marchas y despidos laborales.

Democracias con mayor violencia contra PDD	Brasil	Contra la desviación del gasto público en la Copa Mundial de Fútbol y los Juegos Olímpicos(USDS, 2014, AI, 2016)	Fuerza excesiva y asesinatos originados por la policía. Criminalización.
		Derecho al medio ambiente y a la tierra (AI, 2006-2008; HRW, 2008 USDS, 2016)	Criminalización y asesinatos alentados por terratenientes, fuerzas estatales y grupos armados privados.
	Colombia	Derechos Humanos: derecho al medio ambiente y a la tierra contra la implementación de proyectos extractivos y el acaparamiento de tierras (AI,USDS YHRW; 2006-2017)	Asesinatos llevados a cabo por autoridades estatales y grupos paramilitares, guerrillas y grupos desconocidos. Asimismo, criminalización.
	Filipinas	Derechos de las comunidades indígenas y el rechazo de la extracción de recursos naturales (AI, 2016)	Fuerza excesiva de la Policía y asesinatos llevados a cabo por la Policía y grupos privados.
		Derechos Humanos, respeto de la división de poderes y elecciones justas y periódicas (HRW, AI, y USDS, 2006-2017)	Constante hostigamiento, criminalización, desapariciones forzadas y asesinatos cometidos por las Fuerzas Estatales.
	Honduras	Derecho al medio ambiente y a la tierra contra la implementación de proyectos extractivos(AI, 2006-2017; USDS, 2010, 2015 y 2016)	Asesinatos llevados por Fuerzas Estatales o desconocidos. Criminalización
		Derechos de la comunidad LGBTI (AI,2010)	Asesinato realizado por desconocidos.
	México	Libertad de expresión (USDS, 2007, AI, 2014-2017)	Criminalización y vigilancia permanente activada por autoridades locales y otras autoridades estatales.
		Derechos Humanos (USDS, 2015)	Criminalización. Homicidio realizado por grupos delictivos organizados.

También resalta la respuesta coercitiva utilizada contra solicitantes de asilo y las PDD de los derechos de personas migrantes; a menudo, la detención preventiva por largos períodos de tiempo y las devoluciones a los países de origen de los solicitantes de asilo. Estos casos se encontraron en los países con mayores cualidades democráticas. Por ejemplo, el caso "The Stansed 15´s" en el Reino Unido. En 2017, 15 manifestantes bloquearon el despegue de un

vuelo de expulsión de migrantes. Por estos hechos, el Tribunal de Chelsmford los condenó por interrupción de los servicios de un aeródromo. El tribunal ignoró las pruebas que respaldaban que estas PDD actuaron para detener la violación de los derechos de migrantes y sobre la ausencia de un riesgo real y material para el aeropuerto. Solo en febrero de 2019 la condena fue anulada.[137] Esta violencia puede ser imperceptible o normalizada por la sociedad debido a las limitaciones legales de la ciudadanía. En consecuencia, aunque la respuesta coercitiva proviene de autoridades estatales migratorias, la violencia también puede provenir de la sociedad.[138] De hecho, este tipo de violencia se puede reproducir con apoyo popular.[139] A los tipos de reclamos afectados con la respuesta coercitiva se suma la represión contra PDD que cuestionan gobiernos y políticas estatales. Por ejemplo, la respuesta coercitiva está presente en aquellos países en los que el poder ejecutivo ha aumentado su poder.

V. LAS IMPLICACIONES DE LA VIOLENCIA EN LOS COMPONENTES DE LAS DEMANDAS DE LAS PDD

1. La Afectación de la Integralidad, Intensidad y Dinamicidad de las Demandas de las PDD

Los anteriores tres mecanismos de violencia tienen implicaciones en los componentes de las demandas de las PDD. Estas implicaciones pueden ser trazadas con la ley de las oscilaciones de Walter Benjamin. Mientras que la explicación tradicional sugiere un movimiento hacia una mayor

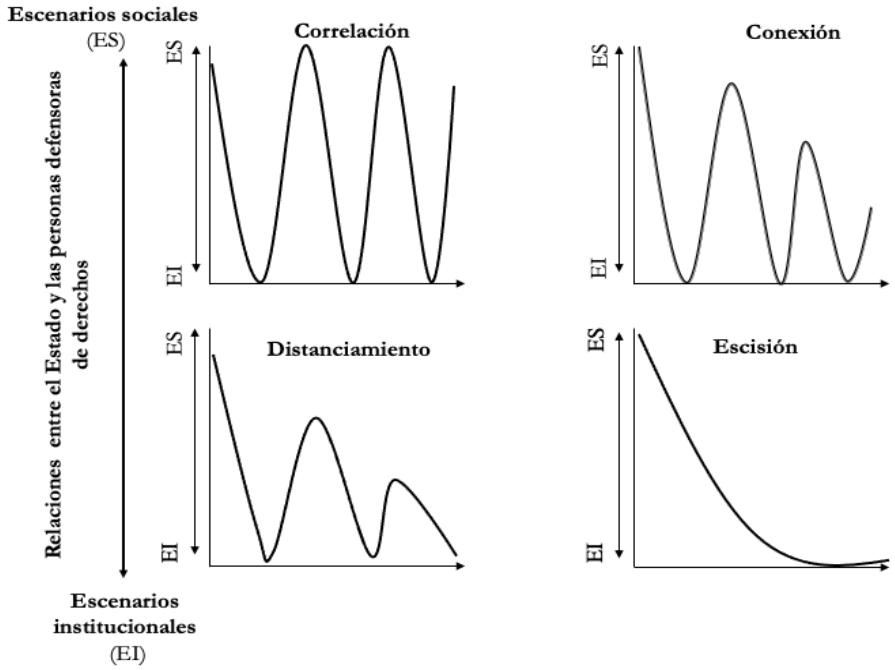
[137] Ben Smoke, 'The Stansted 15's Quashed Conviction Shows We Were Never Terrorists' *The Guardian* (February 2021) <https://www.theguardian.com/commentisfree/2021/feb/02/stansted-15-quashed-conviction-terrorists-deportation-hostile-environment>.

[138] Rita Laura Segato, *Las Estructuras Elementales de La Violencia. Ensayos Sobre Género Entre La Antropología, El Psicoanálisis y Los Derechos Humanos.* (Universidad Nacional de Quilmes 2003), 105–117.

[139] Roberto Briceño-León, *Sociología de La Violencia En América Latina* (FLACSO 2007), 149.

institucionalización de las demandas de las PDD en espacios democráticos y del derecho, la Figura 2.1 revela una descripción más compleja. Esta figura brinda un panorama más amplio para analizar las acciones de las PDD y otros escenarios que son afectados por la violencia.

A. *Figura 1. Efectos que trazan los reclamos de las personas defensoras de derechos humanos.*[140]



De un lado, como muestra el eje vertical del plano, la labor de los activistas se representa en escenarios sociales e institucionales. El escenario social (ES) incluye acciones llevadas autónomamente por la sociedad civil. Este está representado por procesos comunitarios autónomos para la defensa de los derechos. En estos casos es permitido y posible a los ciudadanos expresar su voz, asociarse y vetar las decisiones que los afectan. El escenario institucional (EI) involucra instituciones facultadas por la decisión libre de los ciudadanos. Se confía en que las acciones desarrolladas por las instituciones corresponden al interés público y los derechos humanos.

[140] Elaboración propia

La relación entre los dos escenarios crea cuatro supuestos de hecho. Primero, el movimiento oscilatorio continuo o el escenario de correlación. En este las demandas de las PDD son respaldadas en procedimientos transparentes y públicos. Asimismo, estos procedimientos garantizan una respuesta adecuada y sin violencia. Esta categoría implica que la democracia y el derecho son horizontes en construcción. En términos prácticos, la alternancia de valores, fines y reglas en el derecho es permanente. En el movimiento oscilatorio amortiguado o el escenario de conexión, las instituciones son receptivas a los reclamos de las PDD. Sin embargo, al incluir la delegación del poder, crea el riesgo que se antepongan intereses de grupos poderosos. En este escenario, la voz y el veto de las PDD son funcionales pero restringidos a derechos y procedimientos señalados en reglas.

El tercero, el movimiento oscilatorio sobreamortiguado o escenario de distanciamiento, muestra los efectos de la violencia contra PDD. El espacio de los asuntos que puede decidir la ciudadanía se limita. Existen temas sobre los cuales no pueden interferir los ciudadanos como la economía. Los instrumentos legales y canales institucionales cumplen mayoritariamente con fines regulatorios, disminuyendo su capacidad emancipatoria. Finalmente, el movimiento oscilatorio crítico o escenario de escisión muestra una sobre-institucionalización. Las decisiones públicas son cooptadas por el Estado. Las demandas de las PDD solo pueden ser entendidas si son expresados dentro del derecho estatal y los procedimientos democráticos establecidos. Todo lo que existe fuera de estos límites es ilegal o tienen altas probabilidades de ser reprimidos.

Los mecanismos de violencia que se presentaron en la sección 4 ilustran los escenarios de distanciamiento y escisión. Estos sugieren una restricción de los derechos, de los mecanismos de control del poder estatal y de los asuntos que pueden ser debatidos. Sin embargo, las figuras que representan los escenarios de Correlación y Conexión señalan los posibles componentes afectados de las demandas de las PDD.

La violencia restringe tres componentes de las demandas de las PDD: integralidad, intensidad y dinamicidad. La integralidad se refiere a la articulación de las demandas sociales con distintos reclamos y las causas de fondo de la violencia. En términos de Butler, la articulación de un gran conjunto de demandas sociales en torno a la lucha contra la desigualdad.[141] La investigación empírica ha determinado que la mayoría de protestas contra las desigualdades no se enmarcaron en términos de derechos humanos sino de justicia económica o democracia.[142] En consecuencia, la violencia no solo impacta la capacidad de las herramientas institucionales, también puede afectar la percepción del logro de determinados reclamos. En este sentido, la concepción de las demandas de las PDD es distorsionada en sus objetivos y tácticas. La utilización de una amplia gama de reclamos es restringida a los derechos formalmente reconocidos. Al mismo tiempo, la ciudadanía cognitivamente estima que ciertos problemas no pueden ser enmarcados en el derecho oficial. Como lo plantea Foucault, la preponderancia del principio de racionalidad basado en el Estado y el cálculo de la economía por fuera del poder de la sociedad menoscaba otras esferas políticas.[143]

La intensidad es la capacidad de las estrategias de las PDD para producir transformaciones. Mientras que la violencia estructural implica demandas de PDD más ambiciosas y grandes recursos, las violencias específicas exigen demandas restringidas, menos costosas y realizables en el mediano plazo. Entre el 2006 y el 2013, el 63% de las protestas en el mundo no lograron ninguno de sus objetivos. Estos objetivos se relacionaban con temas estructurales.[144] Esta realidad visibiliza la violencia que conserva el derecho

[141] Judith Butler, 'So. What Are the Demands? And Where Do They Go From Here?' [2012] Tidal 8.

[142] Sara Burke, 'Qué Nos Dice Una Era de Protestas Globales Sobre La Efectividad de Los Derechos Humanos Como Lenguaje Para Lograr El Cambio Social' (2014) 11 Sur.International Journal of Human Rights 27, 27–32.

[143] Michel Foucault, 'Governmentality' in Peter Miller Graham Burshell, Colin Gordon (ed), *Foucault Effect. Studies in Governmentality* (University of Chicago Press 1991).

[144] Isabel Ortiz and others, 'World Protests 2006-2013' (2014) 6–12.

que impide reconocer demandas de derechos para la eliminación de las causas estructurales de la violencia. También plantea un reto sobre la idoneidad de los mecanismos legales tradicionales y los procedimientos formales de la democracia para alcanzar los objetivos de las PDD. Hardt y Negri[145] explican que las luchas pueden ganar intensidad si apuntan la atención a visiones alternativas, significados locales y las competencias por los significados de la democracia y los derechos.[146] Estos se caracterizan por ser más ruidosos, descentrados, desordenados y dinámicos. Ejemplos de ello son conciertos, obras de teatro, expresiones artísticas, entre otras. Adicionalmente, Iris Marion Young propone una importante herramienta para lograr estos fines: la narrativa.[147] Esta es útil en el proceso de diálogo y deliberación. A través de esta se transmiten las experiencias de vida e injusticia a las otras personas. Igualmente, a través del lenguaje cotidiano se posicionan las injusticias del ámbito privado en el escenario de discusión colectiva. [148]

El tercer componente, la dinamicidad, es considerada como la confrontación y transformación de la agenda de las PDD. Independiente de la capacidad de los derechos y los recursos utilizados, las PDD se enfrentan al reto de renovar los logros conseguidos en el pasado. La consagración de los derechos puede crear un proceso de normalización o confianza que impide elaborar un catálogo más amplio de los derechos.[149] Las consecuencias son notorias cuando las tradiciones legales no son transformadas. Berman ha explicado que la ausencia de transformación del derecho puede ser la crisis revolucionaria más grande de cualquier momento de la historia.[150] Estos

[145] Michael Hardt and Antonio Negri, *Imperio* (Harvard University Press 2000).

[146] Julia Paley, 'Toward an Anthropology of Democracy' [2002] Annual Review of Anthropology 469.

[147] Iris Marion Young, 'La Democracia y "El Otro": Más Allá de La Democracia Deliberativa' [2000] Revista Jurídica Universidad de Palermo 41, 53.

[148] Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' [1990] Social Text 56, 75.

[149] Bruce Ackerman, *The Civil Rights Revolution, We the People*, vol 3 (Harvard University Press 2014) 7.

[150] Harold J Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Harvard University Press 1983).

muestran la necesidad de vincular las demandas de las PDD con los procesos de democratización y creación del derecho. En este sentido, nuevas medidas son necesarias para comprender los procesos de democratización. Una propuesta útil es la de Charles Tilly. Tilly incorpora como variables de la democracia: la existencia de movimientos sociales, repertorios, interacciones entre los movimientos sociales y la internacionalización de los reclamos.[151]

VI. Conclusiones

La violencia contra PDD actúa para prevenir, encauzar, obstaculizar, desincentivar y eliminar procesos de movilización de los derechos humanos que amenazan intereses de grupos dominantes aporta varios conocimientos. Primero, aunque la violencia directa contra PDD se reducen en Estados que se acercan al ideal de la democracia, esta violencia no desaparece con la democratización y la existencia de normas de protección de los derechos. Esto se refleja en realidades que muestran la convivencia entre violencia, derecho y procedimientos democráticos: las normas que permiten la represión preventiva, la ineficacia perseguida o manipulación de las normas, la ocupación de escenarios estatales de creación del derecho por grupos poderosos y temas vedados para la sociedad.

El artículo permite también identificar múltiples mecanismos de violencia: 1) control o eliminación legítima, 2) encauzamiento y 3) respuesta coercitiva. La evidencia sugiere coincidencias frente a los mecanismos de la violencia contra las PDD. Las coincidencias de los mecanismos evidencian: poderes discrecionales de utilización de violencia basados en la creencia de legitimidad del derecho, la preferencia hacia intereses de grupos poderosos y regulaciones estrechas o políticas ineficaces de los derechos. No obstante, esta realidad requiere aproximaciones teóricas y empíricas más profundas que

[151] Charles Tilly, *Los Movimientos Sociales, 1768-2008. Desde Sus Orígenes Hasta Facebook* (Crítica 2009) 248–55.

analicen los mecanismos de violencia en procesos específicos de movilización de los derechos que se oponen a intereses de grupos poderosos. Igualmente, en próximas investigaciones es necesario considerar ejemplos en los que las autoridades estatales y las PDD lograron resistir a la violencia contra las PDD. Específicamente, sería conveniente analizar cómo lograron derogar leyes o responsabilizar a los responsables de la violencia contra las PDD.

Asimismo, aunque este estudio utilizara tres mecanismos de violencia contra PDD en 20 países, estos mecanismos podrían desagregarse para una identificación específica de acciones y omisiones que producen esta violencia, lo que permitiría identificar las acciones y omisiones más utilizadas. Large N-Studies (estudios que involucren más de 20 países) en países con características democráticas comunes podrían encontrar patrones de violencia contra las PDD y validar la confiabilidad de los tres mecanismos de violencia. Futuras investigaciones podrían utilizar otras dimensiones para medir la violencia contra PDD. Por ejemplo, la violación de derechos civiles y políticos (incluso la violación de derechos económicos), los obstáculos para participar en la creación de derecho, la ausencia de mecanismos institucionales o legales para vetar decisiones (oportunidades políticas y legales) y la creación de impunidad o la ausencia de herramientas para exigir rendición de cuentas o imponer castigos.

