January 2025
ISSN: 0928-0634

SYbIL | Spanish Yearbook of International Law

VOL. 28 (2024)

SYbIL | Spanish Yearbook of International Law

tirant lo blanch

SYbIL | Spanish Yearbook of International Law

Vol. 28 (2024), SYbIL

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Book's review

SYbIL | Spanish Yearbook of International Law

In Memoriam. Oriol Casanovas y La Rosa (1938-2024): a lucid intellectual, a teacher, a friend

I

Oriol Casanovas y La Rosa, professor of Public International Law and International Relations, passed away on September 23, 2024 in Barcelona at the age of 86. A disciple of two of the greatest Spanish international law scholars of the 20th century, Adolfo Miaja de la Muela and Manuel Díez de Velasco, he was a professor at several Spanish universities.

Oriol Casanovas began his university career at the University of Barcelona in 1960 under the guidance of Professor Díez de Velasco. In 1966, as he himself stated without any irony, he was fortunate to be expelled from the university for political reasons along with sixty-seven other professors. The fortune consisted in the possibility of being able to concentrate on finishing his doctoral thesis and, above all, thanks to the intervention of Díez de Velasco, to spend time at the University of Valencia with Professor Adolfo Miaja de la Muela: "His teaching left a deep mark on me not only in the professional field. Firstly, because professor Miaja represented a solution of continuity with the University before the Spanish Civil War. His anecdotes about colleagues who preceded him and his contemporaries were very rich, but above all he reflected the continuity of the university institution above the political ups and downs that both he and I all things considered had led us to Valencia. On the other hand, in his conversations he also addressed issues of international law and knew how to smooth the way by establishing a dialogue in which the first-timer was treated as an interlocutor whose opinion interested him".[1]

Oriol Casanovas accompanied Professor Díez de Velasco during the founding years of the Autonomous University of Madrid. In 1975 he returned to Barcelona to the recently created Autonomous University of Barcelona, where he was a professor between that year and 1982, in a context of strong political protest in which the university was one of the most active arenas. Later, between 1982 and 1990, he taught at the University of Barcelona. Finally, in 1990 he moved to the Pompeu Fabra University, where he developed the last part of his academic career until his retirement in 2008. At this university, characterized by its uniqueness and its commitment to pedagogical innovation, he formed the current Public International Law and International Relations group and contributed decisively to the renewal of pedagogical materials for teaching Public International Law through

[1] Oriol Casanovas, *Cincuenta años de Derecho internacional público*, Barcelona, s.e., 2008, p. 4. This publication by the author contains the text of the lecture given in Catalan on the occasion of his retirement on 2 July 2008 at the closing ceremony of the official postgraduate Master's Degree in Legal Sciences, chaired by the Magnificent and Excmo. Mr. D. Josep Joan Moreso, Chancellor of the Pompeu Fabra University.

his works on theory,[2] materials and practical cases.[3] Borrowing the words that Professor Casanovas himself pronounced at the event in memory of Professor Manuel Díez de Velasco held at the Complutense University of Madrid on February 17, 2010, what characterizes us as a group is not so much the defense of certain doctrinal theses as "the recognition that its members share for his figure as a teacher, the gratitude we feel for the support we have received at decisive moments and the endearing and almost family-like treatment that he gave us."

II

Professor Oriol Casanovas was a reference in the Spanish academy for his teaching and scientific contributions. He was a jurist with a solid and refined conceptual framework, sensitive to the academic and international context in which he developed his work, with a precise argumentative style and a great concern for the human condition both in personal and international relations.

The result of his concern for the human condition was his specialization in international humanitarian law. He soon advocated the humanization of armed conflicts and the need to protect victims. Some of his most notable works in this field were the inaugural lecture of the 1993-1994 academic course at the Pompeu Fabra University[4] and, above all, the course he gave in the summer of 2003 on "La protection internationale des réfugiés et des personnes déplacées dans les conflits armés".[5] The persistence of armed conflicts in Ukraine, the Middle East, in several African countries and in Central and South Asia, as well as their terrible effects on the lives of too many human beings, remind us of the relevance and timeliness of this concern.

III

However, the main contributions of Oriol Casanovas as a Spanish international lawyer to international legal science are his explanation of the compatibility of unity and pluralism in international law and the conception of international law as a truly public law, which helps to understand and explain today's world.

On the one hand, anticipating the work of the United Nations International Law Commission, he argued that the quantitative and qualitative increase in international legal norms that make up normative subsystems called international regimes were a manifestation of the political, social and legal pluralism existing in the international community and that at the same time it was possible to defend the formal and material unity of the international legal system. His general course in the *Bancaja*

2 O. Casanovas y A.J. Rodrigo, *Compendio de Derecho internacional público*, 12ª ed., Madrid, Tecnos, 2014.
3 O. Casanovas y A.J. Rodrigo, *Casos y Textos de Derecho internacional público*, 7ª ed., Madrid, Tecnos, 2016.
4 O. Casanovas, *De l'ajuda humanitària al dret d'ingerència humanitària*, Barcelona, Universitat Pompeu Fabra, 1993.
5 O. Casanovas, "La protection internationale des réfugiés et des personnes déplacées dans les conflits armés", *Recueil des Cours*, 2003, Tome 306, pp. 1-176.

Euromediterranean Courses of International Law and subsequent monograph on *Unity and Pluralism in Public International Law*[6] are a good example of this.

And, on the other hand, his conception of international law as the legal order of the international community in which there is also a public dimension has a greater explanatory value for current international relations.[7] Now that the liberal international order led by the United States is in crisis (perhaps final) and some propose an illiberal international order, Oriol Casanovas argued that the return to Westphalia no longer makes sense because in the current international community, although there are Westphalian spaces, there is also the global public interest. He postulated the existence of general interests of the international community that have a plurality of manifestations and that are protected and regulated by means of an international law that is already truly public for two reasons. The first is because international law, despite all its problems, is a limitation for the most powerful; nothing is more necessary and urgent at this time, as armed conflicts and international migrations make clear. The second is that this public dimension of international law helps to protect and regulate global common (the seabed and its mineral resources, marine biodiversity in the high seas, fishery resources, Antarctica, etc.), to provide global public goods (global health, the stability of the climate system, etc.) and to defend universal values (life, peace, physical integrity, the prohibition of torture, genocide, apartheid, etc.). [8] In other words, this conception makes it possible to defend life, civilization and the planet.

IV

Furthermore, he was concerned and made sure that those who studied with him understood that international law is closely linked to international relations and defended, like few others, the scientific dialogue between both disciplines. This was a genuine defence, inherited from what he called the internationalist essay referring to a specific genre preceding the studies of international relations nourished by the works of Spanish scholars such as Antonio Truyol, Antonio Poch and G. de Caviedes, Gonzalo de Reparaz, Manuel Terán, Vicente Gay, Román Perpiñá or Camilo Barcia Trelles, among others.[9]

Oriol Casanovas preached the links between international relations and public international law with a committed and generous example, especially during his years at the Pompeu Fabra University. There he cared for and promoted the theory of international relations among those who enjoyed his teaching. He did so on a daily

6 O. Casanovas y La Rosa, "Unidad y Pluralismo en Derecho internacional público", *CEBDI*, Vol. II, 1998, pp. 35-267; a revised version of this course published in English can be viewed at *Unity and Pluralism in Public International Law*, The Hague, Martinus Nijhoff, 2001.

7 O. Casanovas, "La dimensión pública del Derecho internacional actual", in N. Bouza, C. García y Á. J. Rodrigo (dirs.) y P. Pareja (coord.), *La gobernanza del interés público global*, Madrid, Tecnos, 2015, pp. 57-75

8 It is the conception that underlies tacitly and also explicitly in the work *Compendio de Derecho internacional público*, 12ª ed., Madrid, Tecnos, 2024.

9 O. Casanovas y La Rosa, "Comunidad y Sociedad como categorías de análisis de las Relaciones Internacionales", in C. García y E. Vilariño (coords.),*Comunidad internacional y sociedad internacional después del 11 de septiembre de 2001*,Gernika, Gernika Gogoratuz/Munduan Paz y Desarrollo, 2005, pp. 9-17.

basis and particularly in some seminars devoted to topics and authors in which the link between the two disciplines seemed inseparable. He thus reflected the academic trends that in the 21st century underlined both the conditions of power in the international legal order and the relevance of legal norms in the behaviour of international actors.

This concern for the creation and evolution of international norms, so characteristic of the liberal and constructivist theoretical approaches after the end of the Cold War, was for Oriol Casanovas the echo of classic authors of the 20th century, such as Norman Angell, Martin Wight or Hedley Bull. At the same time, some theoretical approaches of classical realism, perhaps disdained by the concerns of the post-Cold War, continued to reserve for Oriol Casanovas lucid and valuable ideas and concepts for the analysis of the transformations of the contemporary international order, as was the case of the works of Georg Schwarzenberger, Hans Morgenthau and, of course, Carl Schmitt. He devoted special attention to the latter, as demonstrated by his last published book, since he was an intellectual who conceived the international order at the crossroads of politics and law. Far from Schmittian ideological convictions, this interdisciplinary conception was shared by Oriol Casanovas.[10]

V

Oriol Casanovas was a university professor who became a teacher for his students, for his disciples and for his colleagues in his area, discipline and in the different universities where he taught. As a university professor, he gave masterful classes that truly deserved this title because he had a deep knowledge of the discipline of Public International Law and also of its political, social and legal context. He was a comprehensive jurist. Research in specific areas and specialization required, in his opinion, a mastery of the discipline that could only be obtained by studying and preparing classes in the different subjects of the area of knowledge with different textbooks, in different languages, and from different legal environments. For Oriol Casanovas, teaching was an essential task of the university professor who participated in the training of lawyers, while it also constituted an essential component of the training of doctoral students and future researchers. He was not a teacher like any other, because with him you learned the discipline, how to explain each subject, what were the difficulties and the abysses that one faced when, after a few years of finishing the degree (with some master's and postgraduate degrees behind us) you entered classrooms full of students. Only teaching allows you to learn in each session the complementarity between deep and detailed knowledge of the subject and the skills to transmit it in a precise way, with the appropriate cadence, tone and register. He taught his students and taught his collaborators and disciples how to teach, to whom he transmitted the importance of having colleagues with whom to share university tasks, discuss and reach agreements on the most varied issues such as, for example, the formulation of exams, teaching plans, marking guidelines, etc. In relation to this issue, Professor Casanovas considered that "every exam and its correction is a lesson in humility for the professor", who often fails to understand how his students can respond so inaccurately to questions on topics that the professor believed he had explained

[10] O. Casanovas y La Rosa, *Carl Schmitt: pensador del orden internacional*, Madrid, Tecnos, 2022.

brilliantly in class. His involvement with the public university was always consistent with the vocation of service to society through research and the teaching of Law.

As a professor, Oriol Casanovas was always interested in learning and in incorporating the best strategies and materials into teaching. To do so, he consulted teaching plans and materials to prepare practical sessions of the subject from other universities, he was interested in how public international law was learned abroad and he devoted much effort to preparing teaching that was at the service of the learning of all students. This implied sufficient flexibility and capacity to satisfy the most prepared minds with complex content and discussions, without neglecting those perhaps less advanced in knowledge, but equally eager to learn. He argued that all students, or at least the vast majority, should be able to finish the teaching sessions with the conviction that they had learned something. He devoted himself to preparing his own materials, such as the book of *Casos y Textos de Derecho internacional público*, with which many generations of lawyers learned, and later the *Compendio de Derecho internacional public* (with Professor Ángel J. Rodrigo). His academic vocation and european conviction led him to organize a Seminar on Community Institutions and Policies at the Faculty of Law of the University of Barcelona in order to be able to teach a group of his students who were most interested in international law and European law the integration process, history, institutions, law and community policies, at the end of the 1980s, on the occasion of Spain's entry into the European Communities. The seminar, which had around twenty sessions (and which in some editions included visits to institutions and meetings with Spanish representatives) did not entail obtaining credits, nor any mention in the academic record, nor recognition for the teachers, but it was a priceless gift that can only be explained by his vocation and conviction. Oriol Casanovas had the virtue of making the most difficult subjects seem accessible, almost easy, and this was the result of much study and reflection on the underlying issue and, also, on how to transmit its essential elements in an orderly manner, without renouncing complexity or hiding the lack of doctrinal agreement. In addition, he had the gift of restraint, which he transferred to his writings so that nothing in them was superfluous.

VI

Oriol Casanovas was also admired for his human dimension and his personal style. He was a person of exquisite manners. Affectionate and attentive in personal relationships, he practiced the now unusual habit of responding in writing and in a personalized way to all the people who sent him their work. In addition, he displayed a fine sense of humor and an inexhaustible university anecdote that made him an excellent conversationalist and made him the center of reference at meetings of colleagues and friends. He had an almost infinite intellectual curiosity that led him to read works, beyond international law and international relations, on literature, painting and art in general. He had a special sensitivity towards Catalan culture, on which he had gathered important collections of cultural magazines from various periods. One of the most fascinating features of Oriol Casanovas was not so much his knowledge, which was very considerable, but above all the elegance and relevance with which he made use of it. The disappearance of Oriol Casanovas means the loss for the entire Spanish academy of a professor, a lucid intellectual and a reference teacher in the doctrine of Public Intentional Law and

International Relations. In addition, for us, a gentleman and a generous friend who, with his words and actions, encouraged us to be the group that we are, is also gone. He learned from his teachers that "the university is continuity" and he contributed in an excellent way to this. Now it is our responsibility to live up to his academic and human example.

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The Classics' Corner

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Bringing theory back in

Oriol Casanovas y La Rosa[1]

1. There exists a widespread doubt over whether law in general not only Public International Law can be scientifically studied. This scepticism reached a high point during the development of *scientism* during the nineteenth century. Scientism viewed science as the way to resolve human and social problems in the world, which involved the development of sciences based on experimentation and rigorous laws. By delving ever deeper into the study of the natural world and understanding its laws, man would acquire control over his environment, thus allowing him to solve the problems of the time, thereby overcoming his ignorance. Science was the true path to progress and only those fields of study which followed its premises were deemed worthy of the name physics, chemistry, geology, mathematics etc. These disciplines deserved to be called sciences because, due to their accumulation of facts and investigations, and in line with the objectives and methods of scientism, they allowed society to achieve its fundamental goal of progress. The results of prior investigations would provide the basis for future investigations, which would allow for the discovery of new laws, which, through the development of increasingly abstract and general formulae, would lead to an understanding of a greater number of seemingly different phenomena.

   This approach left little room for forms of human knowledge which were not directly observable or measurable and, as a consequence, led to the development of new sciences which did not share the goal of dominating the natural world, but rather focused on using the methods used in natural sciences to explain social phenomena. This was developed by, amongst others, Émile Durkheim in the field of sociology.

2. In the field of law the influence of scientism created a double reaction. Firstly, there were scholars who argued that knowledge of law should be as objective and neutral as possible. This approach was adopted in France during the first half of the nineteenth century with the School of Exegesis, for whose followers scientific knowledge of law had to be based in objectivity. According to the School of Exegesis, the objective basis of law was legislation, and all positive law was identified with written law.

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[1] Professor of Public International Law Pompeu Fabra University, Barcelona
This work was published as "La vuelta a la teoría", in *Hacia un nuevo orden internacional y europeo: Estudios en homenaje al profesor don Manuel Díez de Velasco,* Madrid, Tecnos, 1993, pp. 179-196.

The second reaction consisted of asserting the specific scientific nature of non-natural sciences based on their particular object of study and methods of gaining knowledge, onto which it would be inappropriate to apply the systems of the natural sciences. We thus see the distinction, as developed by Neo-Kantians, between sciences of nature and sciences of the spirit. In accordance with this approach, law would have objectives and methods which were distinct from those of the natural sciences, as it did not exist in the physical world nor was it based on experimentation, but it would have its own scientific nature, which it shared with other cultural sciences.

3. The denial of the scientific nature of knowledge of law was embodied by Kirschmann. In his famous conference of 1848, titled *On the Worthlessness of Jurisprudence as a Science,* he argued that legal scholars 'study the lacunae, the mistakes and the contradictions of positive laws; looking at what is false, antiquated or arbitrary within them. Their goal is ignorance, negligence, the passion of the legislator […] Due to positive law, legal scholars have become worms who live off rotten wood; avoiding what is healthy and setting up their nest in that which is sick. As science makes its object of study contingent, it defines its own contingency; Three lines from the Court of Justice and entire libraries become waste paper.'[2] Kirschmann's critique was aimed directly at the methodological approach adopted by the School of Exegesis, which focuses the work of the legal scholar on an analysis of written law. We thus need to ask if the legal scholar is limited to simply studying legal statutes.

   The critique of the School of Exegesis was developed in France, principally by François Gény, for whom there are two elements within law: that which is *given* and that which is *constructed*. On the one hand, legal scholars seek legal rules through an objective analysis of what can be deduced from 'social nature', where possible in its purest form, which forms what is the *given* element of law. On the other hand, legal scholars try to apply these natural, *given* elements, transforming them in such a way that they become modelled on the requirements of the legal order to which they are destined to form part of. The result of this 'artificial' work constitutes what is *constructed* within law. This duality allows Gény to develop a distinction between *science* and *technique*. *Science* consists of 'the development of the elements of law, carried out without artifices, observing facts of nature.' *Technique*, on the other hand, looks at the construction of law, consisting of 'the special and professional effort through which the surprising and unique contours, and considerable importance of a legal order are adopted.'[3]

4. Within Gény's analysis we see the elements necessary to put forward the idea of a science of law. The concepts of *given* and *constructed* elements, and of *science* and *technique*, can be taken as a starting point for this development, if we move away from scientism and other philosophical currents of the time.

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[2] H.J. von Kirschmann, *La Jurisprudencia no es Ciencia* (*On the Worthlessness of Jurisprudence as a Science*), translation and foreword by A. Truyol y Serra, 3rd edition Centro de Estudios Constitutionales, Madrid, p. 29

[3] F. Gény, *Science et technique en Droit Privé Positif*, Sirey, Paris, n.d., pp. 98-99

Kirschmann's critique had something of a basis in that the science of law cannot limit itself to the study of legislation. Whilst laws frequently change, sometimes too quickly, many laws have a long history. For many centuries legal scholars have developed a language, methods of reason, categories of interpretation and intellectual models to apply to laws and their application, and these often outlive the laws which they were designed to analyse. Angel Latorre highlights the importance of this doctrinal tradition for the possibility of creating scientific knowledge on law, positing, 'however radical legislative changes may be, the mental habits, terminology, and technical language of this doctrinal tradition are always applicable. It is in the preparation of this *forma mentis*, in the use of certain methods and the use of particular language that we see real legal training, rather than in the specific knowledge of particular laws.'[4]

This does not mean that the science of law consists exclusively of certain modes of reasoning and a specialized language, as its object of study also includes laws, specific legal norms and legal orders as a whole. In this sense it is worth making an often overlooked observation: law as such, that is, legal order, is not in itself a science; rather law is the object of study of a science, namely the science of law. As Luis Recasens Siches so graphically put it, law is not a science in the same way that an elephant is not a science; what are sciences are zoology and the science of law.[5] The distinction between law and the science of law is not always clearly understood. There are many reasons for this confusion, starting with the way the word *law* is used to refer both to legal orders and the work of legal scholars.

The objective of the science of law is, firstly, to develop knowledge on laws, norms and legal orders, which we could refer to as the *given* elements of law, though in a slightly different way to that of Gény. And the second objective is to interpret and understand the techniques, intellectual habits, language, methods of reason, categories and intellectual models used by legal scholars, which we could refer to as the *constructed* elements of law. Just because specific laws and norms may be subjected to changes, this does not reduce their individualization and creation at any particular moment in time. Legal orders last over time and these *constructed* elements enjoy a high degree of permanence. Playing with the concepts of constancy and transience, Karl Larenz observes, 'the science of law is concerned with both that which is transient and that which is (to a lesser or greater degree) constant; it also delas with that which is constant within transience, that is, with the multitude of its constant manifestations. The object of study is both that which is special or individual, such as particular decisions in particular cases, as well as that which is general, namely a general idea of law and the way it is carried out.'[6]

5. From a different perspective, the scientific nature of law has been defended in terms of recent contributions to philosophy and the history of science. Kuhn has underlined the fact that scientists do not limit themselves to formulating empirical

4 A. Latorre (1968), *Introducción al Derecho*, Ariel, Barcelona, p. 122

5 L. Recasens Siches (1971), *Experiencia Jurídica, Naturaleza de la Cosa y Lógica 'Razonable'*, Fondo de Cultura Económica/ Universidad Autónoma de México, Mexico, p. 500

6 K. Larenz (1966), *Metodología de la Ciencia del Derecho*, (translation to Spanish by E. Gimbernat Ordeig), Ariel, Barcelona, pp. 20-21

laws based on the observation of natural phenomena as outmoded scientism postulated, but that they also accept certain premises that lack an empirical grounding, and that the scientific community uncritically accepts this.[7] Alberto Calsamiglia has argued that legal knowledge functions in the same way, as it has its own rules and it possesses objectives and social functions that are not arbitrary or subjective. The legal community, just like the scientific community, determines the acceptance of these features of legal knowledge and oversees their application. As Calsamiglia notes, 'it makes no sense to ask more of jurisprudence than of any other mature science.'[8]

6. The science of law thus deals with *given* and *constructed* elements, and expands the *given* elements beyond that which Gény outlined. Therefore, we need to ask what the role of *technique* is within law, and in this sense we need consider the two functions of technique. Firstly, law has a technical aspect in that it is an instrument which aims to achieve particular results. At a very general level, law is a technique or mechanism that aims to solve conflicts of interest (satisfactory function) and bring about peace, eliminating the individual use of violence (pacifying function).[9] Secondly, the language, modes of reasoning, habits of thought etc. are also *techniques*, or individual technical instruments. Therefore, the science of law cannot view either norms or modes of reasoning as absolutes, but rather as technical instruments which have a functional validity. This is what allows the science of law if it does not wish to cut itself off from its most important activities to be a science which is not only cognitive, but also *practical*.

7. From this perspective we see that Public International Law, which is not a science in itself, in the same way that domestic law is not a science either, can be the object of study of the science of law in that it is a form of legal order. Being a different form of legal order from that of domestic legal order, it can be a different object of study for the science of law. The role of *given* elements is far less important than that of *constructed* elements when compared with domestic legal order. We thus see that Hall's phrase, which was already inaccurate *there is no place for the refinement by courts of the coarse jurisprudence of nations* is even more inaccurate today.[10]

International Law, developed under the umbrella of the rich legal tradition of jurisprudence and supported from its origins by contributions from Roman Law, very quickly became a focus of the science of law. Its relatively modern origins, especially when compared with Civil Law, represent no problem in this sense, as it comes together with a much older scientific tradition. The claims of certain branches of law to be considered as an independent theoretical stream are, without doubt, overplayed. Whilst each branch of law has its own peculiarities, we can not seriously talk of a science of Civil Law or Procedural Law, for example. And neither can we talk of a science of International Law as such. However, we can talk of the Science of Law applied to international legal order.

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7 T. Kuhn (1962), *The Structure of Scientific Revolutions*, University of Chicago Press, Chicago
8 A. Calsamiglia (1986), *Introducción a la Ciencia Jurídica*, Ariel, Barcelona, p. 77
9 L. Díez-Picazo (1973), *Experiencias Jurídicas y Teoría de Derecho*, Ariel, Barcelona, pp. 18-20
10 W. E. Hall (1924), *A Treatise on International Law*, 8th ed., edited by A. Pearce Higgins, Oxford, p. 395, fn. 2

8. Methodology indicates the means through which knowledge can be acquired within sciences and how sciences can be taught. Within the field of law in a general sense, and within International Law in particular, it is understood that methodology can be broadly interpreted to include the means employed in the acquisition of scientific knowledge on the international legal order, and in a narrower sense, with reference to the means used to determine the existence of norms or rules within International Law.[11]

   The issue is more complicated than it appears as presented in this simple dualistic approach, however, as international legal scholars, just like other legal scholars and even other scientists, carry out their work on three distinct planes which are tightly interconnected: the plane of description, the plane of explanation and systemization, and the plane of operationality and application to reality. Elías Díaz, focusing this triple function on legal norms, posits that the work of a legal scholar can be differentiated along these three elements: a) the work of *locating* the valid norms which can be used for a specific case; b) the work of *interpreting* norms, of connecting norms in the *construction of institutions and fundamental legal concepts*, and of *systemizing* norms and institutions into a coherent whole; c) the work of *applying* norms for the resolution of particular cases in real life and for the implementation of a certain system of values within a particular society.[12]

   In a broad sense, the methodology of law should consist of the set of intellectual instruments which the legal scholar uses in order to carry out the aforementioned functions. Methodology should include both the methods used to determine the existence of international norms and to determine their interpretation and systemization, as well as to outline how they can be applied to a specific case. To a greater or lesser degree all legal scholars carry out these functions, but the importance given to each of these elements varies between scholars and practitioners of law.

   The fundamental task of the legal scholar consists of the second of the aforementioned functions: the interpretation and systemisation of legal norms and institutions as a constructed and coherent whole. This task, however, also presupposes the function of determination and application of the norms of the legal order under study. The system of producing laws in a particular order conditions the perspective taken and the tools which should be used to examine the order. The way we study an order with high levels of written law and codification will be very different from that of an order where customary law or jurisprudence are more prevalent.[13]

   The function of application goes far beyond being a mechanical operation which is complementary to the location and interpretation of norms. In fact, it takes on creative features in cases where there is a gap within the law or it is necessary to

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11 C. Dominicé, 'Methodology of International Law', in *Encyclopedia of Public International Law*, vol. 7, p. 334

12 E. Díaz (1971), *Sociología y Filosofía del Derecho*, Taurus, Madrid, p. 70

13 Manuel Pérez González indicates that 'the meaning of law-making within international society is of crucial importance to methodology' and its importance to understanding 'law as an ordering system of characteristic intersocial relations.' M. Pérez González (1989), 'Observaciones Sobre la Metodología Jurídico-Internacional: Método, Evolución Social y *Law-Making* en Derecho Internacional Público', in *Liber Amicorum en Homenaje al Prof. Dr. Luis Tapia Salinas*, Madrid, p. 251

simultaneously apply various norms from different orders. In these cases we see problems in the way jurisprudence creates laws and the way in which analogies are used to solve particular legal cases.

The contributions made by the science of law in terms of generating a better understanding of law have been varied and highly valuable, and they are closely linked to the development of thought and social sciences in recent times. Taking the international legal order as a reference point, we need to ask to what extent the methods of the science of law are applicable to International Law and whether other methods from social science can contribute to the development of the science of International Law.

9. Within the modern science of law there has been a wide-ranging debate around the method which has contributed to its development and enrichment. The main methodological currents within this debate have also been seen more specifically in International Law. In fact, the science of law and the science of International Law have followed parallel paths. Any analysis of methodological issues in International Law that were limited purely to the sphere of the science of International Law, and not the science of law more generally, would only provide a partial picture of this theme. Debates have raged within various interconnected doctrinal streams. The aim here is to analyse the general theme of these debates, incorporating contributions from various fields, not only International Law, though there will obviously be more of a focus on International Law.[14]

10. For many years the science of law has been identified with the dogmatic method. Developed by great German legal scholars at the end of the nineteenth century, the dogmatic method sought to construct legal *concepts*. Basing itself on the study of positive laws, it aimed to establish general legal concepts such as those relating to property, contracts, inheritance etc. that were valid in a general sense regardless of any particular legal system. These concepts would acquire a supralegal nature and, in certain way, a metaphysical and abstract status. Legal dogma grew up from the positivist premise of 'isolation' from a specific aspect of reality, which in this case meant isolation from law. This meant that a 'scientific' analysis would be possible without interference from other aspects of the reality within which law was embedded. For the dogmatic method, this exclusion of sectors of reality is as important as its concept-construction technique of reasoning. As Gallego Anabitarte notes, '*dogmatic reasoning* is that whose aim is to think through to the logical end of an *authoritative* opinion in order to understand its meaning; this opinion should be thoroughly analysed so as to understand all its possible meanings, but it is forbidden to go beyond the opinion, which is what characterizes this intellectual activity. Dogmatic thought means staying within the realm of the particular aspect being analysed, and developing a series of distinctions, relations,

[14] For a more detailed analysis of the distinct methodological currents within the contemporary science of International Law, see A. Truyol y Serra (1977), *Fundamentos de Derecho Internacional Público*, 4th edition, Tecnos, Madrid, pp. 53-83. See also, A. Ortiz-Arce de la Fuente (1980), 'Consideraciones Metodológicas en Derecho Internacional Público', *Revista de la Facultad de Derecho de la Universidad Complutense de Madrid*, nº 60, pp. 7-45, and nº 61, pp. 67-94

classifications etc. This process is full of difficulties and can infuriate those who are not instructed in its method.'[15]

The dogmatic method proposes *deductive* reasoning. The basic scheme of this has been well captured by Castberg, who observes, 'legal reasoning is characterized by its use of norms, from which conclusions are deduced through the introduction of a specific case under the general law, the norm.'[16]

In short, we can say that the dogmatic method is characterized by: 1) its methodological *premise* of the 'isolation' of law from other sectors of reality; 2) its scientific programme, that is, the construction of *concepts*, and; 3) its reasoning technique, namely, deduction.

Critiques of the dogmatic method have come from three different fronts. Legal sociologism and functionalism have questioned the premise of isolation; historicism and sociologism have criticized its programme; and the school of argumentation has criticized the validity of deductive reasoning.

Focusing on the critique of the dogmatic method's programme, historicists argue that abstraction of something as fluid and contingent as the historic reality of legal systems is pointless. This is captured by Francesco Calasso, who observes, '*Dogmatic* is the most unfortunate term within the vocabulary of legal scholars, and it does not even belong to them. It has been borrowed from the only science which can proclaim dogma, or unmovable truth, theology, *scientia Dei*, knowledge of a *substantia omnino immutabilis*, and therefore, *scientia uniformis et invariabilis*. As this concept has infiltrated law, which is human field that is governed by the law of movement, this is an enormous problem.'[17]

Luis Díez-Picazo notes, 'institutional concepts and categories are not dogmas, but rather responses that are historically conditioned to groups of typical social problems. They do not make sense in themselves but are worthy in terms of the results which they functionally produce or aim to produce.'[18]

Within the field of International Law the dogmatic method has some well known exponents in Tomaso Perassi and a large sector of the Italian doctrine.[19] However, it should be noted that Perassi did not take dogma to the extremes that other branches of law have done. Perassi was not ahistorical. In his *Introduzione alle Scienze Giuridiche* he clearly marks out the complexity and complementarity of the diverse scientific approaches to law, of which dogmatic method is nothing more than one particular approach or technique.[20]

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15 A. Gallego Anabitarte (1965), 'Constitución y Política', appendix to the Spanish translation of the work by K. Loewenstein, *Teoría de la Constitución*, Ariel, Barcelona, p. 475

16 F. Castberg (1933), 'La Méthodologie du Droit International Public', *Rec. Des Cours*, vol. 43-I, pp. 320-321

17 F. Calasso (1966), *Storicità del Diritto*, Giuffrè, Milan, p. 180. Se also B. Paradisi (1956), *Il Problema Storico del Dirittto Internazionale*, 2nd edition, Naples, p. 24

18 L. Díez-Picazo (1970), *Fundamentos de Derecho Civil Patrimonial*, vol. I, Tecnos, Madrid, p. 36

19 E. Pecourt García (1965), *Tendencias Actuales de la Doctrina Italiana de Derecho Internacional Público*, Institución Alfonso El Magnánimo/ Caja de Ahorros y Monte de Piedad de Valencia, Valencia

20 T. Perassi (1938), *Introduzione alle Scienze Giuridiche,* Rome, pp. 25-31

11. Professor Georg Schwarzenberger proposes what he terms the *inductive approach*. If we focus exclusively on its theoretical formulation, this approach displays certain features which link it to a revised version of the dogmatic method. But if we examine Schwarzenberger's use of the inductive approach, then we see that it is in fact a more complex method. It is in this contradiction that we can locate the ambiguity of Schwarzenberg's position and the difficulty of knowing whether to situate him within the fold of modified positivists or amongst *realist* sociologists.

Given the emphasis that Schwarzenberger places on the distinction between *lex lata* and *lex ferenda*, and taking into account his critique of authors who combine deductive and inductive approaches and look at social and functional elements of the legal order, whom he defines as eclectic, we could classify the *inductive approach* at least in its theoretical formulation, which is what interests us at this moment as an approach which is closer to positivism and the dogmatic school.

According to Schwarzenberger, the inductive approach is characterized by the following four features:

1) Its emphasis on the exclusive existence of three law-creating processes in International Law: consensual commitments in the broadest sense of the term, customary International Law and the general principles of law as recognized by civilized nations.

2) The establishment of means to determine legal rules (law-determining agencies) in accordance with rationally verifiable criteria.

3) Its awareness that only the norms of International Law are compulsory, unless there is evidence that a principle, derived from these norms, has acquired a superior status so as to prevail over others (overriding rule).

4) The recognition of the differences that exist between International Law applied to the inorganic society, to the partially organized society and to the fully organized society. Whilst in the first case International Law is generally *ius strictum*, in the second case and, above all, in the third case International Law tends to become *ius aequum*, as in the case of the United Nations. [21]

When Schwarzenberger looks at methodological assumptions whose links to positivism are fairly clear in that they set out the tasks for the doctrine the *functional* analysis takes on a key role. Schwarzenberger proposes that the inductive approach take in the possibilities of interdisciplinary study, bringing in historical, sociological and axiological perspectives so as to complete the results of the inductive approach from the basis of jurisprudence and international practice.[22]

The approach put forward by Schwarzenberger was radically opposed by Wilfred C. Jenks. Jenks' critique attacked the conservativism of Schwarzenberger which makes it difficult to change the direction of international jurisprudence the limited role afforded to deduction and intuition in legal reasoning, and the 'sealed

[21] G. Schwarzenberger (1965), *The Inductive Approach to International Law*, Stevens, London, pp. 5-6

[22] Ibid., pp. 43-71. Also, by the same author (1957), 'El Derecho Internacional en el Sistema de las Ciencias Políticas', *Revista de Estudios Políticos*, nº 91, pp. 3-14

compartments' which are established as tasks for international legal scholars as analysts of law.[23] This critique is fully justified in Jenks' eyes, as he advocated methodological eclecticism and believed that the doctrine had an important role in the development of International Law.[24]

12. Due to the attention which International Law pays to the historical, social and economic contexts in which it plays out, one part of the doctrine insists on the relevance of these contexts in producing knowledge of International Law.[25] A pioneer in this line was the Swiss legal scholar Max Huber. His starting point was that the state was a fundamental element of international relations. The state is a territorially defined form of social organization and its power is projected over its entire territory, not over social, tribal or family groups. States have a tendency to expand, but at the same time they maintain legal relations of cooperation with each other. The reasons why states develop relations are, firstly, due to complementary interests (as in reciprocal trade) and, secondly, due to common interests or coinciding aims. The primary reason why states enter into treaties is their own self-interest. Consequently, International Law should not move too far away from its social and political foundations, or from the interests of states (understood in terms of this broad formula) and, in general, from the configuration of power in international life. These concepts were heavily influential on Max Huber as both a judge and arbitrator, and on subsequent authors.[26]

    This focus on the social foundations of law is also found in the more intellectually developed thought of the French solidarist school, represented in the field of International Law by Georges Scelle. International Law springs from the social solidarity that occurs when different groups of humans come into contact with each other. From this empirical observation, Georges Scelle develops a very personal concept of International Law which has attracted many followers, doubtlessly due to its evolutive and totalizing discourse which allows for the adoption of postures towards the future which are essentially open.[27] In this line we could cite many other authors of the time and subsequently, such as the influential Italian Santi Romano[28] and the perspective adopted by the Belgian legal scholar Charles de Visscher, whose most well-known work, *Theory and Reality in International Law*,[29] is a brilliant and nuanced study of the relations between the international legal order and the social context in which it operates.

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23 C. W. Jenks (1964), *The Prospects of International Adjudication*, Stevens, London, pp. 623 and ff.

24 See the chapter, 'La Pericia en Derecho Internacional', in C. W. Jenks (1968), *El Derecho Común de la Humanidad*, (tranlsation into Spanish by M. T. Rodríguez de Arellano), Tecnos, Madrid, pp. 375-405

25 R. Yakemtchouk (1974), 'L'Approche Sociologique du Droit International', *Revue Générale de Droit International Public*, pp. 5-39

26 J. Klabbers (1992), 'The Scoiological Jurisprudence of Max Huber: An Introduction', *Austrian Journal of Public and International Law*, vol. 43, pp. 197-213

27 G. Scelle (1932 and 1934), *Principes de Droit de Gens*, 2 volumes, Sirey, Paris. On the influence of his work, see various pieces published in *La Technique et les Principes du Droit Public. Études en l'Honneur de Georges Scelle*, 2 tomes, LGDJ, Paris (1950), and A. Cassese (1990), 'Remarks on Scelle's Theory of "Role Splitting" in International Law', *European Journal of International Law*, nº 1-2, pp. 210 and ff.

28 R. Monaco (1932), 'Solidarismo e Teoria dell'Istituzione nella Dottrina di Diritto Internazionale', *Archivio Giuridico Filippo Serafini*, vol. CVIII, fasc. 2, October, pp. 221-243

29 C. de Visscher (1970), *Théories et Realités en Droit International Public*, 4th edition, Pedone, Paris

The functional approach proposed by Philip C. Jessup which is, as the author himself admits, difficult to define also represents an attempt to join legal norms to human activity, as 'norms are born in human activity and their aim is to provide order to this activity.'[30] His work is vast, as he aspired to study international norms in relation to their background in international society, taking into account information from disciplines such as political science, history, economics, sociology. Jessup himself admitted that it was such an ambitious venture that it could strike fear into even the most industrious and hardworking of scholars, but he also recognized that 'we can consider the functional method without having to aspire to perfection.'[31]

The sociological theory of Talcott Parsons influenced the school led by Myres S. McDougal, also known as the New Haven approach owing to its links to the University of Yale.[32] This school perceives Public International Law as 'a system of global public order', expressed through political conduct (policy) which gives rise to a series of behavioural standards (patterns), which provides regularity to the process of decision-making, creates expectations amongst actors in the international system and provides stability to this system.[33]

The current known as 'jurisprudence of interests' also focuses on the social realities in which norms are developed and has had a certain impact within the doctrine of International Law. This is seen in works by Kraus, Wengler and Maarten Bos,[34] who look at interests in international life, though none of these are true followers of the focus developed by Heck and his school of thought.

13. Numerous scholars within the doctrine believe that international law scholars must go beyond studying legal norms and the social and political factors which influence these. They contend that the need to understand the role of values within legal phenomena forces them to broaden their field of vision, though at the same time ensuring that they remain within the limits of scientific objectivity as promoted by those who defend objectivisation within the methodology of the science of law.[35] Law is more than a technique and it must go beyond the function assigned to it by the highest exponent of the exclusion of values from the field of science, namely Max Weber. From Weber's perspective, 'law should limit itself to defining what is valid according to the rules of legal thought, which is partly strictly logical and partly linked to some conventionally constructed frameworks. Its function is to determine

30 P. C. Jessup (1938), 'Application de la Methode Fonctionnelle au Droit International', in *Introduction à l'Étude du Droit Comparé. Recueil d'Études en l'Honneur d'Edouard Lambert*, vol. II, Paris, p. 172

31 Ibid., p. 175

32 M. Medina Ortega (1961), 'Una Nueva Concepción del Derecho Internacional: El Sociologismo de Myres S. McDougal', *REDI*, pp. 517-533, and B. Rosenthal (1970), *Étude de l'Oeuvre de Myres Smith McDougal en Matière de Droit International*, LGDJ, Paris

33 M. S. McDougal et al. (1960), *Studies in World Public Order*, Yale University Press, New York/ London, p. 871

34 H. Kraus (1934), 'Interesse und Zwischenstaatliche Ordnung', in *Niemeyers Zeitschrift für Internationales*, Recht, pp. 22-65, and *Staatsinteressen im Internationalen Leben*, Munich (1951); W. Wengler (1950), 'Prolegomene zu einer Lehre von den Interessen im Völkerrecht', in *Die Friedens-Warte*, pp. 180 and ff.; M. Bos (1968),'Dominant Interests in International Law', in *Estudios de Derecho Internacional. Homenaje a D. Antonio de Luna*, CSIC, Madrid, pp. 79-96

35 I. Von Munch (1961), 'Zur Objektivität in del Völkerrechtswissenschaft', Archiv des Völkerrechts, pp. 1-26

when certain legal norms and methods of interpretation are compulsory. It does not correspond to law, however, to decide whether law should exist or whether certain laws should be established and not others. Law can only indicate that if a certain aim is to be achieved that the most suitable means to achieve it, in accordance with our framework of legal thought, is one or another norm.'[36] This notwithstanding, the problem does not lie in whether the legal scholar should consider values or not within their scientific endeavours, which they undoubtedly must, as they form part of the objective of the scholar's analysis; rather the question is whether the legal scholar should carry out their work from a basis of a certain system of values.

The critical analysis of law from the basis of a certain system of values is what is known as *legal axiology*. The rebirth of *iusnaturalism* in part follows this line of critical evaluation of law.

Within the field of International Law, Ernst Sauer, amongst others, has defended the importance of values and drawn links between the legal and moral spheres.[37] There is a very strong argument in favour of this approach as, in the words of Carrillo Salcedo, 'the supposedly untainted positions, contrary to appearances, are heavily committed to a particular order or disorder that has been established within International Law, and are not sustainable today.'[38]

14. Later studies on legal thought, of which the work by Viehweg[39] is a brilliant example, have rejected dogmatic positions from a perspective of legal thought as *topical* thought. Viehweg argues that 'the most important point in the examination of a topic is the claim that it is a thought technique which is focused towards a problem.'[40] This reasoning technique was developed by Aristotle and Cicero and it is found within *ius civile*, in *mos italicum* and in current legal thought. The reason for which it has not been appreciated until recently is due to the influence of Cartesians in the domain of legal enquiry. For many years topical thought remained hidden behind the deductivism and axiomatic thinking of dogmatism. From the topical perspective, legal thought is not deductive thought from certain basic principles, neither is it thought based on the construction of abstract concepts; rather it is thought based in problems, an aporetic or topical thought. This is summarised by Luis Recasens Siches, who states that ' [legal thought] does not spring from first principles, such as premises, in order to draw conclusions, but rather it comes from practical problems that arise in social life, which it analyses in terms of all their factors and dimensions. It then ponders these problems through an analysis of the contrasting arguments that interested parties adduce; it evaluates these in terms of justice and prudence; and it strives to find a solution which is fair inevitably in

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36 M. Weber (1967), *El Político y el Científico*, (translated into Spanish by F. Rubio Llorente), Alianza, Madrid, p. 210

37 E. Sauer (1954), 'Zur Völkerrechtliche Methode', in *Mensch und Staat in Recht und Geschichte. Festchrift für Herbert Kraus*, pp. 163 and ff. Also E. Sauer (1963), 'Zur Grundlegung der Völkerrechtliche Methodologie', *Acta Scandinavica*, pp. 121 and ff.

38 J. A. Carrillo Salcedo (1976), *Soberanía del Estado y Derecho Internacional*, 2nd edition, Tecnos, Madrid, p. 278

39 T. Viehweg (1964), *Tópica y Jurisprudencia*, (translated into Spanish by Luis Díez-Picazo y Ponce de León), Tecnos, Madrid

40 Ibid. p. 49

relative terms prudent and viable, taking into account all the circumstances of the problem, which are highly diverse and changeable.'[41]

It cannot be argued that scholars of International Law have been unresponsive to this way of focusing law. The interpretation of international treaties as a 'topical' activity was proposed by Grotius himself, when he posits that 'the measure of good interpretation is the deduction of thought through the most probable indices,'[42] linking the activity of interpretation to dialectic and problematic deduction, just as Aristotle did. More recently within the doctrine, Ilmar Tammelo has argued that Public International Law, perhaps more than other legal orders, has an essentially 'topical' nature.[43] Firstly, Public International Law is not based on a series of clearly defined basic principles from which conclusions can be drawn; on the contrary, it contains a high number of principles with a reduced central core and many grey areas which, when applied to specific, complicated cases, lead to contradictory results. Secondly, the absence of the 'rule of 'precedent', that is, the binding nature of judicial decisions when applied to similar posterior cases, increases the lack of determination in the application of norms. International Law continues to be an order based on customary law. The establishment of customary laws requires an analysis of highly complex international practice (*diuturnitas*), which in certain cases leads to courts resorting to rhetorical arguments in sentencing. Customary norms become 'sites' of argumentation. Neither do international treaties offer much of a basis for deduction, becoming references for 'dialectic' argumentation. The inclusion of customary norms within multilateral international treaties, especially in cases which affect the vital interest of states, is effectuated in terms of very highly general formulations which, owing to their breadth and vagueness, give rise to multiple positions in terms of their application to specific cases. Finally, taking 'the basic principles of law' as a reference which allows us to resolve cases in which there is no applicable customary or conventional law is a move that could be considered a *topoi par excellence*.[44]

15. In recent years legal thought has been enriched by authors representing what is known as the *Critical Legal Studies Movement*. This movement's object of study focuses on legal argumentation, and from this perspective they can be considered as the successors to the debate opened by authors who adopted a topical focus towards law; however, it should be noted that their positions and methods are radically different. The origins of this movement can be found within the universities of North America at the end of the 1970s, and it spread rapidly through France, Germany and other European countries in the following decade. Amongst its proponents there is a diversity of positions, though they all share a focus on legal issues from a broad perspective of social theory in accordance with the most recent contributions to structuralism, the critical theory of the Frankfurt School and post-

41 L. Recasens Siches, *op. cit*., p. 104

42 Hugo Grotius (1925), *Del Derecho de la Guerra y de la Paz*, book II, chapter XVI, section I, (translated into Spanish by Jaime Torrubiao Ripoll, tome II, Reus, Madrid, p. 293

43 I. Tammelo (1964), 'The Law of Nations and Rhetorical Tradition of Legal Reasoning', *The Indian Yearbook of International Affairs*, pp. 227-258

44 Ibid. p. 253

structuralism. Their epistemological approach is highly radical and their aims are ambitious: a deep critique of traditional legal thought, even in its most *updated* forms.[45]

In the ambit of Public International Law, the most renowned members of the Critical Legal Studies Movement are the Harvard professor David Kennedy[46] and the member of Finland's foreign service bureau, Martii Koskenniemi.[47] In this line we also see Anthony Carty,[48] Friedrich V. Kratochwill[49] and Ulrich Fastenrath.[50] It is maybe to soon to meaningfully analyse the contribution of Critical Legal Studies in the field of Public International Law, as the movement is still evolving and it is highly possible that new insights will be produced in the coming years.[51]

16. The aforementioned authors share a common critique of the recent doctrine of International Law that is characterised, in their opinion, by a general abandonment of reflection on the theoretical bases of International Law. Indeed, the producers of Public International Law during the 1960s and 1970s seem to have renounced any reflections on the general problems of the international legal order, focusing instead on specific questions, especially regarding international organisations. Within North America the doctrine has referred to this trend as the *move to institutions*. In the Spanish doctrine we also see this phenomenon, fostered by polarisation around European Union Law. This discreditation of theoretical reflection was heightened by the fact that even authors who did employ general positions, informed by doctrinal considerations of previous generations (normative scholars, sociologists, *iusnaturalists*, etc.) failed to bring their doctrinal influences into their work on the specific cases of International Law, and they were able to debate and reach common points of understanding with authors who held completely contrary doctrinal positions. There was a widespread sensation that theory was 'not necessary'. The dominant doctrine had found a comfortable terrain in a pragmatism that dispersed theory and which, in certain cases, was sugarcoated with a progressive ethos that projected unconvincing references to general values such as peace and material justice.

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45 See the work of Roberto M. Unger (1986), *The Critical Legal Studies Movement*, Harvard University Press, Cambridge, MA; Peter Fitzpatrick and Alan Hunt (eds.) (1987), *Critical Legal Studies*, Basil Blackwell Oxford-Cambridge, MA; and Andrew Altman (1990), *Critical Legal Studies: A Liberal Critique*, Princeton University Press, Princeton, NJ

46 Author of numerous articles published in academic legal journals in North America. His most well-known work is *International Legal Structures*, Nomos Verlagsgesellschaft, Baden-Baden (1987)

47 Martii Koskenniemi (1989), *From Apology to Utopia: The Structure of International Legal Argument*, Lakimieslüton Kustannus, Helsinki

48 Anthony Carty (1986), *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*, Manchester University Press, Manchester/ Dover NH

49 Friedrich V. Kratochwill (1989), *Rules, Norms and Decisions; On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge University Press, Cambridge

50 Ulrich Fastenrath (1991), *Lücken im Völkerrecht,* Duncker & Humbolt, Berlin

51 See the attempts to analyse the impact of the movement by Anthony Carty (1991), 'Critical International Law: Recent Trends in the Theory of International Law', *European Journal of International Law*, vol. 2, pp. 66 and ff., and Nigel Purvis (1991), 'Critical Legal Studies in Public International Law', *Harvard International Law Journal*, vol. 32, pp. 81-127

As a consequence of this intellectual stagnation, the study of the field of International Law has become progressively marginalised within the sphere of legal studies. Within universities claims are made the Public International Law has an importance that cannot be questioned, but there is little commitment towards its teaching within law faculties, and it is typically taught only as an introductory course during the first year of degree courses. This also seen in the way that Public International Law is perceived in more scientific terms. Scholars of International Law who turn their back on theoretical reflection when looking at specific problems are condemned to reproduce those problems, without moving forwards in the production of knowledge on International Law. Even much of the work which manages to go beyond being descriptive is still scientifically 'insignificant' in philosophical terms. Faced with this situation, members of the Critical Legal Studies Movement adopt a common position that pushes for a truly scientific approach to the study of International Law, which can only be carried out from positions based in social theory and political philosophy.

17. Faced with this panorama, authors from the Critical Legal Studies Movement contend that the scientific reflection within Public International Law should focus on the discussion of premises (which are generally not set out explicitly) that make up the underlying foundations of argumentation in International Law. The contemporary doctrine of International Law has taken on board a certain vision which is not exactly liberalism but rather a 'liberal conception'. This conception does not involve making declarations in favour of democracy and social progress through moderate change, but rather argues that it is desirable and natural that there be a social framework which facilitates political debate and decision-making between actors representing different positions (liberalism, socialism, nationalism etc.). The problem with this 'liberal conception' is that it claims to be neutral and independent from the ideologies whose presence within the doctrine it fights to defend.

This 'liberal conception' constitutes the fundamental theoretical premise of the contemporary doctrine of International Law scholarship, and the uncritical acceptance of this leads the doctrine into deep contradictions. The Critical Legal Studies Movement argues that the roots of these contradictions lie in the *objectivism* that underlies the doctrine. Objectivism has been defined as 'the belief that legal texts which are granted with authority legislation, jurisprudence and accepted legal ideas embody and structure a project based on human association.'[52] Legal texts develop, albeit imperfectly, an intelligible moral order. In other cases these are the result of the practical needs of social life, such as the functioning of the economy, which, together with the constant desires of human nature, represent a normative force. Therefore, law is not just the outcome of particular power struggles or practical needs that lack authority, but rather it has an existence beyond the scope of lawmakers, judges and legal scholars. It is, as such, an objective social phenomenon. If we move from these abstract positions to a terrain which is more familiar to scholars of International Law, we are reminded that this objectivist

[52] Roberto M. Unger, *op. cit.*, p. 2

position is in line with the theoretical reflections of Robert Ago, who, from my perspective, rounded off the cycle of important contributions made by International Law scholarship between the end of the nineteenth century and the mid-twentieth century. The illustrious Italian legal scholar concludes one of his most important works with the following words: 'A legal order is an objective reality whose existence is seen through history,' arguing that the international legal order 'can only be demonstrated as the result of objective, scientific analysis of empirical reality.'[53]

The prevailing 'liberal conception', with its relativism towards ideological concepts and its objectivist theoretical premise, leads the doctrine of International Law towards an incoherent logic. The doctrine cannot base itself on the rejection of objective values, which is a feature of the 'liberal conception', and at the same time claim to be able to resolve international conflicts through the application of objectively neutral norms. The legal argumentation of scholars within the doctrine of International Law is based on a series of dichotomies which are assumed to be natural and objective: sovereignty of states Vs international order; the domestic Vs the international sphere; public Vs private etc. In adopting these contradictions as elements of legal argumentation, the doctrine sets up a contradiction with its own epistemological premises, which are supposedly relativist. As Martii Koskenniemi observes, the dilemma of the 'liberal conception' is that 'if liberalism is to maintain its radical scepticism towards values, it cannot function as a basis for the coherent resolution of problems; if it refers to the objective nature of certain values, it enters into conflict with itself.'[54]

18. Authors from the Critical Legal Studies Movement adopt a methodological approach from structuralist philosophy, aiming to draw out the 'deep structure' of argumentation within International Law. Following in the footsteps of Jacques Derrida, the method which allows them to capture this deep structure is 'deconstruction'. The argumentation of international law, in this respect, is a 'discourse' which, in addition to its immediate meaning, has an implicit internal structure which needs to be highlighted in order to understand its scope and meaning. In this sense international legal texts have certain codes which must be deciphered. The most common methodological features seen in the Critical Legal Studies Movement are represented by a holistic, formalist and critical approach.

The approach is *holistic* in that it aims to move away from the debate on the content of International Law in terms of specific issues, concentrating rather on the broader doctrine of International Law in its entirety and social theory. Methodologically the focus is on the whole as the primary category of analysis. In this sense, the whole is more than the sum of its parts, as the whole is affected by the position of the parts within it the *totum* is not the *compositum*. We thus observe that the whole is made up of a series of relations which are established between its parts, this representing its 'structure'. This overarching view aims to highlight the common points that

53 Roberto Ago (1956), 'Science Juridique et Droit International', *Recueil des Cours*, vol. 90, II, p. 954. See also the extensive review of the original piece of work by Ago (1950), *Scienza Giuridica e Diritto Internazionale*, Guiffrè, Milan, carried out by Manuel Díez de Velasco (1951), and published in *REDI*, vol IV, pp. 655-664 (see especially the critical nuances in pp. 662-664)

54 Martii Koskenniemi, *op. cit.*, p. 68

exist between arguments that are apparently opposed yet which form part of the same whole and whose implicit premises must be recognised in order to justify positions. The breadth of this focus means we can overcome traditional distinctions between the doctrine of International Law, reserved for theoretical scholars, and the practice of International Law, which is the domain of politicians, diplomats and lawyers. These distinctions between theory and practice are, however, a pure illusion stemming from the widely accepted objectivism of the doctrine. For authors from the Critical Legal Studies Movement, truth is essentially subjective and relative. As Anthony Carty puts it, 'We cannot observe the world of International Law as it is in reality, as this world and the way we observe it are one and the same.'[55]

The Critical Legal Studies Movement is *formalist* in that aims to highlight the deep structure of argumentation within International Law. This deep structure is not explicit and is produced within a closed circle of interactions between sources, substantive norms and dispute-resolution mechanisms. None of these three ambits of argumentation allows for the resolution of the problems that arise from the need for a foundation with sufficient authority, which needs to be sought from *outside*, or to resolve the dichotomy between state sovereignty and international order. Despite the common elements which structuralist analysis of the discourse of International Law highlights, David Kennedy notes that 'discourses on sources, procedures or content seem to be distinguished from each other and relate with each other through a series of differential references and projections. So that, paradoxically, each discourse seems to support itself through reference to the others so as to complete and continue their own project.'[56] This conclusion fully aligns with the formalist positions of linguistic structuralism, initiated by Ferdinand de Saussure, who analyses the meaning of words (*paroles*) through a socially established code of language (*langue*). Each word must be understood as the transformation of a code which must be known, that is, meaning does not come from specific contents, but rather from a set of relations. Each of the legal schools can be understood as a series of *paroles* whose meaning depends on a set of relations which make up the *langue* of legal argumentation, which, in our case, is that of Public International Law.

The Critical Legal Studies Movement is also *critical*. By uncovering the hidden code of the discourse of Public International Law, authors from this school of thought present themselves as promoters of a strong critique which questions the predominant doctrine of International Law. As, according to structuralist postulates, language precedes thought, the contemporary doctrine of International Law (including even the most 'progressive' authors) puts forward a certain view of social reality as *objective* or *natural*. The critical approach is not based on defining the problems which the Critical Legal Studies Movement believes should receive priority treatment within the doctrine (poverty, racism, economic inequality, sexism etc.) but rather focuses on providing a theoretical framework for an alternative to the predominant discourse within the study of international law, whose theoretical

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55 Anthony Carty, *op. cit.*, p. 129

56 David Kennedy, *op. cit.*, p. 292

incoherence prevents these problems from being solved. According to one of the most distinguished scholars of the Critical Legal Studies Movement, Martii Koskenniemi, International Law, in its current form, is useless as a mechanism through which to justify or critique the behaviour of states. Koskenniemi posits that 'In basing itself on contradictory premises, it is both a legitimating mechanism by excess or default. In terms of excess, it can be invoked to justify any behaviour (justificationism), and by default in that it fails to provide any convincing argument regarding the legitimacy of any practice (utopism).'[57] In this we see the deep *radicalism* of the position adopted by these scholars.

19. It has been argued that, in putting forward such a radical critique of the current doctrine of International Law and its epistemological premises founded in the 'liberal conception', the Critical Legal Studies Movement paradoxically falls into an approach similar to *iusnaturalism* or legal nihilism. Its members' critique of the relativism and internal incoherence of the 'liberal conception' could push them towards positions similar to those of *iusnaturalism;* the radicalism of their analysis and their lack of alternative solutions could be considered as nihilism. To avoid these accusations of being a *iusnaturalist* in disguise, Martii Koshenniemi argues that 'the critical legal scholar has to accept the reality of this conflict.'[58] Legal discourse does not consist of the application of universal principles to specific cases but rather is a process within which the adoption of normative decisions is carried out through an 'open (non-coercive) discussion of the various alternative material justifications.'[59] The accusations of nihilism can be countered through stressing the epistemological value of critical knowledge. As one member of the critical current puts it, 'Knowledge in itself can be a force for progress, moral autonomy and *good*.'[60]

The approaches and analyses of scholars from the Critical Legal Studies Movement may appear to be excessively abstract to legal scholars who are unfamiliar with contemporary philosophical thought. The importance of the members of this current may owe less due to positions and conclusions, which need many critical nuances, and more to their objectivist methodology. This chapter began with some simple reflections on the scientific nature of law in general, and Public International Law more specifically. In response to those who accuse the Critical Legal Studies Movement of adopting a focus which is distant from that adopted by mainstream legal scholars, one of the key figures within the movement argues that the 'deconstruction' that the movement advocates 'only aims to achieve what traditional science has always strived for: to provide a theory which with the least possible number of variables is able to explain a wide variety of seemingly distinct phenomena through regularities which can be explained.'[61] It is difficult to disagree with this scientific objective.

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57 Martii Koskenniemi, *op. cit.*, p. 48
58 Ibid., p. 486
59 Ibid., p. 487
60 James Boyle (1985), 'Ideals and Things: International Legal Scholarship and the Prison-House of Language', *Harvard International Law Journal*, vol. 26, p. 350
61 Martii Koskenniemi, *op. cit.*, p. XXIV

20. Even if it is only due to their critique of the doctrine of International Law, which is often disconnected from its theoretical underpinnings, the contribution of scholars from the Critical Legal Studies Movement deserves to be considered. The most astute sector of the European doctrine is aware of the need to recover the theoretical debate. Bruno Simma, writing in the *European Journal of International Law*, states that 'the time is certainly ripe for a new analysis of international legal theory,' and the journal which he himself edits is an excellent venue from which to launch a new debate and build new foundations.[62] The members of the Critical Legal Studies Movement, with their method of 'deconstruction' have shaken up the generally accepted doctrine of international legal studies. Now what needs to happen is for the doctrine of international legal studies to shake up its theoretical base.

[62] Bruno Simma, 'Editorial', *European Journal of International Law*, vol. 3, p. 215

SYbIL | Spanish Yearbook of International Law

On certain aspects of the unity of the international legal order

Fernando M. Mariño Menéndez*

1. The unity of the international legal order, that is, that the order be conceived as a a single whole, depends on its most fundamental general norms being, and being perceived as, universal. The unity of such an order is, in reality, no more than the appropriate legal manifestation of the unity of a specific social group namely the international community understood as a single sociological global base. Today it is irrefutable that within the heart of this single international community we observe the presence of, and interactions between, all (non-global) social groups and all people.[1]

   This being said, the universality of the aforementioned norms is enshrined in the fact that these norms prevail over all other norms, whatever the applicable legal order is considered to be. The universality of these norms also implies, therefore, their peremptory nature as *jus cogens*. In short, the universality of these norms underlies, and is underlain by, the legal order of our single and unique international community.

   In accepting the validity of certain general norms as universal, we also accept that a legal order of the international community is valid, and that the rules of this order cannot have sovereign equality of states as a *single* fundamental rule. On the contrary, this level of universal legality requires certain *legal personifications*, both with respect to the single international community and all people,[2] and in terms of primary social communities or peoples (that is, communities who 'democratically' organise themselves as states)[3] and the international community as a whole, which

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This work was published in *Anuario de estudios socials y jurídicos*, 1979-1980, Nº 8-9, pp. 105-128,

1 On the concept of global society as a *transnational society*, see García Pelayo, M. (1977), *Las Transformaciones del Estado Contemporáneo*, Madrid, 16ff. On the existence of a global socioeconomic system, see Mesarovic, Pestel (1974), *Strategie pour Demain*, 2nd Report of the Club of Rome, Paris.

2 As will be developed in this article, the legal profession is not for believers in the radical monism defended by Scelle (1932), *Précis du Droit des Gens*, vol. 1, Paris, pp. 27-8.

3 Regarding the complicated notion of 'peoples' within international law, see my articles 'Políticas sobre el medio humano y contradicción entre pueblo y estado: aspectos jurídicos internacionales', *R.E.D.I.*, (1977), 2, and 'La Declaración Universal de los derechos de los pueblos', in *Revista Jurídica de Cataluña*, 1977, nº 2. As I made quite clear in the first of these articles, the implementation of a global system of 'democracy' within the international order is crucial for adapting the order to the requirements of the globalisation

encompasses the entirety of humanity. This level of legal order would not be universal if it were only concerned with relations between forms of government, independently of social groups and without taking into account criteria to judge the legitimacy of these governments in their actions towards their own social groups and citizens. This is, I believe, completely logical, as, if this legal system is to be considered as universal, it must protect the interests of all individuals, all peoples and humanity as a whole. From this perspective, universality is articulated through the existence of common legal subjects within all legal orders.[4]

Obviously, and as has been widely observed, the principle of sovereign equality between states, understood as the *single* underlying principle of international law, cannot be taken as a *universal* norm in the sense of those we have mentioned. This is due to the fact that within a legal order based on the principle of sovereign equality, the only subject is "sovereign" forms of government, meaning that there can be no unity. This principle in fact means that there will be legal orders in the world to the extent that different groupings of states have wished to establish them. If the only basic rule to organise relations within a group is that each member only has the obligations that they themselves have agreed to, then there is no form of universal validity. Rather we are left with the aggregation of particular situations, each with its own singular basis. So the order is not singular, but rather we are dealing with a plurality of particular orders without a universal basis. This is especially the case for the international legal order, within which the principle of sovereign equality was only accompanied by the prohibition of the use of threats and violence in the nineteenth and twentieth centuries. Indeed, it is only the prohibition of the use of force and the positivisation of rules relating to human rights and the right to self-determination that have led to a singular international legal orderbeing in force and

process that the international community is currently undergoing. Obviously, the debate on 'democracy on a global scale' remains relevant but, following Kant (*Metaphysical Principles of Law*), Truyol (1966) observes that 'peace is not possible outside the framework of an organisation', and that 'constitutional homogeneity' in the sense of genuine rule of law would be a *sine qua non* condition of a valid universal order of peace ('La organización mundial en perspectiva histórica: Idea y realidad', in *ONU año XX*, Madrid, 51ff. On 'law of peoples' see Cassese, A. and Jouve, E. (eds.), (1978), *Pour un droit des peuples*, Paris.

4 On the unity of the legal system within the context of relations between the international legal order and domestic orders, see Verdross (1975), *Il collegamento normative del diritto internazionale e la procedura per la soluzione dei conflitti tra questi ordinamenti*, Comm. E Studi, 14, Studi Morelli, 981ff.
Professor Cabrillo Salcedoobserved that internationalist doctrines of the 19th century, including those which developed classical idees, abandoned universalism due to three factors: the process of rationalisation of natural law, *the progressive establishment of the state as the only subject of international law* (my italics), and an erroneous vision of historical progress (Eurocentrism), in 'Aspectos doctrinales del problema de la universalidad del derecho de gentes. (Un ensayo de interpretación histórica)', *R.E.D.I.* (1964-1), 3ff (especially p. 15). The nascent 'univeralism', which is in part observed as real and in part as a possibility, is not in itself a political phenomenon that is *structurally opposed* to 'internationalism', as Quadri (1964) notes in 'Course general de Droit International Public', *R.C.A.D.I.*, III, p. 246. In my view, Jenks (1968) interprets this well in noting that 'International law should be seen as "law which is common to all humanity" during an early stage of its development,' *El Derecho Común de la Humanidad*, Madrid, pp. 15, 22 ff. This not withstanding, Virally (1964) also has a point when he notes that the global legal order 'is not a fanciful idea that is unattainable, but rather the channels for achieving this can be started now'and that 'although we are a long way from this, and that the obstacles to overcome may be too numerous, diverse and fearsome that we cannot be sure of reaching this objective,' in 'Sur un point aux ânes: les rapports entre Droit International et droits internes,'*Mel. Rolin*, Paris, 1964, pp. 488 ff., p. 498, fn 24.

allowed the legal system to be considered as unique.[5] In this line, it can be argued that universal rules which protect certain human rights and certain rights included within the principle of self-determination are in force. In fact, if these rules are not accepted as universal, the unity of the international order breaks down.[6]

On the other hand, the rule which allows us to identify norms as universal, that is, the rule which regulates the process through which such norms are formulated, is that which is expressed as the consensus of the international community as a whole.[7] That is, the rule which establishes the universality of other norms, is itself implicit in the formation and validity of these other norms. And if, hypothetically, the validity of universal norms were to disappear, the validity of the norm of consensus would also disappear. We can thus say that this rule of consensus is self-establishing as an aspect of universal general rules, and this is expressed sociologically from the unity of the international community in its current form and, ultimately, through the *authority* of the international community as a whole.[8]

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5 On the role of the United Nations' Charter in the consolidation of contemporary international law as general law, within the Spanish docrtine see: Medina Ortega, M. (1971), 'La Carta de las Naciones Unidas como Derecho Internacional General', *R.E.D.I.* nº 1-2, p. 31 ff. See also (especially the earlier opinions) of Giuliano (1950), *La Comunitá Internazionale e il diritto*. Padua, p. 237, who refers to 'the deforming influence of certain concepts of the phenomenon of international law, such as the legal order of all humanity and of human beings.'

6 If these *logical* aspects of the unity of the international legal order are acceptedas evident, they are seen in the validity of universal rules which protect *certain* human rights and *certain* rights included within the principle of self-determination.
Without going into excessive detail, and without the need to provide support from the practice or doctrine (see my articles cited in footnote 3 above), we can assert that these are human rights and fundamental freedoms which are protected by general international law, that is, those within the main international legal instruments in these areas (European Convention on Human Rights of 1950; the United Nations Covenants on Human Rights of 1966; and the Inter-American Convention on Human Rights of 1969), which cannot be overturned even during times of war (see footnote 38). These rights would be, primarily, the right to life, the right to not suffer torture or slavery, and the non-retroactivity of penal laws, to these we could add the right to a legal personality, the right to non-interference in private and family life, freedom of conscience and religion, and the right to a name. I believe it is still debatable as to whether economic, social and cultural rights have been *fully* positivised as part of general international law.
On the other hand, there is no doubt that positive general international law ascribes to peoples subjected to colonial or racist domination, or whose human rights are systematically and seriously violated, the right to free themselves, including through the use of force. Similarly, all peoples have the right to sovereignty over their wealth and natural resources, even within imperative law.
What I wish to stress with all this is that whilst there are arguments that the *effectiveness* of these norms (and of other universal-general norms of international law) will, on occasion, fully depend on the effective establishment of internal law within a state, this does not in fact mean that domestic law prevails over international law. In other words, where a state impedes the effective application of international law (through non-acceptance of the international guarantees that these laws are applicable), there are no *legal* arguments arising from the principle of non-interference in domestic affairs which legitimate and justify the actions of domestic legal actions in not willing to be subjected to any external controls. This refers to situations in which the organised international community can reasonably claim that international law has been violated. This counters arguments from Tunkin (1970), *Theory of Public International Law*, (translated by Butler), p. 81 ff.
Within another branch of thinking, it is argued that *universal*, which takes things just as they were conceived, differs from *general*, which takes things as they were systemised within a framework. See Safouan, M. (1977), *Estudis sobre el Edipo*, Mexico, p. 79, who follows the line of Lacan.

7 See especially Mosler (1974), 'The International Society as a legal community' *R.C.A.D.I.*, vol. 140, nº IV, pp. 34 and 83 ff. This is, in my opinion, one of the authors that most follows this line.

8 Reuter (1975), who is highly sceptical of idealistic postulations, as a disciple of the idealist Scelle, posits that, 'All states together, not just in the juxtaposition of their sovereignties, but rather in their totality as a whole,

It can only be argued up to a certain point that this authority that we refer to implies that the international community has a legal personality, with the common consent of all, or the vast majority, of *states*. By way of example, in some contexts, such as cases in which one or more states have violated the aforementioned universal norms, it might be more appropriate to refer to the *universal community of peoples*. Thus, as far as the validity of these universal norms is concerned, there can be no exceptions in terms of the action of any particular state, nor explicitly reserved fields of sovereignty in this respect. All specific legal frameworks within the world must align with these universal norms. In effect, although it can be said that amongst the key references relating to each person and people we see an overlap between norms that pertain to various legal orders interpenetrating norms within the domain of predominating universal rules it is more astute to invert this perspective, as these references are nodes within a network constituted by the continuum of a single legal system.[9]

In this line, certain legal situations referring to any person or people can be legally formulated within and for any legal order or context. Especially with reference to specific contexts where we see the interpenetration of domestic orders and the international legal order. That is, all specific legal orders and contexts have aspects which are the same in that they offer the same protections, and these are based on universal norms. For this reason, the unique rules of specific legal orders areonly valid within the realm of that particular order and cannot be generalised beyond that.