Finalmente, los mecanismos de violencia también permiten considerar los efectos de los mecanismos de violencia en los componentes de las demandas y procesos de movilización de los activistas. Este análisis fue guiado con la ley de las oscilaciones de Benjamin. Esta ley me permitió cumplir dos propósitos. De un lado, pude trazar la incorporación de las demandas de las PDD en el derecho cuando está presente la violencia. De otro lado, me permitió resaltar la existencia de un escenario social que también es afectado por la violencia. Este escenario está conformado por espacios sociales (procesos comunitarios y organización social) para la defensa de los derechos o la creación de demandas de las PDD. Específicamente, en contraposición con los patrones históricos de creación de los derechos, la violencia intrínseca

en el derecho y la práctica de los procesos democráticos representa la defensa de los derechos que se expresa fuera de ámbitos "reconocidos" como "anormal", "disfuncional", simplemente "social" o "ilegítima".[152] En este sentido, futuras investigaciones podrían explorar cómo la sociedad acepta, condona o participa de las prácticas de la violencia. Algunos hechos que sustentan esta información es la disminución de la tolerancia a minorías[153] y el posicionamiento de ideas autoritarias en la sociedad.[154] Las siguientes preguntas podrían guiar el análisis en el futuro: ¿cómo afianza la ley los estándares hegemónicos en torno a los derechos humanos y el activismo? ¿Cómo se configura la perspectiva de la sociedad civil por estas normas jurídicas?.

Además, al detallar los componentes de integralidad, intensidad y dinamicidad de las demandas de las PDD, analicé cómo pueden ser afectados por los mecanismos de la violencia contra las PDD. Como afectación a la integralidad, el derecho dificulta que determinadas violencias no puedan ser enmarcadas en derechos formalmente reconocidos o vinculados a otros derechos. La violencia también restringe la intensidad de las estrategias utilizadas para la defensa de los derechos. En este caso, las demandas de las PDD solo son consideradas válidas si se tramitan por procedimientos legales. Respecto a la dinamicidad, la consagración de los derechos puede crear un proceso de normalización o confianza que impide reclamar un catálogo más amplio de los derechos. Sin embargo, los estudios futuros deberían especificar las limitaciones, posibilidades y transformaciones de las demandas y estrategias de las PDD frente a la resistencia de los mecanismos de violencia presentes en el derecho y la democracia. Futuras investigaciones deberían considerar las causas de una menor legalización de ciertos reclamos de PDD

[152] Balakrishnan Rajagopal, *El Derecho Internacional Desde Abajo. El Desarrollo, Los Movimientos Sociales y La Resistencia Del Tercer Mundo* (Ilsa 2005) 199.

[153] Ronald Inglehart, 'The Danger of Deconsolidation. How Much Should We Worry?' (2016) 27 Journal of Democracy 18, 21.

[154] Roberto Stefan Foa and Yascha Mounk, 'The Signs of Deconsolidation' (2017) 28 Journal of Democracy 5; Roberto Stefan Foa and Yascha Mounk, 'The Democratic Disconnect' (2016) 27 Journal of Democracy 5.

o los reclamos de activistas que implican un mayor riesgo para su vida. Aunque en mi análisis identifico algunos reclamos (económicos, políticos, culturas), un debate más profundo sobre la inclusión de reclamos que son prohibidos o que son más reprimidos es necesario.

SPECIAL SECTION: LEGAL IMAGINARIES

EDITORIAL

THINKING THE UNTHINKABLE: BEYOND INTERNATIONAL LAW'S IMAGINARIES?

Gail Lythgoe*

Every discipline is composed of a set of restrictions on the imagination.[1] The very notion of a legal discipline, with its codes and perimeters, avoids, forbids, and represses the use of other conceptual apparatuses, vocabularies, and styles. It is inherent to the idea of discipline – to train oneself and others to obey, contribute to, follow, to fit in to an ever-unfolding and therefore ever-reinforcing orthodoxy. Shared imaginaries are often a key element that distinguishes one discipline from another.

As a result, multiple phenomena, because of limited conceptual apparatuses, vocabularies, and styles, remain invisible to international legal thought. For instance, the limited spatial imaginary of international law tends to direct inquiries towards questions such as: 'are borders still relevant?'; 'if global governance processes no longer rely on a legal geography centered around state territories, are states declining in significance?'[2]; 'is international law, a state-territorial order, being displaced?' or 'if the legal order is no longer

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1 Hayden White, *Tropics of Discourse: essays in cultural criticism* (Johns Hopkins University Press 1985) pp. 126-127. See also Jean d'Aspremont, "Critical Histories of International Law and the Repression of Disciplinary Imagination" (2019) 7 London Review of International Law 89.

2 Saskia Sassen, 'The State and Economic Globalization: Any Implications for International Law What's Wrong with International Law Scholarship' (2000) 1 Chicago Journal of International Law 109, 109.

territorially ordered, what is the new ordering principle?'. It is easy to find evidence of such inquiries in international law scholarship.[3] That is not to say these inquiries are wrong or have no use, just that sticking to dominant imaginaries of international law inevitably shapes and limits the questions we ask and prevents us from accounting for different dynamics, such as, I argue elsewhere, reterritorialisation(s).[4]

The group of essays in this special issue stems from an Emerging Voices workshop 'Thinking the Unthinkable: Beyond International Law's Imaginaries' organised by the Women in International Law Network (WILNET) in Manchester in April 2022 in collaboration with colleagues at the TMC Asser Instituut and Koç University.[5] With this event, our aim was

[3] Oscar Schachter, 'The Decline of the Nation-State and Its Implications for International Law' (1997) 36 Columbia Journal of Transnational Law 7, 7; Heike Krieger and Georg Nolte, 'The International Rule of Law: Rise or Decline? – Points of Departure', *KFG Working Paper Series, No. 1. October 2016* (2016) <https://ssrn.com/abstract=2866940> accessed 21 February 2017; Cedric Ryngaert and Mark Zoetekouw, 'The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2523354 <https://papers.ssrn.com/abstract=2523354> accessed 5 March 2020; Daniel Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' (2014) 25 European Journal of International Law 9; David S Koller, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law: A Reply to Daniel Bethlehem' (2014) 25 European Journal of International Law 25; Ian R Douglas, 'Globalisation and the End of the State?' (1997) 2 New Political Economy 165; Roman Kwiecień, 'Does the State Still Matter? Sovereignty, Legitimacy and International Law' [2012] Polish Yearbook of International Law 45; Barry Buzan and Richard Little, 'Beyond Westphalia? Capitalism after the "Fall"' (1999) 25 Review of International Studies 89; '"Spaces beyond Sovereignty: International Law Outside of Territorial Jurisdiction" 28th Annual SLS/BIICL Workshop on Theory in International Law' (2019) <https://www.biicl.org/event/1395/28th-annual-slsbiicl-workshop-on-theory-in-international-law> accessed 4 April 2019.

[4] Gail C. Lythgoe, 'Distinct Persons; Distinct Territories: Rethinking the Spaces of International Organizations' *International Organizations Law Review* 19 (2022) 2, 365-390,

[5] Emerging Voices Workshop 2022 https://sites.manchester.ac.uk/wilnet/2022/04/21/emerging-voices-workshop-2022/

to foster a space for woman-identifying scholars at an early career stage to showcase the research they were undertaking to help rethink international legal imaginaries. Scholars used a variety of approaches, including doctrinal, theoretical, critical, empirical, and historical perspectives, and either explored international legal imaginaries, or critically reflected on the very ambition and prospects of going beyond dominant established beliefs, languages, and ways of thinking in international law.

As organisers, we chose to discuss and think about imaginaries because they create the conditions of the possible powerfully opening up or closing off avenues of research and practice. Imaginaries are not just key but constitutive to thinking legally and applying law. In other words, what is even thought of as law that is possible to apply in the various framings already collectively shared by the majority of the discipline, but also key to reframing and rethinking what is potentially possible. But what is more, examining imaginaries requires a closer look at the 'imaginer' – it is more personal, and thus we cannot avoid thinking of our own biases, however these have been accumulated, unlike a focus on theories or methods, which can be much more externalised to the legal thinker.[6] Whereas a theory or a method can also open up or close off avenues of inquiry, they are to a greater extent external to the writer; chosen, often cynically or simply because they suit a research project, and do not sit so close to home. The self is always involved in constituting the imaginaries. Questioning our imaginaries is therefore an effort to be 'more self-conscious of our interpretative constructs'[7] and not always an easy task.

Law is by now widely understood to play a particularly powerful role in constituting our social lives. Law constructs everything from the international 'order' to the family. The foundational imaginaries of law are therefore one avenue of research worth interrogating. One such imaginary

[6] Pierre Schlag, *Laying Down the Law: Mysticism, Fetishism and the American Legal Mind* (New York University Press, 1996), 69.

[7] Ibid, 95.

is that of how law applies and operates: a central assumption of non-lawyers, law students and practicing lawyers alike, is to imagine law as applying to or regulating something. The imaginary here is a mental picture of a relationship of law applying to an object, whether that be oceans, land, people, technologies, natural resources, data, or property. For instance, this past semester, teaching a course on International Law, Technology and Security, the theme that came up most when talking to students was that they wanted to understand 'how law can better regulate AI' or another such technology. This is imagined as a relationship such as:

Law → Object.

A related but different imaginary is that law governs the relationship between a person and their property or a state and their territory. The mental picture sees law as the link between person and object:

Legal Person $\xrightarrow{\text{law}}$ Object.

Both these mental images present a false picture. Law structures social relations. Thus, the imaginary might be better understood as:

Legal Person $\xrightarrow{\text{law}}$ Legal Person.

Law is not in a relationship between it and an object. Nor does law describe the relationship between a person and their house or car, or a state and its natural resources. It is never about law applying to new technologies or the seabed but about regulating rights between legal persons of access, use, etc. Perhaps of an object such as the seabed. Law orders relations between people. This is a basic legal realist insight about law, which for some reason continues to elude the popular imaginaries of law. Legal realists re-interpreted the relationship in the likes of property law not as between the individual and 'their' property but between the particular right-holder and all others, i.e., those against whom the rights can be enforced, those who have duties to the right holder, etc. Property *consists of legal relationships*

between different actors rather than 'ownership of things or relationships between owners and things."[8] Law is entirely relational.

A more useful and productive thinking of law is as creating, sustaining, changing, enforcing, legal relationships. The power of this insight was to undo the perception that law applies passively, neutrally to some object, but structures social hierarchies and exposes the politics of doing law and thinking legally. As such, the foundational imaginary of how we even perceive the application of law has a profound effect.

There are more imaginaries at work, informing the legal imaginary and informed by the legal imaginary. I understand these to be entangled processes, but processes it is possible to trace and 'disentangle'. By this I mean that law is framed by other discourses, and in turn these discourses are co-produced by law. One cannot discuss 'the family', especially in western societies, in ethnographic, anthropological, or sociological works, without also recognising the role of law in constituting ideas about the family and its individual relations. In the same vein, one cannot understand 'the environment', without it being informed by socially produced legally constituted spaces and imaginaries. What is more, our imaginaries are always spatially informed. We are always imagining some object in our minds as above, below, related, at distance, closer, near, inside, outside, connected, disconnected, ruptured or continuous. This means that our legal imaginaries are also always informed by our assumptions about space. As Philippopoulos-Mihalopoulos argues, our understanding of space has been produced by and are mediated by our understanding of law: 'Ideas of space as representation, text, abstraction, system and closure ... all come from a juridical understanding of space. Not only does law understand space in the above ways, but also, this specifically legal way of understanding space affects the

[8] DR Johnson Reflections on the Bundle of Rights' (2007) 32 Vermont Law Review 247, 249.

way other disciplines understand space as well'.[9] Interrogating our imaginaries is key to understanding, unpacking, challenging and rethinking how 'law and space are folded into each other: they are co-emerging, co-constituting and co-evolving'.[10] These two are therefore mutually implicated and therefore a vital part of the process of rethinking law is to rethink our imaginaries of law.

The reason for exploring 'thinking the unthinkable' as part of the workshop, was that sometimes discussing what may at first seem 'impossible' or very much outside the box or discipline, can be productive in exploring the conditions of the already possible as well as finding new avenues to research. Inspired by the idea that 'unlearning vindicates reform and re-imagination,'[11] we also recognised the political nature of either repeating or challenging orthodox imaginaries. We wanted to unsettle orthodox thinking(s) about international law, and include research projects that might present themselves as unconventional. It was therefore, or at least we hoped, an open and reflexive topic.

Inhabiting different spaces and perspectives during this process of rethinking, changes the modalities chosen. As such, rethinking can be conducted while one is working internal to a discipline or external to it. But these are not two points on a map. Perhaps it is more useful to imagine a scale where one is either more fully internal or external to the discipline that is primarily the object of rethinking. Moreover, how we employ and fold two, three, or more disciplines, methods, or theories together in our rethinking can differ greatly. One discipline can be a 'bridge' into another discipline; one method borrowed from one discipline and applied to a second or original discipline can operate as a different lens and focus the gaze on a

[9] Andreas Philippopoulos-Mihalopoulos 'And For Law: Why Space cannot be understood without Law' (2018) 17 Law Culture and the Humanities 620–639, 627.

[10] Ibid, 630.

[11] Jean d'Aspremont, *International Law as a Belief System* (Cambridge University Press 2018), 119.

particular concept or subject, offering a new insight; or one can adopt a 'trans-disciplinary' perspective to more wholly 'transform' an insight, method, concept, or subject. The perspective can be static, or it can constantly shift. For example, one strand of rethinking that is always fruitful is to (re)visit other disciplines and apply critiques, different framings, concepts, and tools that have been developed in the likes of semiotics, Marxist theory, security studies, or sociology. There are some who might argue that transdisciplinary perspectives are the only way to tackle global problems given their complexities. Another strand is to entirely de-centre state-made law and state-legal thinking and instead apply critical insights from the likes of indigenous legal thought or inhabit the perspective of a different actor such as a corporation or a city. Such strategies can all be employed to different extents depending on how radically one embraces the un- and re-learning process. Frequently considered to be the least radical method of rethinking is one which involves utilising the tools, concepts, and theories already present within one's discipline. The choice as to which method to adopt largely depends on the scale of the problem identified and the solution of subjective interest to the researcher in question. It also depends on who as thinkers we are wanting a particular piece of writing to speak to. If our audience is other legal scholars, then employing the same concepts and vocabularies can make this process easier – opting for a vocabulary that is very different can be alienating for some and of no use to others. Where there is a shared disciplinary vocabulary and conceptual framework, the risk of the authors' meaning to get lost or (mis)(re)interpreted decrease. Finally, of course, the author of the rethinking exercise is a determining factor as to the method adopted. Those who were trained first in one discipline before retraining as lawyers, may feel more comfortable swapping between imaginaries and intellectual frameworks. However, this need not always be the case. Many, when 'thinking legally', will find it necessary or even just comforting to think within just one discipline and sometimes the best legal thinkers are those who recognise and regulate their performance of the boundaries between disciplines in terms of

concepts, practices, and vocabulary. It can at times boil down to how lost we want to get, for rethinking fundamentals can be an uncomfortable process, but a necessary discomfort in order to radically challenge and rethink one's imaginary.

What is clear however is that embarking on an exercise of rethinking is a process, not a one-off event, and not necessarily one with an end in sight – beyond the line that we may each need to draw to publish an idea in an article or a book. Moreover, the process of re-imagining is also continuous not only on the level of the individual, but as a systemic whole. We are each always building on already existing re-imaginings. There is solidarity in rethinking, and there is ultimately something inspiring about this thought.

RETHINKING THE PROBLEM OF THIRD-STATE INJURIES IN THE SITUATION OF SELF-DEFENCE: JUSTIFICATIONS AGAINST THE HOST STATE AS FOCUS

Weihang Zhou*

When responding to armed attacks by an aggressor state operating within a third state in self-defence, a victim state may inadvertently violate the rights of that host state, including but not limited to their rights to territorial integrity or to freedom of navigation. How can the victim state justify such infringements under current international law? As a legal concept, self-defence has traditionally been perceived as producing legal effects bilaterally, between the aggressor state and the victim state. To justify the victim state's conduct against the host state within this traditional framework of self-defence, solutions have been put forward in contemporary scholarship, relying either on the host state's involvement with the aggressor state or on its violation of the law of neutrality. An alternative method attempts to revamp self-defence under the law of state responsibility into a multilateral concept, expanding its preclusive effects to cover the host state. However, neither this revised approach nor those devised with the traditional perception of self-defence's legal effects surmount the conceptual and pragmatic challenges. This article suggests yet another way of the resort to countermeasures as a circumstance precluding

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wrongfulness to justify third-state injuries caused by the victim state, which can better resolve the problem in the situation of self-defence.

Keywords: circumstances precluding wrongfulness; countermeasures; self-defence; state responsibility; host states; third states.