2. With respect to the *application* of the aforementioned universal norms, that is, the way in which they are enforced and complied with be that through spontaneous compliance or coercive imposition there are numerous complementary factors that need to be considered collectively and which emanate from the decentralised structure of the international community.[10]

We only see legal orders effectively brought under the control of universal rules in cases where rules come from positive law; in other cases we are dealing with norms from natural law (in various forms, which we will not go further into here), but not

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appear under various names and formulae as a reality which is *logical and sociological, and consequently, legal'* (my italics). In 'Conféderation et federation"vetera et nova"', *Melanges Rousseau*, Paris, 1975, p. 199 ff., and p. 212. Regarding the crucial concept of the international community's *authority*, which goes back to the thinking of Francisco de Vitoria, within the Spanish doctrine see: Miaja de la Muela (1965), 'El derecho "totius orbis" en el pensamiento de Francisco de Vitoria', *R.E.D.I.* 1965, 3, pp. 341 ff. This notion of authority is distinct from *will* in its purest sense, due to its relation to the thinking of Jenks (1960), 'The Will of the World Community as the basis of obligation in International Law', *Homm*. Basdevant, Paris, pp. 280 ff., as well as that of Quadri(*op. cit.*). See also Truyol y Serra, A. (1967), *Ensayo introductorio a la Relectio de Indis*, Madrid, CSIC.(ibid.), Ann. Asociación Fracisco de Vitoria, 7 (1946-47), p. 179.
What we refer to here is the authority of an *organised* international community, as will be developed in the article. However, as Guggenheim (1958) has pointed out, 'Vitoria's idea of the unity of all humans does not presuppose the existence of international organisation,' *Les origins de la notion autonome du droit des gens*. Symbolae Verzijl, The Hague, p. 178; see also, de Vitoria, *De potestate civili*, 13, 3:21, *Relectio Indiis*, sect. 2 *De jure belli*, 19; also Suarez, *De legibus*, II, XIX, 5.

9 The simulataneous subjecting of individuals to the rules of various legal orders, especially those of international law and domestic law, underlies the analysis of Tammes (1977), *The binding force of International obligations of States for persons under their jurisdiction*. Leiden, pp. 57 ff.

10 On the crucial factor of application of norms within international law scholarship, see P. de Visscher (1972), 'Cours general de Droit International Public', *R. C. A. D. I.*, II, vol. 136, pp. 135 ff.

within a legal order in the full sense of the term. Where we refer to a full legal order we mean one whose norms are valid (because they have been formulated in a valid way and compliance is effective, either due to spontaneous or coercive mechanisms), and these norms serve to control relations within the heart of a historically specific social group, which in our case refers to the international community. We must thus consider that the effective application of universal norms is, together with their validity, crucial to their effectiveness and, therefore key to the singular and unified nature of the international legal order. Neither of the two aforementioned factors (application and validity) can prevail over the other in the effectiveness of law. Other interpretations may argue that one mechanism prevails over the other and is therefore *more effective*.[11] We thus observe that the prevalence of universal norms over any norm from other legal orders, particularly at the state level, can be effectively articulated through a variety of channels and procedures:

i) The first of these processes is constituted by the series of procedures that each internal order establishes in order to align its own arrangements with universal norms, giving these effectiveness in domo sua.[12]

ii) The second of these comes from the set of mechanisms, established through international treaties, that guarantee compliance and sanction non-compliance of the aforementioned norms.[13]

iii) The third process — which is essential but which looks increasingly precarious today — is the enforcement and compliance mechanisms of the international order itself.

From my perspective, to overlook the importance of the first two mechanisms and underline the importance of the third is to distort our understanding of the effectiveness of the universal norms both in terms of validity and action.[14] This is because not only do we overlook the legitimate plurality of the ways in which these norms are brought into force, within their imperative limits, and, therefore, the legitimate freedoms of each people in how their states are organised, but we also fail to consider each state's legitimate possibilities to reconsider its own laws before they are considered as finalised in terms of how they may be interpreted

11 See Miaja de la Muela, A. (1976), *Nuevas realidades y teorías sobre la efectividad en Derecho Internacional*, III, Pamplona, pp. 3 ff.

12 Without going into excessive bibliographical detail, within the Spanish doctrine we see the general observations of G. Campos (1975), *Curso de Derecho Internacional Público*, 1, Oviedo, pp. 217 ff. See also, from the same author (1977), article 1.5 of Título Preliminar del Código civil espanyol, in *Comentarios a las reformes del Código civil*, vol. I, Madrid, pp. 78 ff.

13 See P. De Visscher, *op. cit*., pp. 139 ff.

14 Paradoxically, Schwarzenberger (1976), who is a noted sceptic of the concept of international 'society', preferring international 'community', argues that within this nascent community international customary law would act 'almost automatically', and that then 'procedures to enforce it coercively would be hardly necessary', *The Dynamics of International Law, ch. VII: Civitas Maxima?*, London, p. 111. More incisively, in my opinion, Mosler contends that 'today international society cannot find its identity, as a community, in an ideal concept of the world [...] There should be [...] a forum for discussion and procedures for negotiation that can constitute the process through which principles, rules and criteria for behaviour are produced', 'The International Society as a legal Community', *R. C. A. D. I.*, vol. 140, pp. 1 ff, and p. 43.

as violations of universal norms.[15] Furthermore, we overlook the interrelationships between procedures through which non-universal norms (general or particular) are created in the international order and the interchangeability between methods used to demonstrate these norms. We also miss out on understanding how these proceduresof norm demonstration may also form part of the process that identifies consensus within the international community, which is the basis for the effectiveness of universal norms.[16]

Taking the foregoing points into account, in the context of relations between the legal order of the international community and domestic orders at the state level, the rule which organises relations between these orders and which establishes the primacy of international law over domestic orders is implicit in the aforementioned universal consensus and is derived from the same nature as universal norms. This notwithstanding, each state is free to specify the form of this within the established imperative limits and in good faith. For this reason, outside the frameworks of particular international agreements it can be difficult to determine violations of these norms.[17] Nevertheless, it should be borne in mind that the application of norms in domestic contexts is not the only possible mechanism for either general or particular norms.[18]

In effect, we can state that the prevalence of universal norms over others not only *can* be established in a range of complementary legal orders and contexts, and through various complementary procedures, but that this prevalence *is being effectively established*. The fact that, in certain cases, it is almost impossible to impose collective sanctions on states which violate international norms (especially where we are dealing with great powers or superpowers), does not take away from the fact that, in other cases, the international community has placed and legitimated sanctions against states which violate norms, especially through the United Nations.[19]

Furthermore, any person whose rights are protected by universal norms has the right to defend themselves in the face of violations of these rights, even through the use of force where necessary (this is obviously utopian, as it involves acting against states in the defence of rights. *Monarcomachi res praeterita*).[20] And all peoples that find themselves in situations where universal norms are being violated can also

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15 On the theme of international protection of human rights, within the Spanish doctrine see Ruiloba, E. (1978), *El agotamiento de los recursos internos como requisitos de la protección internacional del individuo*, Valencia.

16 See, for example, Reuter (1973), *Droit International Public*, Paris, p. 52. See also Lashs (1972), 'Some reflections on substance and form in International Law', in *Transnational Law in a changing society*, Essays in honor of Jessup, New York and London, pp. 101 ff.

17 Such is the case that Weil (1977) argues that state laws with extraterritorial reach 'must be assumed, as long as they do not violate international law, to be internationally licit', in 'Le contróle par les tribuneaux de la liceité internationale des actes de états étrangers', *A. F. D. I.*, p. 9 ff., and p. 48.

18 P. de Visscher, *op. cit*.

19 Notably, in the cases of Rhodesia and South Africa, as examined by Cadoux (1977), 'L'Organisation des Nation Unies et le probléme de l'Afrique australe. L'evolution de la stratégie des pressions internationales', *A.F.D. I.*, pp. 127 ff. On the effectiveness of sanctions on Rhodesia, see Kuyper, P. J., 'The límits of supervision: the Security Council Watchdog Committee on Rhodesia Sanctions', *Netherlands International Law Review*, 1978-2, pp. 159 ff.

20 On Monarchomachs in general, see Fasso, G. (1968), *Storia della filosofia del diritto*, vol. II, Bologna, pp. 63 ff.

defend themselves (this is more achievable and less utopian, and is established within the relevant norms of positive international law).[21]

Consequently, the fact that organs of the international community with powers to decide on violations of universal norms and the laws to be applied in each specific case have yet to be established obviously works against the effective implementation of universal norms, but this does not mean these norms do not exist. It is rather the case that we should recognise that in terms of their *effectiveness* there is a certain *relativism*, which can only be overcome through *specific universal consensuses* regarding the compliance and sanctioning mechanisms of universal law via the channels of the international community. This, however, presupposes international cooperation.

3. Regarding the broad principle that states should cooperate in various spheres of international relations, this is nothing more than, in my opinion, a reformulation of the international community's stress on the convenience of establishing a functioning cooperative order. However, this does not mean that this general cooperative order will be effective in all areas of international life.[22]

In fact, as is well known cooperation is a term which does no more than denote a mode of collective action in order to achieve the collective interests of two or more subjects within a legal order (in our case, the international order).[23] From my perspective, if cooperation were included as a fundamental and positive element of the international legal order, we could then refer to a cooperative order.

However, international practices show that this is not the case. Whilst some of the universal norms that we have seen as being in force especially those which protect human rights and self-determination do indeed constitute a cooperative order, this is not generalised across the entire order. This is especially due to the fact that the procedures through which international law is developed are subject to a certain relativism owing to the ongoing existence of mechanisms for effectuating international law which belong within the order governing coexistence between states. In terms of human rights, no effective mechanism for governing this field has ever been accepted by all members of the international community.[24] In terms of

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[21] See Calogeropoulos Stratis (1973), *Le droit des peuples a disposar d'eux mèmes*, Paris. Also Rigo Sureda (1973), *The right of selfdetermination. A study of U.N. practice*, Leiden. Also Cristecu, *Informe sobre el principio de autodeterminación*. Comisión de derechos humanos. E/CN. 4/Sub. 2 L. 641 (8-7-76), supra note 6. Also Gros, H. (1976), 'En torno al derecho a la libre determinación de los pueblos', *Aunario de Derecho Internacional*, III, Pamplona, pp. 49 ff.

[22] International law is necessary, but it is not suficient for the organising of humanity, as put forward by Friedmann (1970), 'Droit de coexistence et droit de cooperation. Quelques observations sur la structure changeante du Droit International', *Revue Belge de Droit International*, nº 1, pp. 1 ff, and p. 6. See also Friedmann (1967), *La nueva estructura del Derecho International*, Mexico,pp. 113 ff.; Sahovic (1972), 'The duty of states to cooperate with one another in accordance with the charter', in Sahovic (ed.), *Prinicples of International Law concerning friendly relations and cooperation*, Belgrade, pp. 277 ff.; Garzon (1976), 'Sobre la noción de cooperación en Derecho Internacional', *R. E. D. I.,* XXIX, 1, pp. 51 ff.

[23] See, especially, Virally (1974), 'La notion de la fonction dans la theorie de l'Organisation internationale', *Mel. Rousseau*, Paris, pp. 277 ff.

[24] Notwithstanding the United Nations Commission on Human Rightsand its subsidiary organs. See Schreiber (1975), 'La practiuque recente des Nations Unies dans le domaine de la protection des droits de

the right of peoples to self-determination, particularly in the field of economic and social development within the heart of a cooperative international economic order, we can say that although international law has set out criteria which legitimate certain claims, and that certain legal arrangements have been developed in the field of development, the mechanisms for guaranteeing compliance with the legal arrangements in place are generally non-existent or highly precarious, in line with the flexibility of the norms within what is known as *economic law*.[25]

Inter-state cooperation flows through standard diplomatic channels, but the results of this are developed within permanent institutions, that is, intergovernmental organisations, especially those which enjoy status as international subjects. We can thus state that there does not seem to be any *general* obligation in force which requires states to cooperate via these organisations, even in the fields of respect for human rights or the self-determination of peoples.

It is certainly the case that a global organisation that pursues general aims will tend to be united and will be singular in that it works for the whole of humanity, as in the case of the United Nations.[26] However, the United Nations is not universal in a *de facto* sense and it is premature to argue that it represents an 'organisation of the international community'. Membership of the United Nations or the organisations within its system, many of which are also universal, is not compulsory for all states; if this were the case, the legal right to withdraw from these organisations would also be brought into question.

The foregoing analysis does not, I believe, mean that the only general principle in force within international law regarding these organisations is the principle of effectiveness.[27]International practices already include other general rules, according to which the status of international organisations as international subjects is recognised, this being determined in line with the will of the founder states. From this we see the possibility of developing international legal acts in areas such as the legal possibility of forming permanent relations with other subjects of international law.[28]There are even some international organisations whose international legal

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l'home', *R. C. A. D. I.*, II, pp. 297 ff.

25 On 'economic law' in general, see Farjat (1971), *Droit economique*, Paris. On international economic law, within the Spanish doctrine see Miaja de Muela, A. (1970), *Ensayo de delimitación del Derecho internacional económico*, Valencia; Aguilar Navarro, M. (1972), *Ensayo de delimitación del Derecho internacional económico,* Madrid. See also Schwarzenberger, G. (1966), 'The province and standards of international economic law', *R. C. A. D. I.*, I, vol 117, pp. 5 ff.; *S. F. D. I.*, Colloque d'Orleans (1972), Aspects du droit international économique, Paris, (Especially the contribution by Weil, P., pp. 3 ff.); Carreau, D, Julliard, P and Flory, T. (1978), *Droit International économique*, Paris.

26 See Virally (1972), *L'Organisation mondiale*, Paris. See also Virally (1972), 'De la classification des organisations internationales', *Miscellanea W., J. Ganshof Van der Meersch*, I. Paris-Bruselas, pp. 365 ff. Within the Spanish doctrine, see Diez de Velasco (1978), *Instituticiones de Derecho internacional público*, II, 2nd Edition, Madrid, pp. 34 ff, and 69 ff.

27 On this point see Reuter (1975) in *Melanges Rousseau, op. cit*, pp. 214 ff. The limitations of studying the international order purely through international organisations are pointed out by Yalem, R. (1975), 'The concept of world order', *Yearbook of World Affairs*, pp. 320 ff.

28 See, especially, Rama Montaldo, M. (1970), 'International legal personality and implied powers of international organizations', *B. Y. I. L.*, pp. 111 ff. Rama Montaldo focuses on the the sentence of the ICJ regarding the 'reparation for injuries suffered in the service of the United Nations' *Rec.*, 1949, pp. 174 ff. See

subjectivity can be imposed on third parties, regardless of whether these actors recognise the legal subjectivity of the organisation in question, as in the case of the United Nations.[29] Along these lines, it has been accepted that in practice these organisations are endowed with the right to organise themselves.[30] For the United Nations, this right has special characteristics due to the organisation's nature, as it is the only subject of international law with the capacity to create new functional subjects of international law through a unilateral legal act. It is, therefore, in the field of global organisation and its system where the universal order of cooperation begins to cohere. It is also in this realm where procedures that create the general cooperative order begin to take shape.[31]In my view, this is even clearer if we consider that humanity, as the focus of interests protected by the international legal order, has been considered within legal instruments developed within the heart of the United Nations and its system.

4. In effect, the acceptance and development of a concept of humanity, with its own sense of self within the international legal order in terms of the granting of legal subjectivity to the international community, will affect this order as a whole and lead to a rearrangement of all its fundamental concepts.

   The historically formed nature of humanity as a single whole is based, firstly, on the concept of there being no inhabited geographical spaces outside of the global system of social relations and, secondly, that there is an observable and fundamental link between all the main economic, political, social and cultural processes in terms of the possibility of collective action within humanity.[32]The reality of the unity of humanity, which is insufficiently based on a spirit of global solidarity, has been partially specified within international law, even though we cannot yet claim that global peace and security are effectively and permanently guaranteed within the military and political spheres; neither can it be claimed that it is possible to achieve an appropriate organisation of global resources between all humans and their institutions of government.

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also Virally (1975), *Melanges Rousseau*, *op. cit*.; and Schwarzenberger, G. (1976), 'International Constitutional Law' (vol. III, International law as applied by International courts and tribunals), London, especially pp. 115 ff.; Dupuy, R. (1973) in *Ann. I. D. I.* , p. 314; and Reuter (1972), in *Ann. I. D. I.*, II pp. 178 ff., andReuter (1973), in *Ann. I. D. I*, II, pp. 81 ff.

29 ICJ, Rep. 1949, *op. cit*., p. 179. See also Schwarzenberger (1976), *op. cit*., p. 223

30 See, for exemple, I. Detter (1965), *Law-making by International Organization*, Stockholm, pp. 47 ff. Also Schermes (1972), *International Institutional Law*, volume 2, Leiden, pp. 482 ff.; Diez de Velasco (1978), *op. cit.*

31 Virally (1972), 'L'O.N.U. devant le droit', *Journal de Droit International*, pp. 501 ff. (especially p. 506). On the substitution of coercive controls for preventative ones in this field, see, for example, Zellentin, G (1976), *Les missions permanentes auprés des Organisations Internationales*, vol. IV, Brussels, pp. 100 ff.

32 Regarding this last point, Cassirer (1945) contends that, 'It is undeniable that culture finds itself divided across activities that follow different courses and pursue different aims… But […] we do not seek unity of effects, but rather unity of action […], unity of the creative process. If the term humanity has a meaning, it is that despite all the differences and contrasts which exist between its various manifestations, these manifestations cooperate to achieve common goals', *Antropología filosófica*, Mexico, p. 111. This fits perfectly with the astute observations of Heisenberg (1964), who argues that there seems to be a consensus within the social sciences that the internal balance of a society, at least to a certain degree, is based on the general relation to 'the singular whole'. Therefore, it is necessary to find this 'singular whole'. *Más allá de la física*, Madrid, p. 184. For perspectives on how law can be included within a unitary theory of social science from a Marxist perspective, see Cerroni, U (1977), *Introducción a la ciencia de la sociedad*, Barcelona.

One place where we can observe a certain 'legal personification' of the international community in its entirety is within certain articles of the Vienna Convention on the Law of Treaties, such as those regarding the effects of norms of imperative law. This term, interpreted in accordance with the text of the Convention, and taking into account the intention of parties and contextual factors, expresses the *concurrence* of the main groups of states, which produce the fundamental elements of law; these groups of states are also the creators of the international legal order through their practice. The expression 'in its entirety' can be interpreted as 'taken together' or 'as a whole', rather than referring to each and every state. Therefore, the concept of humanity can be seen as the whole prevailing over its component parts.[33]

It is, without any shadow of a doubt, a burden for positivism to have to reduce the relevance of the Convention's recognition, in an abstract sense, of the importance of international imperative laws. This can be seen, for example, in the impossibility of being able to determine specific *jus cogens* laws. This is because in order to admit this category in an abstract sense would mean also having to admit that there is at least *one* imperative rule; this would be determinable in a specific case, but determinable all the same and in good faith.[34] Whatever this rule were, it could be objectively tested in a given case. What is noteworthy here is that in denying the role of imperative norms, such as those outlined, the unity of the international order is also fractured, thereby meaning the international legal system is also broken. This must be borne in mind in order to avoid confusions, especially regarding unilateral state laws which configure or violate international law and which are constituted by legal acts which come from the organs of domestic legal orders, such as domestic laws and sentences. In addition, within the context of international development law, the right to development is a human right.[35]

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33 In Spanish see the observations on the creation of articles 53 and 64 of the Vienna Convention in the volume produced by De la Guardia and Delpech (1970), *El derecho de los tratados y la Convención de Viena de 1969*, Buenos Aires, pp. 364 ff. See also the observations of Tunkin (1975) on this theme, 'International Law in the International System', *R. C. A. D. I.*, vol. 147, IV, pp. 85 ff. Also Ago (1976), in *Anuario de la C. D. I.* I, p. 263. For a natural law perspective on the concept of humanity, see Legaz (1970), 'La Humanidad, sujeto de Derecho', *Homenaje a SELA*, vol. II, Oviedo, pp. 549 ff.

34 Wengler (1975), who acknowledges the unity of the international legal order (based, above all, on an order 'des injonctions et de contraintes'), and who posits that the aim of all the rules of international law should be the *bonum commune* of all humanity, argues that the 'the only effect of the concept of international *jus cogens* is to extend legal insecurity to conventional law, as is seen in various rules of universal customary law,' in 'La crise de l'unité de l'ordre juridiques international', *Melanges Rousseau, op. cit*., pp. 329 ff (especially pp. 335 and 339). From my perspective, this is not due to legal logic, *a fortiori*, neither is it due to legal ethics, as in the aforementioned *bonum commune*.
Adorno (1977), highlights the connections between the paradigmatically positivist thought of Hobbes and the rejection of the concept of humanity in terms of *what isessentially human*. 'The founding relationship between men and society due to a collective impulse, to a collective need which is inherent to men, is rejected by Hobbes'. Therefore, there is no 'concept of humanity which expresses that which is essentially human. What we understand as essentially human is no more, in this theory, than an abbreviation of singular men'. *Terminología Filosófica*, vol. II, Madrid, p. 186.

35 Carrillo Salcedo, J. A., (1972), 'El derecho al desarrollo como derecho de la persona humana', *R. E. D. I.*, vol. XXI, p. 119. See also, Gros, H. (1975), *Derecho Internacional del desarrollo*, Valladolid; Abellan (1973), 'Codificación y desarrollo progresivo del Derecho Internacional del desarrollo', *R. E. D. I.*, 2-3; Miaja de la Muela (1977), 'Principios y reglas fundamentales del nuevo orden económico internacional', *I. H. L. A. D. I.*, Madrid (for an interesting focus on the fundamental role of *equity* in the construction of this new

It is important to stress that imperative norms are those whose violation constitutes an international crime in accordance with article 19 of the project to codify general norms on the international responsibility of the state regarding illicit acts.[36] All the norms within this article, which are indicated as those whose violation represents an international crime, function to protect the interests of the international community in its entirety; these are interests which are protectable *ergo omnes* within the lines set out by cited jurisprudence from the International Court of Justice.[37]

It is therefore not enough to highlight the unity of humanity as legally protectable in an abstract sense; we must also underline this unity in both *ad extra* terms, with reference to hypothetical bodies which are external to it, as well as in *ad intra* terms, with reference to all the social groups and actors within it, and to all humans which make up humanity.

This unity of humanity, as the focus of interest for international law, has been confirmed in international practice, above all by resolutions of the United Nations General Assembly and the international conventions which it has developed and/or approved. This has been seen in fields such as the prohibition on the use of force within international relations, especially in cases where this use of force is considered an international crime. We also observe this in the international protections of rights belonging to all persons, including the humanitarian law of armed conflicts, as well as the protection of the human environment on a planetary scale and the right to self-determination, achieving freedom from colonial and racist domination and human rights violations, allowing these states to choose their own developmental path within the New International Economic Order.[38]Furthermore, and also as a focus of international law, humanity can be

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order); Bedjaoul (1978), *Pour un Nouvel ordre economique internacional*, UNESCO, Paris (for an analysis of the concept of humanity).

36 See *C. D. I. Anuario* 1976, 1, pp. 249 ff., and *C. D. I. Anuario* 1976 2, part 1, report 5 by R. Ago on the international responsibility of the state regarding illicit acts.

37 I. C. J. Rec. (1949), (*Strait of Corfu*), p. 23; Rec. 1951 (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*), p. 23; Rec. 1970 (*Barcelona Traction, Light and Power Company*), p. 32.

38 Amongst the main instruments which include the protection of the interests of humanity, we observe:
i) The United Nations Charter (preamble). General Assembly Resolution 1653 (XVI), 24/11/1961. Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons, General Assembly Resolution2373 (XXII), 12/06/1968. Treaty on the Non-Proliferation of Nuclear Weapons General Assembly Resolution 2826 (XXVI), 25/02/1972. Biological Weapons Convention, General Assembly Resolution 3314 (XXIX), 14/12/1974. Convention for The Definition of Aggression of Helsinki (1975) in the Conference onCooperation and Security in Europe, General Assembly Resolution 31/ 72, 10/12/1976. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, General Assembly Resolution/ S-10/23, 30/06/1978. Final documents of the Extraordinary General Assembly on Disarmament.
ii) General Assembly Resolution 217 (III), 09/12/1948. Universal Declaration of Human RIghts. General Assembly Resolution 2319 (XXIII), 26/11/1968, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. General Assembly Resolution 3074 (XXVIII), 03/12/1973, Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. General Assembly Resolution 32/44, 08/01/1977, regarding human rights in armed conflicts.
iii) General Assembly Resolution 260 (III), 09/12/1948, Convention on the Prevention and Punishment of the Crime of Genocide. General Assembly Resolution 1904 (XVIII), 20/11/1963 UN Declaration on the Elimination of All Forms of Racial Discrimination. General Assembly Resolution 2106 (XX), 21/12/1965,

seen as united in terms of certain spaces,such as the Antarctic, ocean and sea beds and what lays beneath them beyond national jurisdictions, as well as outer space and celestial bodies. All these spaces would, in principle, be controlled under state sovereignty, but as things stand they cannot be militarised and their exploitation must be carried out, at least partially, in the interest of humanity.[39]If the 'interest' in terms of international law needs to be specified, this would undoubtedly be through universal active legitimation by states to claim damages related to this 'protected interest', which is the equivalent of a law.[40]

International practice does show a slight indication that this legitimation is beginning to appear, at least in terms of cases which exhibit the most serious damages.[41] The aforementioned *specific consensus* regarding the general obligation to resort exclusively to law-based solutions in order to resolve all disputes of this nature still seems to be a long way off. Also, this universal, active legitimation by states might need to be carried out by a global organisation, which at the moment is even more difficult.

The above analysis does not, however, take away from the fact that there is, in my opinion, a discernible evolution in the emergence of this *actio popularis* within international law. This in itself is significant for the arguments put forward in this article. And even without this universal specific consensus in the field of procedure, a universal consensus in substantive terms is perfectly acceptable: the norms regarding certain human rights and rights of peoples are still universal in the aforementioned sense.

UN Convention on the Elimination of All Forms of Racial Discrimination. General Assembly Resolution 2626 (XXV), 24/10/1970, International Development Strategy for the Second United Nations Development Decade. General Assembly Resolution 3068 (XXVIII), 03/12/1973, International Convention on the Suppression and Punishment of the Crime of Apartheid. General Assembly Resolution 3201 S-VI, 01/05/1974, Declaration on the Establishment of a New International Economic Order. General Assembly Resolution 3281(XXIX), 12/12/1974, Charter of Economic Rights and Duties of States.

iv) Declaration and final documents of the United Nations Conference on the Human Environment, Stockholm, 16/06/1972.

[39] i)Antarctic Treaty 01/12/1959

ii) General Assembly Resolution 1962 (XVIII), 13/12/1963, Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. General Assembly Resolution 2222 (XXI), 19/12/1966, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. General Assembly Resolution 2777 (XXVI), 29/11/1971, Convention on International Liability for Damage Caused by Space Objects. General Assembly Resolution 3235 (XXIX), 12/11/1974, Convention on Registration of Objects Launched into Outer Space.

iii) General Assembly Resolution 2660 (XXV), 07/12/1970, Treaty on the Prohibition of the. Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean. General Assembly Resolution 2749 (XXV), 17/12/1970, Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction. 3rd United Nations Conference on the Sea. Doc. A/Conf. 62/WP. 10 of 15 from 7-77 (article 136).

[40] Wengler (1975), *op. cit*., p. 332. On this theme within the Spanish doctrine, see Miaja de la Muela, A. (1970), *Aportación de la sentencia del Tribunal de la Haya en el caso de Barcelona Traction (5 February 1970) a la jurisprudència internacional*, Valladolid, pp. 66 ff. Also, (1975) *El interès de las partes en el proceso ante el Tribunal Internacional de la Justicia*, Comm. E Studi, XVI, Milan (Studi Morelli), pp. 525 ff.

[41] Miaja de la Muela: *Studi Morelli*, citing ICJ Barcelona Traction (second phase) Sentence of 05/02/1970, pp. 32 ff. See also ICJ sentence of 21/06/1971, onLegal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Rec. 1971.

5. If all the aforementioned analysis leads us to an understanding whereby the unity of the legal system is only possible when there is a single international legal order, which is based on universal norms, this also means that every powerful group, or power in itself, which acts within the decentralised international community, would be directly subjected to international law, especially the legal norms which protect human rights and the rights of peoples. It is for this reason that the obligations of international public order have begun to cover transnational companies and groups of companies, whose actions are not adequately controlled either in their home country or the countries in which they carry out their business, leading to situations in which international law may be persistently violated. In the same vein, it should be highlighted that the legitimacy of the wielding of transnational power, judged from the global perspective of the international community as a whole, is relevant for international public law, regardless of whether the power emanates from a person or group considered to be 'private' within domestic legal orders. Here we find ourselves in the field of emerging law, as seen in the recent session of the Institute of International Law where a resolution was adopted regarding multinational companies.[42]

   I thus contend that developments in the aforementioned direction have a logical role within the creation of the criteria of international public law with respect to this distinction, as well as establishing criteria in domestic law and for interactions between international and domestic law.[43]

   To round off, another advance, which is implicit in the acceptance of the unity of the international order, is found in the acceptance (in line with international legal criteria) of the freedom of states to use their powers in terms of international cooperation.[44]However, this requires not only progress in the collective security of humanity but also full positivisation of international protection of human rights in

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42 Resolution of 7 September 1977 adopted in the Oslo session on multinational companies. *Ann. I. D. I.*, vol. 57, tome II, pp. 338 ff. See the debates prior to the adoption of the resolution, (*ibid*., p. 192), where the observations of Professor Rigaux are particularly relevant. The ideas of Rigaux are, in my opinion, key to the analysis of overcoming the dichotomies between public and private power within the international order and the expression of this within the legal context. See also other works by Rigaux: *Droit public et droit privé dans les relations internationales*. Paris, 1977; 'Reflexions sur les rapports entre le Droit International privé et le droit des Gens', in *Homenaje a DE Luna*, Madrid, 1968, pp. 569 ff.; 'Le droit International Privé face au Droit International', *Revue Critique de Droit International Privé*.

43 In particular the distinction between relations and contexts of imperative and universal international public law, and other legal frameworks. In short, we can state that the 'globality' of the global order would impede a return to 'inferior' levels of protecion of human rights and the rights of peoples within *the field of law*. An obvious exception to this would be situations in which there were an 'absence' of law. On a more idealistic (yet not utopian) plane, is the perspective that from the single and unique international legal order, which is based on universal norms, within each domestic order we could differentiate between relations and situations of international public law and international private law. Other distincions between private and public law would be the domain of domestic legal orders or specific international legal contexts.

44 In this line see, Weil, P. (1970), 'Droit international Public et Droit Administratif', *Mélanges Trotabas*, Paris, pp. 511 ff. Weil states (p. 514) that 'we are seeing today that the development of the idea of the functions of international laware not only to guarantee the coexistence of equal and sovereign entities, but also to bring together states and other subjects of international law in common tasks for the progress (*mieux-être*) of the whole of humanity'. See also Medina Ortega (1971), *op. cit*., p. 59.

the economic, social and cultural fields; similarly, it requires the total eradication of subdevelopment at a global level. The extent to which this depends on moral values is beyond the remit of this article. Nevertheless, it should be stressed that the legal personality of the individual, as posited by the universal norms of the single and unique legal system, needs to be accompanied by a stronger legal responsibility of the individual within the international community. Currently this is seen within international law in the obligation of states to punish individuals guilty of crimes against peace, war crimes and crimes against humanity.[45]

6. Conclusions

It can thus be argued that the operating logic of the legal system through the universal imperative norms of international law shows the possibility of progressively establishing a cooperative global order of persons and peoples, as is befitting of a unified international community. It is one of many possibilities, but it is no less real for that.[46] In any case, *all legal reason is now developed within the single and unique system of law and the single and whole humanity*.

[45] See *A.C.D.I.*, 1976, I, pp. 50 ff.

[46] In any case, the process through which this possibility can be developed would seem to be absent, or at least very much relegated to the background as an informal concept. As Huizinga observes, this informal, or less serious, dimension has been present in the nature of law since the Ancient Greeks. Huizinga (1972), *Homo ludens*, Madrid, p. 99. This informality here could be seen in the possible forms of cooperation.

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Special regimes as communities of practice A new way to improve communication across legal specializations

Ulf Linderfalk*

Abstract: International lawyers refer to international criminal law, European human rights law, WTO-law and many other branches as 'special regimes'. As traditionally defined, a special regime is a collection of norms. As this article suggests, a special regime should be conceived instead as a community of practice in the sense of educational theorist Etienne Wenger. The article makes a convincing case for this new understanding, which entails a description of a special regime by reference to the social relationships that exist between the individuals and institutions that are engaged with understanding, discussing and applying legal norms. This understanding has many advantages. Not only does it help to explain why, sometimes, lawyers and legal decision-makers active in different fields of law have reason to do similar things differently. It also explains why international lawyers have such difficulty understanding each other across legal specializations, and why divergent practices of international law cause so much contention.

Keywords: Special regimes theory of communities of practice fragmentation of international law legal specialization.

Received: March 8, 2024 *Accepted:* October 22, 2024

(A) INTRODUCTION

Over the last thirty or so years, international law and legal practice have become increasingly more specialized and diversified. As stated by the ILC Study Group on Fragmentation of International Law in its Final Report of 2006:

> What once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", "law of the sea", "European law" and even such exotic and highly specialized knowledge as "investment law" or "international refugee law" etc.[1]

This trend has seen the development of some strikingly divergent legal practices lawyers and legal decision-makers active in different fields of law do things differently. Below are a few prominent examples:

- The International Criminal Tribunal for Former Yugoslavia has adopted a different understanding than the International Court of Justice of the rule that

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[1] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group prepared for the 58th session of the International Law Commission (2006), 1 May-9 June and 3 July-11 August 2006, UN Doc A/CN.4/L.682, Corr 1 and Add 1, at 10.

attributes to a state the action of a group of private persons when it controls it.[2] It has similarly adopted a different conception of *jus cogens*.[3]

- The European Court of Human Rights ascribes an effect to invalid reservations to the European Convention that differs significantly from how international lawyers other than human rights specialists conceive of the effect of invalid reservations to a treaty.[4]
- International environmental law specialists understand the concept of a conflict of norms differently than most other international lawyers.[5]
- The WTO Appellate Body has always been reluctant to resort to the proportionality principle to justify its decisions, in contrast to the European Court of Human Rights, which readily uses this principle for similar purposes.[6]
- International investment lawyers are reluctant to resort to the principle of sustainable development. This principle, however, is an important element in the reasoning of many other international lawyers, such as those specialising in international environmental law or the law of the sea.[7]

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2 For the understanding of the ICTY, see *Prosecutor v. Duško Tadić*, Case No IT-94-1-A, Appeals Chamber, Judgment (15 July 1999), available at: https://www.icty.org, at paras 88-145. For the understanding of the ICJ, see *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*, Merits (1986), ICJ Reports 1986, 14, at paras 113-115; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (2007), ICJ Reports 2007, 43, at paras 308-407.

3 For the conception adopted by the ICTY, see e.g. *Prosecutor v. Anto Furundžija*, Case No IT-95-17/1-T, Trial Chamber, Judgment (10 December 1998), available at: https://www.icty.org, at paras 155-157. For the conception adopted by the ICJ, see *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (2012), *ICJ Reports 2012*, 99, at paras 92-93. For an analysis of these different conceptions of *jus cogens*, see U. Linderfalk, 'The Legal Consequences of *Jus Cogens* and the Individuation of Norms', 33 *Leiden JIL* (2020), 893-909.

4 For the understanding of the European Court, see e.g. *Belilos v Switzerland*, ECHR (1988), available at: https://hudoc.echr.coe.int, at paras 50-60; *Weber v Switzerland*, ECHR (1990), available at: https://hudoc.echr.coe.int, at paras 36-38; *Grande Stevens v Italy*, ECHR (2014), available at: https://hudoc.echr.coe.int, at paras 204-211. For the understanding of international lawyers other than human rights specialists, see e.g. A. Pellet, 'Article 19: Formulation of a Reservation', in O. Corten & P. Klein (eds.), *The Vienna Conventions on the Law of Treaties. A Commentary* (OUP, Oxford, 2011), Vol. 1, 442.

5 For the understanding of international environmental law specialists, see e.g. D. Brack, 'Reconciling the GATT and Multilateral Environmental Agreements with Trade Provisions: The Latest Debate', 6 Review of European, Comparative & International Environmental Law (1997), 112-120; S. Charnovitz, 'Multilateral Environmental Agreements and Trade Rules', 26 *Environmental Policy & Law* (1996), 163-169; S. Hydnall, 'Towards a Greener International Trade System: Mutilateral Environmental Agreements and the World Trade Organisation', 29 *Columbia Journal of Law & Social Problems* (1996), 175. On other possible ways of understanding the concept of a conflict of rules, see U. Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (EEP, Cheltenham, 2020), 156-161.

6 For the practice of the WTO Appellate Body, see e.g. A. Mitchell, 'Proportionality and Remedies in WTO Disputes', 17 *EJIL* (2006), 1004-1008. For the practice of the European Court, see e.g. B. Pirker, *Proportionality Analysis and Models of Judicial Review* (Europa Law Publishing, Groningen, 2013), Chapter 5.

7 For the perspective of international investment lawyers, see e.g. M. Chi, *Integrating Sustainable Development in International Investment Law* (Routledge, Abingdon, 2018). For the perspective of international environmental law specialists, see e.g. C. Voigt, *Sustainable Development as a Principle of International Law* (Martinus Nijhoff, Leiden, 2009).

In their attempts to explain and to justify these divergent legal practices, international lawyers have coined a new term. They now widely refer to international criminal law, European human rights law, WTO-law, international environmental law and many others as 'special regimes'.[8] Such references raise two critical questions:

1. What are the defining features that allow international lawyers to think about a subpart of the international legal system as a special regime separate from other special regimes and from general international law?
2. What does the concept of a special regime help doing that cannot as easily be done without it?

International lawyers answer these questions differently. For many, the feature that distinguishes a collection of norms and defines it as a special regime is either the pedigree or logical form of these norms.[9] Because of the close connection of this particular understanding of a special regime with the legal positivist's conception of the international legal system,[10] I will refer to it as 'the legal positivist's conception of a special regime'. Special regimes, a legal positivist would argue, include branches such as diplomatic law, which has a very distinct form, structured, as it is, based on a relationship between a sending and receiving state.[11] They include the law of the United Nations a collection of norms, which all have their basis in the Charter of this organisation, directly or indirectly. Similarly, they include European human rights law, if by this moniker we understand the collection of all norms that come within the jurisdiction of the European Court of Human Rights. From the perspective of the legal positivist's conception of a special regime, the concept of a special regime helps to understand and to describe social facts in a logically coherent fashion.[12]

For other lawyers, what defines a collection of norms as a special regime is what these norms refer to either a set of distinct facts or a set of predictable legal consequences.[13] Because of the close connection of this particular understanding of a special regime with the legal realist's conception of an international legal system,[14] I will refer to it as 'the legal realist's conception of a special regime'. From the point of view of legal realism, diplomatic law is a special regime, since it addresses diplomatic activities. International

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8 See e.g. G. Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law', 25 *Michigan JIL* (2004), 849-863; S. Humphrey, 'Climate Change: Too Complex for a Special Regime', 34 *Journal of Energy & Natural Resources Law* (2016), 51-56; D. Joyner (ed.), *Non-Proliferation Law as a Special Regime* (CUP, Cambridge, 2012); M. Koskenniemi, 'The Politics of International Law', 20 *EJIL* (2009), 7-19; M.T. Lanquetin, 'L'égalité entre hommes et femmes dans le régime spécial de retraite de fonctionnaires', 2 *Droit social* (2002), 178-199; K. Siehr, 'A Special Regime for Cultural Objects in Europe', 8 *Uniform Law Review* (2003), 551-563; R. van Steenberghe, *Droit international humanitaire. Un regime special de droit international?* (2013); J. Viñuales, 'Cartographies imaginaires: observations sur la portée juridique du concept de 'régime spécial' en droit international', 140 *Journal de droit international* (2013), 405-425. See also Fragmentation of International Law, *supra* n. 1, 37.

9 See U. Linderfalk, *The International Legal System as a System of Norms* (EEP, Cheltenham, 2022), 111-112.

10 *Ibid*, 115-116.

11 See the Vienna Convention on Diplomatic Relations, 500 UNTS 95 (adopted on 18 April 1961, entered into force 24 April 1964), and the Vienna Convention on Consular Relations, 596 UNTS 261 (adopted on 24 April 1963, entered into force 19 March 1967.

12 See Linderfalk, *supra* n. 9, 117-118.

13 *Ibid*, 115-116.

14 *Ibid*.

trade law is a special regime, since it addresses trade across borders. International responsibility law is a special regime, since it ensures the full reparation of injury caused to a state or an international organisation, and the non-repetition of wrongful behaviour. International criminal law is a special regime, since it establishes individual criminal responsibility for certain acts. From the perspective of the legal realist's conception of a special regime, the concept of a special regime helps to think and talk in general terms about detected differences in legal practice.[15] This seems to be necessary if predictions of future legal decisions are to be at all possible.

Neither of the legal positivist's and the legal realist's conceptions of a special regime provides a full explanation of the divergence of legal practices such as any of those in the earlier list of examples. The positivist's conception directs attention to the formal relationship between legal norms: its explanation to why specialists prefer different solutions is that they address norms with partly different logical structures or pedigrees. The realist's conception directs attention to the referential meaning of legal norms: its explanation is that specialists focus upon norms that address different categories of facts or legal consequences. Both explanations beg further questions. They do not explain why the different logical structures or pedigrees of norms, or the focus of these norms on different categories of facts or legal consequences, cause or give specialists reason to prefer different solutions. They lack the depth of a sound explanation of human behaviour, for the same reason that legal positivism and legal realism do not offer any full explanations of the concept of legal obligation.

This shortcoming, I insist, is an important cause of legal fragmentation. Fragmentation of international law has been a much-discussed issue among international lawyers and scholars, all since the mid-1990.[16] Discussions led the International Law Commission to include the topic on its agenda of work, and to establish a group for the purpose of conducting a study on the topic.[17] In parallel to the work of the ILC, scholars published a long series of articles and monographs addressing particular issues of legal fragmentation.[18]

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15 *Ibid*, 118-119.

16 See e.g. M. Andenäs & E. Björge (eds.), *A Farewell to Fragmentation* (CUP, Cambridge, 2015); L. Barnhoorn & K. Wellens (eds.), *Diversity in Secondary Rules and the Unity of International Law* (Nijhoff, The Hague, 1995); A. Fisher-Lescano & G. Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan JIL* (2004), 999-1046; C. Giorgetti & M. Pollack (eds.), *Beyond Fragmentation* (CUP, Cambridge, 2022); M. Koskenniemi & P. Leino-Sandberg, 'Fragmentation of International Law: Post-Modern Anxieties', 15 *Leiden JIL* (2002), 553-579; U. Linderfalk, 'Cross-fertilisation in International Law', 84 *Nordic JIL* (2015), 428-455; A. Paulus, '*Jus Cogens* in a Time of Hegemony and Fragmentation', 74 *Nordic JIL* (2005), 297-334; S. Sur, 'The State between Fragmentation and Globalization', 8 *EJIL* (1997), 421-434; M. Young (ed.), *Regime Interaction in International Law* (CUP, Cambridge, 2012).

17 Report of the International Law Commission, Fifty-fourth Session, 29 April-7 June and 22 July-16 August 2002, Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10), at paras 492-494.

18 See e.g. A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*', 74 *Nordic JIL* (2005), 27-66; N. Matz & R. Wolfrum, *Conflicts in International Environmental Law* (Springer, Berlin, 2003); C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *ICLQ* (2005), 279-320; A. Orakhelashvili, *Peremptory Norms in International Law* (OUP, Oxford, 2006); Paulus, *supra* n. 16, 297-334; J. Pauwelyn, *Conflict of Norms in Public International Law* (CUP, Cambridge, 2003); D. Shelton, 'Normative Hierarchy in International Law', 100 *AJIL* (2006), 291-323; B. Simma & D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', 17 *EJIL* (2006), 483-529; C. Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP, Cambridge,

This research much like the work of the ILC Study Group concentrated mainly on the formal relationships that exist between rules of international law, and on phenomena such as legal hierarchy, the resolution of normative conflicts, the filling of legal gaps, the systemic interpretation of treaties, and the possibility of review of international legal decisions. It paid little attention to the more acute issue of communication across legal disciplines. Because of the increasing specialisation and diversification of international law, specialists are experiencing increasingly greater difficulty with understanding the reasoning of other specialists and their particular solutions to legal problems. Generalists are having similar problems with understanding the specialists, and vice versa. This is the real threat posed by an increasingly more specialized and diversified international law and legal practice. When international lawyers cannot any more understand each other, all that they will see is incorrect thought and behaviour. It is at this point that they start seriously questioning the fundamental idea of international law as a single legal system.[19]

The objective of this article is to introduce in international legal discourse a new understanding of the concept of a special regime. The increasing specialization of international law calls for a theory that can explain why, time and again, international lawyers find themselves doing similar things differently. The traditional theories of a special regime cannot perform this task. There is need for a theory of a fundamentally different nature one that explains the existence of a special regime by reference to the social relationships between the individuals and institutions that are engaged with understanding, discussing and applying legal norms. This article suggests that special regimes be conceived as communities of practice. The concept of a community of practice derives from educational theorist Etienne Wenger, who is probably best known for his book, published in 1998, called "Communities of Practice: Learning, Meaning and Identity".[20] The book is essentially an investigation into the everyday concept of 'learning'. For Wenger, learning is a social phenomenon. It is an enterprise that people pursue in the context of some or other social community, through engaging in and contributing to its practices. A community of practice presupposes the existence of a particular kind of relationship between community members. According to Wenger, this relationship manifests itself in a distinct set of normative presuppositions: community members think it desirable that they join forces and collaborate in the pursuit of some enterprise; they have an idea of what desirable state of affairs they are pursuing; and they have a shared understand of what tools are appropriate to use in this pursuit. As this article will demonstrate, this theory serves to describe branches such as WTO-law, European human rights law and international criminal law as special regimes. It has great appeal and the potential to muster wide approval, as it helps describing explicitly and in a systematic way what international lawyers already know intuitively.

2005); E. Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory', 17 *EJIL* (2006), 395-418.

19 The ILC Study Group concludes: "International law is a legal system". See Report of the ILC Study Group. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group prepared for the 58th session of the International Law Commission, 1 May-9 June and 3 July-11 August 2006, UN Doc A/CN.4/L.702, at 7.

20 E. Wenger, *Communities of Practice. Learning, Meaning and Identity* (CUP, Cambridge, 1998).

The organisation of the article will follow the logic of the objective. In Section (B), I will draw up the contours of the theory of communities of practice and explore how it translates to the context of international law and the concept of a special regime. In Section (C), I will clarify some of the methodological issues that would have to be addressed every time that a person refers to a branch of law as a special regime and another person challenges this suggestion. In Sections (D), (E) and (F), I will provide a number of concrete examples that will help to illustrate the utility of the theory of communities of practice. In Section (G), finally, I will briefly reflect on the reason for why international lawyers have such difficulty understanding each other across disciplines. I will similarly ruminate about the reason for why divergent practices of international law cause so much contention.

(B) THE THEORY OF COMMUNITIES OF PRACTICE

Etienne Wenger's book introduces a new perspective to the understanding and further study of the everyday activity of *learning*. "Our institutions", Wenger explains, "are largely based on the assumption that learning is an individual process, that it has a beginning and an end, that it is best separated from the rest of our activities, and that it is the result of teaching".[21] Wenger's perspective is another. For him, learning is a social phenomenon.[22] It is an enterprise that people pursue relative to the activities of some or other social community. Dentistry, for example, is learned relative to the activities of dentists; law is learned relative to the activities of lawyers and adjudicators; carpentry is learned relative to the activities of carpenters. Social communities of this kind are not formed by coincidence. As Wenger argues, they come into being because of the engagement of their members in a common enterprise dentistry, law, carpentry, and so forth. This engagement manifests itself in the contributions of these members to a practice.[23]

This idea reflects Wenger's assumptions about the nature of knowledge and what learning is eventually all about. Briefly put:

(1) Humans are social beings.

(2) *Knowledge* is a matter of competence with respect to valued enterprises.

(3) *Knowing* is a matter of participating in the pursuit of such enterprises.

(4) *Meaning*, in the sense of an ability to experience the world and our engagement with it as meaningful, is ultimately what learning is to produce.[24]

These assumptions form the basis for his theory, which characterizes learning as participation in the practice of a social community.

Participation in the practice of a social community is a form of belonging, Wenger argues. Not only does it affect what people do, and how they do what they do, but it is also

[21] *Ibid*, 3.
[22] *Ibid*.
[23] *Ibid*, 6-7.
[24] *Ibid*, 4.

an important factor in the development of their identities.[25] Based on this assumption, Wenger suggests that we look upon learning as a process that has altogether four necessary components:

(1) *Meaning*: a way of talking about our (changing) ability individually and collectively to experience our life and the world as meaningful.

(2) *Practice*: a way of talking about the shared historical and social resources, frameworks, and perspectives that can sustain mutual engagement in action.

(3) *Community*: a way of talking about the social configuration in which our enterprises are defined as worth pursuing and our participation is recognizable as competence.

(4) *Identity*: a way of talking about how learning changes who we are and create personal histories of becoming in the context of our communities.[26]

Three of these components are immediately relevant for our understanding of a special regime. I will explain them one by one, in Sub-sections (1), (2) and (3).

(1) The concept of a practice

A practice, in the sense of Wenger, originates in the pursuit of a group of individuals of some common enterprise.[27] This pursuit requires that individuals interact, and this, in turn, forces them to modify, to some degree, their relations with each other to accommodate for the needs of their common pursuit.[28] It gradually changes how individuals understand and interact with their factual environment.[29] Bit by bit, they learn how to do things. Over time, this collective learning results in a practice, which reflects not only the pursuit of the many individuals involved, but also how they perceive of each other and their factual environment.[30]

Translated to the context of international law, a practice is what international law specialists develop while doing their jobs. The international law specialists are a heterogeneous bunch. They are accredited representatives of states to international organisations and their organs; they are the own officers of international organisations; they are experts appointed by international organisations to perform particular missions; they are delegates at diplomatic conferences; they are legal counsellors and legal advisors; they are judges and arbitrators; international law scholars; NGO employees; and so forth. Depending on the particular capacity in which an international law specialist is acting, his or her job may include the performance of many different tasks. Thus, specialists negotiate; they draft and adopt international agreements, resolutions and other similar instruments; they make oral statements; they write reports and *amicus curiae* briefs; they deliver written submissions; they hold and participate in plenary and committee

[25] *Ibid*.
[26] *Ibid*, 5.
[27] *Ibid*, 45.
[28] *Ibid*.
[29] *Ibid*.
[30] *Ibid*.

meetings and in hearings of courts and arbitration tribunals; they plead; they adjudicate; they publish articles and monographs; they participate in academic conferences; they present papers at such conferences; they contribute to blogs; and so forth. As Wenger emphasizes, practice includes the explicit as well as the tacit.[31] For the purpose of my investigation of international law, this means that we would also have to recognize the importance of the less visible parts of the job of international law specialists. For example, specialists develop certain attitudes and mind-sets; they adopt certain perspective and approaches to the world and their fellow-specialists; they endorse and maintain certain understandings; they assume and take certain things for granted; and so forth.

(2) The concept of meaning

Wenger's interest is not so much in the concept of meaning as such as in its role in the process of learning. Since Wenger has already defined a practice as a process by which people can experience the world and their engagement with it as meaningful, the important question for him is how a practice can bring about meaning.[32] As he argues, meaning is created through a combination of 'participation' and 'reification'.[33]

'Participation', as Wenger understands this term, presupposes action and social connection. It stands for the experiences that come from membership in social communities and active involvement in the social enterprises that social communities pursue.[34] This definition makes participation a very wide-ranging concept, indeed. In the sense of Wenger, "[i]t is a complex process that combines doing, talking, feeling, and belonging".[35] It is not synonymous with collaboration, but "involves all kinds of relations, conflictual as well as harmonious, intimate as well as political, competitive as well as cooperative".[36]

In a legal context, participation materializes as legal discourse. Lawyers argue this is what they do. By oral and written statements, they seek to affect the beliefs, attitudes and behaviour of other people. Participation includes active engagement in such argumentation. More subtly, it involves also the mental state or states of affairs that participants provoke or seek to affect: approval, belief, apprehension, sympathy, endorsement, satisfaction, commitment, determination, concurrence, assent, conviction, expectation, hope, suspense, impatience, ambivalence, doubt, mistrust, disbelief, suspicion, fear, misgivings, qualm, grievance, unease, reluctance, concern, dedication, hesitation, indecision, disapproval, dissatisfaction, and so forth.

'Reification' is the term that Wenger uses to represent the process, by which people give form to their experience of a practice by producing "things" that congeal it, such as abstractions, tools, terms and concepts.[37] In a community of practice, he explains, such

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31 *Ibid*, 51.
32 *Ibid*, 51.
33 *Ibid*, 52.
34 *Ibid*, 55-56.
35 *Ibid*, 56.
36 *Ibid*.
37 *Ibid*, 58.

products unavoidably affect the way in which its members experience their activities and pursuits.[38] If, for example, community members are given a new tool to perform an activity, this typically changes the way in which they conceive of this same activity. Similarly, if community members are given a term to denote a particular relation between those who participate in an activity, this term typically changes the way in which they conceive of each other. In Wenger's terminology, this is to say that reification creates new meanings.[39] This interplay between reification and participation is an ever-continuing process: new meanings lead to further developments of the community practice, which in turn inspire new processes of reification, and so forth *ad infinitum*.[40]

Translated to the context of international law, reification brings one to think of the sources of law. Products of reification are practically everything that the basic criteria of the international legal system prompt lawyers to consider: treaties concluded by states and international organisations; established patterns of state practice; general principles of law recognized by civilized nations; unilateral declarations of states; judicial decisions; resolutions adopted by international organisations; draft articles and other instruments adopted by the International Law Commission; and so forth. Importantly, products of reification include also other kinds of output of international legal discourse: terminologies, concepts, principles, axioms, maxims, instructions, regulations, guidelines, codes of conduct, model conventions, theories, doctrines, modes of operation, general approaches, methods, ways of dressing, ways of talking, writing and behaving more generally, etc.

(3) The concept of a community

The very idea of a social community presupposes the existence of a very particular kind of relationship between community members. As Wenger argues, this relationship has three distinctly different dimensions.[41] First, there must be a mutual engagement: a feeling of "togetherness" an idea among community members that they are engaged in something together.[42] This mutual engagement, Wenger points out, may require different things, depending on the particular enterprise that engages the community.[43] For some, it may be a requirement that community members come to an office and work together in a defined physical environment. For others, such as singers or carpenters, focus is more on the performance of some presupposed task than on the place in which the task is being performed. Importantly, Wenger emphasizes, mutual engagement does not imply homogeneity; real life experience indicates rather the opposite.[44] Thus, when people engage in the pursuit of a common enterprise, community members specialize and make themselves known for their different ability to do whatever their enterprise requires them to do. Without these different competences, a mutual engagement would

38 *Ibid*, 56.
39 *Ibid*, 62.
40 *Ibid*, 58.
41 *Ibid*, 72-73.
42 *Ibid*, 73.
43 *Ibid*, 74.
44 *Ibid*, 75.

often not be possible.[45] In the sense of Wenger, consequently, mutual engagement draws upon what community members do and what they know, as much as on their ability to connect meaningfully to what they do *not* do and what they do *not* know.[46]

In the activities of international law specialists, a mutual engagement manifests itself in the existence of two different phenomena. A first phenomenon is the existence of a legal discourse. It is of critical importance that specialists not only take action – such as the adoption of international instruments, the adjudication of an international dispute, or the holding of presentation at an academic conference – but that they do this to affect the beliefs, attitudes and behaviour of other members of the community. A second phenomenon is specialisation. European human rights law, international criminal law and WTO-law are examples of enterprises that require the involvement of different competences, much like all international law. Thus, when international law specialists ascribe different functions to different categories of community members – judges, NGOs, scholars, international organisations, and so forth – this is a clear indication of their mutual engagement.

In a community of practice, secondly, community members entertain the idea that they are engaged in *a joint enterprise*.[47] This enterprise is not fixed at the outset but is defined and developed by community members in the course of their pursuit. Thus, it is the result of a process of negotiation in much the same way as the experiences of meaning that it creates.[48] Community members may have different opinions on how to do things and why they do them, but they may conceive of their activities as a joint enterprise nevertheless. If an enterprise is joint, it is because it is communally negotiated.[49] Such negotiations among community members define the goal of their enterprise, manifested in the existence of an idea among community members that some certain states of affairs are desirable: effective political democracy,[50] respect for human dignity,[51] the effective prosecution of international crimes,[52] the maintenance of international peace and security,[53] and so forth. Negotiations also help to develop relations of mutual accountability,[54] which is essentially an idea of the proper way to perform assignments. In the context of international law, this idea may entail, more specifically: an understanding of which states of affairs community members should spend efforts improving; an understanding of which legal propositions these members should take the troubling of justifying; an understanding of which legal issues they should consider important; an understanding of the proper way to ascribe importance to different assignments; an understanding of the proper way to prioritize among different outstanding assignments; and so forth.

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45 *Ibid*.
46 *Ibid*, 76.
47 *Ibid*, 77.
48 *Ibid*, 78-79.
49 *Ibid*, 78.
50 See e.g. Statute of the Council of Europe, ETS No. 1, preambular para 4.
51 See e.g. *Prosecutor v Anto Furundžija*, *supra* n. 3, *para 183.*
52 See e.g. Statute of the International Criminal Court, 2187 UNTS 90 (adopted 17 July 1998, entered into force 1 July 2002), preambular para 4.
53 See e.g. Charter of the United Nations, 892 UNTS 119 (adopted 26 June 1945, entered into force 24 October 1945), Art. 1(1) and (2).
54 See Wenger, *supra*, n. 20, 81.

In a community of practice, finally, community members have *a shared repertoire*.[55] The repertoire of a community of practice provides resources for negotiating meaning.[56] As Wenger explains:

[it] includes routines, words, tools, ways of doing things, stories, gestures, symbols, genres, actions, or concepts that the community has produced or adopted in the course of its existence, and which has become part of its practice. The repertoire combines reificative and participative aspects. It includes the discourse by which members create meaningful statements about the world, as well as the styles by which they express their forms of membership and their identities as members.[57]

In a legal context, since law is all about argumentation, the bulk of this repertoire will consist of rhetorical tools of various kinds, such as:

- *Terminologies*: the terms that specialists use and the meanings that they associate these terms with.
- *Concepts*: *e.g.* the concept of the reasonable person,[58] or the concept of incidental jurisdiction.[59]
- *Methods*: *e.g.* the ecosystem services approach used for calculating environmental damages,[60] or the historical method used for the interpretation of treaties and other similar instruments.[61]
- *Forms of argument*: *e.g.* arguments based on analogies,[62] or on the perceived further consequences of the application of a norm generally.[63]
- *Doctrines*: *e.g.* the margin of appreciation doctrine,[64] or the doctrine of intertemporal law.[65]
- *Theories*: *e.g.* the dualist and monist theories of the relation between international and domestic law,[66] or the declarative theory, according to which states can exist irrespective of other states' recognition.[67]

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55 *Ibid*, 82.
56 *Ibid*.
57 *Ibid*, 83.
58 See e.g. V. Jeutner, *The Reasonable Person* (OUP, Oxford, 2023).
59 See e.g. *Prosecutor v Duško Tadić* (IT-94-1), Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for Former Yugoslavia, Appeals Chamber, Decision of 2 October 1995, available at: www.icty.org, at para 20.
60 See e.g. *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation* (2018), ICJ Reports 2018, 15, at paras 45-48.
61 See e.g. O. Ammann, *Domestic Courts and the Interpretation of International Law* (Brill Nijhoff, Leiden & Boston, 2019), 215.
62 See e.g. S. Vöneky, 'Analogy in International Law', in R. Wolfrum (ed.), *The Max Planck Encoclopedia of Public International Law* (OUP, Oxford, 2012), Vol. 1, 374-380.
63 See e.g. T. Clark, 'The Teleological Turn in the Law of International Organisations', 70 *ICLQ* (2021), 533-567.
64 See e.g. Y. Shany, 'Towards a General Margin of Appreciation Doctrine', 16 *EJIL* (2005), 907-940.
65 See e.g. U. Linderfalk, 'The Application of International Legal Norms Over Time: The Second Branch of Intertemporal Law', 58 *NILR* (2011), 147-172.
66 See e.g. P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed (Routledge, Abingdon, 1997), 63-64.
67 See e.g. *ibid*, 83.

(C) A METHODOLOGY FOR IDENTIFYING A SPECIAL REGIME

Since the publication of Wenger's book, the term 'community of practice' has become very popular. It is used by authors of academic and management literature to refer to organizational groupings and areas of activity in a wide range of different situations.[68] Over time, this has made the meaning of the term imprecise and has blurred some of the fundamental tenets of Wenger's theory. As scholars have argued, many of the forms of social interaction that are referred to in the literature as communities of practice are not communities of practice at all, or at least not in the sense of Etienne Wenger.[69] This criticism raises questions of justification. How can you justify a proposition assimilating an area of activity, such as a subpart of the international legal system, with a community of practice?

To answer this question successfully, we need to be perfectly clear about the ontology of a community of practice. As Wenger argued, there can be no community of practice without a mutual engagement, a joint enterprise and a shared repertoire.[70] These elements, however, are not defining features of the concept of a community. As Wenger warned, he was not suggesting that everything that anybody might call a community is a community of practice.[71] The three elements describe the relationship that in a community of practice always obtains between the practice and the community. They are the dimensions of *the social relationship* that defines a multitude of people participating in a practice as precisely a community of practice.

Thus, a community of practice exists in the sense of a set of normative presuppositions of its members. When, in Section 3, I explored the concept of a joint enterprise, I articulated it in terms that make this explicit. I referred to it as an idea among community members that some certain states of affairs are *desirable*. As I pointed out, this idea comes hand in hand with an understanding of the *proper* way to perform assignments. The other two elements of the trio exist in the same sense, if not as obvious. A mutual engagement, I wrote, is a feeling of togetherness. It does not exist just because community members have a common interest. In the sense of Wenger, two individuals (P and Q) are mutually engaged if, and only if, P and Q both think it *desirable* that they join forces and collaborate in the pursuit of some enterprise. As for a shared repertoire, in a legal context, it takes essentially the form of a set of rhetorical tools: terminologies, concepts, methods, forms of argument, etc. I made this point already in Section 3. What I should have spelled out is that a shared repertoire is more than just a set of rhetorical tools. In the sense of Wenger, there is a shared repertoire if, and only if, community members consider the use of these tools *appropriate*.

Thinking that something (p) is desirable, proper or appropriate is to assume that p *should* be the case. The question that would have to be answered is how you establish the existence of such a normative presupposition on the part of a person or group of

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68 See e.g. A. Amin & J. Roberts, 'Knowing in Action: Beyond Communities of Practice', 37 *Research Policy* (2008), 353-369.

69 *Ibid*.

70 See *supra*, Section (B).

71 Wenger, *supra* n. 20, 72.

persons. As I believe, no normative presuppositions of the members of a community of practice can themselves be observed. What can be observed are the ways in which the normative presuppositions manifest themselves in community practice. As Wenger was careful to stress, a mutual engagement, a joint enterprise and a shared repertoire are not phenomena that exist in a vacuum. They develop in the course of a community practice as the result of a process of negotiation, much like the meanings that participants experience.[72] This observation is key. If it is through the interactions of community members that their normative presuppositions form and develop, then it is through the medium of these same interactions that these presuppositions must be studied.

Such studies require a very particular methodology. Habermas refers to it as 'rational reconstruction'.[73] When you study the interactions of people, and you conclude that these people form a community of practice, you confer meaning of those interactions. According to Habermas, the meaning of communicative action is what people infer from its mere occurrence, combined with the assumption that the author of that action behave rationally and, thus, that he or she is committed to some certain standard or standards of communication.[74] In international legal discourse, he argued, as in all practical discourses, discussants are committed to the below three general standards of communication:

1. You must speak the truth.
2. You must act as you yourself consider socially appropriate.
3. You must be sincere about that which you express, that is to say, you must mean what you express.[75]

This may seem to be a very modest claim, but it helped Habermas to work out an elaborate methodology that he suggested should be used for the further analysis and understanding of practical discourse, be it ethical, political or legal. In the context of this article, it similarly helps to explain the methodology that will have to be used to justify a proposition assimilating a subpart of the international legal system with a community of practice.

As Sections (D), (E) and (F) will help to illustrate, the normative presuppositions that characterize a community of practice certainly lend themselves to systematic study. They can be studied as implicit in the actual conduct of community members, based on the assumption that these members act rationally and that they recognize the appropriateness of their own action. To establish this proposition, I will direct all my attention to the example of European human rights law. International lawyers have grown used to thinking of this branch of law as a special regime. In Sections (D), (E)

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72 See *supra*, Section (B).

73 On the concept of rational reconstruction and the utility of this method for legal analysis, see U. Linderfalk, 'Rational Reconstruction and International Legal Reasoning' (December 13, 2022). Available at SSRN: https://ssrn.com/abstract=4300851.

74 See J. Habermas, *The Theory of Communicative Action*, Vol I: Reason and the Rationalization of Society, translated into English by T. McCarthy (Polity Press, Cambridge, 1984), 307 et passim.

75 *Ibid*. For further analysis of the validity claims, see e.g. M. Cherem, 'Jürgen Habermas', Section 3, in *Internet Encyclopedia of Philosophy*, https://iep.utm.edu/habermas, last visited on 28 November 2022.

and (F), I will investigate how this assumption coheres with the suggestion that special regimes be characterized as communities or practice in the sense of Etienne Wenger.

(D) A MUTUAL ENGAGEMENT

From the point of view of the idea that assimilates a special regime with a community of practice, the categorization of European human rights law as a special regime entails the claim that there is among European human right lawyers a mutual engagement. A mutual engagement is a feeling of togetherness. Thus, if there is a mutual engagement among European human rights lawyers, this is because these lawyers do what they do based on a very particular normative presupposition: they believe that it is desirable that they all join forces and collaborate in the pursuit of some certain enterprise.

To establish such normative presuppositions, as Section (C) helped to explained, we need to assume that European human right lawyers act rationally and that they recognize the appropriateness of their own action. Having made this assumption, the existence of a mutual engagement among European human rights lawyers can be understood to be implicit in a variety of different actions. Among other things, it can be inferred from the existence among these lawyers of a distinct way of ascribing functions to international legal scholars.

International legal scholars do a whole lot of things. A considerable part of their activities can be captured by the use of a grammatical verb.[76] Thus, international legal scholars:

1. *Describe*: *e.g.* a scholar may engage in the description of an arbitration award in which the abuse of rights doctrine is applied to the facts of a particular dispute.
2. *Interpret and understand*: *e.g.* a scholar may engage in the study of an arbitration award in order to understand whether a reference by the arbitrators to the conduct of an investor as an "abuse of process" means something other than an "abuse of rights".
3. *Systemize*: *e.g.* a scholar may engage in the study of a vast series of arbitration awards seeking to establish a pattern that can help to come to grips with the abuse of rights doctrine in the context of investor-state arbitration disputes.
4. *Analyse*: *e.g.* a scholar may engage in the study of arbitration awards in order to understand whether the occasional reference by arbitrators to the abuse of rights doctrine as an aspect of the principle of good faith sheds further light on the precise relationship between these two legal phenomena.
5. *Conceptualize and define*: *e.g.* a scholar may investigate what it is precisely that defines the conduct of investors as an abuse of rights.
6. *Critically reflect*: *e.g.* a scholar may demonstrate a lack of coherence between the abuse of rights doctrine and the theory according to which the definition of the

[76] Although analytically distinct, in the actual conduct of legal research, these activities tend to overlap and are often difficult to distinguish.

precise terms of application of an investment treaty is a matter exclusively for the treaty parties.

7. *Theorize*: *e.g.* a scholar may draw up a theory which explains the relationship between the abuse of rights doctrine and the principle of good faith.
8. *Speculate*: *e.g.* a scholar may ruminate on the future assessment by arbitrators of certain kinds of conduct on the part of investors.
9. *Solicit*: *e.g.* a scholar may propose that the abuse of rights doctrine be applied differently in investor-state arbitration disputes or not at all.

In carrying out this work, international legal scholars make an important contribution to international legal discourse. A legal discourse, as I understand this rarely defined concept, is a collection of verbal exchanges of legal propositions. In this article, consequently, 'international legal discourse' refers to the sum of all utterances in oral or written form expressing a proposition about international law. Understood in this sense, international legal discourse extends over a great number of different activities. They include, but are certainly not limited to, the negotiation and adoption of international agreements, the issuing of public statements and decisions, the pleading on behalf of a disputing party before an international court, the holding of conference presentations, and the publication of reports, academic articles and monographs.

International legal scholars contribute to international legal discourse in two fundamentally different ways.[77] First, scholars contribute by developing an understanding of phenomena or issues, which were earlier either not clearly defined or insufficiently studied. In the earlier list of scholarly activities, the ones that tend to leave such contributions are the first seven. I will refer to these activities as 'exploratory research'.

Second, scholars contribute by predicting the consequences of phenomena or issues and by proposing conduct relative to these, such as discontinuing earlier practices, enacting new legislation, or negotiating a new treaty. In the earlier list of scholarly activities, the ones that tend to leave such contributions are the last two. I will refer to these as 'argumentative legal research'.

If argumentative legal research is properly conducted, it uses information obtained by exploratory research to support its proposals. Hence, we should not think of the relationship between exploratory and argumentative research as in any way antagonistic, but rather as complementary. Stated more precisely, we should think of exploratory research as subservient to argumentative legal research and other normative contributions to international legal discourse.[78] Still, it remains a fact that in different communities of international lawyers, scholars place different emphasis on the different kinds of legal research. To put it simple, the specialization of scholars would seem to make them unequally prone to argumentative legal research.