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I. INTRODUCTION

In 2019, Israel launched a series of attacks on Iranian military infrastructure.[1] One of these operations involved guided missiles that were fired over Lebanese territory, aiming at the elite Quds Force of the Iranian Revolutionary Guards in Syria.[2] During a United Nations Security Council meeting addressing the situation in the Middle East, Syria and Lebanon lodged complaints against this conduct and urged the organisation to ensure accountability.[3] Israel maintained that it was acting in response to an Iranian 'act of aggression' in the form of an airstrike from Syrian territory.[4] This reaction was labelled by some states in the meeting as Israel exercising its 'inalienable right to self-defence'.[5]

Israel conduct could be recognised as self-defence so long as it satisfies certain procedural and substantive conditions under international law, most important of which are necessity and proportionality.[6] Generally, this legal

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1 Isabel Kershner, 'Israel Confirms Attacks on Iranian Targets in Syria' *The New York Times*, (New York, 20 January 2019) <https://www.nytimes.com/2019/01/20/world/middleeast/israel-attack-syria-iran.html> accessed 1 January 2023.

2 Jonathan Marcus, 'Syria War: Israeli Jets Target Iranian Positions Around Damascus' (*BBC News*, 21 January 2019) <https://www.bbc.co.uk/news/world-middle-east-46941717> accessed 1 January 2023.

3 United Nations Security Council (UNSC), 'Verbatim Record of 8449th Meeting' (22 January 2019) UN Doc. S/PV.8449 30, 32.

4 ibid 8–9.

5 ibid 12, 21.

6 For an overview of self-defence's conditions, see Georg Nolte and Albrecht Randelzhofer, 'Article 51' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary, Volume 2* (3rd edn, Oxford University Press 2012); James A. Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing 2009), 63–109; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004), 141–187; Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th edn, Oxford University Press 1992), 442; Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (World Peace Foundation 1946),

concept of 'self-defence' embodies two qualities. Firstly, it is an 'inherent right' recognised in customary international law and enshrined in the Charter of the United Nations (UNC).[7] Secondly, without prejudice to the UNC,[8] the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) codified by the International Law Commission (ILC) prescribes it as a 'circumstance precluding wrongfulness'.[9] These qualities mean that self-defence creates two different legal consequences ensuing from the conduct. The first is to grant the victim state an inherent right to self-defence. This legitimises use of force by the victim state by way of an exception in the general prohibition of force. The second legal consequence can be seen through exerting preclusive effects on potential breaches, or on potential 'wrongfulness' as ILC put it, occasioned by the victim state's self-defensive conduct. The breaches are usually incidental, including but are not limited to those of the rights to territorial integrity, non-intervention, and freedom of navigation and commerce.[10]

However, even if the claim of self-defence can be vindicated, Israel's conduct may still not be fully justified. To illustrate, self-defence as a legal concept is

177–8; *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Reports 161, paras 76–7; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Reports 14, paras 176, 194.

7 Article 51 of the UNC: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations[.]' The provision is considered the crystallisation of international customary law. See Murray Colin Alder, *The Inherent Right of Self-Defence in International Law* (Springer 2013), 71–90; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (The Lawbook Exchange 2000), 791–2.

8 Article 59 of the ARSIWA: 'These articles are without prejudice to the Charter of the United Nations.'

9 Article 21 of the ARSIWA: 'The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.'

10 See ILC, 'Second Report of the Special Rapporteur, Mr. James Crawford' (1999) UN Doc. A/CN.4/498 and Add.1–4 74–5.

traditionally perceived as producing its legal effects bilaterally, that is only between the aggressor state and the victim state.[11] It is on this basis that, relying on self-defence, Israel is allowed to resort to force against the aggressor state, Iran and its military forces, without being liable for its use of force and most incidental injuries. For a state under armed attacks, though, repelling such attacks extraterritorially through force may put it at risk of breaching obligations owed to multiple states. In the case of Israel's defensive act, third states, such as Syria or Lebanon, have their right to territorial integrity or to freedom of navigation inadvertently impeded. The legal concept of self-defence seems inadequate to justify such potential breaches.

In reality, states nonetheless often invoke self-defence, as the victim states which suffer armed attacks, to rationalise their use of force against aggressor state's forces or materiel located within the borders of a third state.[12] This quintessential 'third state', namely the host state, and the potential injuries caused to them by the victim state's exercise of self-defence, garner most attention in the practice and literature. This article thus analyses the avenues utilised to justify these third-state injuries, concentrating on the host state. Although the exposition might be relevant for other third states, like Lebanon in the earlier example, they will not be further discussed.

There are of course debates over whether the practice of allowing the incidental infringements on the host state is widespread and consistent

[11] As Cassese observes, resort to force in self-defence has been traditionally regarded 'to be exclusively directed to repel the armed attack of the aggressor state'. Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 European Journal of International Law 5, 995.

[12] See *e.g.*, Charles Michel, Ursula von der Leyen and Volodymyr Zelenskyy, 'Joint Statement Following the 24th EU-Ukraine Summit' (2023) <https://www.president.gov.ua/en/news/spilna-zayava-za-pidsumkami-24-go-samitu-ukrayina-yes-80765> accessed 5 February 2023; John Kirby, 'Statement by the Department of Defense' (2021) <https://www.defense.gov/News/Releases/Release/Article/2672875/statement-by-the-department-of-defense/> accessed 5 February 2023.

enough to shape customary international law.[13] At any rate, academic discourse has already taken a step forward to shore up the legal footings in that direction. Most arguments are built on the host state's involvement with the aggressor state[14]or its violation of the law of neutrality.[15] With a bilateralist perspective of self-defence's legal effects, these approaches are beset with issues. Efforts have thus been made to reconstruct the legal concept of self-defence under the law of state responsibility.[16] According to this revised understanding, self-defence can generate preclusive effects multilaterally, meaning that they operate not only within the aggressor-victim pairing, but also within the legal relationship between the victim state and the host state to preclude the wrongfulness.[17] Therefore, self-defence is enabled to exonerate the victim state from inadvertently infringing upon the rights of the host state, which is a third state instead of the aggressor state.[18]

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[13] See *e.g.*, Wee Yen Jean, 'The Use of Force against Non-State Actors: Justifying and Delimiting the Exercise of the Right of Self-Defense' (2019) 9 Singapore Law Review 1, 6–7; Gregory Travalio, 'Terrorism, International Law, and the Use of Military Force' (2000) 18 Wisconsin International Journal of Law 1, 171–2; UNSC, 'Consideration by Security Council' (9–14 July 1976) UNYB 316, 319.

[14] See Erika de Wet, 'The Invocation of the Right to Self-Defence in Response to Armed Attacks Conducted by Armed Groups: Implications for Attribution' (2019) 32 Leiden Journal of International Law 91, 103–4; Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28 European Journal of International Law 563, 579–85.

[15] See Markus Krajewski, 'Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen – Der 11. September und seine Folgen' (2022) 40 Archiv des Völkerrechts 183, 203.

[16] See Nicholas Tsagourias, 'Self-Defence against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule' (2016) 29 Leiden Journal of International Law 801, 804; Federica Paddeu, 'Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence' (2017) 30 Leiden Journal of International Law 93, 144–5. These articles are grappling with self-defence against non-state actors, but their arguments are largely rooted in and therefore compatible with inter-state self-defence.

[17] Tsagourias (n 16); Paddeu (n 16).

[18] Tsagourias (n 16); Paddeu (n 16).

As will be explicated later, this creative version of self-defence can hardly survive scrutiny from conceptual and pragmatical angles.[19]

To resolve the problem of third-state injuries arising from self-defence, an alternative solution might be needed. To achieve that goal, this paper is arranged as follows: Section II investigates the approaches to this problem proposed with the traditional view of self-defence's legal effects as bilateral and their shortcomings. Section III turns to an anatomy of the revised understanding of self-defence's preclusive effects in a multilateral way, providing a critical review of this revamp's validity. Building on that analysis, Section IV goes on to contemplate an alternative solution. By rethinking self-defence in the context of the law of state responsibility, this paper ultimately concludes that, rather than changing the approach to the preclusive effects of self-defence from bilateral to multilateral, this third-state problem in the situation of self-defence can be better tackled by considering countermeasures as a circumstance precluding wrongfulness.

Before delving deeper into the examination, an important caveat must be acknowledged. This paper confines its study of self-defence to the inter-state level. It zeroes in on the host-state problem, as manifested in the case described above, arising from a situation where the host state's territory was used by a group of individuals to launch armed attacks, which are identified with another state instead of the host state.[20] In no way does this suggest that the academic discourse about unattributable armed attacks emanating from

[19] See Section III.3.

[20] Given the focus of the problem on *third*-state injuries, it is assumed here that the group's behaviour cannot be ascribed to the host state and instead, is 'effectively controlled' by and hence imputable to the aggressor state. This test of attribution is reckoned to be strongly espoused by the ICJ. See *Nicaragua Case* (n 6) para 195; Kowalski Michał, 'Armed Attack, Non-State Actors and a Quest for the Attribution Standard' (2010) 30 Polish Yearbook of International Law 101, 113–8.

non-state actors in a third state is insignificant.[21] Quite the contrary, they influence the intellectual landscape profoundly, whose legal reasonings are drawn on as a useful reference.[22]

II. Tackling the Problem of Third-State Injuries with the Traditional Perception of Self-Defence's Legal Effects as Bilateral

As stated in the introduction to this article, legal effects of self-defence are traditionally seen as having bilateral effects. In other words, self-defence only operates between the victim state and the aggressor state and cannot cover any third state. While scholars have sought to legitimise the potential infringements on the host state's rights by conducts of self-defence through justifications based on the host state's involvement[23] or its violation of the law of neutrality,[24] these methods suffer from certain shortcomings within the bilateral bounds of self-defence.

1. Involvement of the Host State

States often proffer the explanation that a host state has been involved in the aggressor state's armed attack to support the use of the self-defensive

[21] There are heated debates about this topic especially post-9/11. See Christian J. Tams, 'Self-Defence against Non-State Actors: Making Sense of the "Armed Attack" Requirement' in Mary Ellen O'Connell, Christian J. Tams and Dire Tladi (eds) *Self-Defence against Non-State Actors* (Cambridge University Press 2019); Kimberley Trapp, 'Can Non-State Actors Mount an Armed Attack?' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015); Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press 2010).

[22] In this regard, this paper sometimes directly applies legal reasonings extracted therefrom to illustrating the third-state problem among states. Despite similarities, it should be borne in mind that non-state actors have rights and obligations different from states in international law.

[23] de Wet (n 14) 103; Lanovoy (n 14) 584.

[24] Krajewski (n 15).

measures on its territory.[25] This invites a wide range of rationales grounded in the 'unwilling and unable' doctrine, the 'due diligence' principle,[26] or the rules on complicity,[27] to name but a few. Although these narratives may vary, the host state is mainly expected to have failed to uphold some obligation. The issue is, however, that the host state's breach of such an obligation does not cause it to forfeit its rights to territorial integrity or not to be interfered with.

For instance, it is argued that by virtue of the rules of complicity, the self-defensive force targeting an aggressor state within a host state's domain will not infringe on the latter state's rights, since it is complicit in armed attacks unfolding in its territory.[28] Yet, the violation here is that of the obligation not to aid or assist in the wrongful conduct of the aggressor state. To put it another way, the host state is only liable for this supportive behaviour, which is a separate wrongful act from the principal's wrongful act.[29] When a failure to fulfil this obligation not to facilitate, aid or assist in a wrongful act leads to state responsibility, the legal consequences for the host state can only be the cessation of its aid or assistance and reparation.[30] It will not become accountable for the armed attack orchestrated by the principal actors,[31] nor will this complicit conduct warrant the conduct of self-defence from the

[25] 'Joint Statement' (n 12); 'Statement by the Department of Defense' (n 12).

[26] See, *e.g.*, de Wet (n 14).

[27] See, *e.g.*, Lanovoy (n 14).

[28] Christian J. Tams, 'The Use of Force against Terrorists' (2009) 20 European Journal of International Law 373, 385.

[29] ILC, 'Report of the International Law Commission on the Work of Its Fifty-Third Session' (2001) UN Doc. A/56/10 66.

[30] Helmut Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) 85.

[31] Nico Schrijver, 'Regarding Complicity in the Law of International Responsibility from Bernhard Graefrath' (2015) 48 Belgian Review of International Law 444, 445.

victim state, for instance, intruding on the rights to territorial integrity or non-intervention of the host state.[32]

In a similar vein, 'unwilling or unable' doctrines and the 'due diligence' principle are premised on the host state's 'obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[33] Not fulfilling this obligation may render the host state responsible to cease its inaction and make reparation. It would not result in the host state's rights to territorial integrity or non-intervention being foreclosed.

Some authors, upon contemplating the legal conception of self-defence from the aspect of the customary condition of necessity in self-defence, alternatively construe the non-compliance with such obligations[34] from the host state as a metric of measurement of necessity.[35] The use of force in self-defence would be necessary if the host state does not undertake due diligence or is unwilling or unable to conform with the obligation by handling the threat of the aggressor state within its territory. Despite being plausible, this reinterpretation only explains the reason why the victim state is able to rely on self-defence against the aggressor state or its military forces. The potential injuries to the host state cannot be justified since the legal concept of self-defence only delivers its service bilaterally from the victim state to the initial wrongful state that mounts the armed attacks, not to the host state as well.

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[32] Kimberley Trapp, 'The Use of Force against Terrorists: A Reply to Christian J. Tams' (2009) 20 European Journal of International Law 1049, 1051.

[33] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (Merits) [1949] ICJ Reports 4, 22.

[34] ibid.

[35] Raphaël van Steenberghe, 'Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?' (2010) 23 Leiden Journal of International Law 183, 207.

2. Violation of the Law of Neutrality

It is proposed by other authors that for justifying potential injuries to the host state's rights, the law of neutrality should be taken into account.[36] This corpus of law sets out that a neutral state enjoys certain rights in wartime. Simultaneously, however, certain duties are imposed on them, such as the duty of non-participation.[37] If a neutral state breaches that duty by supporting a belligerent to the level of 'constitutes an illegal armed attack', then it must tolerate encroachment from another belligerent to use force on its territory.[38] As self-defence may be viewed as the use of force between the victim state and the aggressor state, the host state might as well be a neutral state to their armed conflict, whose behaviour should be governed by the law of neutrality.[39] In this case, the host state's contribution to the aggressor state's armed attacks must in itself constitute 'an illegal armed attack' for the victim state to resort to the use of force against it. Due to the high threshold of imputing the aggressor state's armed attacks to the host state, it is almost as difficult to meet as that of validating a claim of self-defence against the host state individually,[40] and thus cannot effectively resolve the problem of third-state injuries.

III. Tackling the problem of Third-state Injuries with the Revised Perception of Self-Defence's Preclusive Effects as Multilateral

As traditional imagination restricts the capability of the methods above in dealing with the problem of third-state injuries, re-imagination may be

[36] Krajewski (n 15).
[37] ibid 614.
[38] ibid 611.
[39] Michael Bothe, 'The Law of Neutrality' in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (4th edn, Oxford University Press 2021), 602.
[40] It returns the exposition to examining the test of attribution, which would lead to the conclusion that the conduct is not imputable to the host state as assumed in this paper.

required. To put it differently, the preclusive effects stemming from the ARSIWA can become multilateral. This would mean that self-defence can preclude wrongfulness of certain violations on the host state's rights when the self-defensive conduct is taken in conformity with the UNC. By doing so, the injuries inflicted on the host state in the course of self-defence against the aggressor state can be legitimised. Proponents bolster this argument in two steps: first, by cataloguing the legal effects of self-defence in terms of the obligations owed to the aggressor state which a self-defensive conduct may contravene, and second, by widening the scope of the preclusive effects of self-defence to operate between the victim state and the host state as well.

1. Legal Effects against the Aggressor State: The Obligations Categorised

The legal effects of self-defence are split into different facets in the legal relationship between the aggressor state and the victim state by the ILC.[41] The legal effects of self-defence, specifically in relation to the obligation deriving from the rules on the use of force, are entirely subject to the UNC and customary international law. If a victim state employs forcible measures in self-defence accordingly, there will be no latent breach of the obligation not to use force *ab initio*.[42] At the same time, other obligations, such as the protection of the aggressor state's territorial integrity and freedom of navigation, may be encroached upon in an accidental way during the self-defensive conduct,[43] and yet the potential breaches thereof are precluded by virtue of the law of state responsibility.[44]

Still, there are obligations that states must abide by regardless of whether they are undertaking self-defence or not, namely the obligations that are 'expressed or intended to apply as a definitive constraint even to States in armed conflict'.[45] These include the obligations of *jus in bello*, particularly

[41] UN Doc. A/56/10 66 (n 29) 74–5.
[42] ibid.
[43] UN Doc. A/CN.4/498 (n 10) 74–5.
[44] UN Doc. A/56/10 66 (n 29) 74.
[45] ibid 74–5.

those under international humanitarian law, and the protection of non-derogable human rights.[46] These obligations, being of an absolute nature are often identified as the obligations *erga omnes*.[47] It is crucial to acknowledge that the victim state is prohibited from violating these obligations owed to third states too, but these obligations will not be factored into our analysis of the third-state problem here since their non-derogable characteristic is definite.