Compare, for example, the way that case notes are typically framed, depending on whether they are written by an international law generalist or a European human rights law specialist. European human rights law specialists *describe*: for example, a scholar

77 See Linderfalk, *supra* n. 73, 13.
78 *Ibid*.

may provide an outline of the factual and legal context of a case brought before the European Court of Human Rights, and give an account of the response of this court to the arguments of the applicant and respondent.[79] They *interpret*: for example, a scholar may provide her opinion on what might have been perceived by the European Court as a factor in its assessment of the proportionality of a measure restricting the exercise of a human right.[80] They *systemize*: for example, a scholar may refer to the pattern of practice of the European court to establish that a certain kind of conduct could amount to an inference with a certain right.[81] *They analyse*: for example, a scholar may find that concerns raised by dissenters have little bearing on a case.[82] They *conceptualize*: for example, a scholar may distinguish the case at hand from one or several earlier human rights cases brought before the European Court under the same provision of the European Convention.[83] They *critically reflect*: for example, a scholar may remark that the response of the European Court to arguments probably took many by surprise.[84] They *theorize*: for example, a scholar may infer that, generally speaking, the European Court has applied a European consensus in order to establish an expanded scope of protection for the European Convention in areas not expressly mentioned within it or contemplated at the time of its drafting.[85] They *speculate*: for example, a scholar may warn about the risk that a certain judicial approach poses to the continuing development of "a rights-based, constitutionalist public order" throughout Europe.[86] They *solicit*: for example, a scholar may advise a government not to rely on the non-binding nature of MoUs to escape the scrutiny of courts with regard to its efforts to ensure their enforcement.[87] Overall, generalists do much the same things, but to different degrees. It is only on rare occasions that you find them speculating and soliciting.[88]

If it is our assumption that international legal scholars recognize the appropriateness of their own action, these differences can be understood to reflect some very different ideas of the function of legal scholarship. All scholars look upon themselves as engaged in an enterprise that seeks to affect the behaviour of legal and political decision-makers. Whereas generalists admit that their role is largely limited to providing the groundwork

79 See e.g. F. de Londras & K. Dzehtsiarou, 'Grand Chamber of the European Court of Human Rights, A, B & C v Ireland, Decision of 17 December 2010', 62 *ICLQ* (2013), 250, at 257; J. Maher, 'Eweida and Others: A New Era for Article 9', 63 *ICLQy* (2014), 213, at 224-225; T. Eatwell, 'Selling the Pass: *Habeas Corpus*, Diplomatic Relations and the Protection of Liberty and Security of Persons Detained Abroad', 62 *ICLQ* (2013), 727, at 734.

80 See e.g. de Londras & Dzehtsiarou, *supra* n. 79, 257.

81 See e.g. Maher, *supra* n. 79, 224-225.

82 See e.g. Eatwell, *supra* n. 79, 734.

83 See e.g. *ibid*, 738.

84 See e.g. Maher, *supra* n. 79, 220.

85 See e.g. de Londras & Dzehtsiarou, *supra* n. 79, 251.

86 See e.g. *ibid*, 258.

87 See e.g. Eatwell, *supra* n. 79, 739.

88 See e.g. C. Barker, 'International Court of Justice: Jurisdictional Immunities of the State (Germany v. Italy) Judgment of 3 February 2012', 62 *ICLQ* (2013), 741, at 753; F. Fontanelli & E. Björge, 'International Court of Justice, Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v Greece) Judgment of 5 December 2011', 61 *ICLQ* (2012), 775, at 775. This is not to say that speculating and soliciting are equally rare in other kinds of texts. Still, I do believe that whatever kind of text we are studying, we will find European human rights law specialist more prone to argumentative legal research than the generalists.

for practical argument, human rights specialists believe that they are themselves acting to affect directly the behaviour of those decision-makers, much like any other participant in international human rights discourse. This is proof of a mutual engagement among human rights lawyers that does not exist among the generalists.

(E) A JOINT ENTERPRISE

From the point of view of the idea that assimilates a special regime with a community of practice, the categorization of European human rights law as a special regime entails the claim that European human rights lawyers are engaged in a joint enterprise. To say that European human rights lawyers are engaged in a joint enterprise is to assume the existence of a normative presupposition. It is to assert that European human rights lawyers do what they do based on the idea that some certain state of affairs is desirable. If, once again, we assume that European human rights lawyers act rationally and that they recognize the appropriateness of their own action, the existence of such a presupposition can be established based on actual conduct. Among other things, it can be inferred from the way in which European human rights lawyers perform assignments. A case in point is their particular conception of proportionality.

Proportionality assessments are conducted by legal decision-makers in the course of the application of many norms of international law.[89] They concern the relationship between a measure taken by a legal agent pursuant to an international norm and the injury that this measure entails. The relationship is examined in the light of a presupposed legal objective. Thus, simply put, proportionality assessments are conducted to ensure that a measure is not incommensurate with the injury suffered, considering the legal objective for the sake of which the measure is being taken [90] in the application of law, as in other spheres of human activity, the end does not always justify the means. This fixation on the presupposed legal objectives makes proportionality assessments a perfect candidate for a study of the suggestion that assimilates European human rights law with a community of practice. By identifying the objectives involved in the proportionality calculi, we can gain a fuller understanding of the state of affairs that European human rights lawyers find desirable. As a point of comparison, I will consider also the way in which proportionality assessments are being conducted in international responsibility law a discipline that most international lawyers classify as general international law.

As provided by international responsibility law, the proportionality of a countermeasure is a condition for its legality. Thus, according to the Articles on the Responsibility of States for Internationally Wrongful Acts, "[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question".[91] The Draft Articles on the Responsibility of International Organizations, adopted by the International Law Commission in 2011, include an

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89 See U. Linderfalk, 'Proportionality and International Legal Pragmatics', 89 *Nordic JIL* (2020), 422-437.

90 *Ibid*.

91 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session, Report of the International Law Commission on the work of its fifty-third session, *Yearbook of the International Law Commission* 2001, Vol. 2, Part 2, 26 *et seq*. On 12 December 2001, the UN General Assembly adopted resolution 56/83, recognising the work of the

identically worded provision.[92] Interestingly, neither of these provisions include any information about the objective that they seek to protect. International lawyers have reacted differently to this absence.

Some express the proportionality test in terms that would allow those who take countermeasures considerable flexibility, as when they suggest that countermeasures should serve goals "which are consistent with the expressed desire of the international community".[93] Some believe that the proportionality rule is based on a very specific objective, but do not agree on what that particular objective might be. Thus, according to one commentator, the proportionality of a measure "is tested by what appears reasonably necessary to induce the wrongdoer to cease its course of action".[94] As other commentators express it, it is the objective of the proportionality rule to ensure that countermeasures do not lead to inequitable results.[95] The great majority of commentators, however, use language that altogether avoids recognizing the relevance of any objective. Lawyers may warn, for example, that since recourse to countermeasures involves the great risk of causing an escalation of conflict, counter-measures should be "a wager on the wisdom, not on the weakness of the other party".[96] This survey of the discourse on international responsibility law gives a very clear impression: overall, lawyers do not seem to have a very clear idea of what desirable state of affairs that they are pursuing.

This observation is in stark contrast with the jurisprudence of the European Court of Human Rights. In the application of the European Convention and its additional protocols, the European Court uses "the principle of proportionality" in various situations.[97] Often, it uses it to establish the necessity of measures restricting the enjoyment of fundamental freedoms.[98] In these situations, the Court would typically start by pinning down that "a fair balance has to be struck between the demands of the general interest and the requirements of the protection of the individual's fundamental rights".[99] This standard implies consideration of an objective that can help to determine when a fair balance has been struck and when it has not. It is not often that the Court articulates this objective explicitly, but it would seem to have done so in the two cases of *Refah Partisi* and *United Communist Party of Turkey*, both of which concerned complaints of the dissolution of a political party by the Turkish Constitutional Court.

ILC and the adoption of the ILC Articles. From then on, the ILC Articles are officially referred to as the *Articles on Responsibility of States for Internationally Wrongful Acts*. See Art. 51.

92 Draft Articles on the Responsibility of International Organizations with Commentaries, Report of the International Law Commission on the work of its sixty-third session, *Yearbook of the International Law Commission* 2001, Vol. 2, Part 2, 39 *et seq*. See Art. 54.

93 R. Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement', 51 *NILR* (2004), 41, at 71.

94 E. Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures', 12 *EJIL* (2001), 889, at 910

95 Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* n. 91, 135. See also Fourth Report on State Responsibility, by Mr Gaetano Arangio-Ruiz, Special Rapporteur, Report of the International Law Commission on the work of its forty-fourth session, *Yearbook of the International Law Commission* 1992, Vol. 2, Part 1, 1, at 23.

96 *Air Services Agreement*, Decision of 9 December 1978, 18 RIAA 417, at para 91.

97 See e.g. J. Christoffersen, *Fair Balance* (Nijhoff, Leiden, 2009), 31 *et seq*.

98 Sometimes, the Court uses the principle to establish the very substance of human rights, such as the right to life, the right to property, and the right not to be subjected to inhuman or degrading treatment or punishment.

99 *Perdigão v. Portugal*, ECHR, Grand Chamber (2010, available at: https://hudoc.echr.coe.int, at para 63.

In commenting upon the possibility of imposing restriction on the enjoyment of the right to freedom of association, the Court affirmed: "the Convention was designed to maintain and promote the ideals and values of a democratic society".[100] As it insisted, "no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society".[101] This same objective explains why the Court refers to measures as disproportionate when they are the result of an arbitrary or discriminatory application of a rule of law;[102] when they are not "accompanied by specific reasoning";[103] when they thwart "the free expression of the people in the choice of the legislature";[104] when public authorities have failed to act with "diligence" or within a "sufficiently prompt" time-frame;[105] when the decision-making process resulting in the adoption of a measure does not involve a judiciary;[106] when measures are contrary to "the demands of that pluralism, tolerance, and broad-mindedness, without which there is no democratic society";[107] when there is no access to a court or possibility of appeal;[108] and so forth. Overall, the European Court seems to have a very clear idea of what desirable state of affairs it is pursuing when applying the proportionality test. For those European human rights specialists who accept its jurisprudence, it can be considered as proof of the existence of a joint enterprise.

(F) A SHARED REPERTOIRE

From the point of view of the idea that assimilates a special regime with a community of practice, the categorization of European human rights law as a special regime entails the claim that European human rights lawyers have a shared repertoire. To say that European human rights lawyers have a shared repertoire is to say that they consider the use of a set of rhetorical tools appropriate. If, once again, we assume that European human rights lawyers act rationally and that they recognize the appropriateness of their own action, the existence of such a presupposition can be established based on actual conduct. Among other things, it can be inferred from the use of a distinct set of theories.

The language of the European Convention on Human Rights is imbued with terms that would seem to refer to concepts of domestic law. Prominent examples include "normal civic obligations",[109] "the lawful arrest or detention of a person",[110] "alcoholics",[111]

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100 *United Communist Party of Turkey and Others v Turkey* (1998), available at: https://hudoc.echr.coe.int, at para 45.

101 *Refah Partisi (The Welfare Party) and Others v Turkey*, ECHR, Grand Chamber (2003), available at: https://hudoc.echr.coe.int, at para 99.

102 *Evans v United Kingdom*, ECHR, Grand Chamber (2007)available at: https://hudoc.echr.coe.int, at para 89; *Animal Defenders International v United Kingdom*, ECHR, Grand Chamber (2013), available at: https://hudoc.echr.coe.int, at para 122.

103 *Frodl v Austria*, ECHR (2010), available at: https://hudoc.echr.coe.int, at para 35.

104 *Scoppola v Italy (No 3)*, ECHR, Grand Chamber (2012), available at: https://hudoc.echr.coe.int, at para 84.

105 *Rousk v Sweden*, ECHR (2013), available at: https://hudoc.echr.coe.int, at paras 124 and 122, respectively.

106 *Scoppola v Italy (No 3)*, *supra* n. 104, at para 98.

107 *Otto-Preminger Institut v Austria*, ECHR (1994), available at: https://hudoc.echr.coe.int, at para 49.

108 *Stubbings and Others v United Kingdom*, ECHR (1996), available at: https://hudoc.echr.coe.int, at paras 65-66.

109 Art. 4(3)(d). For further consideration of this concept, see e.g. *Karlheinz Schmidt v Germany*, ECHR (1994), available at: https://hudoc.echr.coe.int, at para 23.

110 Art. 5(1)(f). For further consideration of this concept, see e.g. *Akram Karimov v Russia*, ECHR (2014), available at: https://hudoc.echr.coe.int, at para 177.

111 Art. 5(1)(e). For further consideration of this concept, see e.g. *Witold Litwa v Poland*, ECHR (2000), available at: https://hudoc.echr.coe.int, at paras 60-61.

"criminal offence",[112] "penalty",[113] "association",[114] "expulsion",[115] "responsibilities of a private law character",[116] and "marriage".[117] The European Court of Human Rights has established a very particular approach to the interpretation of these terms. Scholars refer to it as "the theory of autonomous concepts".[118] According to this theory, terms such as any of those in the list of examples enjoy a status of semantic independence.[119] The meaning that domestic law and legal practice ascribe to them is certainly not irrelevant for the way in which they should be understood in the context of the European Convention.[120] It cannot be, since, typically, this is their ordinary meaning and thus a frame of reference throughout the entire process of interpretation of this instrument.[121] In effect, what the theory of autonomous concepts does is to confirm the importance of other means of interpretation. Even though it is indeed very difficult to think of a *criminal offence* or a *penalty* without regard to domestic law and legal practice, the domestic legal meaning of a term is never itself decisive if, for example, the context or the object and purpose of the European Convention suggest that it be understood differently.

Now, references to domestic legal concepts are not unique for the European Convention. They can be found in many international treaties. Consider, for example, the UN Convention on Jurisdictional Immunities of States and Their Property,[122] which uses terms such as "witness",[123] "contract of employment",[124] "immovable property",[125] "intellectual property",[126] "attachment or arrest",[127] and "the central bank".[128] This Convention allows for some interesting comparison, since in the interpretation of

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112 Art. 6(2). For further consideration of this concept, see e.g. *Engel and Others v The Netherlands*, ECHR (1976), available at: https://hudoc.echr.coe.int, at para 81.

113 Art. 7. For further consideration of this concept, see e.g. *M v Germany*, ECHR (2009), available at: https://hudoc.echr.coe.int, at para 120.

114 Art. 11. For further consideration of this concept, see e.g. *Chassagnou and Others v France*, ECHR, Grand Chamber (1999), available at: https://hudoc.echr.coe.int, at para 100.

115 Art. 4 of Protocol 4. For further consideration of this concept, see e.g. *N.D. and N.T. v Spain*, ECHR, Grand Chamber (2020), available at: https://hudoc.echr.coe.int, at para 185.

116 Art. 5 of Protocol 7.

117 Art. 5 of Protocol 7.

118 See e.g. G. Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', 15 *EJIL* (2004), 279, at 282; A. Legg, *The Margin of Appreciation in International Human Rights Law* (OUP, Oxford, 2012), 111. The approach is sometimes also referred to as "autonomous interpretation". See e.g. F. Matscher, 'Methods of Interpretation of the Convention'", in R. St. J. Macdonald *et als* (eds.), *The European System for the Protection of Human Rights* (Nijhoff, Dordrecht, 1993), 63, at 70-73.

119 Letsas, *supra* n. 118, 282; C. Ovey & R. White, *Jacobs & White, European Convention on Human Rights*, 3rd ed. (OUP, Oxford, 2002), 31.

120 See, emphatically, R. Bernhardt, 'Thoughts on the Interpretation of Human Rights Treaties', in F. Matscher & H. Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J Wiarda* (Heymann, Köln, 1988), 65, at 67.

121 See Arts. 31-32 of the Vienna Convention on the Law of Treaties, 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980).

122 UN Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/59/508 (adopted 2 December 2004, not yet in force).

123 Art. 8.

124 Art. 11.

125 Art. 13.

126 Art. 14.

127 Art. 18.

128 Art. 21.

terms such as these, lawyers tend to defer largely to their meaning in domestic law and legal practice.[129] It is evident that in the interpretation of the UN Convention on Jurisdictional Immunities of States and Their Property, little place is reserved for something like a theory of autonomous concepts. This observation raises a crucial question. Why do judges of the European Court of Human Rights think of the theory of autonomous concept as appropriate for the understanding of the European Convention, when obviously international lawyers do not think it of it as appropriate in other legal contexts? The answer would seem to reside in the characterization of European human rights law as a special regime. Judges of the European Court believe that the theory of autonomous concept helps them to obtain some certain desirable state of affairs. To illustrate this proposition, consider the two judgments of the European Court in *Engel v. The Netherlands* and *Chassagnou v. France*.

In *Engel and Others v. The Netherlands*,[130] four conscripted soldiers complained over the penalties for offences against military discipline that had been passed on them by their respective commanding officers. The applicants argued that that the proceedings before the military authorities were not in conformity with the requirements of Article 6 of the European Convention. The Government, for its part, claimed that disciplinary measures did not come within the extension of a "criminal charge" in the sense of Article 6. This gave the Court reason to clarify the importance of the distinction made in all contracting states between disciplinary and criminal proceedings:

> It must thus be asked whether or not the solution adopted in this connection at the national level is decisive from the standpoint of the Convention. Does Article 6 (art. 6) cease to be applicable just because the competent organs of a Contracting State classify as disciplinary an act or omission and the proceedings it takes against the author, or does it, on the contrary, apply in certain cases notwithstanding this classification?[131]

To answer this question, the Court introduced the idea that criminal charge was an autonomous concept. A sovereign state is free, it said, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line as it sees fit. For purposes of the application of the European Convention, however, this freedom is exercised subject to certain conditions:

> If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of … [Article 6] would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with *the purpose and object of the Convention*.[132]

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[129] See e.g. H. Fox, *The Law of State Immunity*, revised and updated third edition (OUP, Oxford, 2015); R. O'Keefe *et als* (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP, Oxford, 2013). See also Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries, Yearbook of the International Law Commission 1991, Vol. 2, Part 2.

[130] *Case of Engel and Others v The Netherlands*, *supra* n. 112.

[131] *Ibid*, at para 80.

[132] *Ibid*, at para 81. Italics are added.

In *Chassagnou and Others v. France*,[133] the applicants were owners of landholdings in Western France. They complained over the compulsory inclusion of their land in the hunting grounds of a local hunting association an *Associations communales de chasse agréées*, an "ACCA" for short. Similarly, the complained over the obligation to join this association, although, as members of the anti-hunting movement, they strongly disapproved of its objectives. They submitted that they had suffered an infringement of their right to freedom of association, in the sense of Article 11 of the European Convention. The Government maintained that the hunting organisation in case was in fact not an association but a "public-law para-administrative institutions", as it called it.[134] The Court noted that, in French law, the question whether ACCAs are governed by private or public law had not yet been settled. It continued in terms similar to its findings in *Engel and Others v. The Netherlands*:

[T]he question is not so much whether in French law ACCAs are private associations, public or para-public associations, or mixed associations, but whether they are associations for the purposes of Article 11 of the Convention.

If Contracting States were able, at their discretion, by classifying an association as "public" or "para-administrative", to remove it from the scope of Article 11, that would give them such latitude that it might lead to results incompatible with *the object and purpose* of the Convention, which is to protect rights that are not theoretical or illusory but practical and effective […].[135]

As it concluded:

The term "association" therefore possesses an autonomous meaning; the classification in national law has only relative value and constitutes no more than a starting-point.[136]

(G) THE DIFFICULTY OF COMMUNICATION ACROSS LEGAL DISCIPLINES

The developments towards an increasingly more specialized and diversified international law have had an effect on the self-image of international lawyers. Today, rarely do you hear a person describe him or herself as an international lawyer, pure and simple. Instead, international lawyers identify themselves as either "specialized generalists" or as preoccupied with the practice or scholarly study of particular branches of international law, such as international investment law, international human rights law, international environmental law, international peace and security law, the law of the sea, and so on. Lawyers affiliating themselves with these groups are experiencing increasingly greater difficulty with understanding each other. Consider one of the divergent legal practices referred to in Section (A): the European Court of Human Rights ascribes an effect to invalid reservations to the European Convention that differs significantly from how international lawyers other than human rights specialists conceive of the effect of invalid reservations to a treaty. Non-human rights specialists are aware of the practices

[133] *Case of Chassagnou and Others v France*, *supra* n. 114.
[134] *Ibid*, at para 98.
[135] *Ibid*, at para 100. Italics are added.
[136] *Ibid*.

developed by the European Court. Still, they cannot understand why an approach such as that of the Court should be adopted. Why is understanding this so difficult?

My suggestion that special regimes be conceived as communities of practice helps answering this question. It directs attention to the social context the relationship between the human beings and institutions that are engaged with understanding, discussing and applying legal norms. Access to the social context of human behaviour is often crucial to understanding it. Assume, for example, that in the beginning of a game of football, a TV commentator sounds off: "United has a good bench". Football buffs will immediately understand that the commentator is referring to the substitutes of the one team. Outside of the community of football buffs people will understand this utterance differently, and they will no doubt conceive of it as very peculiar. As I have demonstrated in this article, a special regime is fully comparable to the community of football buffs. In line with this particular conception of a special regime, if lawyers that are not themselves active in a field of law are not equipped to understand the reasoning and behaviour of those who are, this is because they do not have full access to the social context in which these other lawyers operate. This is indeed a very plausible explanation to why different groups of lawyers have great difficulty understanding each other.

This observation turns our attention to a related question. Why is it that divergent legal practices such as any of those referred to in Section (A) cause so much contention? Stated from an inter-personal perspective, why is it that international lawyers active in one field of law have such difficulty accepting that lawyers active in other fields of law do things differently? The theory of communities of practice helps answering this question, too.

A community of practice, Wenger insists, does not just entail the negotiation of meaning. Since a community of practice can only exist among people, who acknowledge each other as community members, a practice also entails the negotiation of ways of being a person in that community.[137] More than anything else, identity forms because of the competence that community members develop from participating in a practice.[138] Wenger analyses this competence along the same three dimension that he earlier examined the concept of a community.

For Wenger, consequently, identity inheres, first, in a mutuality of engagement. In a community of practice, we learn certain ways of engaging with other people:

We develop certain expectations about how to interact, how people treat each other, and how to work together … As an identity, this translates into a form of individuality defined with respect to a community. It is a certain way of being part of a whole through mutual engagement.[139]

Secondly, identity inheres in the accountability to an enterprise:

As we invest ourselves in an enterprise, the forms of accountability through which we are able to contribute to that enterprise makes us look at the world in certain ways

[137] See Wenger, *supra* n. 20, 149.
[138] *Ibid*, 152.
[139] *Ibid*.

… As an identity, this translates into a perspective … [and] a tendency to come up with certain interpretations, to engage in certain actions, to make certain choices, to value certain experiences […].[140]

Thirdly, and finally, identity inheres in the negotiability of a repertoire.

Sustained engagement in a practice yields an ability to interpret and to make use of the repertoire of that practice … As an identity, this translates into a personal set of events, references, memories, and experiences that create individual relations of negotiability with respect to the repertoire of a practice".[141]

This close relationship between competence and identity helps Wenger to explain what most people experience when being exposed to a practice with which they are themselves largely unfamiliar:

When we come into contact with new practices, we venture into unfamiliar territory. The boundaries of our communities manifest as a lack of competence along the three dimensions I just described. We do not quite know how to engage with others. We do not understand the subtleties of the enterprise as the community has defined it. We lack the shared references that participants use. Our non-membership shapes our identities through our confrontation with the unfamiliar.[142]

Wenger does not have any particular community in mind, but this passage feeds directly into my investigation of international law and the concept of a special regime. It can be argued that it is precisely because the identities of international lawyers are at stake that their different solutions to similar legal problems cause so much contention.

[140] *Ibid*, 152-153.
[141] *Ibid*, 153.
[142] *Ibid*.

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The role of International Relations theories for understanding Current International Society. Special emphasis on Realism and the Ukrainian War

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Abstract: This article entitled "the role of international theories for understanding current international society. Special emphasis on Realism", which analyses the plurality and the diversity of the discipline of International Relations, is divided into two parts. The first part explains the two main theoretical poles of the science of International Relations (Rationalism and Reflectivism), their central objectives for the study of international reality, their vision-contribution to the knowledge of international society, as well as the theories arising from each of them. The second focuses on the most relevant theory of the discipline, Realism, to address its main characteristics and the role it plays in the conflictive international scene of the present time. In this sense, the theoretical realist postulates applied to the complex and dramatic war between Ukraine and Russia are analyzed, as well as the responses of the different international actors, among which the European Unión (EU) stands out[1].

Keywords: International Relations, Russo-Ukrainian war, Realism, theoretical principles, Reflectivism, Rationalism.

Received: May 14, 2024 *Accepted*: November 20, 2024

(A) INTRODUCTION

Since its origin as a scientific discipline, International Relations (IR) have fallen[2] under the broader scope of Social Sciences, endowed with certain fundamentals and theories, some of them known as *paradigms3*, which seek, among others, to provide a "scientific" explanation of the phenomena and relationships that develop within the so-called *International Society*, the material object under consideration. The new discipline

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1 This work is the result of research as members of High-Performance Group on Freedom, Security and Citizenship in the International Order (INTERCIVITAS) at the Rey Juan Carlos University. It has also been carried out within the framework of the Carlos III University Project with the title: "Regulatory gaps and progressive development of the *2030 Agenda* and the principle of sustainability: Special relevance for Spain", General Call for Knowledge of the Ministry of Science and Innovation. E-mail: mariasagrario.moran@urjc.es

2 The origin of this new discipline, in its university academic dimension, was first established in 1919 at the University of Aberyswith (Wales). That year the first chair of International Relations was created "under the auspices of Alfred Zimmern and the cohort of idealist international lawists", GARCÍA PICAZO, P. *Teoría breve de Relaciones Internacionales*, Madrid, Tecnos, 2004, p. 15.

3 The concept of paradigm has become very popular in the social sciences since the publication of Thomas Khun's famous essay. As Kuhn says, "A paradigm is an accepted model or pattern, and that aspect of its meaning has enabled me, lacking a better word, to appropriate paradigm here". KUHN, T. *The Structure of Scientific Revolutions*, The University of Chicago Press, Chicago, 1970, p. 23.

and its different theories aim "to improve our understanding of global politics", as the internationalist Kal Holsti rightly pointed out[4]. In short, explores then uncertainty and inability to foresee that has accompanied human beings regarding events that endanger peace, progress and international security.

This paper will discuss first the two prevailing IR theories, their key objectives, and their vision and contribution to the understanding of international society, as well as the emerging theories in each of them. And second, it will analyse realism as the key theory of the discipline, its main characteristics, the role it plays in the current global and how it applies to the Ukrainian war and in the changes observed in the international order that emerged after the end of the Cold War and the Era of globalization in which we find ourselves immersed. With this, this work provides and original and current perspective in which in line with the study of current practice, the most striking effects of realism are detailed, basically characterized by the unpredictability and the reordering of power in the international scene, without forgetting the premises of other theories of international relations. All of this is analysed in detail in a contradictory situation of "permanent crisis" or, at least, in what happens in the scope of an international society yet to be defined in the long term.

It has been highlighted that the transformations that new events have produced on the international scene and currently two opposing perceptions of international reality coexist although full of nuances and precisions. On the one hand, there is an unwavering determination to defend the values and principles that the United Nations embodies and that are reflected in the substantive norms of international law, particularly those related to the maintenance of international peace and security; in the words of the European Council, it demonstrates "unprecedented determination to defend the principles of the United Nations Charter and restore peace (…)"[5]. On the other hand, the position of countries that could be shamelessly described as authoritarian regimes that advocate a return to an international policy based on power relations and in which the most essential international norms, particularly those related to the maintenance of human rights international peace and security. In such a framework, realist positions in international reemerge strongly and the different qualities that outline this theory become visible.

(B) THE HOSTILE, GLOBAL, TURBULENT AND IN TRANSITION SOCIETAL FRAMEWORK THAT DEFINES THE INTERNATIONAL RELATIONS OF THE 21ST CENTURY

Today, as throughout history, the *social environment* in which IR operates is hostile, conflict weakens progress made in cooperation and integration among the actors involved. They have yet to take significant and sustained action towards *solidarity*. In fact, the accompanying *principles* deal more with conflict prevention and sharing of

4 HOLSTI, K. *The dividing discipline. Hegemony and diversity in International Theory*, Boston, Allen and Unwin, 1985, p. 14. In BARBÉ, E. *Teoría de las Relaciones Internacionales,* Madrid, Tecnos, 2007, p. 56.

5 A Strategic Compass for Security and Defence. For a European Unión that protects its citizens defends its values and interest and contributes to international peace and security, Council of the European Union, March 21, 2022, Doc. 7371/22, p. 5.

competences than with cooperative and solidarity-based motives. Rather than being complete, the challenge of *building an international community* is precarious, fragmented, and subject to both the changing interests of the states, which are the main protagonists of the international system on the one hand, and of certain structures (international organizations) set up by the states themselves to settle disagreements and conflicts between them, as well as to protect themselves from future enemies, make progress and gain influence and power in the international arena, on the other. An international society with permanent features that are in question and that, at the same time, are reaffirmed by those who want to substantially change the rules that would constitute a true international community.

International Relations operate within this global societal framework, and changes in ties between international actors are taking place, albeit very slowly. At present, these transformations do not alter elements of continuity, such as heterogeneity, inequality, or conflict, which have been present since the beginning of history in all its dimensions. Meanwhile, the scope for action of the different actors has been widened, as proved by the *2030 Agenda*, in which states have pledged to move towards sustainable development by addressing the main issues that explain the instability of the international order. Moreover, through advances and retreats, the international reality is acquiring some stability and permanence that are constantly altered by states' behavior, other international actors, different factors, and the relationships between them. Likewise, the international context remains deeply divided, very turbulent and disruptive, requiring international actors to continuously adapt to new circumstances.

The third decade of the twenty-first century has seen everything in "crisis", both IR and its companion discipline, International Law (IL). Andreas Zimmermann, Professor of International and European Law at the University of Potsdam, described IL as an "endangered species", due to the turbulent times we are currently living in with unpredictable and challenging events for this legal system[6]. The international order based on rules and established after the Second World War is experiencing turbulent times due to the little respect shown towards it by the great powers of international relations. For its part, the discipline of International Relations remains in a permanent identity crisis in scientific terms, at present with "new" phenomena and actors that modify the transcendental and classic dimensions of international reality, particularly the political, social, economic, environmental and, above all, security dimensions. Among the latest events that reflect the situation described above, we can highlight the trade and technological war that began in 2018 between the Asian giant and the American power and which is currently taking on an ideological and military character, the Covid-19 pandemic, which generated a health crisis with consequences in all areas of international relations , and, finally, the "global" crisis caused by the political-military clashes between Russia and Ukraine, Israel, and Hamas, among others. Two conflicts that, beyond the multidimensional consequences they have at a regional and global level, have fostered the rapprochement that had been brewing since the 1990s between the two great rival powers: Russia and China, and which is being essential to

6 ZIMMERMANN, A. "Times are changing: And What about the International Rule of Law then?" *EJIL*: Talk, 9 March 2018.

avoid isolation that the EU is pursuing as punishment for the war in Ukraine and that is "causing global realignments that are unflattering to Western democracies"[7]. It would be naïve not to value these events in their true dimension, beyond their consideration as mere international conflicts and to accord them the category of situations that reveal the current state of international relations and the changes that are coming.

Nevertheless, it is often remarked that turbulent times have been a constant in international relations. Roberto Mesa, professor in international relations, also expressed this idea in the 1980s in these words: "on few occasions will it be more appropriate than at present to highlight the effects of the permanent crisis in contemporary international society (...) Crisis, moreover, which is shown as a polyhedron of multiple faces and facets. Growth crisis motivated by the increase in the number of international protagonists, not only regarding the number of states (…) Identity crisis (…) antagonistic crisis of poverty and plenty. Ideological crisis and profound crisis of civilization…"[8]. In other words, for contemporary international society, permanent crisis in its various dimensions and instability are the norm. This society is always caught between the unforeseen and perplexity, and in which war between states or between states and non-state actors, as terrorism, drug-trafficking and the case of Hamas, threatens "order" and international peace due to its capacity to spread and involve the actors with higher military power (*hard power*) on the international chessboard.

This paper does not attempt to provide a pessimistic vision of contemporary international relations because they also contain, as stated, elements of stability and permanence that allow us to assess the current events with other criteria and perspectives. In fact, contemporary international society moves along very similar lines to those of the past, albeit with the incorporation of new meanings and values. It is worth recalling that at the *San Francisco Conference* in 1945, the participating countries focused on the need to create an international organization, the United Nations, aimed at putting an end to war and promoting peace, justice, and security for all humanity. Therefore, peace and understanding among states and other international actors lead to the permanence of substantial values that enable us to look at international society with a less tragic view. The international scene is currently being debated in the context of the struggle between the affirmation of the values proclaimed and projected particularly since the nineties of the 20th century and the determined will of a significant group of countries to modify their contents and, above all, distance the principles that derive from them. Democracy is being attacked from various positions, the defense of human rights faces the existence of particularisms; sustainable development does not end up crystallizing in the international order; and above all, it is worrying that peace as the supreme value of the international community is threatened by postulates that claim the legitimacy and legality of the use of armed force. From there, it is necessary to review the theories of international relations, something that has yet to be done, and accept, where appropriate, the preeminence of postulates from the past, even if the come coated with new attributes, we refer to characteristics of realism.

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7 DACOBA CERVIÑO, F.J. "En un mundo multipolar no sobrevivirán los más fuertes, sino lo que mejor sepan adaptarse", *Documento de Análisis, IEEE*, 84/2022, p. 4.

8 MESA, R. "Factores de paz y elementos de crisis en la Sociedad Internacional contemporánea", *Revista de Estudios Internacionales*, Vol. 7, 4, 1986, pp. 1059-1060.

(C) THE PATH TOWARDS THEORETICAL PLURALITY AND DIVERSITY IN THE DISCIPLINE OF INTERNATIONAL RELATIONS: THE TRADITIONAL STRUGGLE BETWEEN RATIONALIST-REFLECTIVIST AXES

The year 2019 marked the first centenary of the establishment of the discipline of International Relations. Despite its youth compared to others such as Philosophy , this science has evolved and has its own theories and scientific debates. In this sense, the French political scientist Stanley Hoffmann pointed out that "theory is the principle of order in a discipline"[9] and through it a discipline acquires order of scientific nature and generates knowledge. For this purpose, our discipline has not hesitated in providing itself with a philosophical basis, which is always necessary for the resolution of ontological and epistemological issue. Although it would be a mistake to place the theoretical framework in the field of philosophy, ignoring that it has specific features that derive from the profiles of international society.

In addition to ordering and systematizing discipline, according to Robert W. Cox "theory is always for someone and for some purpose. All theories have a perspective. Perspectives derive from a position in time and space, specifically social and political time, and space"[10]. In the matter at hand, international theory seeks to study, analyse, and investigate the so-called international society and thus offer a scientific explanation of what happens in it. Theories in the discipline of IR are important since "they are the ones that somehow enable us to give meaning to international reality. It is always from a concrete theoretical proposal that we define what to study, how to approach it, how to represent it in the mind and to master it to make it intelligible"[11]. Therefore, theories are a kind of *map or mental imagery;* guides for action that define reality, interpret, and represent it, as well as encourage international actors to behave accordingly.

To other scholars, such as Steans and Pettiford, "a theory is an attempt to explain something an event or an activity ". Thus, they point out that a theory "might attempt to explain the cause of a war, or why and under what conditions states engage in cooperative trade strategies. Thus, if a perspective is a particular representation of reality, a theoretical perspective is an attempt to construct a coherent explanation for a certain phenomenon, which in turn rests upon a wider belief system, or upon certain basic assumptions, about the nature of the world"[12]. Together with the ability to explain logically or objectively what happens, any theory, especially in the case of the discipline of International Relations, should have the ability to predict events, considering that this was one of the raisons d'être of this new science. Therefore, in addition to trying to explain the why of international actors' behavior and the evolution of international

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9 HOFFMANN, S. *Teorías contemporáneas de las relaciones internacionales*, Tecnos, Madrid, 1963, p. 26.

10 COX, R.W. "Social Forces, States *and World Orders: Beyond International Relations Theory", Millennium*: *Journal of International Studies*, vol. 10, 1981, 2, p. 128; y COX, R. "A perspective on Globalization", en J.H. MITTELMAN (comp.), *Globalization: Critical Reflections*, Lynne Rienner, Boulder, 1996, p. 87.