2. Preclusive Effects against the Third States: The Scope Broadened

The previous fragmentation of self-defence's legal effects appears to have been presented bilaterally.[48] The ILC's attitude towards bilateralism might not be that lucid on the level of the law of state responsibility, as an intriguing shift during the drafting stages of the ARSIWA appears to suggest.

In the first reading of the draft articles, it was expressed by members of the ILC that allowing self-defence to be used against third states 'could certainly not have been the intention of the drafter' and 'the neutrality of a third State must in principle be respected'.[49] The commentary also exhibited the prevalent stance that 'the interests of a third State […] *must obviously be fully protected*'.[50]

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[46] ibid.

[47] See *e.g.*, Marco Longobardo, 'The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding *Obligations Erga Omnes* and *Erga Omnes Partes*' (2018) 23 Journal of Conflict and Security Law 383, 391–9; Yoram Dinstein, 'The Erga Omnes Applicability of Human Rights' (1992) 30 Archiv Des Völkerrechts 16, 16–21.

[48] In the commentary, it is underscored that 'the principal effect' of self-defence 'is to preclude the wrongfulness of conduct of a State in self-defence *vis-à-vis the attacking State*'. (n 29) 75 (emphasis added).

[49] ILC, 'Summary Record of the 1620th Meeting' (1980) UN Doc. A/CN.4/SR.1620 189.

[50] ILC, 'Report of the International Law Commission on the Work of Its Thirty-Second Session' (1980) UN Doc. A/35/10 61 (emphasis added).

The wording of this provision was adjusted ahead of the second reading. According to the ILC, a victim state during self-defence against an aggressor state 'might be entitled to take action against third States' as well. Without delving deeper, the opposability of self-defence against third states had been diverted to the realm of 'the relevant primary rules', which was believed sufficiently adequate to cover it, rather than rely on the secondary rules of the law of state responsibility.[51] Later in the commentary, the ILC annotated that the language of this provision '*leaves open all issues* of the effect of action in self-defence vis-à-vis third States'.[52] The ILC has not provided a concrete view on this legal issue. Anchoring themselves to the vagueness surrounding self-defence and third states, some authors contend that there is room reserved for a re-imagination of self-defence. This would mean that self-defence would be open to extension to the host state to preclude the victim state's wrongfulness of incidentally injuring the host state.[53] These scholars draw on the practice of establishing maritime exclusion zones on the high sea.[54] In these instances, states have resorted to self-defence, thereby justifying its intrusion into the navigation freedom of all other states.[55] It has been argued that the rationale for the invocation as such, namely certain 'involvement between the third state and the aggressor', should be adopted to decide whether self-defence's preclusive effects can be expanded or not.[56] Moreover, the level of involvement should coincide with the 'extent to

[51] ILC, 'Summary Record of the 2587th Meeting' (1999) UN Doc. A/CN.4/SR.2587 141.

[52] (n 29) 75 (emphasis added).

[53] Tsagourias, (n 16) 821; Paddeu (n 16) 113.

[54] See Christopher Michaelsen, 'Maritime Exclusion Zones in Times of Armed Conflict at Sea: Legal Controversies Still Unresolved' (2003) 8 Journal of Conflict and Security Law 2, 388; Sandesh Sivakumaran, 'Exclusion Zones in the Law of Armed Conflict at Sea: Evolution in Law and Practice' (2016) 92 International Law Studies 1, 177–81.

[55] For an example, see United Kingdom Parliament, 'Falkland Islands Volume 22: Debated on Wednesday 28 April 1982' (1982) <https://hansard.parliament.uk/Commons/1982-04-28/debates/03f1abe8-1b23-49a6-ab51-dc740649cc5e/FalklandIslands> accessed 5 February 2023.

[56] Paddeu (n 16) 113.

which third state rights are impaired'.[57] In this respect, when the right to territorial integrity is infringed, the standard will be that the host state is actually involved in the armed attack as proved by evidence.[58] Based on this model, a formula for the third-state problem has been recommended. While the use of force against the aggressor state is permitted as per Article 51 of the UNC, the wrongfulness of collateral damages caused by it to the host state is eliminated by self-defence codified in Article 21 of the ARSIWA, whose preclusive effects are envisaged multilaterally.[59]

This revised perception of self-defence's legal effects can mitigate the difficulties encountered by the solutions trapped in the bilateral understanding of self-defence in international law when it comes to the host state. The function of circumstances precluding wrongfulness is designed to absolve states of *prima facie* breaches of the obligations, irrespective of their substantive contents.[60] Furthermore, it sets a flexible threshold for the preclusive effects to stretch to the host state, which is lower than what is demanded in the context of the law of neutrality[61] when it comes to rights to territorial integrity and freedom of navigation.

3. Observational Notes

All said, modifying the preclusive effects of self-defence to encompass the host state as a third state faces challenges from both conceptual and pragmatic standpoints.

To begin with, there is a conceptual lacuna in this re-imagination of self-defence's preclusive effects that might be overlooked in the discussion. The law of state responsibility does not have a say in deciding the legal effects of self-defence concerning the obligation not to use force. In the situation of

[57] ibid.
[58] ibid.
[59] ibid 113–4.
[60] UN Doc. A/56/10 66 (n 29) 71.
[61] See Section II.2.

self-defence against the aggressor state's military forces located within the host state's territory, does the victim state violate this obligation owed to the host state? If so, can self-defence's legal effect in terms of the obligation not to use of force oppose third states too? Neither Article 51 of the UNC nor its commentaries furnish useful clues to these questions.[62] But the possibility remains that certain interpretations of the 'use of force' removes the risk of violation for the victim state. If only when the forcible measures are undertaken with an intent to threaten the host state's territorial integrity or political independence do they constitute the 'use of force' in Article 2(4) of the UNC against that state,[63] then there can be leeway for the victim state to argue that the obligation not to use force is not breached at all. Indeed, it is baked into the legal concept of self-defence that the victim state needs to carry out its self-defensive conduct in a restrictive and temporary manner, for the objective of coercing the aggressor state into halting its armed attacks. The victim state typically emphasises through political announcements that its purpose is to target the group specifically, rather than the host state.[64]

[62] Jean-Marc Thouvenin, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Self-Defence' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010), 464.

[63] Article 2(4) of the UNC: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' For the argument, see Travalio (n 13) 166; Olivier Corten, *The Law Against War* (Bloomsbury Publishing 2011), 85–90. It is also seen as implied in *Nicaragua Case* (n 6) para 231.

[64] For some examples, see Israel, 'Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council' (2006) UN Doc. S/2006/515; Turkey, 'Identical letters dated 20 January 2018 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council' (2018) UN Doc. S/2018/53. There are also opposite claims. For an example, see United States National Security Council, 'The National Security Strategy of the United States of America' (2002) <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss3.html> accessed 1 January 2023: 'We make no distinction between terrorists and those who knowingly harbor or provide aid to them.'

Based on this interpretation, no breach of the obligation not to use force is committed and no justification is needed for the victim state against the host state.

The conceptual doubt over this re-imagination has not been completely dispersed, as it still puts in jeopardy the coherence of the understanding of circumstances precluding wrongfulness. Other defences in this category all explicitly or implicitly define their preclusive effects with a bilateral configuration, exemplified by countermeasures. To elaborate, any countermeasures causing damages to third states, no matter if it is implemented against them or directed at the initial wrongful state, will bring about responsibility for the enforcing state.[65] It is also noteworthy that the conduct of countermeasures can only be non-forcible, which would if allowed, pose less of a threat to third states than a self-defensive conduct involving the use of force. By analogy, it seems disproportionate for self-defence's preclusive effects to yield a wider reach.

From the perspective of practicality, this re-imagination is far from clear about how the flexible the threshold for expanding self-defence's preclusive effects fluctuates in light of diverse obligations the victim state might breach. This re-imagination is advanced with an example of legitimising the potential injuries to the host state's right of territorial integrity when its level of involvement is actual and proved by evidence. It is then natural for us to inquire what the degree of involvement with the aggressor state is that can submit the host state to the infringement of non-interference with political independence in self-defensive conduct. How about the intrusion into freedom of commerce? The list can be infinite. This idea, lacking elaboration from the practice and research, is not yet to mature so far and carries with it the unpredictable legal consequences for states.

[65] UN Doc. A/56/10 66 (n 29) 129–30.

IV. Rethinking the problem of Third-state Injuries in the Situation of Self-Defence: Justifiable via Countermeasures

Regrettably, careful examination of the current solutions to justifying the possible injuries inflicted on the host state reveals a lack of conceptual and practical viability. Taking an outset in the criticism of those solutions provided above, I propose that the legal concept of countermeasures may be a better avenue towards justifying the possible injuries inflicted on the host state in the exercise of self-defence.

Countermeasures, as a legal concept, come from the same pool of norms where self-defence belongs to in the law of state responsibility, entitled 'circumstances precluding wrongfulness'.[66] As pointed out as a merit of the re-imagination of self-defence, the purpose of circumstances precluding wrongfulness absolves states of *prima facie* breaches of the obligations, no matter what their substantive contents are.[67] According to the ARSIWA, countermeasures may be applied to preclude the wrongfulness of a state's potential breach of the obligations owed to another state. However, these countermeasures only apply when the conduct is carried out in response to an internationally wrongful act committed by the other state and is meant to encourage the other state to comply with its obligation.[68]

Now, it should be recalled that for the rationales of the host state's involvement, the main dissatisfaction is a mismatch between the state responsibility generated from the host state's wrongdoing and the outcome that the victim state's self-defence produces.[69] This mismatch will not be an issue if we draw on the legal concept of countermeasures to dissolve the victim state's *prima facie* breaches of most obligations owed to the host state. If the host state is found breaching its obligation not to aid or assist, then the

[66] UN Doc. A/56/10 66 (n 29) 27.
[67] UN Doc. A/56/10 66 (n 29) 71.
[68] ibid 129–30.
[69] See Section III.1.

victim state's potential infringements on its rights to territorial integrity and non-intervention can be rendered as not wrongful by countermeasures.

Needless to say, the implementation of countermeasures is not unbridled. It is submitted to certain procedural and substantive requirements, for instance, that its goal must be inducing the host state's cessation of aid or assistance.[70] These requirements also await a more detailed study of the problem of third-state injuries in the situation of self-defence. Nevertheless, the blank area that needs to be filled is much smaller than that of overhauling the legal concept of self-defence, with a reservoir of well-founded practice and research on countermeasures in international law.

V. Concluding Remarks

The Great Gatsby ends with this: 'So we beat on, boats against the current, borne back ceaselessly into the past.'[71] For tackling the problem of justifying third-state injuries in the situation of self-defence, re-envisioning self-defence in a multilateral way is boating against the current of the mainstream perception of self-defence's legal effects. It pushes the boundaries of that bilateralism which is well established under the law of state responsibility in the direction of the multilateralism, after pinpointing what are flawed in those solutions in the traditional framework. But re-imagination does not always guarantee a success. The revised approach in our case experiences assaults on the fronts of logic and practicalities. Therefore, with the reflection on the drawbacks the previous methods expose, we rethink and fabricate another potential path for this problem built on the traditional framework of self-defence, which is to resort to countermeasures. We are borne back into

[70] UN Doc. A/56/10 66 (n 29) 129–30. For an overview of countermeasures' conditions, see Federica Paddeu, 'Countermeasures' (September 2015) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedias of International Law* (online edn) paras 17–34.

[71] Francis Scott Fitzgerald*, The Great Gatsby* (Scribner 2020), 180.

the traditional perception of self-defence's legal effects, but then we beat on, re-living and transcending the past into the better route.

LEGAL IMAGINARIES

INDIGENOUS PEOPLES IN INTERNATIONAL LAW: RESISTANCE, REFUSAL, REVOLUTION

Armi Beatriz E. Bayot*

Despite advances in the international legal protection of Indigenous peoples, contemporary state-centric international law continues to subordinate Indigenous peoples by denying them sovereignty. International law-making in the area is circumscribed by state sovereignty and state prerogatives, which requires the corresponding silencing of Indigenous peoples. Thus, even as Indigenous peoples assert their goals and aspirations, international legal institutions do not hear them. Examining the development of the Indigenous right to self-determination through the lens of epistemic violence, this article proposes that international law must be fundamentally reimagined if we are to create an equitable international community between Indigenous peoples and states. Such a radical reimagination would involve making space for Indigenous or Fourth World Approaches to International Law.

Keywords: Indigenous peoples' rights; epistemic violence; indigeneity; Fourth World Approaches to International Law; the Fourth World; Third World Approaches to International Law

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I. Introduction

Due in large part to Indigenous peoples' persistent and creative engagement with international legal institutions, the past few decades have seen a rise in various instruments that acknowledge Indigenous peoples' rights and mechanisms that provide for their legal protection.[1] Through these strategic engagements, Indigenous concepts such as spiritual relationships to the land and communal land ownership have made their way to the growing body of international law on Indigenous peoples, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[2] However, it

[1] See for instance, Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002); S James Anaya, *Indigenous Peoples in International Law* (2nd ed., Oxford University Press 2004).

[2] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UNGA Resolution 61/295, UN Doc. A/RES/47/1 (2007), adopted on 13 September 2007. The UNDRIP affirms 'the inherent rights of Indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources' and aims to have these rights recognised in binding legal instruments. While UN declarations are generally not binding, the UNDRIP is arguably the most significant instrument embodying Indigenous peoples' rights, considering its adoption by the overwhelming majority of states at the United Nations General Assembly (as well as its subsequent acceptance by States that voted against its adoption), as well as its widespread use by national and international courts in cases concerning Indigenous peoples' rights. *See for instance* Sylvanus Gbendazhi Barnabas, 'The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law' (2017) 6(2) International Human Rights Law Review 242.

is important to recognise that engagement with international law requires playing by international law's rules, foremost of which is the primacy of the state and its exclusive claim to sovereignty. While Indigenous peoples have been able to make major inroads both in the international legal system and in domestic legal systems, these achievements have been circumscribed by the dominance of states and prevailing conceptions of state sovereignty, which limit the transformative potential of their legal advocacies.

This article argues that international law creates a hierarchical relationship between states and Indigenous peoples, thereby perpetuating colonial logics of subordination even in those projects that are widely perceived to be liberative. Innovations such as the UNDRIP's articulation of Indigenous peoples' right to self-determination, the development of the norm of free, prior, and informed consent (FPIC), and the emergence of legal remedies for the protection of Indigenous land rights are implemented in the context of the state's authority over Indigenous peoples and are, consequently, severely restricted by state prerogatives. Using the framework of epistemic violence as an analytical lens, the article examines the development of Indigenous peoples' right to self-determination to show that the state-centricity of international law limits the redress available to Indigenous peoples by undermining Indigenous sovereignty. The article not only aims to confront the colonial legacies in international law but also seeks to expose the ways in which it rationalises ongoing colonial conditions against Indigenous peoples. Thus, while it is inspired by the political commitments of Third World Approaches to International Law (TWAIL), as well as the insights of scholarship critical of empire more generally, it endeavours to contribute to alternative Fourth World Approaches to International Law[3]

[3] *See for instance* Usha Natarajan, 'Decolonization in Third and Fourth Worlds' in Xavier, S., Jacobs, B., Waboose, V., Hewitt, J.G., & Bhatia, A. (eds), *Decolonizing Law: Indigenous, Third World and Settler Perspectives* (Routledge 2021); Armi Beatriz E Bayot, 'Free, Prior, and Informed Consent in the Philippines: A Fourth World Critique' in Isabel Feichtner, Markus Krajewski and Ricarda Roesch, *Human Rights in the Extractive Industries: Transparency, Participation, Resistance*

that foreground Indigenous peoples independently of colonial/postcolonial states. Employing a Fourth world perspective, this article ends with a challenge to international lawyers: if using international law's own rules against itself does not suffice, how can we reconceptualise international law to facilitate meaningful and equitable international community among states, Indigenous peoples, and other non-state nations?

II. THE EPISTEMIC VIOLENCE OF INTERNATIONAL LAW

The concept of epistemic violence, as employed by Gayatri Chakravorty Spivak in her work in postcolonial studies, operates with two mutually reinforcing notions of 'representation' i.e., political representation (*vertreten*) and re-presentation (*darstellen*, a reimaging, 'staging' or 'framing'). Silencing through epistemic violence is such that even when the subaltern speaks, she is not heard because the prevailing systems of discourse do not recognise her speech as speech, nor the intentions behind the speech.[4] Both notions of representation have been at play against Indigenous peoples through several

(Springer 2019); Hiroshi Fukurai, 'Fourth World Approaches to International Law (FWAIL) and Asia's Indigenous Struggles and Quests for Recognition under International Law' (2018) 5(1) Asian Journal of Law and Society 221; Amar Bhatia, 'The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World' (2012) 14(1) Oregon Review of International Law 131.

[4] Gayatri Chakravorty Spivak, '"Can the Subaltern Speak?"' in Rosalind C Morris (ed), *Can the Subaltern Speak?: Reflections on the History of an Idea* (Columbia University Press 2010); Donna Landry and Gerald Maclean, 'Subaltern Talk: Interview with the Editors', *The Spivak Reader: Selected Works of Gayatri Chakravorty Spivak* (Routledge 1996); *see also* Suzana Milevska, Gayatri Chakravorty Spivak and Mirushe Hodja, 'Resistance That Cannot Be Recognized as Such: Interview with Gayatri Chakravorty Spivak: Rezistenca e Cila Nuk Mund Të Njihet Si e Tillë: Intervistë Me Gayatri Chakravorty Spivak' (2003) 2(2) Identities: Journal for Politics, Gender and Culture 27.

waves of colonial rule around the world, and they continue to colour Indigenous peoples' relations with the international community today.[5]

Indigenous peoples' relations with the state-centred and Eurocentric international legal system are characterised by continuities of epistemic violence that manifest in the form of silencing of persons and peoples, resulting in their being cut off from political, economic, and cultural power.[6] The colonial project relied on the silencing of non-European populations. According to colonisers' account, this was achieved by reimagining non-Europeans as barbaric and uncivilised 'Others,' resulting in confiscatory legal rules built on top of these narratives.[7] Narratives of the primitive native have been utilised to underpin centuries of colonial rule. Francisco de Vitoria thus argued in 1557 that Spain established a government in the New World to act as trustees over uncivilised Indians 'unfit to found or administer a lawful State up to the standard required by human and civil claims."[8] Centuries later, Emer de Vattel would assert that the 'failure' to cultivate land and make it productive not only revealed a moral failure on the part of certain people groups, but also justified the taking of their land by more industrious nations.[9] James Cook similarly asserted in the 1770s that, being uncivilised, the Indigenous peoples of Australia had no form of land tenure or claim to

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[5] *See for instance* Silvel Elias, 'Epistemic Violence against Indigenous Peoples' (*International Work Group for Indigenous Affairs (IWGIA)*, 25 November 2020) <https://www.iwgia.org/en/news/3914-epistemic-violence-against-indigenous-peoples.html#> accessed 4 August 2023.

[6] Spivak (n 4).

[7] *See* Audra Simpson, 'On Ethnographic Refusal: Indigeneity, "Voice" and Colonial Citizenship' (2007) 9 Junctures-the Journal for Thematic Dialogue 67, 69-70.

[8] Francisco de Vitoria *De Indis et De Ivre Belli Relectiones* (Ernest Nys ed, John Pawley Bate tr, Carnegie Institute of Washington 1557/1917) *cited in* Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) Third World Quarterly 739.

[9] Emer de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct of Nations and Sovereigns* (Charles G. Fenwick tr, Carnegie Institution of Washington 1916) *cited in* Antony Anghie, 'Vattel and Colonialism: Some Preliminary Observations' in Vincent Chetail and Peter Haggenmacher (eds), *Vattel's International Law from a XXIst Century Perspective* (Brill | Nijhoff 2011).

land ownership. This paved the way for the application of the doctrine of *terra nullius* or "empty land" in Australia, effectively dispossessing Indigenous peoples of their lands.[10]

Audra Simpson writes that the impact of Cook's account lies not only in establishing difference but also in establishing presence, meaning that it establishes the terms of even being seen.[11] In the colonial encounter, the coloniser established these terms. Antony Anghie refers to these terms as the dynamic of difference between 'civilised' and 'uncivilised' – the animating distinction of imperialism which compels the coloniser to bring the uncivilised to civilisation while also instituting a strict hierarchy between them.[12] The dichotomy between coloniser and the colonised is closely linked with changing frameworks concerning the idea of 'human progress'. Over the centuries, similar dichotomies have been used to categorise peoples as Christians/non-Christians, human/subhuman, progressive/backward, modern/primitive, and civilised/uncivilised, indicating where they could be found in the hierarchies of progress.[13] These categories are at the heart of colonisation's 'civilising mission,' which involved both the imperative to civilise humans and the prerogative to take lands from those whom colonisers deemed unfit to hold them.

Although more sophisticated in its language use, contemporary international law continues to rely on silencing to institute the dynamic of difference between Indigenous peoples and state populations. The international community of states continues to employ *vertreten* and *darstellen* to constrain Indigenous peoples through international law-making. Epistemic violence

[10] Only overturned in 1992 in the Mabo decision, *see Mabo and Others v. Queensland* (No 2) (1992) 175 CLR 1 [*Mabo*].

[11] Simpson, 'On Ethnographic Refusal' (n7) 70.

[12] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) Third World Quarterly 739.

[13] Liliana Obregón Tarazona, 'The Civilized and the Uncivilized' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012).

marks various encounters between Indigenous peoples and international law. Epistemic violence is present in the trusteeship notions that animated Britain's special administrative regimes over the native peoples in its colonies, the Berlin Conference on Africa, and the modern laws that pit Indigenous peoples' ways of life against states' claims over lands, natural resources, and the environment. States have spoken and continue to speak on behalf of Indigenous peoples through the creation of laws and legal instruments that impact on their lives, their lands, and the endurance of their communities. International law's definition of rights in its various instruments limit the content and scope of rights that Indigenous peoples can claim and exercise within the state-centred international legal system, and it bars them from making sovereignty claims over their lands.

III. EPISTEMIC VIOLENCE AND THE FOURTH WORLD

In the face of international law's state-centricity and epistemic violence, several legal scholars have begun to explore Indigenous and Fourth World perspectives to international law. This emerging body of work has come to be known as Fourth World Approaches to International Law (FWAIL).[14] As used in this article, FWAIL are critical approaches to international law that seek to correct its centuries-long framing of Indigenous peoples' identities, geographies, and histories.[15] These approaches are inspired by the advocacy and scholarship produced by the Indigenous peoples, particularly the work produced by the Fourth World Movement. The latter was one among many transnational pan-Indigenous advocacies that mobilized in the 1970s and early 1980s to support the political, economic, and cultural survival of

[14] The use of the term Fourth World Approaches to International Law and the acronym 'FWAIL' appears to have been first used by Fukurai at the Inaugural Asian Law and Society Association (ALSA) Conference in Singapore in 2016 n (1).

[15] Objectives of the Fourth World movement, *see* Bernard Nietschmann, 'The Fourth World: Nations versus States' in George J Demko and William B Wood (eds), *Reordering the World: Geopolitical Perspectives on the Twenty-first Century* (Westview Press 1994).

Indigenous peoples.[16] The Fourth World Movement[17] identified with the anti-colonial sentiments of the then newly decolonised or decolonising Third World. However, the Fourth World's demands were distinct from the Third World's – the movement sought an end to the continued imposition of authority on Indigenous peoples by states, including newly independent states, even after decolonisation. The term 'Fourth World' is often credited to George Manuel's 1974 book, *The Fourth World: An Indian Reality*.[18] The Fourth World can be described not only as a political project against colonialism and imperialism, but also as a particular demographic, as Manuel stated,

> We are the fourth world, a forgotten world, the world of aboriginal peoples locked into independent states but without adequate voice or say in the decisions which affect our lives.[19]

Fourth World scholars[20] have identified several goals shared by Indigenous peoples, which they argue are vital for the continued endurance of Indigenous communities. Among these goals is the continued care of humans' relationship to land and nature. Yvonne P Sherwood argues, for instance, that land is seen by Indigenous peoples not as an abstract concept, but as unique and concrete places that are linked to the unique and concrete

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[16] Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press 2010) 47-66.

[17] George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (University of Minnesota Press 2019).

[18] Manuel and Posluns (n 17); Richard Griggs, 'The Meaning of Nation and State in the Fourth World' (1992) Fourth World Documentation Project, Occasional Paper #18 <http://www.nzdl.org/cgi-bin/library?e=d-00000-00---off-0ipc--00-0----0-10-0---0---0direct-10---4-------0-1l--11-en-50---20-about---00-0-1-00-0--4----0-0-11-10-0utfZz-8-10&cl=CL1.5&d=HASHe0f6e4aaf0d3baeb51a527&x=1> accessed 6 April 2022.

[19] George Manuel, 'Statement to the Mackenzie Valley Pipeline Inquiry, 1969' *This Magazine* 10, no. 3 (1976) 17, *cited in* Manuel and Posluns (n 17) *xii.*

[20] Many scholars continue to write in advancement of the Fourth World Movement's goals and ideals. Both scholars from the Fourth World Movement of the late 20th century and more contemporary scholars who write in support of Fourth World goals are hereinafter referred to as Fourth World scholars.

identities of diverse Indigenous peoples who claim such places as their lands and territories.[21] Other Fourth World scholars write that, for Indigenous peoples, nature is viewed as life-giving resource, which underscores the inseparability of humans and nature and militates against activities that burden and destroy the natural environment.[22] This relationship has been described by Aileen Moreton-Robinson as the ontological basis of Indigenous sovereignty.[23] Indigenous sovereignties[24] are seen in terms of relativity,[25] in the sense that people experience the universe as alive and everything in the natural world as in relationship with every other thing.[26]

While the term 'sovereignty' itself is a non-Indigenous term, the term 'Indigenous sovereignty' has been used within Indigenous political and legal scholarship to encompass several meanings, including people who have never surrendered their lands, as well as opposition to illegal occupation; inherent rights in territories; belonging to a particular Indigenous people; holding tribal citizenship, a political and moral claim to inclusion within

[21] Yvonne P Sherwood, 'Toward, With, and From a Fourth World' (2016) 14(2) Fourth World Journal 15, 17-19.

[22] Sherwood (n 21) 17-21; Manuel and Posluns (n 17) 255-258; Rudolph Carl Ryser and Dina Gilio-Whitaker, 'Fourth World Theory and Methods of Inquiry' in Patrick Ngulube (ed), *The Handbook of Research on Theoretical Perspectives on Indigenous Knowledge Systems in Developing Countries* (IGI Global 2017) 54-55.

[23] Aileen Moreton-Robinson, 'Incommensurable Sovereignties' in Brendan Hokowithu and others (eds), *Routledge Handbook of Critical Indigenous Studies* (Routledge 2020); While Moreton-Robinson is not herself affiliated with the Fourth World movement, her work is cited here as an example of Indigenous scholarship that supports Fourth World scholars' claims.

[24] The plural form is deliberate, as the sovereignties of Indigenous peoples correspond to their diverse, place-based identities, see Sherwood (n 21) 17.

[25] Citing Deloria's definition: "(E)verything in the natural world has relationships with every other thing and the total set of relationships makes up the natural world as we experience it. This concept is simply the relativity concept as applied to a universe that people experience as alive and not as dead or inert." In Vine Deloria Jr, 'Relativity, relatedness, and reality' in Barbara Deloria and others (eds), *Spirit and Reason: The Vine Deloria, Jr., Reader* (Fulcrum 1990); *see also* Ryser and Gilio-Whitaker (n 22) 54-62, 68.

[26] Moreton-Robinson (n 23).

settler colonial states; recognition as first peoples; and treatment as sovereign nations. The common thread among these various conceptions is opposition to the assumption of state sovereignty over Indigenous peoples.[27]

Another key goal identified by Fourth World scholars is an equitable relationship between Indigenous peoples with other nations in the international community.[28] For many Fourth World scholars, Indigenous peoples are not just nations within states, but are also nations within the larger geopolitical processes of today. They exist simultaneously within and beyond the conceptual limits of the state and have existed far beyond and far earlier than the founding of the modern state system. Indeed, for this reason, some Fourth World scholars have rejected the term 'Indigenous' in favour of 'Fourth World nations' to reiterate their difference, while rejecting the implications of backwardness and inherent vulnerability that the notion of indigeneity has come to acquire in the popular imagination.[29] In the Fourth World vision of international community, Indigenous peoplehood is given the same political space to thrive as European nations and even their former colonies. [30]

IV. Resistance and the Limits of Relief within the International Legal Order

The question remains, however, as to how states might be compelled to give this kind of meaningful political space to Indigenous sovereignty. Fourth World scholars speak of negotiating with states for the space to assert their Indigenous nationhood alongside (and not under) states – which assumes the

[27] ibid 258.

[28] Some Fourth World scholars emphasise the unnaturalness of the concept of statehood, and call attention to the importance of cultivating relationships of the Fourth World with other non-state nations, *see* Sherwood (n 21) and Ryser and Gilio-Whitaker (n 22).

[29] Griggs (n 18); Ryser and Gilio-Whitaker (n 22).

[30] Nietschmann (n 15); Manuel and Posluns (n 17) 214-266; Ryser and Gilio-Whitaker (n 22).

existence of effective mechanisms for Indigenous peoples to speak and a willingness and ability on the part of states to listen. Epistemic violence against Indigenous peoples, however, is at play even in the international legal projects that purport to support and uphold their rights. The experience of Indigenous peoples in their efforts to claim a political right to self-determination under international law illustrates the limits to what can be achieved within the international legal order.

In 1960, the UNGA Resolution 1514 (XV) on the Declaration on the Granting of Independence to Colonial Countries and Peoples provided that,

> The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.[31]

This declaration set the stage for decolonisation and resulted in the recognition of the right of colonised peoples to external self-determination under international law. Despite having been subject to colonial rule, however, Indigenous peoples remained under the authority of sovereign states as newly independent states emerged from former colonies. The granting of independence was limited to Trust Territories, Non-Self-Governing Territories, and other territories that were then 'under tutelage' for future self-governance. On the other hand, the doctrine of *uti possidetis* required former colonies to maintain colonial borders upon the establishment of an independent state regardless of the pre-existing historical claims of Indigenous peoples to their lands.[32]

For many Indigenous peoples' advocates, the question of Indigenous peoples' self-determination remained the 'unfinished business of

[31] Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960).

[32] *See for instance* James Summers, *Peoples and International Law* (BRILL 2013) 1-82; 192-210.

decolonization'.[33] During the 1970s and early 1980s, Indigenous peoples' movements sought freedom for Indigenous peoples to exercise Indigenous sovereignty and control over their lands. They used the language of self-determination to articulate these claims, and they used self-determination to encompass claims ranging from autonomy to secession.[34] Indigenous peoples were sceptical of human rights discourses during this period as they perceived undertones of the 'civilising mission' in human rights law. Also, many Indigenous peoples' advocates believed it failed to capture and address issues of Indigenous peoples' distinctive land base and their collective political rights.[35]

Indigenous peoples' engagement with international and regional institutions revealed strong institutional and state opposition to the framing of Indigenous rights as linked to political self-determination. The Inter-American System of Human Rights, the Human Rights Committee, and the International Labour Organization were not keen to recognise a right to political self-determination in favour of Indigenous peoples but were open to entertaining Indigenous rights claims under the human right to culture. States and international institutions deemed the notion of Indigenous peoples' self-determination as a threat to states' territorial integrity or exclusive claim to authority within their borders, and human rights seemed to be the less dangerous avenue for Indigenous claims.[36]

This opposition made it necessary for Indigenous peoples to frame their self-determination claims in terms of human rights.[37] This turn to human rights

[33] Franke Wilmer, *The Indigenous Voice in World Politics: Since Time Immemorial* (Sage 1993).

[34] Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22(1) European Journal of International Law 141, 151–152; Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press 2010) 46–99.

[35] Ibid.

[36] Ibid.

[37] Engle, *The Elusive Promise of Indigenous Development* (n 34).

influenced the negotiation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which describes Indigenous peoples' self-determination as a form of collective human right premised on the right to culture.[38] The UNDRIP took over two decades to negotiate and complete owing to the various points of contention raised by states regarding the scope and content of Indigenous peoples' rights. One of the key issues raised during the negotiations was the application of common Article 1 of the human rights conventions on self-determination to Indigenous peoples.[39] The debates on Indigenous peoples' self-determination were resolved only after the inclusion of language that precluded external self-determination for Indigenous peoples.[40]

The classification of self-determination as a collective cultural right had the effect of side-lining the political aspirations of Indigenous peoples as sovereign peoples. Despite being a landmark instrument for including an explicit reference to the right to self-determination, among other rights, the vision of self-determination in UNDRIP thus still falls short of the aspirations of the Indigenous movements that led to its negotiation in the first place.[41]

Indeed, tying in Indigenous peoples' claims to the international human rights regime is fraught with difficulty. Using the terminology of Lillian A Miranda, Indigenous peoples have been successful in 'uploading' Indigenous concepts of collective ownership, land tenure, and spiritual relationships to the Inter-American system's human rights regime through strategic

[38] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UNGA Resolution 61/295, UN Doc. A/RES/47/1 (2007), adopted on 13 September 2007.

[39] The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social, and Cultural Rights (ICESCR) as seen in Article 3 of the 1993 draft, which reads: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.

[40] Engle, 'On Fragile Architecture' (n 34) 143–150.