11 SARQUIS, D. J. "¿Para qué sirve el estudio de las relaciones internacionales?", *Revista de Relaciones Internacionales de la UNAM*, 111, 2011, p. 44. See GARCÍA SEGURA C. y VILARIÑO PINTOS, E. (Coords.): *Comunidad Internacional y Sociedad Internacional*. Gernika Gogoratuz, Guernica, 2005.

12 STEANS J. & LLOYD PETTIFORD, T. *An Introduction to International Relations Theory: Perspectives and Themes*, Pearson Longman, London, 2004, p. 9, in SARQUÍS, David J. ¿Para qué sirve el estudio de las relaciones internacionales? ...cit., p. 60.

reality, a question arises as to whether the different theories of International Relations have been able to predict or glimpse the eruption of any event capable of modifying the international structure and putting at risk stability and world order, or we are dealing with theories with low predictive and prospective value. Paul Maxim of the Balsillie School of International Affairs puts it in the following terms: "Intuitively, theories are sets of verbal statements that synthesize the behavior of empirical systems. Depending on the approach followed, theories describe the behavior of empirical systems or provide sufficient explanation to understand why such systems behave as they do"[13].

In this case, theories are known as paradigms in the discipline of International Relations. A paradigm, as defined by Thomas S. Kuhn, is an "approximation or global conception of the object studied", so that, in the words of Kal Holsti, it "imposes some sort of order and coherence on an infinite universe of facts and data which, by themselves, have no meaning"[14]. Therefore, a paradigm should be understood as a theoretical approach that seeks to observe reality, analyze what happens in it, and theorize taking as a reference events and phenomena that are the protagonists of that reality.

In short, the different strands and paradigms that articulate the discipline form a whole that can be called: "International Relations Theory", which explains dynamics and phenomena that coexist in international society and that lead international actors to behave in a certain way. In view of the above, it would be appropriate to embrace Robert W. Cox's view, who distinguishes two kinds of theories: 1) First, *problem-solving theories*. These ones take the world as they find it and present themselves as explanatory theories of the *immutable and permanent* international reality. Thus, according to the Canadian professor, the first group would include theories that help "solve" problems (*solving theory*) arising in international society [15] or positivist paradigms, which take the world as it is, including its power relationships, and aimed at providing solutions and answers to the problems posed by its functioning. This type of theory makes the world seem normal, just as it is, that is, it "legitimizes" the maintenance of the existing international order, based on inequality and the exclusion of part of humanity. In fact, apart from assuming that people are influenced or conditioned by objective forces that move the general dynamics of the universe, these theories seek, basically, to explain through arguments the phenomena and events taking place in the international society. 2) A second group would be comprised of those known as critical theories, which include strands that call into question the existing power and social relationships, precisely because one of their main tasks is to critique and question the established order in international society (*critical theory*)[16], by the way, an international order established after the Second World War and based on rules according to the parameters and values of the West. This group includes post-positivist or reflectivist theories that promote critique from which they seek to build a new international reality-order.

From what we said, it seems that theory in any discipline is complex, and International Theory is no less so. In addition, there is a lack of knowledge among those who even bear

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13 MAXIM, P. *Métodos cuantitativos aplicados a las ciencias sociales,* Oxford, México, 2002, p. 30.

14 HOLSTI, K. *The dividing discipline…op. cit.,* p. 14.

15 René Descartes, French philosopher, is the father of Western Rationalism whose fundamental method is observation and experimentation. Author of the famous phrase, *Cogito ergo sum*, (I think, therefore I am), essential element of Rationalism.

16 COX, R.W., *Social Forces, States and World Orders: Beyond International Relations Theory; …op cit*., p. 128.

the title of experts. As for the abstract world of theories and concepts, Winston Churchill once said: "I pass with relief from the tossing sea of Cause and Theory to the firm ground of Result and Fact"[17]. Also, the eminent French sociologist Marcel Merle pointed out that the world of theory in any discipline is complex, in such a way that "to venture into it requires a willingness to embrace abstract thinking that not everyone has and that few of those who possess it actually enjoy"[18]. Moreover, international relations are unpredictable, and this explains why none of its theories suffices to provide a reasoned argument. And this evident difficulty in analyzing what happens in society suggests why theories have not ceased to proliferate since the birth of the new science. In fact, despite the "warnings" made by outstanding scholars, IR, a discipline with scientific pretensions, addressed its theoretical foundation from the very first moment of its creation. Besides, as Raymond Aron pointed out, IR theory "can hardly be a hypothetical, deductive system as in the hard sciences with almost mathematical rigor and that supposedly reflects the objective conditions of reality. On the international scene, actors, factors, processes, structures, behaviors" are in constant change[19].

Bearing these premises in mind and given that there is a direct link between the theoretical option and the methods employed in the study of international reality, the following lines will present the main narratives, paradigms or strands that have guided theory and research in this field over the years. Thus, this outcome of the complexity and plurality of IR theories might reflect the evolution that this discipline has undergone since its birth, from First World War to the present.

Therefore, it should be noted that each of the theories aims to explain certain phenomena, their implications, and complexities, as well as the way in which actors participate in and exert an influence in the international system. Indeed, each of them is reductive and focused on aspects or events on the international scene. For instance, realism centers its analysis on situations of power, leadership, interest that a constructivist, however, does not consider important. In essence, theories are explanatory constructions based on the analysis of what happens in a particular part of international society and, as Steve Smith rightly points out, "enough theories to choose between and they paint very different pictures of world politics"[20]. Thus, a first characteristic of the discipline of IR is the existing plurality and theoretical diversity. And there are two broad approaches, axes, centers, or traditions from which strands with different theoretical levels emanate within this paradigmatic pluralism with theories analyzing and interpreting different worlds: *relevant and global* theories, as opposed to *partial or marginal* theories. Furthermore,

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17 HAUSS, Ch. *International Conflict Resolution.* International Relations for the 21 st Century Continuum, London, 2011, p. 13.

18 MERLE, M. *Sociología de las Relaciones Internacionales*, Alianza, Universidad Madrid, 1978, pp. 14-15. See FRANKEL, J. *International Politics*, Pengüin, London, 1973. The Argentine internationalist Myriam Colacrai pointed out in one of her works, in relation to the international situation at the end of the 20th century, that "if we intend to characterize our current world there is only one definition: the world of complexities. That real world that is so far from being able to be analyzed and expressed from a single theroretical current". In COLACRAI, M., "Coexistencia y diversidad de enfoques teóricos: apuntes para abordar la complejidad actual de las relaciones internacionales", *Agenda Internacional,* vol. 7, 14, 2000, p. 57.

19 SARQUIS, D. J. ¿Para qué sirve el estudio teórico de las Relaciones Internacionales?, cit., p. 46. ARON, R. "Qu 'est que c'est qu'une théorie de relations internationales ?", *Revue Francaise de Science* Politique, vol. 17, 1967.

20 SMITH, S. "Reflectivist and Constructivist Approaches to International Theory" in BAYLIS, J. y SMITH, S, *The Globalization of World Politics. An Introduction to International Relations*, Oxford UP, Oxford, 2001, p. 248.

debates and scientific controversies have arisen around constant theoretical formulations [21]. Therefore, it is noted that each theory appears, in its origins, in a particular historical, political, social, and intellectual context, and has its own characteristics.

In any case, the first is the rationalist or positivist approach, which contains as some of its main theories: realism, liberalism/globalism, or complex interdependence; and structuralism/neo-Marxism[22]. At the other extreme is reflectivism or post-positivism with social-constructivism, critical theory, post-structuralism, and feminist theory, among others[23]. Of course, there are significant disparities in the theoretical foundations of each approach. Indeed, the first block includes the so-called "classical theories" which, as has been said, aim to explain (rational *explanans*) facts or events occurring in international reality. Also, they "assume that the world has an ontological nature independently of the individual who studies it, that is, the so-called international reality is what it is according to the dictates of laws and forces that are beyond human will or creativity"[24]. Classical theories are therefore characterized by a certain dogmatism and implicit determinism. The second block contains strands for which the "theory is part of that social, historical and contingent reality"[25]. Therefore, while rationalists focus on knowledge and interests and consider facts to be immutable, the reflectivity approach encompasses diverse and fragmented theories that aim, in addition to *deconstructing* the theoretical postulates of the positivist approach, to present themselves as constitutive theories of international reality.

(D) THE NEED TO PAY ATTENTION TO REALISM'S CAPACITY FOR RENEWAL. THE MAINSTREAM THEORY IN THE ANALYSIS OF TODAY'S INTERNATIONAL SOCIETY

Within the positivist approach are some of the schools and theories developed almost entirely in the United States and Western countries, clearly focused on promoting values and interests of this part of international society. That accounts for the strong ethnocentrism[26] that characterized IR theory until the 1980s. Having made this remark, the three theoretical approaches of rationalism, also called paradigms, are conceptual

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21 HOFFMANN, S. "Theory and International Relations", en ROSENAU, J. (comp.), *International Politics and Foreign Policy,* The Free Press, New York, 1969.

22 Some authors, such as Iñaki Aguirre Zabala, warns that it is surprising "to see dependency theory classified as a "classical theory". For this internationalist, "Dependency theory occupies an important place in the history of internationalist thought for being the first academic expression of a critical theoretical perspective developed from the South and whose period of greatest incidence covers the decades from sixties to eighties of the last century", in CASTRO RUANO, J. L. y ORUETA ESTIBARIZ, G. (Editors): *Escritos de internacionalistas en homenaje al profesor Iñaki Aguirre Zabala*, Servicio Editorial University of Basque Country, Bilbao, p. 30.

23 Celestino del Arenal points out in his writings that in the discipline of International Relations several blocks or groups of theories coexist, and theories must be seen as dissimilar stages of the process of scientific knowledge or as different levels of analysis of International Relations. Each of these paradigms will contribute to the theoretical development of the discipline, although some more than others. In ARENAL, C. del: Introducción a las relaciones Internacionales, Tecnos, Madrid, 2003.

24 SARQUIS, D. J. ¿Para qué sirve el estudio de las relaciones internacionales?, cit., p. 45.

25 SANAHUJA, J. A. "Reflexividad, Emancipación y Universalismo: Cartografías de la Teoría de las Relaciones Internacionales", *Revista Española de Derecho Internacional, REDI*, Vol. 70/2/2018, p. 109.

26 Ethnocentrism is the tendency to think about the world based on your own culture.

frameworks or "mental imagery" developed, mainly, during the historical period known as the *Cold War* and marked by the consolidation of the new discipline. In addition, each paradigm, developed as political, economic, and social events and phenomena changed and altered the structure of international society, seeks to organize reality, help understand some of the events, offer different views of the world and focus attention on certain aspects and turn away from others.

All of them have been developed within the framework of the American centrism that "has affected the global discipline and has been present in its origins and theoretical foundations (…)"[27]. Moreover, "the American centrism that characterizes IR theory has so far proved to be relatively immune to critiques and attacks"[28]. Therefore, it is worth recognizing first, the U.S. predominance in the discipline; and second, the fact that its theoretical development has been linked to the interests and needs of the foreign policy designed in Washington and, in general, of the Western powers. Stanley Hoffman himself acknowledged this in one of his articles: "An American Social Science: International Relations"[29]. Consequently, the strength of the U.S. and Western narrative is a fact in international theory that remains until today.

All rationalist strands are explanatory theories, aimed at the analysis and interpretation of the events taking place in international society, and the study of the causality of the facts. Some of the key themes of the discipline of International Relations are the concepts of anarchy, power, national interest and sovereignty, among others. Furthermore, these theories dominated the field until the 1980s, mainly those within the framework of realist thought. In this respect, it should be recalled that realists conceive international system as anarchic, full of dangers, in which states (particularly the two American and Soviet superpowers) always see their sovereignty and survival under threat, so guaranteeing their security becomes their obsession and explains their actions and interventions, which are sometimes more aggressive than defensive.

Each paradigm provides a view of different aspects of international politics, where realism deals with war and peace, and is concerned with security understood in military terms; liberalism focuses on the management of international regimes and other issues of international reality, as well as the plurality of actors, both state and non-state; and neo-Marxism addresses global poverty, development issues and places the blame for all problems on the capitalist economic system. Which type is correct is then an issue the theoretical discussion avoids, since each paradigm is correct regarding the aspect of international politics it deals with. As has been said, each theory or paradigm emphasizes certain aspects of international reality and this is why some scholars, such as Michael Banks, among other, advocate for the inter-paradigm debate, since the three

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27 C. del Arenal analyzes with a critical perspective ethnocentrism and in particular the American centrism that has characterized the theory of the international relations, in the chapter "Americanocentrismo y relaciones internacionales: La Seguridad Nacional como referente", in the book *Teoría de las Relaciones Internacionales*, Tecnos, Madrid, 2015, pp. 21-60.

28 ARENAL, C., del y SANAHUJA, J. A. *Teorías de las Relaciones Internacionales…. cit*., p. 56, TICKNER, A.B., "Seeing IR Differently: Notes from the Third World", *Millennium: Journal of International Studies*, 32, 2, 2003, pp. 295-324.

29 HOFFMANN, S. "An American Social Science: International Relations", *Daedalus,* vol. 106, 1977, pp. 41-60.

theoretical interpretations lead to a greater understanding of international relations and what happens in international society[30].

In this sense, the three paradigms help explain current world politics as the international stages in which each was created are still present, although sizeable differences remain. However, this paper focuses on the *mainstream* of the discipline of IR, namely, Realism and its variants such as Neorealism. Under this theory, international relations are "power relationships determined by the phenomenon of power and international reality is essentially conflictual in which anarchy and the dictates of the inexorable law of the strongest are its roots"[31]. This scene was particularly relevant after the Second World War, and it was at this time that the consolidation of the Realist School took place. In the post-war context, characterized by political-military tension and the insecurity of states, their difficulty to survive in a hostile environment; the war of ideologies; and the absolute power of two superpowers (the USA and the USSR), Realism prevailed and came about with the purpose of addressing national security with military implications and analyze international relations from the perspective of power and the safeguarding of the national interest of the poles that directed the international scene.

Currently, there is a return to realism, at least in the facts and behaviors of the countries, beyond theoretical and merely doctrinal proclamations. The keys to realist positions are imposed on the international scene and the main attributes of this theory are reborn in new environments and curiously strengthened by actors who question the consequences of the parameters on which it is based. Although the future of contemporary international relations remains to be defined, realist reasoning has gained considerable roots in the behavior of international actors.

(1) The unalterable nature of Realism: a solid basis for the distribution of power in today's international society

First, one of the main theoretical architects of realism was the American political scientist Hans Morgenthau, author of the famous "Six principles of Political Realism"[32], a scientific approach in which he provided an empirical explanation of "power" in the international scene. Morgenthau developed his theory of international politics not only for academic purposes, but also as a practical tool for conducting foreign policy. This theory, which scrapped the proposals of Idealism[33], has the following outstanding aspects:

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30 SMITH, S. *The Self-Images of a Discipline: A Genealogy of International Relations Theory, loc. cit,* pp. 18-19, en AGUIRRE, I. *Proyecto Docente Relaciones Internacionales*, Leioa, 1996, p. 43.

31 CALDUCH CERVERA, R. *Relaciones Internacionales*, Madrid, Ediciones de las Ciencias Sociales, 1991, p. 20.

32 Hans Morgenthau's Six principles of Political Realism are presented as some of the fundamental characteristics of this paradigm, in https://www.yourarticlelibrary.com/international-politics/morgenthaus-realist-theory-6-principles/48472.

33 Idealism is a theoretical current that emerged after the First World War and that took shape in the ideas of the president of the United States, Woodrow Wilson, compiled in his famous "Fourteen Points". A speech in which he included a series of proposals to end the war and restore order and peace in Europe and the world. In this case, it should be noted that Idealism, which was characterized by its faith in progress, its optimistic vision of human nature and by advocating the peaceful solution of political conflict through

1) In the path of the Greek philosopher Thucydides, realism recognizes that human beings (states) are by nature self-interested and power-seeking, moved by the drive to dominate, compete and pursuit wealth, power, and prestige. Hence, one of the main features of political realism "is the concept of *interest* defined in terms of power"[34]. This theory focuses on the rational, the objective and the non-emotional, and assumes that human beings (state) permanently seek survival, the satisfaction of the desire to exert power which gives them an advantage over others. Morgenthau expressed this idea by pointing out that conflict is the result of the imperfect and devilish nature of the individual, and of the state of anarchy prevailing in international society. Such phenomena cause constant conflict and struggle between states which seek to increase their power and hegemony on the international scene. That is why, realist scholars, aware of the selfish nature of human beings, consider that it is possible to prevent any nation or political alliance from achieving international hegemony, through the *balance of power*, which is a key concept to a stable international order.

2) In view of the above, realism highlights the competitive and conflictual side of international politics and excludes other factors such as natural cooperation, or even the validity of IL. For realism, international reality is basically conflictive, and cooperation is only possible when it comes to pursuing the defense of one's own interests, survival or improving position and influence in the international framework. In this theoretical approach, the dimension of force and conflict prevails; the important role played by cooperation in international relations is accordingly overshadowed[35]. As a result, it seems logical that realist scholars are more interested in military strategy, national power, or diplomacy than in peace, cooperation, and IL. As F. Pearson and M. Rochester point out, "realists claim to have learned their own lessons from World War II, namely, that the way to prevent future warlike confrontations lies in relying not only on formal and legal institutions or moral precepts, but fundamentally on a 'balance of power', capable of deterring potential aggressors, or also on a 'agreement of powers' capable of 'policing' the world"[36].

3) Realism emphasizes the anarchical nature and the tendency to chaos and disorder of international reality and marks that, the absence of a higher political authority to provide security forces states to take political-military measures to guarantee their own survival. In other words, classical realist scholars assume that international society is anarchic as there is no similar legal-political order over and above the state nor a supranational

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diplomacy and negotiation, insisted on the need to "minimize conflict and maximize cooperation between nations". Furthermore, Idealism proposed a public diplomacy and multilateral diplomacy, regulated by International Law and certain organizations. In PEARSON, F. S. y ROCHESTER J. M.: *Relaciones Internacionales. Situación global en el siglo XXI*, Mc Graw Hill, 2003, p. 17.

34 MORGENTHAU, J.H. *Politics among Nations. The Struggle for Power and Peace,* New York, Alfred A. Knopf Inc, 1948.

35 MEDINA, M. *La teoría de las relaciones internacionales cit.* Véase también TRUYOL y SERRA, A.: *La Teoría de las Relaciones Internacionales como Sociología* (Introduction of the International Relations Studies), Instituto de Estudios Políticos, Madrid, 1973 (1ª ed., 1957).

36 PEARSON, F. y ROCHESTER, M. *Relaciones Internacionales, cit.*, p. 21. These and other aspects are reflected in the work of BARBÉ, E. "El papel del realismo en las relaciones internacionales (La teoría de la política internacional de Hans J. Morgenthau)", *Revista de Estudios Políticos (Nueva Época)*, **57**, 1987, pp. 149-176.

government to settle disputes or protect the weak[37]. For realists "the highest goal for all states is security in a hostile and anarchical world; so that their policies are determined by power calculations in the pursuit of national security"[38]. In short, the main interest of states is national security, and it must be defended against other interests, suggesting that in international relations a state's security is in contradiction with other actors' interests. This thought inevitably gives rise to conflicts between actors with identical interests or interests close to their area of influence [39].

4) The last characteristic or principle of realist theory concerns the cyclical nature of history or, in other words, the impossibility of historical progress and change towards qualitative different forms of the international order. Thus, through the adoption of a deterministic approach, realism suggests that, although we know what our destiny is, we have no ability to do otherwise. In fact, realist scholars do not expect that over time states will be less favorable to conflict and more inclined to cooperation, since they are convinced that wars between great powers are bound to recur systematically.

As stated, Realism was suggested from its origins as the main theory of IR until the 1960s. At that time, changes in international society with the emergence of new actors and energy, trade, or environmental issues, spurred the development of theories aimed at counteracting the prominent role of realism. However, the increasing tension between the two superpowers, from the following decade, would be the driving force to reformulating the hegemonic strand of IR. In fact, under the guidance of Kenneth N. Waltz, it renewed part of its theoretical foundations so as not to disappear or, worse still, be supplanted by transnationalist or structuralist paradigms.

The revival realism needed to reassert itself as a key theory of IR came with Waltz, founder of Neorealism or Structural Realism. In 1979 he published *Theory of International Politics*, which would "replace" Morgenthau's work as the main reference for Realism[40]. He suggested a theoretical reformulation with two main changes, as E. Barbé recalls: "first the foreign policy decisions of the state are no longer explained by domestic or personal conditioning factors (leadership) but by structural determinants of the anarchic international system; and second, the general reflection that characterized realism, based on history and philosophy, gives way to scientific formalism"[41]. In contrast to the

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[37] The existing international political order, as well as the legal rules that arise under it, are the result of the sovereignty of the states and not the product of a superior political power or authority. VIOTTI, P. R. y KAUPPI, M. V., *International…op. cit*., pp. 47-48.

[38] PEARSON, F. S. y ROCHESTER, J. M. Relaciones Internacionales, cit., p. 20.

[39] This perspective is postulated as an heir to the Hobbesian tradition of thought, in which, as Martin Wight recalls, international relations are conceived as a "pitched war", in which conflict is the most characteristic international activity, similar to the Thomas Hobbes concept of the state of nature. There is no doubt that the central aspects of Realism are ontologically inspired by the Machiavelism or Hobbesian philosophical tradition, WOLFERS, A. *Discord and Collaboration. Essays on International Relations*, The John Hopkins UP., Baltimore, 1962. In BARBÉ, E.: *Relaciones Internacionales…* 1995, p. 62. WIGHT, M. *International Theory: The Three Traditions,* Leicester UP, London, 1991.

[40] About the Neorealism, see WALTZ, K. *Theory of International Politics*, Wesley, Reading, 1979 (trad. 1988). BUZAN, B. y, JONES, C. y LITTLE, R., *The logic of Anarchy: Neorealism to Structural Realism*, Nueva York, Columbia University Press, 1993. KEOHANE, R. (comp.), *Neorrealism and its critics*, Columbia UP, New York, 1986; and BALDWIN, D. (ed.), *Neorealism and Neoliberalism: The Contemporary Debate*, New York, Columbia University Press, 1993.

[41] BARBÉ, E., *Relaciones Internacionales,* Tecnos, Madrid, 2007, p. 78.

traditional realism, in Waltz's theoretical proposal, the unit of analysis is the structure of the international system instead of the state, i.e., neorealism introduces the concept of «structure» as a determining element of political relations among its members. An international structure composed of a small number of protagonist states that take the role of great powers in international relations. Furthermore, another important proposal of contemporary realists incorporated elements of an economic and cooperative nature explaining "the basic structure of international relations and the underlying dynamics of conflicts between states"[42].

Beyond the above, neorealism shows an international reality based on the interests and power of states, in the purest realist style, and argues that the anarchic international system and power relations among actors explain the constant conflicts in international society. Thus, when it comes to expressing its way of seeing the state and conflict relations as protagonists in the inter-state sphere, neorealism, as its very name indicates, implies renewal, but also the inclusion of the key elements of realism. In addition, it maintains the concepts of power and interest, as well as the anarchic, chaotic, and decentralized nature of the international system. However, neorealism takes a step forward by including cooperative and economic relations as significant features of the international system.

Major authors of this strand include Klaus Knorr, Kenneth N. Waltz[43], Robert Gilpin. While Waltz counters with the thesis that bipolarity is the best guarantee for international stability, and analyzes the role played by the political structure of the international system in determining states' behavior; Gilpin favors unipolarity, alleging that the hegemonic power must have the capacity to design economic and political relations that generate interdependence or dependence, of the rest of the actors. Currently internationally we see how bipolarism between USA and China is being imposed, and how two great powers: The EU and Russia, accompany and strengthen one of the poles. Furthermore, the so-called Global South, with its plurality and lack of internal cohesion, expresses a tendency towards the China/Russia binomial[44].

In any case, the process of evolution that realism went through[45], regardless of how it is called —*classical, offensive, defensive, neorealism*, or most recently, *neoclassical realism* —, demonstrates the resilience of the Realist School, not only to maintain itself as a theoretical strand but also to dominate the thinking of several generations of international relations analysts, from the Second World War to the present. Moreover, each version characteristically reviews its foundations and principles in accordance with changes in international society and aims at reinforcing the paradigm against attacks from emerging theories. Nevertheless, although realism presents different stages, all its strands agree on visualizing a disordered and dangerous international society in which

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42 PEARSON, F. y ROCHESTER, *M., Relaciones Internacionales, cit*., p. 21.

43 WALTZ, K.N. *Teoría…, cit.,* p. 119.

44 Let us remember that, in 1996, the two countries signed a strategic partnership with the objective of opposing the unipolar international order led by USA. The Asian giant is in the process of becoming a global power in the economic, political and strategic fields. "According to Dongwu Securities, in 2023, for the first time, China exported more to developing countries than to the United States, the EU and Japan combined", in BRICS+China creates its alternative G7", *Foreign Policy Week Report*, 1335, 2023.

45 MOURE, L., "El Realismo en la teoría de las Relaciones Internacionales: Génesis, Evolución y Aportaciones Actuales", in ARENAL, C. del y SANAHUJA, J. A. *Teorías de las Relaciones Internacionales*, *cit*. pp. 61-96.

states see their sovereignty and, definitively, their own existence threatened, which leads them to conflict and constant competition to remain relevant powers on the international stage. In addition, it is also clear how all strands prioritize a static and deterministic image that hinders and even prevents any possibility of change in international relations or limits eventual modifications in the inter-state system of balances of power. Therefore, continuity and change explain the permanence of the dominant theoretical strand (*mainstream*), since in addition to maintaining some immutable principles, realism has been in constant evolution and transformation, just like the scene and relationships between actors, which it attempts to analyze.

(2) A model based on the permanent crisis and conflict of International Society: Lessons from Realism in the Ukrainian War

In today's international society, conflict is still present in the form of wars between states, such as Russia and Ukraine, and between a state, Israel, and Hamas, a non-state actor, among others. The instability caused by the two conflicts — which are old, unresolved, and particularly devastating that have resumed in historical contexts different from those which gave rise to them — place Realism/Neorealism at the pinnacle of the analysis of international reality due to its capacity to impose itself as a key theory providing a rational explanation of what happens. Then, focusing on the first situation, the Russian invasion of Ukraine, which started on February 24, 2022, has caused "a tectonic shift in European history"[46], as the EU Heads of State and Government stressed in the *Versailles Declaration* (section 6); some of the key points of realism/neorealism are fulfilled.

First, this war shows an important part of the conflict that international society suffers and explains to a large extent the political instability and international insecurity of the planet and how states actors take the path of indiscriminate violence to defend their interests. This would fulfill realism's central premise, which is of course the continued war, driven in part by the obsession of states to maximize their security and power within an anarchic and disorderly world. In the message delivered on the day the invasion of Ukraine began, Russian President Vladimir Putin justified the military aggression by pointing out that for Russia it was, "a matter of life and death, a matter of our historical future as a nation". He added: "And this is not an exaggeration, it is true. It is not only a very real threat to our interests but to the very existence of our state and to its sovereignty". So, on the one hand the president sought to convince his compatriots, and on the other hand the international community, alleging that the aggression was an act of self-defence to protect Russia from threats. Moreover, he went as far as to say that it was "necessary to stop the genocide against the millions of people living there, who

[46] See Versailles Declaration in https://www.consilium.europa.eu/es/press/press-releases/2022/03/11/the-versailles-declaration-10-11-03-2022/.

> rely only on Russia..."[47], clearly referring to the ethnic Russian people living in Eastern and Southern Ukraine. Thus, Vladimir Putin tried to convince international community that the decision was made on security grounds and national survival, to protect and defend Russia's vital interests.

Second, realist thinking considers that there is danger when states voice their dissatisfaction with the *status quo*. They are more likely to start territorial expansion strategies which lead to wars, modify the international order, and undermine, in this case, the political-military unipolarism in force since 1991 and that the United States intends to preserve. Following the disintegration of the USSR, Russia has expressed and shown its need to be the direct heir to the former Soviet Union, in terms of world power and leadership, and to restore, if possible, the bipolarism it exercised with the United States during the *Cold War* or move towards an international order that once again places Russia at the pinnacle of global power and influence[48].

Precisely this objective explains two scenarios: first, that since the 90s it has proposed to strengthen economic and political ties with China, and second, it felt the need to regain (in terms of political-military control) Ukraine, which was the second republic with the greatest weight in the USSR, or at least to avoid general exit out of Russia's sphere of influence. Therefore, it was necessary to prevent its entry into the Western sphere by joining the institutions of the leading pole, i.e. the USA together with the EU. For Russia, Ukraine was slipping out of its sphere of influence and increasingly falling into the Western orbit. This is one of the underlying reasons for Russia's decision to attack. It is undeniable that Ukraine's politics in the preceding years (rapprochement and request for NATO membership) was used by Russia to justify its decision, which was also motivated by its loss of power in the field of IR and, therefore, contrary to its national interest.

The result has been a scene like that which existed in the early years of the *Cold War*, albeit with marked differences. The strains in U.S. relations with Russia have been joined by a third actor, the European Union (EU), which has embraced the realist thesis and has recognized its determination to provide itself with *strategic autonomy*. The Russian aggression has generated an earthquake in the international system and has led the EU to look at itself and its defense capabilities to face the threats looming in its environment and beyond, in addition to responding with measures aimed at the aggressor and the aggressed. The invasion has basically led to the strengthening of the EU on the international stage as a global security actor. This was expressed by the heads of state and government in paragraph 7 of the *Versailles Declaration* when they stated that, "confronted with growing instability, strategic competition and security threats, we have decided to take more responsibility for our security (...)"[49]. With these words, Europe's leaders made it clear that the Russian aggression has a significant impact on the different dimensions of European security and that, therefore, a multiple response

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47 Full text of Putin State of Nation Speech, 24 February 2022, en https://www.nytimes.com/2022/02/24/world/europe/putin-ukraine-speech.html.

48 KIMMAGE, M. y NOTTE, H. "How Russia Globalized the war in Ukraine. The Kremlin's Pressure-Point Strategy to Undermine the West", *Foreign Affairs*, 1, 2023.

49 See Versailles Declaration, *op. cit*.

is required. This would consist of bolstering its defense capabilities, reducing its energy dependencies, and building a more robust economic base, which is why the signatories understand that the military, energy, and economic dimensions of European security are the most affected and compromised by the war in Ukraine[50]. And so, they proclaim: "we must do so for our security and take further decisive steps towards building our European sovereignty, reducing our dependencies and designing a new growth and investment model for 2030"[51]. Therefore, the war of aggression against Ukraine, in addition to raising specters of past times, has sent out to the West, and to the EU, "a very, very clear message: *si vis pacem para bellum*"[52]. These words are reminiscent of those pronounced by General Marshall at Harvard University on June 5, 1947: "I need not tell you gentlemen that the world situation is very serious"[53]. Consequently, following the outbreak of the war, the EU decided to implement a comprehensive security system, mainly focused on these three dimensions.

Thus, on the one hand, the EU approved the *Strategic Compass* (SC) which sets out the guidelines for the implementation of the measures agreed under the *Versailles Declaration*. The extensive 47-page document provides a common vision of the EU's strategic environment, the threats, and challenges in international society, by making the organization a global security actor and strengthening its geopolitical position[54]. Measures comprise, among others, the creation of a "rapid deployment capacity" of up to 5,000 troops for different types of crises, including land, air, and maritime components, etc., with full operational capability planned for 2025. On the other hand, it should be noted that nearly all EU countries have recently increased their defense spending to reduce the shortfalls in military and civilian capabilities and to strengthen the European defense technological and industrial base. Thus, France plans to allocate 400 billion euro in defense spending over the coming years, a considerable increase over the previous decade[55]. In short, it is a simple fact that the Russian invasion has led most European countries and the EU itself to increase their military or defense spending as few times before and, to place *hard power* at the forefront of the international chessboard as a priority measure to guarantee their security[56].

Finally, another backbone of the SC focuses on the purpose of *working in partnership* to achieve common goals and address common threats and challenges which implies

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50 See MORÁN BLANCO, S. *Seguridad Energética y Medio Ambiente: Dos caras de una misma moneda. Especial referencia a la UE*, Navarra, Thomson Reuters Aranzadi, 2015, p. 25. The Copenhagen School (Copenhagen Peace Research Institute) distinguishes five sectors of security: political, economic, social, military and environmental, BUZÁN, B. "New Patterns of Global Security in the Twenty-First Century", *International Affairs,* vol. 67, 3, p. 433.

51 Versailles Declaration, 2022, *op. cit.*

52 GUTIÉRREZ ESPADA, C. "De la guerra en Ucrania", *Anuario Español de Derecho Internacional,* vol. 39, 2023, p. 97.

53 In Dialnet-DiscursoDeMrGeorgeMarshall-2495018.pdf.

54 See "A Strategic Compass for security and defence. Foreword by HR/VP Josep Borrell, 64 pages. HAKANSSON, C., "Where does the Compass point? The European Commissions role in the development of EU security and defence policy. Sage Journals, European View, vol. 21, Issue 1, March 29, 2022. Available in: https://journals.sagepub.com/doi/full/10.1177/17816858221086425.

55 *Noticia Cinco Días*, 23 march 2023.

56 The consulting firm McKinsey anticipates that EU spending may rise by up to 65% between 2021 and 2026, amounting to 488.00 euros.

strengthening cooperation with strategic partners such as NATO, the UN, the OSCE, AU, ASEAN, and even "boosting cooperation with bilateral partners, i.e. with like-minded and strategic partners, such as United States, Canada, Norway, UK and Japan", among others; in addition to "developing tailored partnerships in the Western Balkans, the Eastern and Southern Neighborhood, Africa, Asia and Latin America"[57]. At this point, one of the contributions of neorealism can be observed, namely the cooperative relations that, within the framework of structures (grouping of states), arise in the international reality as an instrument that favors the defense of national interests. Nevertheless, the EU's political will is to highly strengthen the security and defense sector as an essential condition for increasing its importance on the international scene as a global actor and, thus, bolstering its strategic autonomy in the region and the rest of the planet[58]. The EU's role in security and defense matters is a key element for consolidating its leading role on the international scene and in deep crisis.

(E) CONCLUSIONS

It follows that when confrontation and political-military tension increase between the great powers of the international system, there is a reassessment of Realism/Neorealism which entails, among other things, reemerging with an important role as the hegemonic paradigm that explains international reality. At this time, when the tension between international powers immersed in a competition for global governance is becoming perceptible; Realism/Neorealism is rescued as an indisputable theory that help understand the international evolution, as well as the answers and initiatives provided by the different actors that play a leading role in international relations. Realism, with its different approaches, is probably the most genuine theoretical school with the longest intellectual tradition in the discipline of IR, which has steadily offered a global understanding of the behavior of the state in the international system. In fact, despite its limitations, it is essential to implement realist postulates to explain the dynamics and fundamental aspects affecting the international system.

The future of international relations is unpredictable because factors may arise that jeopardize peacekeeping and international security. Thus, as Henry Kissinger — one of the most relevant disciples of realist thought — pointed out in his work *World Order*; there is a need for "the reorganization of the chaotic international system through a kind of global regionalism in which the great powers reach agreements among themselves that generate order and stability"[59]. His neorealist thinking suggests once again that the postulates of hegemonic theory continue to influence the future of international reality and consequently, states should be able to build new regulatory balances through concrete agreements between interlocutors and prevent the conflictive drift of international society. However, what has been noted since the late 1990s and most

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57 See document *Strategic Compass*, in https://www.eeas.europa.eu/sites/default/files/documents/strategic_compass_en3_web.pdf.