[41] Ibid.

litigation on the basis of the human right to property.[42] While strategic litigation has impacted the content of human rights law, it has not challenged the state's status as the primary subject of international law, including human rights law. Pursuing Indigenous claims within the regime of international human rights law makes it difficult for Indigenous peoples to assert their rights because human rights law leaves the implementation of human rights protection and fulfilment in the hands of states themselves. States can neglect or violate these rights because Indigenous peoples are within their power as jurisdictional constituents. States can also interfere with these rights without violating them in the eyes of the court under the guise of pursuing other obligations and prerogatives such as the 'public interest' or 'national development goals'.[43]

In other words, the international legal regime leaves Indigenous peoples at the mercy of states at every turn, and seeking relief under international law perpetuates this dependency. Even when Indigenous peoples contest international law by engaging with its institutions, their 'wins' run the risk of being constrained by international law's commitment to the sovereignty of states and their territorial integrity. The UNDRIP's framing of Indigenous peoples' self-determination illustrates how the prevailing state-centric modern international law limits the extent to which Indigenous peoples can find purchase for, and integrate their ways of being, thinking, and seeing into the broader legal discourse.[44] Because engagements such as

[42] Lillian Aponte Miranda, 'Uploading the Local: Assessing the Contemporary Relationship Between Indigenous Peoples' Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America' (2008) 10(2) Oregon Review of International Law 419, 423.

[43] ibid; Lillian Aponte Miranda, 'Indigenous Peoples as International Lawmakers' (2010) 32(1) University of Pennsylvania Journal of International Law 203.

[44] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UNGA Resolution 61/295, UN Doc. A/RES/47/1 (2007), adopted on 13 September 2007.

these fail to compel fundamental structural change in international law, they are unable to put an end to its epistemic violence.

V. The Limits of Resistance and Refusal

International law's core commitment to state sovereignty forces projects of resistance, such as strategic human rights litigation and the international campaign for Indigenous people's self-determination, to conform to the existing logics and structures of an international legal system that privileges states. Indigenous conceptions of sovereignty and state sovereignty are incompatible with each other, leading Indigenous peoples to surrender their Indigenous sovereignty to accept the state's full authority in what Simpson describes as political and legal effacement.[45]

One problem with participating in international legal processes in acts of resistance is that such acts of resistance, rather than chipping away at the state's power, can paradoxically over-inscribe the state and its power to determine what matters. The stance of resistance treats domination as an all-encompassing frame for action, such that acts of resistance derive their meaning from the very object of their opposition. Due to the conceptual and practical limits of resistance, scholars and activists increasingly look to refusal as a counterhegemonic tactic.[46] While resistance takes the stance of 'I oppose you', refusal asserts that 'Your power has no authority over me'.[47] Refusal tactics emphasise survival, internal solidarity, and a strategy for enduring prevailing unjust and dominant systems. Acts of refusal are perceived as calculated passivity aimed at avoiding any form of entrapment by the state.[48] Simpson gives the example of Mohawks who refuse to obtain passports, social assistance, and medical coverage and likewise refuse to vote and pay

[45] Simpson, 'On Ethnographic Refusal' (n 7)
[46] Audra Simpson, 'Consent's Revenge' (2016) 31(3) Cultural Anthropology 326.
[47] Elliott Prasse-Freeman, 'Resistance/Refusal: Politics of Manoeuvre under Diffuse Regimes of Governmentality' (2022) 22(1) Anthropological Theory 102, 103-107.
[48] ibid, 114.

taxes as they do not recognise the state's sovereign authority and endeavour to preserve their language and political identity as Iroquois.

While resistance can be described as opposition to direct domination with the objective of compelling change, refusal concerns efforts towards constructing a "plane of equivalence"[49] that stands parallel to prevailing and dominant legal and political structures. Refusal serves as a powerful counterpoint to resistance. It is more consistent with the assertion that Indigenous sovereignty is independent of the state, meaning that the existence and validity of Indigenous sovereignty is not dependent on the very colonial structures that profit from Indigenous peoples' subalternity. Refusal highlights Indigenous ways of being that exist independently of international law and its structures, thereby shifting the focus away from the seemingly all-encompassing claims of states and their institutions. By employing refusal tactics, Indigenous peoples shed light on states' continued assertion of their validity as against pre-existing, long-standing Indigenous sovereign peoples. After all, as Moreton-Robinson said,

> […] I asked the question: if Indigenous sovereignty does not exist, why does it require refusing by state sovereignty? […] We have gone to war, we have refused, and we have used political and legal mechanisms to challenge the legitimacy of Canada, Australia, the United States, New Zealand, Hawai'i states and their sovereign claims to exclusive possession of our lands. We do this because every day our sovereignties exist and are operating despite these claims.[50]

Indeed, Indigenous peoples do not need permission to exist. They persist despite the relentless violence of colonialism and international law. Nevertheless, states' own belief in their sovereign authority, as legitimised by international law and supported by multiple layers of international and domestic institutions, enforces through brute force what Indigenous peoples refuse – state control over Indigenous lands and their very persons.

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[49] ibid, 113.

[50] Moreton-Robinson (n 23).

VI. Conclusion: Making Space for Fourth World Approaches to International Law

Fourth World scholars view the relegation of Indigenous peoples to the status of dependent minorities within states as unjust, oppressive, and exploitative. Ultimately, they hope to see an international community where Indigenous peoples have regained control over their lands and are free to exercise their Indigenous sovereignty without state opposition or control. To this end, Manuel argues that Indigenous peoples should have the freedom to negotiate their political relationships with states, bringing an end both to their subordinate status in relation to states and to the invisibility of Indigenous knowledge systems in prevailing laws and legal systems.[51]

But how can the silenced negotiate? As Spivak argues, the subaltern cannot speak because the prevailing legal and political systems do not have the infrastructure to recognise their speech as speech. In effect, the subaltern is so othered as to render their speech utterly impotent. The prevailing systems hinder Indigenous peoples' speech from being heard; access to international legal institutions and other institutions of power is denied to most Indigenous peoples. Moreover, the prevailing systems impede Indigenous peoples' meaning from being understood – in the international legal system, meaning is filtered through particular imaginaries that privilege the state. Indigenous peoples' demands can only be accommodated once sanitised through representation by states and a re-presentation through international and domestic law-making. One must question whether Indigenous sovereignty can coexist with the current design of an all-encompassing state sovereignty, with its impulse to dominate, extract, and profit. Would states ever opt to relinquish their claims to Indigenous lands when international and state laws offer ample legal cover for their confiscation?

Ruth Buchanan wrote that the critical or Third World international legal scholar finds herself being suspended between 'two equally necessary

[51] Manuel and Posluns (n 19) 214–266.

answers to the question: "what is the responsibility or the task of the jurist in revolutionary times, or perhaps these revolutionary times?"' The same could be said for lawyers who profess a commitment to justice for Indigenous peoples. Do we heed Hans Morgenthau's warning that struggling for absolute justice would cost us both relative justice and peace? Or do we accept China Mieville's challenge to,

> abandon law and become a revolutionary, because 'the violence and power politics that the progressive jurist decries are inescapably the violence and power politics of juridical forms'?[52]

Considering the centrality of states and state sovereignty in international law and in the international legal system, efforts to navigate, evade, and even confront international law's violence against Indigenous peoples have done little towards restoring Indigenous peoples' political autonomy and their right to control their lands in a way that is consistent with their place-based identities, spiritual traditions, and long-term survival. Both resistance and refusal, which Elliott Prasse-Freeman describes as the quasi-dialectic tactics of direct confrontation and evasion/endurance,[53] can only exert a limited challenge against the might of the entire machinery of the international legal system and its member states. The epistemic violence of international law is an existential threat to Indigenous peoples, yet its violence is taken as a given, and Indigenous peoples are expected to obtain what little relief they can within its self-preserving limitations.

Addressing the ongoing injustice against Indigenous peoples requires a radical reimagining of what it means to be in an international community. Uncomfortably for international lawyers, this goes beyond acts of resistance and pleas for reform within the rules and mechanisms for engagement that

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[52] Ruth Buchanan, 'Writing Resistance Into International Law' (2008) 10(4) International Community Law Review 445 *citing* "Roundtable: War, Force and Revolution" chaired by Anne Orford, ASIL Proceedings 2006 and Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001).

[53] Prasse-Freeman (n 43).

international law has already sanctioned. Correcting the injustice against Indigenous peoples requires the breaking of our idols – international law's most sacrosanct ideas about the power, prerogatives, and temporal reach of states. If the international legal system itself silences Indigenous peoples, we must question our continuing commitment to it as it stands, and our acceptance of its limited promise for Indigenous peoples. As Mieville argued, since law is an expression of violence, 'the human necessity of revolution might mean the end of law'[54] – or at least the end of international law as we know it.

[54] Buchanan (n 47).

LEGAL IMAGINARIES

THE ROLE OF METAPHORS IN SHAPING THE NARRATIVE OF PROTECTION IN THE MANDATE SYSTEM: A STORY OF A PROTECTIVE FATHER AND HIS CONTROLLED CHILDREN

Derya Çakım*

Metaphors are a ubiquitous tool of rhetoric and aesthetics. Throughout international legal history, they have come in many forms and served diverse purposes. One of their key functions is to shape narratives and serve as a means of concealing the darker aspects of the law. This article focuses on the trust and paternalism metaphors which played this role in constructing a narrative of protection within the discourse of the League of Nations, legitimizing the use of control. The League created a trust-based narrative that emphasized humanitarian rhetoric, moral protection obligations and emotional values, while obscuring the more sinister side of trust as a means of justifying control and exploitation in economic policies. This article explores in particular the trusting parent-child dynamic metaphor which carried significant emotional weight in the relationship between the mandated powers and mandate territories.

Keywords: metaphor; narrative; protection; control; trusteeship; Mandate System.

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I. The Story of a Picture: a Protective Father and his Controlled Children

> The savior or the redeemer, the good angel who protects, vindicates, civilizes, restrains, and safeguards. In reality, however, these are merely fronts. The savior is ultimately a set of culturally based norms and practices.[1]

Figure 1: General George Richardson with Samoan Children, 1925.[2]

This black and white picture tells the story of a protective father holding the hands of his trusting children and looking after them. The children gaze up at their father with hope, and they trust his caring and parental guidance for

[1] Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 Harvard International Law Journal 204.

[2] 'General George Richardson with Samoan Children' (National Library of New Zealand, 1925).

their future.[3] In reality it is the picture of General George Richardson, the administrator of Western Samoa, with Samoan children after World War I, in the Mandate System which was created aiming to internationally administer and provide supervised protection for the people and territories previously controlled by Germany or the Ottoman Empire. The image frames a narrative in international legal history as in the Mandate System. The administrators of the mandated territories desired to be perceived in the same way as General Richardson wanted to be seen — as trustworthy fathers who looked after their child races and peoples. The Western powers regarded the mandated territories as their controlled children, representing the rights and duties in this relationship as a parent-child dynamic, to legitimize their global administration in the form of trusteeship. The trust metaphor helped to facilitate the transition from colonialism to the Mandate System, which justified continued control of territories by portraying the administrators as protective father figures who would ultimately grant independence and self-determination to their wards.[4] This picture captures the assumptions inherited from the colonial practices of international law and informal empire. During the creation of the Mandate System, which was considered the 'first great experiment in global governance,'[5] the League of Nations adopted trust and paternalism metaphors in its Covenant based on these colonial assumptions. As a result, the identities of legal actors (such as the Permanent Mandates Commission, mandatory powers, and mandated territories), legal concepts, and principles reflected in the Covenant were all shaped by these metaphors.

Considering this metaphoric picture's assumptions, the main argument of this paper is that the concepts of protection and control are linked in international law, with the language of colonialism serving as the root of this

[3] Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press 2015) 176 Figure 6.1 Brigadier General George Richardson as he saw himself, with Samoan children.

[4] ibid 3, 267.

[5] ibid 5.

relationship. The idea of protection was often used as a pretext for control, and the moral protection narrative was constructed to justify Western legal systems and institutions imposed on colonized peoples. This paper focuses on the role of metaphors in constructing this paternalistic narrative of protection and shows how this has legitimized control.

In that context, this article delves into the use of metaphors in the discourse surrounding the link between protection and control. Specifically, it scrutinizes the metaphors employed in Article 22 of the League of Nations Covenant that reinforced colonial power dynamics and contributed to the political and economic domination of mandated territories.

By examining the function and power of these metaphors, this article illuminates the consequences of shaping the moral protection narrative with such language. It also explores the emotional appeal of metaphors, particularly during the creation of the Mandate System as a new institution, and the process by which dominant legal discursive communities adopt certain metaphors or metaphor chains while excluding others.

Starting with an exploration of metaphors and narratives in international law (section II), the article delves into the use of metaphors during the Mandate Regime, with a particular focus on Article 22 of the League's Covenant (section III). By analysing the metaphors employed in the language of the Covenant, it demonstrates how they contributed to a moral protection narrative and legitimized control (section IV). In the final section (section V), the article reflects on the power of metaphors in shaping narratives within dominant discursive communities, particularly in the construction of master narratives in international legal history.

II. METAPHORS AND NARRATIVES IN INTERNATIONAL LAW

Brutally simplified, a metaphor is the statement that 'a thing is or is like something it is not'.[6] While novel metaphors easily capture our attention, conventional metaphors, deeply ingrained in language and thought, often go unnoticed.[7] Metaphors serve linguistic, epistemological, and social functions,[8] facilitating understanding of meaning in social contexts.[9] However, metaphors can also be ideological[10] and can mask biases, power dynamics, necessitating critical analysis of the underlying assumptions and beliefs they convey. Furthermore, there exists an epistemological interplay between emotions, narratives, and metaphors.[11]

In international law, metaphors play a crucial role in shaping a shared understanding of legal concepts[12] and emotionally loaded narratives.[13] They

[6] Aristotle, *The Poetics* (Ingram Bywater tr, Project Gutenberg 2009) 53; Susan Sontag, *Illness as Metaphor & Aids and Its Metaphors* (Penguin Books 1991) 91; Maksymilian Del Mar, 'Metaphors', *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart Publishing 2020) 281.

[7] Murray Knowles and Rosamund Moon, *Introducing Metaphor* (Routledge 2006) 4–5.

[8] Raymond W Gibbs Jr., *The Poetics of Mind: Figurative Thought, Language, and Understanding* (Cambridge University Press 1994) 122–134.

[9] Teun Adrianus van Dijk, *Discourse as Social Interaction* (Sage 1997) 50, 245.

[10] Paul Chilton and George Lakoff, *Foreign Policy by Metaphor* (Routledge 1995) 56.

[11] Paul Ricoeur, 'The Metaphorical Process as Cognition, Imagination, and Feeling' (1978) 5 Critical Inquiry 159; Snævarr Stefán, *Metaphors, Narratives, Emotions: Their Interplay and Impact* (Rodopi 2010) 1–2.

[12] Harlan Grant Cohen, 'Metaphors of International Law' in Harlan Grant Cohen, *International Law's Invisible Frames* (Oxford University Press 2021) 220; Maksymilian Del Mar, 'Metaphor in International Law: Language, Imagination and Normative Inquiry' (2017) 86 Nordic Journal of International Law 170, 177.

[13] Michael Hanne and Robert Weisberg, *Narrative and Metaphor in the Law* (University Press 2018) 9; Cohen (n 12) 229.

are tools that visualize narratives[14] and inform international law's past and future. As observed by Koskenniemi,

> European stories, myths, and metaphors not only continue to set the conditions of our understanding of international law's past, they also inform international law's future and global political economy.[15]

Metaphors construct non-neutral narratives with their emotional appeal,[16] concealing dark aspects and power relations.[17] To illustrate, the paternal personification of states and the use of metaphors like community, society, or family in international law presented sovereignty criteria while legitimizing inclusion and exclusion.[18] Orford notes that these gendered and racialized metaphors contribute protection and intervention narratives to obscure exploitation and control.[19] These narratives depict target states as passive and in need of protection by an imagined international community,[20] to be saved from their own weakness.[21] Correspondingly, the Mandate System incorporated Vittoria's 'wardship' and 'trust' metaphors to legitimize power structures which shaped the narrative of moral protection. The 'trust' metaphor, in asymmetrical power relations, initially aiming to prevent

[14] Martin Lolle Christensen, 'Networks and Narrative : Visualizing International Law' (2021) 13 European Journal of Legal Studies 27, 34.

[15] Martti Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism' [2011] Journal of the Max Planck-Institute for European Legal History 155.

[16] Ricoeur (n 11) 159; Stefán (n 11) 1–2.

[17] Cohen (n 12) 226.

[18] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 Harvard International Law Journal 1, 16.

[19] Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 European Journal of International Law 701.

[20] ibid.

[21] ibid; Ruth Gordon, 'Saving Failed States: Sometimes a Neocolonialist Notion' (1997) 12 The American University Journal of International Law and Policy 971.

exploitation, paradoxically facilitated and justified exploitation, demonstrating the unholy alliance between power and trust.[22]

This function of the metaphors in shaping narratives by dominant discourse communities has not been adequately explored in international law literature, which is the theme of this article. Methodologically, the article employs an interdisciplinary research approach that combines international legal and critical and (post) colonial metaphor and narrative studies. It involves first analyzing Article 22 of the League's Covenant, historical documents, and conducting a critical discourse analysis, while also engaging with the related inter-war and contemporary scholarly literature, to identify paradigms and themes concerning the use of metaphors by the dominant discourse community in the Mandate System that shape a masculine moral protection narrative.