58 SANAHUJA, J. A. "La Unión Europea y la guerra de Ucrania. Dilemas de la autonomía estratégica y la transición verde en un orden mundial en cambio", in MESA, M. (Coord.), *Policrisis y rupturas del orden global. Anuario 2022-2023*, Ceipaz, Fundación Cultura de Paz, Madrid, 2023, pp. 23-58.

59 KISSINGER, H. *The World Order*, Houston, Penguin Publishing Group, 2016.

evidently since the beginning of the Russian invasion of Ukraine is the emergence of two disparate blocs, on the one hand, the West, led by Washington, and the other, China and Russa, which does not help generate confidence in international evolution, quite the opposite. The US NSS (National Security Strategic) of October 2022 recognized this: "We find ourselves in the midst of a strategic competition to shape the future of the international order"[60].

One of the most notable expressions of reborn realism will be the positions defended by those who seek to lead the Global South and who seek in the direction of expanding the fields of cooperation and defending common values, without specifying the content and interpretation of those values. From that perspective, the speech of Chinese Presidente Xi Jinping at the 16th BRICS Summit in 2024 could be examined, when he indicated that "the world is going through accelerated transformations never seen in a century, characterized by new trends of multipolarity and the risks of a new Cold War" and when he opted for the BRICS countries to seek "common ground, putting aside differences, working together to further consolidate common values, safeguarding common interest". It would be necessary to define the values that these countries proclaim and determine the content of the rules that should govern international relations in the 21st century, where realistic postulates will probably occupy a relevant place.

Amid the evident unpredictability of the international system, empirical evidence shows the dynamics of conflict, always present since unravel the postulates of realism. That is precisely why the defense of global dialogue and compliance with international law need to be restored, otherwise the future will be catastrophic. There are international institutions that promote cooperation between states and respect for rules governing the behavior of the actors. There is a need for a thorough review and reform of all the institutions operating within the international framework so that they have enhanced ability to minimize security competition, promote world peace and foster a balance that will force states to abandon their objectives of maximizing power. Of course, the United Nations and other similar regional organizations, despite their recognized virtues, have not been able to attenuate the features that define the international behaviour of the actor that lead international relations.

[60] Disponible en: https://www.mfa.gov.cn/esp/zxxx/202410/t20241025_11516089.html.

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The Human Dimension: The Great Forgotten Factor in Migration Along the Central Mediterranean Sea

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Abstract: Every year thousands of people risk their lives trying to cross the Mediterranean through its central route. Mediterranean migration is not a spontaneous phenomenon favoured by geographical proximity, but rather a structured one, with organized crime planning and overseeing every step of the migrants' perilous and lengthy trips. Once at sea, assistance to any person found in distress at sea is supposedly guaranteed. The rights of migrants are granted not only by human rights law but also by treaties from other branches of public international law which should permeate the whole system. However, the protection of migrants' human rights has not played a prevalent role in migration policies at the European Union level. Sea rescues have been relegated to only what is routinely demanded by maritime obligations. Migration by sea is primarily presented from a securitized approach, with a focus on the reduction of arrivals and a downgrading of the human dimension.

Keywords: Migration Human dimension Central Mediterranean EU

Received: June 11, 2024 *Accepted*: October 28, 2024

(A) INTRODUCTION

The Universal Declaration of Human Rights[1] states that "all human beings are born free and equal in dignity and rights" and that they are all "entitled to all the rights and freedoms set forth in this Declaration".[2] Realistically, geography plays a large part in the perceived rights and freedoms for many.

The right of individuals to leave their country is unarguable. The right to emigrate is enshrined in the 1948 United Nations (UN) Declaration of Human Rights, where article 13(2) states that "[e]veryone has the right to leave any country, including his own, and to return to his country". The corresponding right to immigrate though, is not generally recognized, and any State may adopt regulations determining whether or not migrants may enter its territory.[3]

There is no formal legal definition of migrant. According to the International Organization for Migration (IOM),[4] a migrant is "an umbrella term reflecting the common lay understanding of a person who moves away from his or her place of usual residence,

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1 Universal Declaration of Human Rights (UN), GA Res. 271 A (III), Article 1.

2 *Ibid*, Article 2.

3 See T. Scovazzi, 'The Particular Problems of Migrants and Asylum Seekers Arriving by Sea', in S. Juss, T. Scovazzi and L. Westra (eds), *Towards a Refugee Oriented Right of Asylum* (Routledge, London, 2015) 177-232, at 178.

4 IOM, 'Who is a Migrant?', accessed 1 June 2024.

whether within a country or across an international border, temporarily or permanently, and for a variety of reasons". The term migrant refers to foreign-born, foreign citizens, or people who have moved to another country. In either scenario, we are addressing persons to whom the principle of human dignity unquestionably applies. The inherent dignity of the human being constitutes the real basis of human rights.

At first glance, migration is seen in economic and development terms. There is a tendency to explain the phenomenon as a response to economic disparities and the lack of job opportunities. The protection of migrants' human rights has not played a prevalent role in migration policies. Following this interpretation, migrants may come to be regarded as commodities, rather than as individuals entitled to the full enjoyment of their human rights.[5]

The Mediterranean Basin is one of the main migration arenas in the world. It is also, however, one of the most border-controlled areas since it constitutes the outer border of the European Union (EU) on its southern side.[6] The former UN High Commissioner for Human Rights has expressed her concern about the "lethal disregard for desperate people"[7] in the central Mediterranean Sea. This is borne out by the actions of several EU countries to criminalize, impede or halt search and rescue (SAR) activities, which have had deadly consequences for adults and children seeking safety.[8] This paper will assess to which extent (if any) the human dimension[9] inspires the migration policies which govern the Mediterranean Sea, or, on the contrary, the reduction of arrivals which is at the center of the debate.[10]

This work consists of five main sections. After this introduction, Section B focuses on the main characteristics of the Central Mediterranean Route. This brief historic journey contextualizes the research. Section C outlines safety of life at sea as an international obligation. It provides a detailed analysis of the main legislative instruments addressing the duty to render assistance at sea. Section D delves into the political action in the Mediterranean. It concentrates on answering the question "is the human dimension reflected?". For that purpose, it analyses the individual responses and the EU reactions to the migration by sea phenomenon. Conclusions resulting from the previous research are reflected in Section E.

(B) THE CENTRAL MEDITERRANEAN ROUTE

The Central Mediterranean route is one of the most active and dangerous migration routes worldwide. The route has not only gained notoriety due to the increasing flow of migrants but also due to the high death rate. Mediterranean migration is not a spontaneous phenomenon favoured by geographical proximity, but rather has developed into an organized crime, overseeing every step of the migrants' perilous and lengthy trips.

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5 Office of the UN High Commissioner for Human Rights (OHCHR), 'Migration and Development: A Human Rights Approach', *UN Publications* (2008) at 4.

6 C. Wihtol de Wenden, 'Migrations in the Mediterranean Region', *IEMed Mediterranean Yearbook* (2015) 126-131, at 126.

7 OHCHR, 'Lethal Disregard. Search and rescue and the protection of migrants in the central Mediterranean Sea', *UN Publications* (2021) at iv.

8 *Ibid.*

9 Since at the core of this phenomenon lie vulnerable persons on the move.

10 The author acknowledges the importance of the European Court of Justice's case law in inspiring and shaping European policies. However, an analysis of the case law is beyond the scope of this paper.

The central route stretches from the north of Africa — mainly Libya and Tunisia — to Italy and Malta. Throughout the 1990s, there was some limited boat migration from North Africa across the Central Mediterranean. The main country of departure during that period was Tunisia.[11] The departures from Libya date back to around the year 2000 when the migration patterns moved eastwards as Tunisian authorities started to impose stricter border controls. As a consequence, Libya became the main country of departure towards Europe in the Central Mediterranean area.[12]

For years, Libya practiced an open-door policy towards sub-Saharan countries, becoming a destination for people hailing from countries in the region.[13] During the Gaddafi era, many sub-Saharans had stable jobs and could send remittances to their countries of origin.[14] By the end of the first decade of the 21st century, unprecedented numbers of people started taking dangerous journeys across the Mediterranean from Libya. The country ceased to be a destination to become a transit State. However, for European leaders, Gaddafi's presence served as a guarantee of political and migratory stability in the Mediterranean.[15]

While migrations in the Mediterranean were mostly linked to employment opportunities before 2011, the situation changed in the aftermath of the Arab uprisings. In the wake of the Arab Spring and the civil war in Libya, significant waves of migration crossed the Mediterranean. Just after the revolution started, Tunisia and Libya became points of departure for boats heading towards the Italian shores.[16] The numbers dropped again in 2012 and 2013, which coincides with years of relative stability in Libya.

The arrivals through the Central Mediterranean route dominated the landscape between 2014 and 2017 except for 2015, when the Eastern Mediterranean route witnessed an exceptionally high number of arrivals. The number of people crossing the Central Mediterranean peaked in 2016, with over 180,000 people arriving by sea.[17]

The drop in departures from Libya in 2018 and 2019 coincides with a number of initiatives designed to decrease movements to Italy.[18] In 2017, Italy signed an MoU with the Libyan Government of National Accord (GNA) on cooperation in the fight against "illegal immigration" and on "reinforcing the security" of their borders.[19]

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11 *Ibid.*

12 D. Lutterbeck, 'The Central Mediterranean Migration Route: Rise, Fall, and Rise Again', *Med Agenda — Special Issue [Perspectives in a Changing Mediterranean]*, *MEDAC Publications in Mediterranean IR and Diplomacy* (2016), 56-69, at 57.

13 The journey towards Europe started long before people reach the coast of North Africa.

14 E. Borgnäs, L. Cottone and T. Teppert, 'Labour Migration Dynamics in Libya', *IOM Publications* (2020) 298-310, at 299.

15 G. Noll, M. Giuffré, 'EU migration control: made by Gaddafi?', *Open Democracy;* published on 25 February 2011, accessed 3 October 2024.

16 P. Fargues, C. Fandrich, 'Migration After the Arab Spring', *Migration Policy Center, Research Report 2012/09, European University Institute* (2012) at 4.

17 A. Malakooti, C. Fall, 'Migration Trends Across the Mediterranean. Piecing Together the Shifting Dynamics', *Global Initiative Against Transnational Organized Crime* (2020) at 5.

18 *Ibid.*

19 Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, signed in Rome on 2 February 2017. This MoU topped off the relationship forged for decades between the two States on migration matters: the 2006 Memorandum

The EU endorsed the MoU in its legally non-binding Malta Declaration, in which the European Council also agreed to "take additional action to significantly reduce migratory flows along the Central Mediterranean route".[20] These actions included the intensification of efforts to stop smugglers from operating out of Libya or elsewhere, supporting the frontline Member States, enhancing humane reception conditions, voluntary humanitarian returns, cooperation with other countries of origin and transit, as well as voluntary resettlement.[21]

The COVID-19 pandemic changed the pattern again. Migratory flows were not immune to the effects of the pandemic and the subsequent health crisis. With the arrival of the virus in the West, most European and North African countries imposed restrictions to prevent its spread. Measures such as lockdowns, border closures, and stay-at-home policies affected the free movement of persons.[22] In April 2020, the number of irregular crossings detected at European borders along the main routes dropped to 900, the lowest total figure since Frontex began collecting border data in 2009.[23] However, during the first six months of 2020, arrivals on the central Mediterranean route increased compared with the same period in 2019.[24] According to IOM data, arrivals to Italy increased by 150 per cent and to Malta by 33 per cent. In fact, arrivals to Italy and Malta only fell in March, rising again in April.[25]

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for the cooperation against illegal migration, the 2007 Protocol and Additional Protocol to the 2006 Memorandum (Protocollo tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista (Tripoli, 29 December 2007); Protocollo Aggiuntivo Tecnico-Operativo al Protocollo di Cooperazone tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell'immigrazione Clandestina (Tripoli, 29 December 2007), the 2008 Treaty on Friendship, Partnership and Cooperation (Trattato di Amicizia, Partenariato, e Cooperazione (Bengazi, 30 August 2008), and the 2009 Executive Agreement (Protocollo Aggiuntivo Tecnico-Operativo concernente l'aggiunta di un articolo al Protocollo firmato a Tripoli il 29 December 2007 tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell'immigrazione clandestina (Tripoli, 4 February 2009).

20 European Council, 'Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route', 3 February 2017, accessed 3 October 2024.

21 European Council, 'Conclusions 28 June 2018', published on 29 June 2018, accessed 3 October 2024. In 2020, Malta and GNA also signed an MoU in order to set up two coordination centers in Tripoli and Valletta for supporting "operations against illegal migration". Memorandum of Understanding between the Government of National Accord of the State of Libya and the Government of the Republic of Malta in the Field of Combatting Illegal Immigration, signed in Tripoli, 25 May 2020.

22 Á. Jiménez García-Carriazo, 'La ruta migratoria del Mediterráneo central en tiempos de pandemia: ¿cambio en las reglas del juego?', in A. del Valle (Dir.) *Inmigración y Derechos Humanos en las Fronteras Exteriores del Sur de Europa* (Dykinson, Madrid, 2021) 157-164, at 161.

23 Frontex, the European Border and Coast Guard Agency, supports EU Member States and Schengen-associated countries in the management of the EU's external borders and the fight against cross-border crime. Based in Warsaw, it was established by Regulation (EU) No 2016/1624 of 14 September 2016 OJ L 251 (European Border and Coast Guard Regulation). It emerged from the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU which was established in 2004 by Council Regulation (EC) 2007/2004 of 26 October 2004 OJ L 349 (Frontex-Regulation). Frontex, 'Situation at EU external borders in April Detections lowest since 2009', accessed 1 June 2024.

24 I. Schöfberger, M. Rango, 'COVID-19 and Migration in West and North Africa and across the Mediterranean', in IOM, Migration in West and North Africa and Across the Mediterranean. Trends, Risks, Development (IOM Publications, 2020) xx-xxxii, at xxiii.

25 *Ibid.*

The Central Mediterranean continued to be the most used path to Europe for the fourth year in a row in 2023 as over 157,500 migrants were detected on this route.[26] Since 2014, the IOM's Missing Migrants Project has documented over 23,000 people who have died or gone missing crossing the Central Mediterranean route.[27] In 2024 1,154 people have lost their lives in the Central Mediterranean as of 3 October.[28] Deaths along the Central Mediterranean route comprise 69% of all migrant deaths in the entire Mediterranean Sea.[29]

Moved by the recurring and avoidable deaths of migrants at sea, non-governmental organizations (NGOs) and civil society groups have played a crucial role in conducting SAR operations off the Libyan coast. Since 2014, many migrants in distress at sea have been saved by vessels operated by NGOs.[30] These ships aim to decrease fatalities and bring rescued migrants to the EU safely. However, since 2018, NGOs have encountered numerous obstacles to carrying out SAR missions in the Mediterranean. Italy and Malta have filed criminal and administrative proceedings against crew members or vessels and launched initiatives to restrict NGO vessel activities and their access to EU ports. Additionally, disinformation campaigns have severely hindered the NGOs' life-saving work at sea.[31]

(C) SAFETY OF LIFE AT SEA: AN INTERNATIONAL OBLIGATION

According to human rights law, which is based upon the inherent dignity of every person, migrants enjoy the fundamental rights afforded to all persons regardless of their legal status in a State.[32] Since international customary law and international human rights instruments are of universal application, they lay down migrants' rights and the obligations of States toward migrants. Various other international instruments grant rights to migrants by virtue of their humanity.[33]

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26 Frontex, 'Significant rise in irregular border crossings in 2023, highest since 2016'.

27 IOM, 'Missing Migrants Project', accessed 3 October 2024.

28 *Ibid.*

29 OHCHR, 'Lethal Disregard', *supra* n. 7, 3.

30 Operations have been carried out by Médecins Sans Frontières, Migrant Offshore Aid Station, Sea-Eye, Sea-Watch, SOS Méditerranée, Save the Children, LifeBoat, ProActiva Open Arms, Jugend Rettet, Boat Refugee Foundation, Mission Lifeline, Boat Refugee Foundation, and Mediterranea Saving Humans. An indirect role in SAR operations has also been played by Alarm Phone, an NGO operating a hotline for migrants in distress in the Mediterranean Sea. E. Cusumano, M. Villa, 'From "Angels" to "Vice Smugglers": the Criminalization of Sea Rescue NGOs in Italy', 27(1), *European Journal on Criminal Policy and Research* (2021), at 3 [doi: https://doi.org/10.1007/s10610-020-09464-1].

31 F. Romana Partipilo, 'The Role of NGOs within Search and Rescue Activities at Sea', *Lebanese American University,* published on 6 April 2022, accessed 3 October 2024.

32 See *Safi and Others v. Greece*, ECHR (2022) 5418/15, 235.

33 The international human rights treaties and their associated additional protocols that grant rights to migrants by virtue of migrants' humanity are: Universal Declaration of Human Rights, 10 December 1948, 217 A (III); International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, in UNTS vol. 660, p. 195; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, in UNTS vol. 993, p. 3; International Covenant on Civil and Political Rights, 16 December 1966, in UNTS vol. 999, p. 171; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, in UNTS vol. 660, p. 195; Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, in UNTS vol. 1249, p. 13; Convention

The rights of migrants are granted not only by human rights law but also by treaties from other branches of public international law, including but not limited to refugee law; transnational criminal law, especially treaties relating to human trafficking and smuggling of migrants; humanitarian law; labour law; and the law of the sea.[34] Some treaties expressly recognize the human dimension. This is particularly clear in the 2000 Protocol against the Smuggling Migrants by Land, Sea, and Air,[35] which aims to "prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end while protecting the rights of smuggled migrants".[36]

Focusing on migration by sea, emphasis must be placed on the law of the sea and international maritime law. The duty to render assistance at sea is a long-standing rule of international law.[37] A range of actors have obligations to mitigate the loss of life during sea border crossings, including flag States, the captains of ships, coastal States, and States responsible for the coordination of relevant SAR zones. The duty to assist in distress as such is not geographically limited in any way.[38] Irrespective of where a vessel encounters another vessel in distress, it is obliged to assist it.

This international custom is codified in a number of international treaties, including the 1958 Geneva Convention on the High Seas,[39] the UN Convention on the Law of the Sea (UNCLOS)[40] and conventions adopted under the auspices of the International Maritime Organization (IMO), in particular the International Convention for the Safety of Life at Sea (SOLAS Convention)[41] and the International Convention on Maritime Search and Rescue (SAR Convention).[42]

UNCLOS gives incidental protection through Article 98, which can be considered as the most important expression of the duty to render assistance at sea. The first paragraph, which repeats the content of Article 12(1) of the 1958 Convention on the High

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, in UNTS vol. 1465, p. 85; Convention on the Rights of the Child, 20 November 1989, in UNTS vol. 1577, p. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, in UNTS vol. 2220, p. 3; Convention on the Rights of Persons with Disabilities, 13 December 2006, in UNTS vol. 2515, p. 3; International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, in UNTS vol. 2716, p. 3. IOM, 'Migrant Rights', accessed 1 June 2024.

34 *Ibid.*

35 Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention against Transnational Organized Crime, 15 November 2000, in UNTS vol. 2237, p. 319.

36 Emphasis added. *Ibid*, Art. 2 Statement of purpose.

37 See E. de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (London, 1758) at 170; R. P. Pedrozo, 'Duty to Render Assistance to Mariners in Distress During Armed Conflict at Sea: A U.S. Perspective', 94 *International Law Studies* (2018) 101-126, at 106.

38 A. T. Gallagher, F. David, *The International Law of Migrant Smuggling* (Cambridge University Press, Cambridge, 2014) at 447.

39 Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962), UNTS vol. 450, p. 11, Art. 12.

40 UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 397.

41 SOLAS Convention (adopted 1 November 1974, entered into force 25 May 1980), UNTS vol. 1184, 1185, p. 2.

42 SAR Convention (adopted 27 April 1979, entered into force 22 June 1985), UNTS vol. 1405.

Sea, places an obligation on shipmasters to assist[43] any person found at sea who is in danger of being lost:

> Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

The phrase "any person found at sea in danger of being lost" makes no distinction between persons; therefore, the obligation extends from seafarers to irregular migrants in need of assistance at sea.

Additionally, Article 98(2) spells out the positive obligation of coastal States to cooperate with neighbouring States to promote effective SAR services: "Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose".

The SOLAS Convention similarly provides that any ship master at sea who is in a position to assist, upon receiving information that persons are in distress at sea must proceed with all speed to their assistance, and that "[t]his obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found".[44]

The SAR Convention directs coastal States to establish national SAR regions in cooperation with neighbouring States and to take primary responsibility for responding to SAR incidents that occur within their region.[45] It specifies that "[p]arties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which such person is found".[46] The SAR Convention also requires States that provide the overall coordination of such SAR zones, on receiving information that a person is in distress within their SAR zone, to "take urgent steps to provide the most appropriate assistance available".[47]

Following the 2004 amendments to the SAR Convention,[48] where such assistance is rendered, the coordinating State must take primary responsibility for ensuring effective co-ordination and co-operation "so that survivors assisted are disembarked from the

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43 An obligation of conduct, not of result.

44 SOLAS Convention, chapter V, Regulation 33(1). See also Regulation 7(1).

45 SAR Convention, Annex 2.1.3.

46 SAR Convention, Annex, chapter 1, para. 1.3.2.

47 SAR Convention, chapter 2, para. 2.1.9.

48 As a reaction to the *Tampa* affair, the Maritime Safety Committee of the IMO at its 78th session adopted by resolution MSC.155(78), amendments to Chapter II (organization and co-ordination) relating to definition of persons in distress, Chapter III (co-operation between States) relating to assistance to the master in delivering persons rescued at sea to a place of safety, and Chapter IV (operating procedures) relating to rescue co-ordination centers initiating the process of identifying the most appropriate places for

assisting ship and delivered to a place of safety".[49] In this regard, the government in charge of the SAR region in which the survivors are recovered is held responsible for providing a place of safety on its territory or ensuring that such a place of safety is granted.

The SAR Convention "was neither foreseen, nor intended" to respond to mass mixed migration by sea.[50] The 2004 amendments give a fresh veneer by introducing the undefined "place of safety" into the legal framework governing SAR operations. However, considerations of humanity are not at the forefront of the convention application.

The SAR Convention does not provide specific rules for interpretation and does not identify which is the State, among a number of neighbouring States, which should provide assistance in a given case. The fact that the Government of the SAR region in which the survivors are recovered is responsible for providing a place of safety or ensuring that such a place of safety is provided, means that migrants in distress at sea are sometimes brought to the SAR region of another State.[51] Against this backdrop, reluctance, and refusal to disembark rescued sea migrants on land are common responses among coastal States.[52]

In the absence of a legal definition, and with the aim of guaranteeing that persons rescued at sea are provided with a place of safety regardless of their nationality, status, or the circumstances in which they are found, the Guidelines on the Treatment of Persons Rescued at Sea were adopted by the IMO.[53] Although the Guidelines do not establish any binding duty, they provide some guidance on the interpretation of the obligations to render assistance at sea.[54] The Guidelines define a place of safety as "a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter, and medical needs) can be met".[55]

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disembarking persons found in distress at sea. Resolution MSC.155(78), adopted on 20 May 2004, adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, as amended.

49 SAR Convention, as amended, IMO Doc. Resolution MSC.155(78), Annex 5, chapter 3, para. 3.1.9.

50 IMO, 'IMO Secretary-General welcomes UN Security Council resolution on migrant smuggling', Press briefing 45, 2015.

51 J. Coppens, 'The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin', 44 *Journal of Maritime Law and Commerce* 89 (2013) at 4.

52 A. Campàs Velasco, 'Vulnerability and Marginalisation at Sea: Maritime Search and Rescue, and the Meaning of 'Place of Safety", 18 *International Journal of Law in Context* (2022) 85-99, at 87, [doi: https://doi.org/10.1017/S1744552322000076].

53 IMO Resolution MSC. 167(78), Annex 34, Guidelines on the Treatment of Persons Rescued at Sea, adopted on 20 May 2004.

54 R. A. Barnes, 'The International Law of the Sea and Migration Control', in B. Ryan, V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff, Leiden, 2010) 103-150, at 103.

55 IMO Resolution MSC. 167(78), para. 6.12. The rescuing vessel cannot be seen as a place of safety: "An assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship. An assisting ship may not have appropriate facilities and equipment to sustain additional persons on board without endangering its own safety or to properly care for the survivors. Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made" (para. 6.13).

The interpretation of a place of safety might draw on human dignity reasoning. When the Guidelines specifically address the protection needs of refugees and asylum seekers found at sea in paragraph 6(17) by taking into account the need to avoid "disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened", it is defensible that they are inspired by human rights law considerations.[56] A place cannot be deemed safe simply because distress at sea has been prevented.[57] Accordingly, delivery at a place of safety would necessarily exclude locations where there are substantial grounds for believing that there is a real danger or risk for rescued migrants' lives, including being at risk of arbitrary immigration detention and facing obstacles to access immediate assistance such as medical care.[58]

In response to this situation, the Facilitation Committee of the IMO adopted (recommendatory) principles regarding the disembarkation of persons rescued at sea which specify that "[i]f disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support".[59] The principles have not been successfully incorporated into the SAR Convention.[60] Today it is considered that the coastal State has only the obligation to ensure that a place of safety is provided to rescued people without being under an explicit obligation to allow disembarkation on its own territory.[61]

This progress notwithstanding,[62] the Guidelines and the Principles are not binding instruments but can only be regarded as soft law. The existence of a vast legal framework that aims to ensure the safety of life at sea does not prevent migrants from being exposed to life-threatening crossing conditions, devoid of protection of their fundamental human rights.[63] The security aspects of migration have largely overshadowed its humanitarian dimension.

(D) POLITICAL ACTION IN THE CENTRAL MEDITERRANEAN: IS THE HUMAN DIMENSION REFLECTED?

Migration across the Mediterranean is often presented in media as a single, transnational phenomenon, characterized by steady flow of people, seemingly guided

56 Campàs Velasco, *supra* n. 52, at 90.

57 A. Fischer-Lescano, T. Löhr, T. Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law', 21(2) *International Journal of Refugee Law* (2009) 256 296, at 290 [doi: https://doi.org/10.1093/ijrl/eep008].

58 OHCHR, 'Lethal Disregard', *supra* n. 7, at v.

59 IMO FAL.3/Circ.194, Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea, adopted on 22 January 2009, para. 3.

60 Á. Jiménez García-Carriazo, 'Small Island, Big Issue: Malta and its Search and Rescue Region SAR', 7 *Peace & Security-Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations)* (2019) 299-321, at 309 [doi: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10].

61 E. Papastavridis, 'Rescuing 'Boat People' in the Mediterranean Sea: The Responsibility of States under the Law of the Sea', EJIL: Talk!, published on 31 May 2011, accessed 1 June 2024.

62 Which also includes the IMO/UNHCR/International Chamber of Shipping, 'Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees' (2015).

63 Campàs Velasco, *supra* n. 52, at 86.

by uncontrollable forces.[64] Migration has gained salience and has become a political issue, which has been transferred from the traditional internal security domain to the international security agenda.[65]

The issue has become increasingly politicized due to polarized debates, divided electorates, and rising populism. Today, migration by sea is primarily presented from a security approach, with a focus on the reduction of arrivals.[66] The lack of protection for those crossing the Central Mediterranean has turned the situation into nothing less than a tragedy. Furthermore, the context of migration by sea is impacted by a failure of solidarity among States, as evidenced within the EU.[67]

(1) Individual States' Responses to the Phenomenon

The abovementioned legal framework partially applies in the Central Mediterranean, including both transit and destination States. For example, although Libya is not a party to UNCLOS, most of its provisions (including Article 98)[68] have already achieved binding customary international law status. Italy, Malta, Tunisia, and Libya are parties to the SOLAS Convention and the SAR Convention. In principle, assistance to any person found in distress at sea is guaranteed in the area. Besides that, the most striking issue is the Maltese objection to the 2004 amendments to the SAR Convention.

Malta is rarely the intended destination for migrants; most aim at landing in Italy and either end up accidentally on Maltese territory or, more commonly, are rescued within the Maltese SAR region and subsequently disembarked in Malta. In contrast to the small size of its territorial waters, Malta maintains a vast SAR region, covering some 260,000 square kilometers.[69] Its SAR region coincides with the Malta Flight Information Region, which the State inherited from the British Flight Identification Region.[70] The SAR region of Malta overlaps with the Italian SAR region corresponding to Lampedusa and Lampione.

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64 A. D'Angelo, 'Flujos migratorios en el Mediterráneo: cifras, políticas y múltiples crisis', *Anuario CIDOB de la Inmigración* (2018), 30-46, at 31 [doi: doi.org/10.24241/AnuarioCIDOBInmi.2018.30].

65 M. Ferreira, 'Risk Politicization Strategies in EU Migration and Asylum Policies', *Journal of Global Analysis* (2010) 153-183, at 156; Z. Gündüz, 'From 'Necessary' to 'Dangerous' and Back Again. The Economization, Securitization and Europeanization of Migration', 12 *Turkish Review of Balkan Studies* (2007) 751-777, at 775.

66 Restrictive national migration policies are not only seen as serving the national interests of the countries of destination, but by referring "the graveyard of the Mediterranean sea" they are also presented as beneficial for countries of origin. See N. Lauwers *et al.*, 'The Politicization of the Migration-Development Nexus: Parliamentary Discourse on the European Union Trust Fund on Migration', 59(1) *Journal of Common Markets Studies* (2021) 72-90 [doi: https://doi.org/10.1111/jcms.13140].

67 P. Mallia (Vella de Fremeaux), F. Attard, 'Dehumanising the Human Element of Maritime Migrant Smuggling: A Discussion on the Application of Human Rights in the Maritime Sphere', 17 *Benedict's Maritime Bulletin* (2019) 1-25, at 4; M. Riddervold, *The Maritime Turn in EU Foreign and Security Policies: Aims, Actors and Mechanisms of Integration* (Palgrave Macmillan, Abingdon, 2018).

68 Barnes, *supra* n. 54, 134; B. H. Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea', 36 *Columbia Journal of Transnational Law* (1998) 399-429, at 415 [doi: https://doi.org/10.18356/3e8c7ba4-en].

69 P. Mallia (Vella de Fremeaux), *Migrant Smuggling by Sea Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Brill, Leiden, 2009) at 13.

70 J. Coppens, 'Search and Rescue', in E. Papastavridis, K. N. Trapp, *La criminalité en mer* (Académie de Droit International de la Haye, Martinus Nijhoff, Leiden, 2014), 381-427, at 404.

Within this geographical context, the Maltese authorities objected to the amendments to the SAR Convention arguing that they require the State responsible for the SAR region within which persons are rescued to assume responsibility for providing a safe disembarkation place.[71] Maltese authorities maintain that disembarkation must occur at the nearest safe port, which, as a result of the size of Malta's SAR region and the coordinates of rescues performed by the Armed Forces of Malta, is often Lampedusa.[72]

Malta's formal objection has tested its friendly relationship with Italy. This has led to constant diplomatic rows responding to the prevailing lacuna revolving around which State is to allow disembarkation.

In a field such as the protection of human rights in this critical migration crisis, the assessment of the Italian response is inevitably mixed. Italy has played a pivotal role as a front-runner in rescue strategies and has been responsible for bringing the Mediterranean migration high in the EU agenda.[73]

In October 2013 a unique momentum of political and public pressure towards a new strategy was registered. Following two mass drownings off the coast of Lampedusa amounting to 636 deaths, operation *Mare Nostrum* was launched by Italy on 18 October 2013[74] to rescue migrants in order to prevent other similar disasters in an area spanning from Italian waters up to the beginning of Libyan waters.

A number of State and non-State[75] actors worked together for operation *Mare Nostrum* to be successful. The operation employed both naval and coast guard vessels suitable for SAR missions.[76] The medical crew was in charge that all rescued persons underwent medical examination to determine their health conditions and necessary treatments.[77] In response to the high number of children arriving, an agreement with Save the Children Italy has provided for the presence of Save the Children staff in rescue efforts for information, support, legal counseling and cultural mediation targeting children and teenagers rescued at sea.[78]

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71 On 22 December 2005, the depositary received the following communication from the Ministry of Foreign Affairs of Malta: "[…] the Ministry wished to inform that, after careful consideration of the said amendments, in accordance with article III(2)(f) of this Convention, the Government of Malta, as a Contracting Party to the said Convention, declares that it is not yet in a position to accept these amendments". IMO, 'Status of IMO Treaties. Comprehensive information on the status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions', accessed 1 June 2024.

72 Malta thus adheres to the practice that all rescued persons within the Malta SAR region should be disembarked in the nearest place of safety as provided for in the pre-amendment legislation. Jiménez García-Carriazo, 'Small Island, Big Issue', *supra* n. 60, at 306.

73 S. Panebianco, 'The Mare Nostrum Operation and the SAR Approach: the Italian Response to Address the Mediterranean Migration Crisis', *EUMedEA Online Working Paper Series* (2016) at 3.

74 Enrico Letta was guiding the Italian government at that time, but in February 2014 Matteo Renzi became Prime Minister. Ministero della Difesa, Mare Nostrum Operation, accessed 1 June 2024.

75 Including national authorities, local governments, social organizations, including cultural mediators and, doctors specialized in communicable diseases.

76 H. Brady, 'Mare Europaeum? Tackling Mediterranean migration', *Brief European Union Institute for Security Studies* (2014) at 2.

77 Panebianco, *supra* n. 73, at 2.

78 Save the Children, 'Submission for the Office of the High Commissioner for Human Rights (OHCHR) report on migrants in transit (A/HRC/RES/29/2)' (2015) at 2.

Operation *Mare Nostrum* involved 34 warships and 900 sailors and contributed to the rescue of around 150,000 people.[79] However, this life-saving operation was always subject to criticism. Not only for the financial cost borne entirely by Italy[80] but for the supposed "pull factor" that encouraged more migrants to attempt the risky journey across the Mediterranean.

The operation was presented as a military-humanitarian mission in the Mediterranean targeted at both rescuing migrants and arresting smugglers.[81] The boost in capacity organized by the Italian Navy allowed the system to rescue thousands of people with appropriate and safe procedures. The Italian government wanted to leverage its future presidency of the European Council to get support from all EU Member States by using *Mare Nostrum* as a model for other nations. However, the Italian Navy mission was terminated as a result of Italian authorities' dissatisfaction with the lack of EU burden sharing.[82]

Despite the goodwill and good intentions underpinning the operation, it soon became politically and economically unsustainable. However, operation *Mare Nostrum* had the merit of breaking the prevailing perception of migration as a security issue, initiating debate on the need for collective responses to the tragedies.[83]

In the years following operation *Mare Nostrum*, the political situation in Italy drastically changed. A campaign to redefine sea rescue as a crime was launched. Among the measures adopted, the closed-ports strategy was extended not only to NGO vessels but also to commercial and military ships that had carried out SAR activities in international waters.[84] Likewise, Italy funded the training of the Libyan coast guards and the establishment of the Libyan SAR region to close the Central Mediterranean route, transferring responsibility to the Libyan forces even in international waters.[85]

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79 Marina Militare Italiana, 'Mare Nostrum Riepilogo Attività', accessed 3 October 2024; A. Patalano, 'Nightmare Nostrum? Not Quite: Lessons from the Italian Navy in the Mediterranean Migrant Crisis', 160(3) *RUSI Journal* (2015) at 14-19 [doi: https://doi.org/10.1080/03071847.2015.1061253].

80 F. Trauner, 'Asylum Policy: the EU's 'Crises' and the Looming Policy Regime Failure'; 38 *Journal of European Integration* (2016) 311-325 [doi: https://doi.org/10.1080/07036337.2016.1140756]; G. Falkner, *EU Policies in Times of Crisis* (Routledge, New York, 2018) at 318.