III. METAPHORS IN THE MANDATE SYSTEM

Coming back to the image of the administrator of Western Samoa holding hands with Samoan children, portraying him as a protective father figure. This representation also highlights the use of metaphors in Article 22 of the League Covenant,

> 1. To those colonies and territories […] which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.
>
> 2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that

[22] Devika Hovell, 'On Trust: The U.N. Security Council as Fiduciary' (2021) 62 William and Mary Law Review 1233.

> this tutelage should be exercised by them as Mandatories on behalf of the League.

Article 22 lays out that territories no longer under the sovereignty of their former governing states and inhabited by 'peoples not yet able to stand by themselves' in the modern world are treated as a 'sacred trust of civilization', which serves as the overarching principle of the mandate system. This sacred trust emphasizes the moral responsibility of advanced nations to govern and develop these territories. The term 'tutelage' represents the guidance and paternalistic care provided by advanced nations to less-developed peoples or communities, while 'mandatories' refers to the advanced nations assuming the role of trustees as the caretakers and guardians for the mandated territories on behalf of the League.

In the legal language of Article 22 of the Covenant, peoples not yet able to stand by themselves, trust, tutelage, and mandatories hold pivotal significance as metaphors. They attribute human characteristics as they contribute to the depiction of the territories under mandate as dependents and emphasize their inadequacy and weakness, while underscoring the role of advanced nations in fostering their development. These metaphors are laden with emotions like sacred trust, guidance, care, and discipline, shaping the relationship within the mandate system. They depict the paternalistic relationship between advanced nations and less-developed territories, based on the sacred trust of civilization. Among all, the metaphor of trust takes center stage, illustrating the essence of the mandate system, where advanced nations were entrusted with the sacred responsibility to support and nurture less-developed territories towards eventual self-governance. The principle of the sacred trust of civilization dictated that western powers would govern these old colonies, with their rights and obligations embodied in the Covenant.[23] The principle involved a trust for native people and a trust for

[23] Evan J Criddle, 'A Sacred Trust of Civilization', 'in Andrew S. Gold and Paul B. Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014) 408–409.

the world at large.[24] The League, as the representative of the international community, would assume responsibility for the affected peoples.[25] The western states accepting the trusteeship would be appointed by the League to administer the sacred trust on behalf of the international community in the interests of these populations and in the interest of the international community as a whole.[26]

Taking into account this legal language, in international legal studies trust is considered a metaphor that lacks uniform standardization in law.[27] According to Hovell, the use of the term trusteeship in conjunction with trust has led to a tendency to apply the label in new and diverse contexts.[28] Thus, trust operates as a rhetorical figure, rather than being solely a legal principle or concept.[29] The meaning of trust is contingent on its usage in various contexts and interests, with its legal implications and definitions arising according to context.[30] The concrete interests driving the use of the trust metaphor have a significant impact on its legal and general meaning, which depends on the specific context.[31] Therefore the principle of the sacred trust of civilization has the emotional power to construct morally grounded relationships based on the moral duty and responsibility of the parties involved.[32]

In that sense, the language of Article 22 of the Covenant, and the discourse of the Mandate System were deeply shaped by these trust and paternalistic

[24] Hessel Duncan Hall, *Mandates, Dependencies and Trusteeship* (Carnegie Endowment for International Peace 1948) 33.
[25] Criddle (n 23) 409.
[26] ibid.
[27] Hovell (n 22) 1233–1235, 1256.
[28] ibid.
[29] Sebastian Spitra, 'Recht und Metapher: Die „treuhänderische" Verwaltung von "Kulturgut" mit NS-Provenienz' in Olivia Kaiser, Christina Köstner and Markus Stumpf (eds), *Treuhänderische Übernahme und Verwahrung* (1st edn, Vandenhoeck & Ruprecht 2018) 55.
[30] ibid.
[31] ibid.
[32] ibid.

metaphors towards the less developed. Colonial international law used society as metaphor[33], which has led to the metaphor of the family of nations. In that sense, the metaphor 'peoples not yet able to stand by themselves' was used to justify the backward status of the mandated territories in that society and continuous narrative of moral protection of European empires who saw themselves as protectors of weaker backward peoples.[34] The Permanent Mandates Commission (PMC) members, including Dannevig and Rappard, saw the natives as children with both lovable and barbarous qualities.[35] Pedersen notes that the PMC members used trust and paternalistic metaphors to describe the colonial peoples as children who needed protection and education before they could 'stand alone', despite the colonial peoples arguing that self-determination was necessary for effective social reform.[36] 'Only after the Second World War did self-government begin to rival good government as the goal of the international trusteeship system.'[37] One might suggest that Dannevig and Rappard in particular clung so closely to a rhetoric that identified colonial peoples with children in order to reconcile their political liberalism with their tasks as imperial overseers.[38] The inhabitants of mandated territories were to be treated gently, but with a firm hand, as if they were children.[39] This approach aligned with the language of

[33] Anghie (n 18) 16.

[34] See how paternalism was used as an ideal by Wilson to promote the moral protection narrative of natives: 'The notion that Woodrow Wilson approached the race question from a Southern point of view is at best an unsatisfactory oversimplification. It implies that his Southern back- ground had taught him to believe in the superiority of the white race and to regard a paternalistically benign attitude toward colored people as a moral obligation.' Henry Blumenthal, 'Woodrow Wilson and the Race Question' (1963) 48 The Journal of Negro History 1, 1.

[35] Permanent Mandates Commission, *Minutes of the 3rd Session* (1923) 28, 76.

[36] Susan Pedersen, 'Metaphors of the Schoolroom: Women Working the Mandates System of the League of Nations' (2008) 66 History workshop journal 188, 200–201.

[37] ibid.

[38] ibid.

[39] ibid.

the Covenant[40] as the inhabitants were treated in a paternalistic manner rather than being granted individual rights.[41]

While these metaphors may have positive connotations, there exists a darker aspect to their usage. The metaphors of trust, tutelage, and mandate are also employed as analogies within private law, enabling Western powers in their global administration of old colonies to associate these concepts with the idea of possession in a private legal context. In that regard, Brierly elaborated on Arnold McNair's comparison of the Mandate system with the English common law trust and noted that trust, tutelage, and *mandatum* were three analogies with private law, as Article 22 of the Covenant highlights trust as the governing principle of the new institution. To achieve the trust principle, tutelage is considered the most effective method, and *mandatum* defines the approach of its implementation. As such, the idea of possession in a private law sense is linked to the global administration of old colonies by Western powers through trusteeship. This idea is reflected in General Smuts' proposal for the creation of this new institute.[42] Smuts suggested that the League of Nations must be 'the heir to Europe's bankrupt estate, imposing a gigantic task on the League as the successor of the Empires.'[43]

More than forty years after the establishment of the Mandate System, the South West Africa cases addressed the concepts of trust, tutelage, and mandatories, highlighting that these are metaphors, which were misused by the mandated powers, treating them as if they were private law concepts, effectively masking the ideological intentions of the imperial powers. These cases led to a series of legal disputes and advisory opinions concerning the

[40] Pedersen (n 3) 108.

[41] Taina Tuori, 'From League of Nations Mandates to Decolonization: A Brief History of Rights', *Revisiting the Origins of Human Rights* (Cambridge University Press 2015) 285.

[42] James Leslie Brierly, 'Trusts and Mandates' [1929] British Year Book of International Law 217–219.

[43] Jan Christiaan Smuts, *The League of Nations: A Practical Suggestion* (Hodder and Stoughton 1918) 27.

administration and status of South West Africa under the League of Nations and later the United Nations. The government of the Republic of South Africa, in response, cautioned against the improper application of trust metaphors within the context of the system. In its Preliminary Objections to the South West Africa Cases, the government warned against associating trust, tutelage, and *mandatum* with private law institutions. They pointed out that the 'tutelage of a backward community by an advanced nation could only have been intended in a broad, metaphorical sense.'[44] The government raised questions about the intentions and effects of the tutelage imposed on the peoples of Africa under colonial rule, emphasizing the complex and contested nature of these historical institutions.

Consequently, the trust metaphor in the colonial era was merely an ideological cover-up for the true aims of the imperial powers. Trusteeship allowed exercising control through a 'paternalistic exercise of power'[45], and in that way the imperial powers maintained their dominance. This domination of mandatory powers was hidden behind the trusteeship, which revealed the economic interests of European powers, rather than the well-being of colonial subjects, serving the underlying motivations for imperialism.[46] Moreover, trust, in the Mandate System, is an extension the metaphor of 'wardship' over infants, as compared by McNair to the English common law trust system, where power is transferred to a trustee for the benefit of a 'minor or a lunatic' who cannot manage their own affairs, with an analogy drawn between the abeyance of sovereignty and the common law trust system.[47] The aim was to establish a new system of imperialism

[44] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* [1961] ICJ Rep (Preliminary Objections filed by the Government of the Republic of South Africa) 301.

[45] Bernhard Knoll, *The Legal Status of Territories Subject to Administration by International Organisations* (University Press 2008) 68–69.

[46] ibid.

[47] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2012) 145 'The League's adoption of Vitoria's

under international control, while Western powers would retain practical control.[48] Put differently, the Mandate system was designed to implement humanitarian ideals, but in practice, it often resembled a colonial regime.[49] The use of trust metaphors was significant in transforming the Western powers' claims of absolute ownership to a more moral and humane system of control, which established possession of the rights and duties of the entrusted territories for an uncertain period of time.[50] The Mandate System was based on a dichotomy between trust and distrust.[51] Although the trust metaphor was intended to prevent power exploitation, it paradoxically legitimized the authority of the Permanent Mandates Commission over the mandatory powers.[52] Moreover, the use of trust metaphors in the legal framework justified the global administration of old colonies by Western powers. The Mandate System could treat the rights of colonies as if it were a private law possession and this has legitimized the mandatory powers' political and economic control over the territories. This allowed Western powers to exploit the trust metaphor and maintain control over old colonies. Despite the recognition of the peoples' rights of the mandated territories, the Mandate System viewed them as property which benevolent trustee fathers had the right to possess and control, determining the rights to their children.

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extraordinarily potent metaphor of "wardship" had a number of effects. Most significantly, it reinforced the idea that a single process of development -that which was followed by the European states- was to be imitated and reproduced in non-European societies, which had to strive to conform to this model. This in turn justified and lent even further reinforcement to the continuing presence of the colonial powers -now mandatory powers- in these territories, as the task of these powers was not to exploit, but rather to civilize, the natives. This revival of Vitoria's rhetoric was combined through the Mandate System with a formidable array of legal and administrative techniques directed toward transforming the native and her society.'; Knoll (n 45) 60.

48 Tuori (n 41) 285.

49 Spitra (n 29) 68, 69.

50 Pitman B Potter, 'Origin of the System of Mandates Under the League of Nations' (1922) The American Political Science Review 16.

51 Hovell (n 22) 1233.

52 ibid.

All-in all, during the transition from colonial rule to the inter-war era, the use of these metaphors in the legal language favored the mandatory powers' interests over the populations of the mandated territories' interests. The trust and paternalism metaphors and the paternalistic assumptions of the system allowed the colonial powers to legitimize denying self-determination to the people in their colonies and keep questions of independence open. These metaphors were protested by the mandated territories, who asserted their ability to stand alone and demanded self-determination. However, their voices were ignored and excluded from the PMC. Pedersen notes that France and New Zealand were able to justify repressive acts through the language of tutelage, with authorities explaining that 'they were protecting their 'primitive' or still-childish charges from the evil influences of agitators or the consequences of their own immaturity.'[53] The populations under mandate opposed this language and metaphors, claiming they were able to stand alone, that they were not children. Arab nationalists argued they had been promised independence and not 'tutelage', while Samoans insisted they were quite as civilized as their New Zealand 'tutors' and well able to 'stand alone'.[54]

IV. The Function of Metaphors in Shaping the Narrative of Protection and Legitimizing Control

The metaphor of trust was always part of the grammar of colonial legal history, starting from Vitoria's vision of the moral duty of protection. Vitoria, a sixteenth-century Spanish theologian and jurist, is considered an early precursor to modern international law, and he justified colonialism by reconceptualizing and inventing legal doctrines to address the unique issues arising from the encounter between the Spanish and the indigenous peoples.[55] He used the metaphor of 'wardship' to illustrate how powerful

[53] Pedersen (n 3) 176.
[54] ibid 276.
[55] Anghie (n 47) 13.

Western states served as trustees for native peoples.[56] In his lecture titled 'On the Indians Lately Discovered' in 1532, Vitoria argued that the Spanish conquest was justified to protect indigenous people from the cruel and oppressive actions of their own rulers, such as human sacrifice and cannibalism.[57] This legacy of this 'wardship'[58] metaphor and the moral protection narrative shaped colonial and neo-colonialist international law.

The League of Nations adapted Vitoria's 'wardship' metaphor into the language of Article 22 of its Covenant to illustrate the mandatory powers as protectors and caretakers of the mandated states.[59] The metaphor of trust was legalized with the sacred trust of the civilization principle and the concept of trusteeship. Although the Mandates System was the first great experiment in global governance, it was not doing something new.[60] What was new was legalizing and internalizing the metaphor of trust in order to legitimize control of the global administration. Legal language and metaphors were strategically used to be vague in the legal language and silent about the disagreements in this narrative.

Throughout the history of international law, Vitoria's 'wardship' metaphor has reappeared in various forms, such as saviors, protectors, trustees, and

[56] ibid 145.

[57] Francisco de Vitoria and others, 'On the Indians Lately Discovered', *Francisci de Victoria De Indis et De Ivre Belli Relectiones* (The Carnegie Institution of Washington 1917) 115; cited in Criddle (n 23) 406–407.

[58] Fenwick defines 'wardship' as the status of a political community, including protectorates, colonies, or dependencies, that have limited freedom of action due to another state or group of states acting as trustee or guardian. To be considered under wardship, the community must have some legal rights, either de jure or de facto. The term is not a technical term of international law but describes the status of many states whose position within the international community is not well-defined. Charles G Fenwick, *Wardship in International Law* (Government Printing Office 1919) 5–6.

[59] Anghie (n 47) 145.

[60] Pedersen (n 3) 292.

guardians, all aiming to fulfill the sacred trust of civilization.[61] In Mutua's words,

> [t]he savior or the redeemer, the good angel who protects, vindicates, civilizes, restrains, and safeguards. The savior is the victim's bulwark against tyranny. The simple, yet complex promise of the savior is freedom: freedom from the tyrannies of the state, tradition, and culture. But it is also the freedom to create a better society based on particular values. (…) In reality, however, these institutions are merely fronts. The savior is ultimately a set of culturally based norms and practices that inhere in liberal thought and philosophy. (…) the corpus falls within the historical continuum of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions.[62]

According to Mutua, the 'other' was constructed through the metaphors of the savage and victim, portraying native peoples as savages, weak, powerless, lazy, and incapable of creating favorable conditions for their own development.

Consequently, the 'savages-victims-saviors' metaphors have played a significant role in serving as a narrative of moral protection in legal history, eventually evolving into the grand narrative of human rights. These metaphors have created and represented an 'other' perceived as weak and incapable of self-defense, containing a subtext that portrays saviors as rescuing savages. Drawing on Mutua's perspective on the metaphor's role in shaping grand narratives, this article claims that metaphors serve a multifaceted role beyond their function in rhetoric and aesthetics. The Mandate System serves as an exemplar of such a project by adopting the legacy of the 'wardship' metaphor and the narrative of saving and protecting peoples who are deemed incapable of standing on their own. The concept of tutelage and the principle of the sacred trust of civilization allowed the mandatory powers to present themselves as trustworthy, protective fathers guiding the child mandate states toward independence. However, this

[61] Mutua (n 1) 204.
[62] ibid.

paternalistic and masculinist narrative employs humanitarian rhetoric to justify a moral duty of protection over people deemed 'not yet able to stand by themselves.' This narrative masked the true purpose of exercising economic and political control over mandate territories, while claiming to offer protection. The legacy of this narrative is still visible today.[63]

V. Conclusion: a Picture Held Us Captive, yet there is a Way to Break Free

This article treated metaphors' hidden role in a picture of a protective father holding the hands of his trusting children and looking after them. The picture illustrated how metaphors were not only a ubiquitous tool of rhetoric and aesthetics but also served multifaceted purposes throughout international legal history. One of their key functions is to shape narratives in international law with their emotional power and as a means of concealing the darker sides of the law. The article examined how the dominant discourse in the League of Nations utilized the metaphors of 'trust' and paternalism to construct a protection narrative that legitimized control. The article also showed the more sinister aspect of this picture. In this uneven power dynamics, the 'trust' metaphor, initially meant to prevent exploitation, ironically ended up enabling and legitimizing it, illustrating the problematic relationship between power and trust, control, and protection.

Aiming to prompt a reflection on a metaphorical image that sets the conditions of our understanding of international law's past and future, the study demonstrated that metaphors in international law often prioritize

[63] See for the continuity of the role of metaphors in the protection narrative 'It seems the West plans again to come and lighten the darkness. Having found that a number of African states failed or collapsed as nation-states, the West stands ready to put them back together again by governing until they are taught to govern themselves. It is much like parents taking care of their children until the children learn to stand on their own two feet. Indeed, scholars proposing modem trusteeship invoke this very analogy.' Gordon (n 21) 971.

certain people, objects, and frames while neglecting others. Thus, metaphors require critical analysis due to the biases they hold and the power dynamics and interconnectedness with emotions and narratives they contain. Questioning the function and role of metaphors in international law is crucial, as it reveals that what may appear natural or straightforward is actually influenced by power structures and their underlying social, political, cultural, and historical assumptions. When the eye of the international law audience is untrained to see, it may accept the metaphoric images and the assumptions it carries without questioning. A metaphoric picture can hold us captive, yet there is a way to break free.[64]

[64] Ludwig Wittgenstein, *Philosophical Investigations* (Basil Blackwell 1986) para 115.

BOOK REVIEWS

GEOFFREY GARVER, *ECOLOGICAL LAW AND THE PLANETARY CRISIS: A LEGAL GUIDE FOR HARMONY ON EARTH* (ROUTLEDGE 2022)

Niels Hoek*

'The Anthropocene' has developed a wide range of meanings within the scholarly community. In essence, the term encapsulates the innate understanding that humans have become (and perhaps always were) a pressing force on the environment.[1] Short-term objectives in politics, and a legal system that prioritizes growth and the deeply enshrined protection of property rights have been criticized for their role in the decay of nature.[2] Yet, it has been difficult to grasp precisely how law and governance may play a positive role, that can lead to a 'good' environmental outcome. In the volume *Ecological Law and The Planetary Crisis: A Legal Guide for Harmony on Earth,* Geoffrey Garver has made a significant contribution to the literature by developing a framework to reform law and governance within the Anthropocene, in part to address the systemic problems outlined above.[3]

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1 T Flannery, *Europe: The First 100 Million Years* (1st edn, Penguin Publisher 2019). Kees Bastmeijer, 'Intergenerational Equity And The Antarctic Treaty System: Continued Efforts To Prevent Mastery' [2011] The Yearbook of Polar Law Online. 3.; P Kanwal, 'Ecocentric Governance: Recognising the Rights of Nature' (2023]) 69 Indian Journal of Public Administration.

2 Kanwal (n 1).

3 G Garver, *Ecological Law and the Planetary Crisis: A Legal Guide for Harmony on Earth* (1st edn, Routledge 2022). The book can be situated in a strain of (theoretical) scholarship that seeks to reimagine how law can be altered, revised or reformed to (better) sustain ecological needs. See, for a recent example, M Davies, *EcoLaw: Legality, Life, and the Normativity of Nature* (Routledge 2022). and K Anker and others, *From Environmental to Ecological Law* (1st edn, Routledge 2021).

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This framework partly builds on a 'mutually enhancing human-Earth relationship' developed by Thomas Berry, which the author has labelled 'ecological law'. In this paradigm of a mutually enhancing relationship, humans see themselves as 'members, not masters', acting 'in the benefit of the larger community as well as ourselves'.[4] It rejects the automatic primacy of anthropocentric needs and mastery of nature, whereby humans can limitlessly exploit other beings on Earth. The framework does not subscribe to a purist approach, whereby nature is to be brought to a state without human interference. Instead Garver argues that the approach requires a 'thriving human presence within a life-enhancing global ecosystem'.[5] Put simply, this is human-inclusive ecocentrism. Unconventional as such a proposition towards law and governance initially appears, Garver has managed to further develop these ideas in a nuanced and cogent manner.

The book can be summarised as follows. Garver identifies that people, generally speaking, have become detached from nature and the ecosystems that maintain us.[6] He subsequently examines the role of the law with respect to the ecological crisis observed throughout the world.[7] In this context, particular attention is paid to the concept of the Anthropocene, as well as the wider historical considerations that underpin distorted human-nature relationships which led to the present geological epoch.[8] In other words, how did the world arrive at this present state?

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4 *See* T Berry, *The Great Work: Our Way into the Future* (Three Rivers Press 1990).

5 Garver (n 3).

6 Garver (n 3), 32.

7 ibid, 9, *see* E.S Brondízio and others (eds), *Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES 2019).

8 For that are unfamiliar with the term, I refer to the work of the Anthropocene Working Group. 'The 'Anthropocene' is a term widely used since its coining by Paul Crutzen and Eugene Stoermer in 2000 to denote the present geological time interval, in which many conditions and processes on Earth are profoundly altered by human impact.' Working group on the Anthropocene, 'What Is the Anthropocene - Current Definition and Status', (Quaternary Stratigraphy, 2019) <http://quaternary.stratigraphy.org/working-groups/anthropocene/>. Accessed 10 March 2023

Second, the author explores how the growth narrative of prevalent economic theories have failed to stay within crucial ecological limits, both locally and on a global scale.[9] Drawing on numerous examples derived from environmental instruments, the author argues that environmental law has been unable to address systemic issues underpinning the Anthropocene.[10] These examples paint a tumultuous portrait of failing legislation and protection.

Third, Garver proposes, based on concepts such as systems thinking and interspecies fairness, an alternative to the growth narrative in contemporary models. Here, ecological law is introduced as a new paradigm, and the author provides a guide on how actors can move from environmental law towards this alternative mode of governance.[11]

Last, Garver discusses how activism and research strategies may help improve and reform human-nature relationships in line with the principles of ecological law – taking the degrowth movement as an example. This part aims to translate the framework on ecological law into a practical example.[12]

Not all the nuances and themes outlined above can be covered in this review. Instead, I will discuss a handful of strengths of this book. To start off, Graver's argumentative style is a great asset. Throughout the book, Garver presents multiple perspectives before drawing a conclusion, engaging with various counter-narratives and historical considerations underlying the concepts discussed. For example, in framing the Anthropocene as a human-earth dilemma, the author discusses whether the Anthropocene should be approached as an 'inevitable outcome of deeply rooted human traits', or, alternatively, as a means 'to reflect [on] the immense power of humanity's capacity of collective learning'.[13] Additionally, Garver brings in the concept of the 'Capitalocene',

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9 Garver (n 3), 63.

10 ibid.

11 ibid, 167. A systems-based approach highlights the dynamic approach of law. In this theory, legal systems co-evolve with other systems. Graver develops this approach by reviewing strategies for interventions in legal systems, using the leverage points discussed below in this review.

12 ibid, 225.

13 ibid, 42.

which focuses on the issues underpinning systems of power and profit.[14] Multiple schools of thought are discussed, all of which feed into the debate presented by the author. While the author does guide the reader to a defendable end-conclusion, stating that the Anthropocene is a useful frame of reference thus, rejecting critiques of the concept – the line of argumentation walks a highly transparent path. This challenges the reader to reflect on their own position on these complex matters, meaning one can position themselves within pre-existing debates.[15] This is a fantastic attribute of the book, making it a joy to read. Additionally, this argumentative style opens up the discussion to a broader audience – who may not (yet) be familiar with abstract concepts such as the Anthropocene.[16]

Furthermore, the book manages to be simultaneously both critical and constructive. Initially, the author is critical of modern-day environmental law and how it has been unable to halt an exploitative human-nature paradigm.[17] Drawing on numerous examples derived from different legal systems, Garver exposes systemic issues underpinning environmental protection.[18] For example, the author highlights that, in the case of pollution management, technical feasibility and cost-effectiveness often take precedence over the full achievement of calculated critical loads which would preserve ecological integrity.[19] Thus, environmental law has not always respected ecological limits and, on the whole, has failed to prevent biodiversity loss throughout multiple jurisdictions. In the view of this reviewer, that conclusion is easy to accept. Private property protection can often be seen as an offensive and dominant force in Courts, encoding a 'right to destroy' unless environmental law has

[14] *See* J. Moore, *Anthropocene or Capitalocene?: Nature, History, and the Crisis of Capitalism* (PM Press 2016).

[15] Garver (n 3).

[16] ibid, 49.

[17] ibid, 63.

[18] ibid, 73-91.

[19] Critical loads are the 'legal cap' placed on pollution levels, from air quality parameters to maximum allowable levels of nitrogen deposition. *See* for example: Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] *OJ L 152/1.*

formulated a constraint.[20]. Environmental law has, historically, been on the defensive – protecting 'bits' but not 'the whole'. This is, for example, reflected in the fact that property rights are strictly protected in the EU's Charter of Fundamental Rights (CFR), whereas no right to a healthy environment has been guaranteed in this instrument as a counterweight.[21] While this example is brought in by the reviewer, it does consolidate the argument that Garver puts forward.

To draw from another example of failing environmental protection - from outside the book - one may turn to species protection of the EU's Habitats Directive.[22] This Directive is the cornerstone of EU Nature Conservation Law, meant to preserve the habitats and species of 'community interest'. In this case, the scope of protection does not include any fungi, the third animal kingdom, whilst the Directive disproportionality favours more 'charismatic' mammals (such as wolves) over invertebrates (such as moths) in its range of protected species.[23] Whilst a plethora of other examples could have been given in this respect, the narrow view of species conservation within the EU highlights that more holistic environmental protection is often lacking in key areas. In sum, Garver's arguments on failing protection can find support – both through the examples within and from examples outside the book.

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[20] H Jans and A Outhuisje, , *Property and Environmental Protection in Europe* (1st edn, Europa Law Publishing 2016). ; N Hoek, 'Nature Restoration Put to EU Law: Tensions and Synergies between Private Property Rights and Environmental Protection' (2023) 19 Utrecht Law Review 76.

[21] Ibid. Charter of Fundamental Rights of the European Union [2012] *OJ C 326/391.* Whilst property rights can be limited on the basis of environmental reservations in the CFR, this does highlight the defensive nature of environmental protection.

[22] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ *L 206/7,.*

[23] Pedro Cardorso, 'Habitats Directive Species Lists: Urgent Need of Revision' (2011) 5 Insect Conservation and Diversity 169. Whilst some invertebrates are listed on the Annexes of the Habitats Directive, their number is not proportional nor reflective of the situation 'on the ground'.

However, while a critical analysis of environmental law carries a great deal of merit, had the author stopped here, the book would have been somewhat limited in its utility. Instead, Garver goes beyond the critique. A more complex and challenging question is how law and governance in the broadest sense may adapt to prevent ecological collapse – and, perhaps more ambitiously, how it may aid in the restoration of the natural environment. In other words, as opposed to highlighting what, normatively speaking, may be 'wrong' – what can be 'right' is just as relevant a question to ask. Therefore, it is welcome that Garver spends a great deal of effort envisioning how problems embedded within our legal systems are to be (potentially) resolved. The core aspects of ecological law, as put forward by Graver, consist of eleven points that articulate a set of structures for law and governance to adhere to.[24]

Touching on a few key aspects of Garver's framework, the author argues that ecological law recognises humans within flourishing life systems, thus subscribing to a human-inclusive view of environmental protection. Human existence is therefore fundamental to the framework – rejecting a goal of absolute and pristine wilderness (void of human interference). Within this paradigm, it requires the fair sharing of resources amongst present and future generations of human and non-human life. Additionally, ecological law is to provide primacy to ecological limits over economic and political considerations, emphasising the need for adequate monitoring and research to establish these limits. This, in part, is inspired by the concept of planetary boundaries, which establishes a safe operating space based on identified prerequisites for life on Earth - from an intact nitrogen cycle to a healthy biosphere. [25] Here, the framework embodies a precautionary approach whereby safe margins are not assumed, and a lack of scientific evidence cannot justify acts that are inherently risk-filled. Moreover, Graver argues that there is a need for law and governance to comply with the principle of adaptive management.[26] This principle entails that law must evolve and/or adapt to accommodate practical findings 'on the

[24] *See* for the eleven core features, in more detail: Garver (n 3), 128.

[25] *See* for further reading J Rockstorm and others, 'A Safe Operating Space for Humanity' (2009) 46 Nature 472.

[26] ibid.

ground'. [27] The relevance of this can, again, be illustrated by the EU Habitats Directive. This instrument has been criticised for failing to keep up with ecological developments: it hosts a rigid list of protected species that is difficult to update as necessary on a frequent basis.[28] Graver's lens of 'ecological law' can draw out these lacunae within instruments. [29] In a system inspired by ecological law, threatened fungi, for example, would likely be included in the scope of protection within the EU - with relative ease.[30]

A crucial element of ecological law is that it should not be read as 'environmental law plus'. By contrast, Garver argues that this concept should permeate every legal discipline and jurisdiction, from the national, regional to the international.[31] Ecological law is thus not a smaller, albeit more ambitious, branch of environmental law – but an expansive lens that is meant to be widely applicable. Additionally, Graver envisions that the norms underpinning ecological law are to become global, binding, and supranational, taking the principles of proportionality (no excessive regulation) and subsidiarity (regulation at the lowest regional tier possible) into account. Critics will undoubtedly point to the difficulty in achieving these aims within our current global political economy, and they would not be wrong; most decision-makers will resist such a significant transition, a point raised by Graver himself.[32]

In this context, it is commendable that the author discusses a plethora of tools to navigate these difficulties. To name just one example, the author discusses the concept of 'leverage points' in great detail.[33] These leverage points are cases when a small change in one aspect of society (whether it be a minor change to

[27] *See* H Brige, C Allen, A Garmestani, K Pope, 'Adaptive Management for Ecosystem Services' (2016) 183 Journal of Environmental Management 343.

[28] Cardoso (n 26).

[29] This may be argued because, in this model, ecological limits have primacy over political considerations. The exclusion of large parts of the animal kingdom may interfere with ecological integrity and could thus be scrutinised through the lens provided by Garver.

[30] ibid.

[31] Garver (n 3), 128-149.

[32] ibid.

[33] ibid, 170.

a parameter in air pollution regulations, or a matter more entrenched, such as a change in a common worldview) leads to a large ripple effect that can change the aggregate, often in counterintuitive ways.[34] For example, a tightening of air quality standards, in turn, may impact offset and cap-and-trade in pollution laws, pollution taxes, and in the end – give rise to the creation of a new regime on air quality standards. Whilst relevant - the downside of this part of the book is that it is relatively complex compared to the rest of the work. In the view of this reviewer, this merely highlights the fact that there is no easy solution to the present-day environmental crisis. The fact that Garver does, however, formulates a path forward - showcases the constructive character that underpins the book.[35] In part because of this constructive character, the book may be relevant for those seeking a normative framework to analyse existing legislation. The clearly defined 'aspects' of ecological law, outlined above, can guide critical thought on how systems may be reformed and/or improved from the perspective of achieving a 'better' environmental outcome.

Ideally, the book would reach beyond the sphere of environmental lawyers. Environmental law, which is limited in its scope, may not be up to the monumental task ahead. Sources predict that an estimated 1 million species will face extinction in the coming decades.[36] For ecological law to succeed in 'turning the tide', it must be considered how it can be implemented in all fields that may impact the environment. At present, environmental protection is increasingly encoded in instruments previously deemed wholly separate from the issue (i.e., the much-cited 'greening' of other areas of law). To name some examples, one can think of recent proposals in EU law: from the due diligence norms embedded in EU corporate law, green finance in EU procurement law,

[34] ibid.

[35] Garver further expands on these pointers in his book, bringing in concepts such as lock-ins within legal systems - that impedes and/or enhances environmental protection. These concepts, due to limitations of space, are not included in this review.

[36] F Sanchez-Nayo, K Wyckkuys, 'Worldwide Decline of the Entomofauna: A Review of Its Drivers' 232 Biological Conservation 8.; IPBES, 'Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services' (2019).

or the green state aid criteria in EU competition law.[37] In order to prevent a tunnel vision on CO_2 emissions within this 'greening' – and to bring in elements of ecological integrity or intergenerational equity within these instruments – Garver provides a case for a holistic approach that takes a broader spectrum of ecological science into account, in an adaptive manner.

In conclusion, whilst no publication on its own can be considered a panacea for all ills, this reviewer finds the contribution by Garver an informative and thought-provoking starting point to critically reflect on contemporary law and governance. If we are to resolve the perils of the Anthropocene – from rapid biodiversity loss to disruptive climate change, Graver suggests the importance of mending human-nature relationships, both on a personal as well as a societal level. These topics, in the end, concern us all: maintaining a safe operating space for life on Earth is a shared objective. Therefore, all that rests for the reviewer is to warmly recommend the book to everyone interested in the topic, regardless of their academic background.

[37] *See* for the examples mentioned, Proposal for a Directive of the European parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 COM/2022/71 final ; Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022 C/2022/481 [2022] *OJ C 80/1 ;* J Jiggins and N Roling, 'Adaptive Management: Potential and Limitations for Ecological Governance' (2000) 1 International Journal of Agricultural Resources, Governance and Ecology 28.