81 P. Musarò, 'Mare Nostrum: the Visual Politics of a Military-Humanitarian Operation in the Mediterranean Sea', 39(1) *Media, Culture & Society* (2017) 11-28, at 11 [doi: https://doi.org/10.1177/0163443716672296].

82 E. Cusumano, 'Migrant Rescue as Organized Hypocrisy: EU Maritime Missions Offshore Libya between Humanitarianism and Border Control', 54(1) *Cooperation and Conflict* (2019) 3-24, at 9 [doi: https://doi.org/10.1177/0010836718780175].

83 The situation in the Central Mediterranean is unique, although parallelisms with other responses might be found in critical moments. In the weeks after Russia's full-scale invasion of Ukraine in February 2022, Poland immediately opened its borders and became the primary recipient of Ukrainian refugees. K. Golebiowska, M. Pachocka, S. Kubiciel-Lodzińska, 'Poland has opened its arms to nearly 1 million Ukrainian refugees, but will they be able to stay for the long term?', *The Conversation*, published on 27 February 2024, accessed 3 October 2024.

84 Simone Marinai, 'The Control of Migration Flows in the Central Mediterranean Sea: Insights from Recent Italian Practice', 9 *Peace & Security-Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations)* (2021), at 3 [doi: https://doi.org/10.25267/Paix_secur_int.2021.i9.1701].

85 Arci, 'How Italy and Europe Funded the Libyan Coast Guards: 10 Years of Human Rights Violations', accessed 1 June 2024.

(2) EU Reactions to the Phenomenon

After the end of operation *Mare Nostrum*, European governments accepted the sharing of responsibility for patrolling the southern European border along the Italian and Maltese coasts. Under the coordination of Frontex,[86] joint operation *Triton* took over on 1 November 2014. The primary focus of operation *Triton* was "to control irregular migration flows towards the territory of the Member State of the EU and to tackle cross border crime"[87] in a 30 nautical miles stretch of water off the coasts of Italy and Malta.

Operation *Triton* was firmly criticized for being primarily an operation to intercept and block migrant vessels.[88] It was never endowed with the mandate and assets required to replace *Mare Nostrum* nor was it designed as a SAR mission.[89] As the European Commission confirmed, "Frontex is neither a search and rescue body nor does it take up the functions of a Rescue Coordination Centre, it assists Member States to fulfil their obligation under international maritime law to render assistance to persons in distress".[90]

Sea rescues were thus relegated to only what was routinely demanded by maritime obligations.[91] How should one understand the shift from a protection-centered approach in operation *Mare Nostrum* to a security-based strategy in operation *Triton*? As Jumbert suggests, the shift to *Triton* must be regarded as a response to Italy's call for assistance, as well as a reaction to the perception that *Mare Nostrum* served as a pull factor for migration.[92] It confirms long-held beliefs that border patrol has a deterrent effect on migrants.[93]

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86 F. Esteve García, 'The Search and Rescue Tasks Coordinated by the European Border and Coast Guard Agency (Frontex) Regarding the Surveillance of Eternal Maritime Borders', 5 Peace& Security – Paix et Sécurité Internationales (Euroediterranean Journal of international Law and International Relations (2017), at 93-116 [doi: https://doi.org/10.25267/paix_secur_int.2017.i5.04].

87 European Commission, 'Frontex Joint Operation 'Triton' – Concerted Efforts for managing migratory flows in the Central Mediterranean', Memo 31 October 2014, accessed 3 October 2024; Frontex, 'Joint Operation Triton 2014', accessed 1 June 2024; Frontex, 'Operational Plan: EPN CONCEPT Joint Operation EPN Triton' 2014/SBS/09; F. Esteve García, 'El rescate como nueva función europea en la vigilancia del Mediterráneo', 111 *Revista CIDOB d'afers internacionals* (2015), at 167.

88 It has been described as a "renewed strategy of not letting people arrive". M. Tazzioli, 'Border Displacements. Challenging the Politics of Rescue between Mare Nostrum and Triton, 4(1) *Migration Studies* (2016), 1-19, at 7 [doi: https://doi.org/10.1093/migration/mnv042].

89 One should not forget that SAR is not a competence granted by the treaties to the EU, which prevents the adoption of adequate regulation in this regard. The poor regulation regarding maritime rescue in the EU is strictly linked to border control, where the EU does have powers. See the incidental protection awarded by Articles 9 and 10 of the Regulation (EU) 656/2014, of the European Parliament and of the Council of 15 May 2014 OJ L 189, establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU.

90 European Commission, *supra* n. 87.

91 J. Arsenijevic, M. Manzi, R. Zachariah, 'Defending Humanity at Sea: Are Dedicated and Proactive Search and Rescue Operations at Sea a "Pull-factor" for Migration and Do They Deteriorate Maritime Safety in the Central Mediterranean?', *Médecins sans Frontières Report* (2017) at 5.

92 M. G. Jumbert, 'Control or Rescue at Sea? Aims and Limits of Border Surveillance Technologies in the Mediterranean Sea', 42(4) *Disasters* (2018) 674-696, at 688 [doi: https://doi.org/10.1111/disa.12286].

93 *Ibid.*

In April 2015, moved by a terrible incident in which several hundreds of migrants lost their lives,[94] Frontex expanded the area to 138 nautical miles south of Sicily.[95] Despite the upgrade, the then Frontex's Executive Director stated that saving migrants' lives in the Mediterranean should not be the priority for the maritime patrols because "[t]his is not in Frontex's mandate, and this is in my understanding not in the mandate of the European Union".[96]

The Council of the EU acknowledged that operation *Triton* was not enough and established a military crisis management, operation EUNAVFOR MED *Sophia*,[97] which was implemented simultaneously[98] with the purpose of contributing to the disruption of the business model of human smuggling and trafficking networks in the south-central Mediterranean.

Operation *Sophia* brought to the picture a military response to a civilian crisis. The EU decided on a naval operation despite the humanitarian nature of the challenge. This appears even more striking in light of the harsh criticism that militarized naval interventions and restrictive border policies in the Mediterranean have drawn.[99]

The main objective of operation *Sophia* was to disrupt the business model of the human smugglers as a root cause. Rescuing people in distress at sea was not a stated objective of the mission.[100] Although it incidentally[101] contributed to several SAR operations, *Sophia* was restricted by its very nature. As the British House of Lords criticized, operation *Sophia* "responds to symptoms, not causes".[102] However, it is notable and praiseworthy that the mission saved thousands of people.[103]

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94 On 18 April 2015, a boat carrying around 800 migrant people capsized and sank off the coast of Libya. That was the largest single loss of life in the Mediterranean in decades. A. Bonomolo, S. Krichgaessner, 'UN says 800 migrants dead in boat disaster as Italy launches rescue of two more vessels', *The Guardian*, published on 20 April 2015, accessed 3 October 2024.

95 Conclusions of the Joint Council of Justice and Home Affairs and Foreign Affairs, 20 April 2015; Frontex, 'Frontex expands its Joint Operation Triton', accessed 1 June 2024.

96 P. Kingsley, I. Traynor, 'EU Borders Chief Says Saving Migrants' Lives "Shouldn't be Priority" for Patrols', *The Guardian*, published on 22 April 2015, accessed 1 June 2024; See, V. Moreno-Lax, J. Allsopp, E. Tsourdi, P. De Bruycker, 'The EU Approach on Migration in the Mediterranean', Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (2021), at 76.

97 Council Decision (CSFP) 2015/778, of the Council of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ L 122/31.

98 N. Magugliani, 'From Mare Nostrum to Operation Themis: Losing track of protection in the Mediterranean?', *On Law, Rights, and Politics*, published on 2 February 2018, accessed 1 June 2024.

99 R. Boşilcă, M. Stenberg, M. Riddervold, 'Copying in EU Security and Defense Policies: the Case of EUNAVFOR MED Operation Sophia, European Security', *European Security* (2020), 218-236, at 218-219 [doi: https://doi.org/10.1080/09662839.2020.1845657]; V. Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: the 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm', 56(1) *Journal of Common Market Studies* (2018) 119-140 [doi: https://doi.org/10.1111/jcms.12651].

100 While it is true that Recital (6) of the Council Decision stipulates that the operation shall be conducted in accordance with international law and, in particular, with the relevant provisions of UNCLOS, SOLAS, and SAR Convention, which include the obligation to assist persons in distress at sea.

101 G. Bevilacqua, 'Exploring the Ambiguity of Operation Sophia Between Military and Search and Rescue Activities', in G. Andreone (ed.) *The Future of the Law of the Sea. Bridging Gaps Between National, Individual and Common Interests* (Springer, New York, 2017) 165-190, at 186.

102 House of Lords, EU Committee, 'Operation Sophia, the EU's Naval Mission in the Mediterranean: an Impossible Challenge', 14th Report of Session 2015-16, *HL Paper* 144, at 3.

103 During the operation 44,916 persons were rescued. European Council, 'Infographic Lives saved in EU Mediterranean operations (2015-2023)', accessed 1 June 2024.

The tensions regarding the distribution of migrants arriving at EU shores led to the termination of operation *Sophia* in 2020. It was progressively dismantled from March 2019, when the Council extended the operation's mandate but without naval assets.[104] This political decision stripped *Sophia* of her capabilities in the Mediterranean (preventing SAR operations thus), and further strengthened the securitization of migration, with Member States hiding behind a smokescreen.[105]

Operations *Triton* and *Sophia* were succeeded by the ongoing operations *Themis* and *Irini*, respectively. Operation *Themis* responds to EU member States politics of SAR disengagement.[106] It has taken a different mandate from its predecessor, with a stronger focus on law enforcement and border security and a reduction in the distance of patrolling.[107]

In this mission, disembarkation points are identified on a 'case-by-case' basis but at the closest port instead of only Italian ports, which was the case under *Triton*'s operational plan.[108] As a consequence, the Maltese government refused to take part in operation *Themis* in the absence of a clear rule foreseeing the disembarkation in Italian ports of people rescued in the Maltese SAR zone. The overall result for Frontex has been a gradual shift away from SAR in the Central Mediterranean.[109]

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104 While air surveillance capabilities would be strengthened instead. European Parliament, 'European Union Naval Force Mediterranean Operation Sophia', Legislative Train Schedule, 20 November 2019, accessed 3 October 2024; Council of the EU, 'EUNAVFOR MED Operation Sophia: mandate extended until 31 March 2020', press release, published on 26 September 2019, accessed 3 October 2024.

105 G. Mantini, 'A EU Naval Mission Without a Navy: The Paradox of Operation Sophia', *Istituto Affari Internazionali Commentaries* (2019) at 2-3; S. Yuksel, 'Operation Sophia Past, Present and Future', *Beyond the Horizon*, published on 18 April 2019, accessed 1 June 2024.

106 Frontex, 'Operational Plan: JO Themis 2019'; S. Carrera, R. Cortinovis, 'Search and Rescue, Disembarkation and Relocation Arrangements in the Mediterranean. Sailing Away from Responsibility?', *CEPS Paper in Liberty and Security in Europe*, No. 2019-10 (2019), at 7.

107 Whereas Triton's operational area was 30 miles from the Italian coast, Themis operates only 24 miles from the Italian coast and does not cover Maltese SAR area any longer. *Ibid.*

108 News regarding a "secret deal" between Italy and Malta was circulating in European media when Matteo Renzi was in power in Italy. An alleged secret deal where Malta was supposed to have given up oil exploration areas in return for Italy taking in most rescued migrants in the Mediterranean came to light following a parliamentary question asked by an Italian Member of the European Parliament Elisabetta Gardini. The European Commission responded that it was not aware of such a deal, nor was it of any 'inactivity' by the Armed Forces of Malta in terms of responding to SAR duties: "The Commission is not aware of any bilateral agreement between the Maltese and Italian authorities concerning Search and Rescue (SAR) operations in the Mediterranean Sea. However, the Commission notes that the operational area of Joint Operation (JO) Triton hosted by Italy, also with the participation of the Maltese assets, covers a large part of the Maltese SAR area defined in accordance with the 1979 International Convention on Maritime Search and Rescue. The disembarkation rules for migrants intercepted/rescued during the OJ Triton are set out in the Operational Plan agreed by Frontex, Italy as a host Member State and the other participating Member States in accordance with Article 3a (1)(i) of the Frontex Regulation. The participating units are authorized by Italy to disembark in principle in its territory all persons intercepted in its territorial sea as well as in the entire operational area. It should also be noted that most of the SAR cases occur outside of the pre-defined operational area, largely within the Libyan SAR area". I. Sammut, 'A Tug of War of between Rights and Obligations: the Case of Migration from Malta's Perspective', in F. Ippolito, G. Borzoni, F. Casolari, *Bilateral Relations in the Mediterranean: Prospects for Migration Issues* (Edward Elgar Publishing, Cheltenham, Northampton, 2020) 48-65, at 60.

109 M. Laux, 'The evolution of the EU's naval operations in the Central Mediterranean: A gradual shift away from search and rescue', *Heinrich-Böll-Stiftung*, published on 16 April 2021, accessed 1 June 2024.

This approach is particularly reflected in the EUNAVFOR Med operation *Irini*,[110] which aims to oversee the UN arms embargo for Libya. SAR is not even among the secondary tasks defined for the mission. This emphasizes the swing in the operations conducted by the EU. While all operations aimed at securing the EU's external borders (with different levels of human security), *Irini* is the first mission strategically conducted in an area where there is no migration route to circumvent the rescuing of people at sea.[111]

Apart from the operations deployed by the EU in the Mediterranean, soft law instruments have been adopted at EU level.[112] In November 2022, the European Commission presented the EU Action Plan on the Central Mediterranean.[113] The Plan proposes 20 measures aimed at reducing irregular and unsafe migration and insists on solidarity balanced against responsibility between member States. Although Recital 3 of the Action Plan states that SAR capacities will be reinforced "in full respect of fundamental rights and international obligations", reports on attempted sea border crossings as well as migrants who died or went missing are not included. It seems that the Commission fails again to acknowledge the ongoing suffering that this structural situation causes to migrants as well as the increased risk that they confront while crossing.[114] Already criticized for being unworkable and recycling old mistakes,[115] the Plan alone will not provide a structural solution to the challenges in the Mediterranean.

On 14 May 2024, the Council adopted the EU's pact on migration and asylum.[116] The history of the Pact goes back to the autumn of 2020, when the Commission, following lengthy consultations, put forward a new set of regulations aimed at improving the EU's asylum system.[117] The Pact reflects the EU's attempt to learn from previous crises and better prepare for upcoming ones. It is comprised of ten legislative files intended to work as a system and marks a significant effort to establish a more cohesive, effective, and humane response to migration.[118] Member States have two years to implement the laws with the help of an implementation plan being prepared by the Commission.

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110 Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI) ST/6414/2020/INIT, OJ L 101.

111 Laux, *supra* n. 109.

112 See the Malta Declaration above.

113 European Commission, 'EU Action Plan for the Central Mediterranean', accessed 1 June 2024.

114 E. Frasca, F. L. Gatta, 'The EU Action Plan for the Central Mediterranean: Everybody knows that the boat is leaking', *EU Immigration and Asylum Law and Policy*, published on 15 February 2023, accessed 1 June 2024.

115 European Council on Refugees and Exiles (ECRE), 'Mediterranean: Commission's Action Plan on the Central Med Endorsed by EU Interior Ministers Amid Critiques Over Recycling Old Mistakes, High-Profile EU Politicians Accused of Committing "Crimes Against Humanity" Over Cooperation with EU-Funded Libyan Coa', published on 2 December 2022, accessed 1 June 2024.

116 European Commission, Migration and Home Affairs, 'Pact on Migration and Asylum' published on 21 May 2024, accessed 1 October 2024; European Council, Council of the EU (Press Release), 'The Council adopts the EU's pact on migration and asylum', published on 14 May 2024, accessed 1 October 2024.

117 C. González Enríquez, 'The EU Pact on Migration and Asylum: context, challenges and limitations', ARI 67/2024, Real Instituto Elcano, published on 14 May 2024, accessed 1 October 2024.

118 P. Vella de Fremeaux, F. Attard, 'Navigating the Human Rights Trajectory of the EU Migration and Asylum Pact in Search and Rescue Operations (Part One)', *Opinio Juris*, published on 16 September 2024, accessed 2 October 2024.

(3) Criminalizations of NGOs

NGOs have been running SAR operations in order to fill a gap in humanitarian protection in the Mediterranean. These missions have been accused of being a "pull factor" for migrants to attempt dangerous sea journeys. These perceptions have put NGOs at risk of persecution by public authorities.[119] Whereas the legal framework of their SAR activities is beyond the scope of this paper,[120] the "criminalization" of NGOs can be embedded in the political reaction to migration in the Mediterranean Sea.

As stated above, the successive missions deployed dwindling resources for operating without a rescue mandate. When the focus shifted from SAR to border control, civil society organizations attempted to step in and fill the gap. Their early presence was welcomed, as they relieved EU assets of part of the burden of rescuing missions,[121] and their cooperation with Italian and Maltese authorities run smoothly for a period of time.[122]

However, in 2017, Italy and Malta started to place limitations on the freedom of movement at sea upon rescue volunteers.[123] Following the signature of the MoU between Italy and Libya in February 2017,[124] and the adoption of the Code of conduct for NGOs involved in migrants' rescue operations at sea in July 2017,[125] the situation grew more complicated.[126]

During the COVID-19 pandemic, SAR operations in the central Mediterranean were significantly affected by policy responses. In some instances, Italy and Malta denied a safe port to NGO vessels for the disembarkation and imposed restrictions on their operations on the grounds of public health.[127] On top of all this, in January 2023, Italy adopted a decree on urgent provisions for the management of migratory flows, which

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119 E. Cusumano, M. Villa, 'Sea rescue NGOs: a Pull Factor of Irregular Migration?', 22 *European University Institute, Robert Schuman Centre, Policy* Brief (2019) 1-10.

120 In particular, the Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, p. 17 18.

121 See E. Cusumano, 'Emptying the Sea With a Spoon? Non-governmental Providers of Migrants Search and Rescue in the Mediterranean', 75 *Marine Policy* (2017) 91-98 [doi: https://doi.org/10.1016/j.marpol.2016.10.008].

122 V. Moreno-Lax, 'A New Common European Approach to Search and Rescue? Entrenching Proactive Containment', *EU Immigration and Asylum Law and Policy*, published on 3 February 2021, accessed 1 June 2024.

123 I. Mann, 'The Right to Perform Rescue at Sea: Jurisprudence and Drowning', 21 *German Law Journal* (2020), 598-619, at 608 [doi: https://doi.org/10.1017/glj.2020.30].

124 Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, signed in Rome on 2 February 2017.

125 Italian Code of Conduct for NGOs Undertaking Activities in Migrants' Rescue Operations at Sea. The Code of Conduct prohibits NGOs from entering Libyan territorial waters, envisages the presence of police officers aboard NGO vessels, bans NGOs to communicate with smugglers, forbids NGOs to switch off their transponders, and obliges them not to obstruct the Libyan coast guard.

126 Former Italian Interior Minister Matteo Salvini is currently facing kidnapping and negligence charges over refusing to let Open Arms disembark in Italy in August 2019.

127 OHCHR, 'Lethal Disregard', *supra* n. 7, at 3; Jiménez García-Carriazo, 'La ruta migratoria', *supra* n. 21, at 162.

makes SAR operations run by NGOs even more difficult.[128] The decree, passed into law in February,[129] orders NGOs vessels to request a port and sail to it[130] without delay after a rescue, even in the face of other boats in distress.

The final stage of this criminalization drive has been the prosecution of NGOs on the basis of accusations of breaching national legislation or instructions on disembarkation.[131] Since 2018, national authorities began administrative and criminal proceedings against crew members or vessels.

The EU Agency for Fundamental Rights (FRA) collects data on the operations of the NGOs.[132] This includes any legal proceedings against them, as well as on any difficulties in disembarking migrants in safe ports. The most recent figures make extremely disturbing reading: due to ongoing criminal and administrative proceedings, vessel seizures, and mandatory maintenance work, some assets are blocked at ports and cannot carry out SAR operations. In 2024, out of 20 assets, twelve were operational.[133]

Despite the EU efforts to affirm the legality of NGO-led SAR operations through the Commission Guidance on the facilitation Directive,[134] it seems that the Guidance has not gone far enough in ending their criminalisation.[135]

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128 Decree Law No. 1, of 2 January 2023, on urgent provisions for the management of migratory flows. The decree significantly increases the requirements on vessels carrying out rescue missions to enter or transit through Italian territory, including but not limited to, taking prompt initiatives to inform the persons taken on board of the possibility of requesting international protection, and requesting, immediately after the rescue, the assignment of a port of disembarkation, to which the vessel must proceed without delay. The new requirements increase the risks associated with carrying out SAR missions in respect of fines, detention, and confiscation of vessels. Council of Europe, 'Opinion on the compatibility with European standards of Italian Decree Law No. 1 of 2 January 2023 on the management of migratory flows', *Expert Council on NGO Law*, published on 30 January, 2023, accessed 1 June 2024. See S. Carrera, D. Colombi and R. Cortinovis, 'Policing Search and Rescue NGOs in the Mediterranean: Does Justice End at Sea?', *CEPS in-Depth Analysis*, published on 4 February 2023, accessed 1 June 2024, at 9-10.

129 Amended by Law No. 15 of 24 February 2023.

130 The assignment of distant ports for disembarkation of survivors has also been criticized as it keeps rescue ships away for days from the SAR area in the central Mediterranean where most distress cases occur. Moreover, the denial of disembarkation at the closest place of safety prolongs the suffering of those saved and delays the provision of adequate assistance to meet their basic needs. Frasca and Gatta, *supra* n. 114.

131 See inter alia M. Gionco, 'Criminalisation of Solidarity is a Political Act', Stories of Hope in Dark Times. Migrants' Rights Defenders', accessed 1 June 2024; J. Coppens, 'Interception of Migrant Boats at Sea', in V. Moreno-Lax, E. Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill, Leiden, 2016) at 203; S. Carrera *et al.*, 'Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants', *Study for the European Parliament 2018 Update* (2018); D. Ghezelbash *et al.*, 'Securitization of Search and Rescue at Sea', 67 *International & Comparative Law Quarterly* 315 (2018) 347-349 [doi: https://doi.org/10.1017/S0020589317000562].

132 FRA, 'June 2024 Update Search and Rescue (SAR) operations in the Mediterranean and fundamental rights', published on 1 July 2024, accessed 3 October 2024.

133 Eight of the deployed vessels were under maintenance and not currently operational (*Aita Mari, Louise Michel, Open Arms, Astral, ResQ People, Imara, Mare Jonio,* and *Sea Punk*). The remaining vessels and reconnaissance aircraft carried out monitoring activities.

134 Communication from the Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence 2020/C 323/01, C/2020/6470, OJ C 323, 01/10/2020, p. 1 6.

135 M. Wu, 'The EC's Guidance on the Facilitation Directive Ending the Criminalisation of NGO-led SAR Operations?', published on 30 October 2020, accessed 3 October 2024.

These facts demonstrate how the main defenders of the human dimension at sea were degraded. NGOs are losing their verve overwhelmed by red tape and procedures. The accusation of being a magnet to migrants has triggered a process of delegitimization of rescuing operations run by NGOs that has translated into decreasing funding, additional limitations, and growing risks of criminalization for civil society's missions offshore Libya.[136]

(E) CONCLUSIONS

The past decade has been marked by actions, namely, security-based and military crisis management operations, resulting from the immense international pressure on the EU to take responsibility to tackle migratory flows at its doors and to prevent further tragedies through (incidental) SAR operations.

Although there is a legal framework which enshrines the duty to render assistance at sea as a rule of international law, its implementation has not always been smooth. SOLAS Convention and SAR Convention have been subject to several amendments aimed at protecting the human rights of migrants at sea and ensuring crime prevention in SAR operations. Furthermore, IMO has adopted guidelines and other soft law instruments, which, although non-binding, clarify further the obligations of States and shipmasters. Nonetheless, SAR and disembarkation activities of EU Member States are currently not covered by a common EU legal framework, except for those activities carried out in the context of Frontex-led joint operations at sea.

The EU's response has advanced in fits and starts. As a reaction to the humanitarian disasters, the speed of the launch of the operation was unprecedented in EU standards. However, the intensity of the action has not always matched the severity of the tragedies. Although the role of national courts and tribunals may be commended in multiple occasions,[137] the different interests and approaches of EU member States towards migration revealed a serious lack of cohesion and division of responsibilities.

What is happening to migrants along the central Mediterranean route is the result of a failed system of migration governance, one that fails to place the human rights of migrants at the center and for too long has been marked by a lack of solidarity.

One may say that the EU's decision to act in response to the migration crisis was driven, among other facts, by the humanitarian crisis unfolding at its borders, but it is also the result of a security imperative of border protection. Italy tried to secure its security and humanitarian policy goals through solitary action. During operation *Mare Nostrum*, Italy, with a proactive attitude, took up rescue missions beyond its SAR zone.

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136 Cusumano, 'Migrant', *supra* n. 82, at 12.

137 See, among other cases: ECRE, 'Rome Court Orders Humanitarian Visas for Two Afghans Within Ten Days, Ocean Viking Blocked in Italy, Case Submitted to ICC over Malta and Italy's Complicity in Crimes in Libya', published on 21 January 2022, accessed 1 June 2024; ECRE, 'Court Ends Blockade of Rescue Vessel, Italy Releases 'Open Arms', Italy's Crackdown on People Saving Lives at Sea Condemned by UN, Unimaginable Horrors in Libya', published on 9 October 2020, accessed 1 June 2024; ECRE, 'Disembarkations in Italy, Rescues by Malta, Court release NGO Vessel', published on 7 February 2020, accessed 1 June 2024.

According to international law, Italy undoubtedly had the right to initiate a rescue effort at sea, and consequently, the duty to assist arose, even beyond Italy's maritime space. When the operation came to an end, the EU (through Frontex) deployed the much more limited operation *Triton*, which was eventually superseded by operation *Themis*.

The launch of the naval operation EUNAVFOR MED *Sophia* exacerbated the situation. The framing of operation *Sophia* was unexpected given the harsh criticism that militarized maritime interventions in the Mediterranean have drawn, which more often than not have aggravated both the security and the humanitarian situation.

In spite of the above, both Frontex and EUNAVFOR MED activities unintentionally evolved into rescue operations. However, in light of the rising incidence of maritime fatalities, instead of institutionalizing the SAR component within the scope of these missions, search operations and rescue coordination were not included as part of the mandate of operation *Irini*.

Does the human dimension inspire the migration policies which govern the Mediterranean Sea? The perception of migration as a threat to security has put security at the heart of the EU's approach to migration. However, it cannot be denied that over the years, the EU has deployed operational efforts in the Mediterranean. This has been a welcome response to the immediate humanitarian imperative to save lives. The human dimension has very subtly permeated the security approach. However, the EU disregards the root of the problem as it focuses on trying to prevent or discourage people attempting to make the dangerous crossing instead of understanding the reasons that lead people to attempt perilous journeys. Again, the EU responds to symptoms, not causes.

The securitisation approach does not seem to dwindle. Migration policies developed for the Euro-Mediterranean region must demonstrate greater willingness and cooperation between all actors involved. One-sided initiatives that distort the EU's image and foster mistrust in the relationship should be avoided. While border security cooperation is essential, it should only be one component of a larger, multifaceted approach that places the treatment of human beings at the centre of migration-related issues.

Only time will tell how successful the Pact or any new instrument is in defending the human dimension and enforcing solidarity. In any case, the EU has to understand that the same person who migrates, once at sea may become a shipwrecked person to be rescued. Framing the same person as in need of rescue and as a security risk prevents the EU from adopting a comprehensive regime in which SAR is a fundamental component and not merely relegated into the law-enforcement response to combat human smuggling at sea.

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Ensuring protection for trafficking victims in Spain: the role of European and International Law in shaping the Organic Law on comprehensive protection against human trafficking and exploitation

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Abstract: Human trafficking is widely recognized as one of the most egregious criminal activities, inflicting profound physical and emotional harm on its victims while continuing to expand globally. In response to this issue, the European Commission launched a proposal for amending Directive 2011/36/EU, which constitutes the framework for combating trafficking within the European Union. This proposal initiated the European legislative procedure, culminating in the enactment of Directive (EU) 2024/1712 in July 2024, modifying Directive 2011/36/EU. Simultaneously, Spain has undertaken efforts to enhance its legal framework through the introduction of a Draft Organic Law on Comprehensive Protection Against Human Trafficking and Exploitation. However, it is important to note that the national legislative process is still in its initial stages. In light of these legal developments, this article aims to analyse the incorporation of the amended Anti-trafficking Directive into the Spanish legal framework, particularly since the Draft Organic Law was presented before the publication of Directive (EU) 2024/1712. The analysis will focus on provisions specifically related to the protection of trafficking victims, who are the individuals most affected by this egregious crime and have frequently experienced marginalization. Furthermore, it will offer recommendations aimed at aligning forthcoming Spanish legislation with both Directive 2011/36/EU and International Human Rights Law.

Keywords: European Union, Spanish Draft Organic Law, human trafficking, human rights, victims' protection.

Received: October 23, 2024 *Accepted:* December 23, 2024

(A) INTRODUCTION

Human trafficking remains one of the most harmful criminal activities, inflicting severe and long-lasting physical, emotional, and economic damage on its victims. According to the latest statistics from the European Union, the number of recorded human trafficking victims continues to rise, alongside the increasing diversity of exploitation forms[1]. While sexual exploitation remains the most common form, new modalities such

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1 EUROSTAT, Trafficking in human beings statistics, 2024. The most recent available statistics on human trafficking, covering the year 2022, reveal a concerning increase in the number of registered victims within the European Union. A total of 10,093 victims were recorded, representing a 41.1% rise compared to 2021 and marking the highest figure reported during the period from 2008 to 2022. Notably, 18 out of the 27 EU Member States reported an increase in the number of registered victims in 2022. Several countries have attributed this upward trend to enhanced efforts by authorities and agencies dedicated to combating human trafficking, reflecting improved detection and reporting mechanisms. Among the Member States, Germany and Italy experienced the most significant increases in absolute terms.

as forced begging, petty crimes or surrogacy are becoming more prevalent[2]. Spain is no exception to this trend. Recent national statistics reveal a growing number of registered victims, with exploitation manifesting in increasingly varied forms[3]. In a concerted effort to eradicate or at least mitigate the impact of human trafficking on society, the European Commission launched the European Union (hereinafter, EU) Strategy on Combating Trafficking in Human Beings (2021-2025)[4]. This strategy proposed the possibility of conducting a public consultation with key stakeholders involved in the fight against trafficking and the prevention of its victims, focusing on the necessity of reforming the Anti-trafficking legal framework[5].

For over a decade, Directive 2011/36/EU of the European Parliament and of the Council, of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA[6], has governed the fight against human trafficking within the European Union. However, many stakeholders consulted during the review process expressed concerns that the current legal framework was insufficient to address contemporary forms of trafficking[7]. Additionally, there was a pressing need to enhance the system for victim protection and assistance, highlighting the importance of adopting a more comprehensive and integrated approach.

On December 2022, the European Commission introduced a proposal to amend Directive 2011/36/EU, thereby initiating the legislative process within the European Union[8]. This proposal led to extensive and prolonged negotiations throughout 2023 among the co-legislative institutions of the European Union: the European Parliament and the Council of the European Union, each of which developed its own positions on the matter. In October 2023, following the confirmation of these final positions, interinstitutional negotiations between the co-legislators commenced.

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2 *Ibid.*

3 *Ibid.*

4 European Commission, EU Strategy on Combatting Trafficking in Human Beings (2021-2025), 2021, COM/2021/171 final.

5 *Ibid.*

6 Commission Directive 2011/36, OJ 101 L 1/11.

7 For instance, in the follow-up reports of the Directive presented by the European Commission in 2018, 2020 and 2022 these questions were raised, see: European Commission, Report from the Commission to the European Parliament and the Council. Second report on the progress made in combating human trafficking (2018) pursuant to Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims, of 3 December 2018, COM(2018) 777 final at 7, 12 and 14; European Commission, Report from the Commission to the European Parliament and the Council. Third report on the progress made in combating human trafficking (2018) pursuant to Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims, of 20 October 2020, COM(2020) 661 final at 15-17; European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions. Report on the progress made in combating human trafficking (Fourth Report), of 19 December 2022, COM(2022) 736 final, at 14-15.

8 European Commission, Communication from the Commission to the European Parliament and the Council, Proposal for a directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, of 19 December 2022, COM(2022) 732 final.

Following the conclusion of these negotiations, the agreed text received approval in committee on February 15, 2024, during the first reading. However, the interinstitutional agreement was not debated and formally approved in the first reading until the final plenary session of the European Parliament for the 2019-2024 legislative term, which took place on April 23, 2024. Similarly, the Council of the European Union endorsed the text in its first reading on May 27, 2024. Therefore, Directive (EU) 2024/1712, amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims was published in the Official Journal of the European Union on June 24, 2024, and came into force on July 14, 2024[9].

In parallel with the European legislative process, Spain one of the European Union Member States most affected by human trafficking[10] sought to advance its legal framework to address the issue. Despite being a major destination country for trafficking victims within the European Union, Spain lacks specific legislation targeting human trafficking. Currently, Spain relies on the application of Protocols and other frameworks that, while applicable, are not specifically designed to address the complexities of human trafficking[11]. A matter that the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter, CEDAW) Committee, the body responsible for overseeing the implementation of the CEDAW in its State parties, has emphasized to the Spanish government in its most recent periodic report[12].

Among other considerations, these factors prompted the Spanish government to introduce a Draft Organic Law on Comprehensive Protection Against Human Trafficking and Exploitation in 2022[13]. Nonetheless, due to primarily political reasons, it shelved during the 16th legislative term of the Spanish Parliament[14]. With the start of the 17th term, the new government reintroduced a revised Draft of the Organic Law on Comprehensive Action Against Human Trafficking and Exploitation in the first quarter of 2024 (Hereinafter, Draft Organic Law)[15]. Notably, the new text closely resembled the 2022 Draft, with many provisions remaining virtually unchanged. That said, minimal modifications were introduced, as will be examined in detail throughout this study.

The Draft Organic Law comprises seventy-three Articles, organized into a preliminary title and six subsequent titles. It also includes seven additional provisions, a single transitional provision, a single repealing provision, and twelve final provisions. As outlined in the preamble of the Draft Organic Law, which remains in the early stages of the legislative process, the norm aims to fully transpose Directive 2011/36/EU into Spanish law, addressing previous partial transposition efforts. Furthermore, it seeks to align the Spanish legal framework with international regulations aimed at combating human trafficking.

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9 Commission Directive 2024/1712 OJ 2024 L.

10 EUROSTAT, *supra* n. 1.

11 All the regulations can be consulted on the website of the Delegación del Gobierno contra la Violencia de Género.

12 CEDAW Concluding observations on the ninth periodic report of Spain, CEDAW/C/ESP/CO/9, 31 May 2023.

13 Draft Organic Law on Comprehensive Protection Against Human Trafficking and Exploitation, 2022.

14 For a detailed analysis of the 2022 Draft Organic Law: C. Villacampa, 'Acerca del Anteproyecto de Ley Orgánica Integral contra la Trata y la Explotación de Seres Humanos' 20267 *Diario La Ley* (2023).

15 Draft Organic Law on Comprehensive Protection Against Human Trafficking and Exploitation, 2024.

At the global level, this includes the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, commonly known as the Palermo Protocol[16]. Regionally, it seeks alignment with the Council of Europe Convention on Action against Trafficking in Human Beings, also known as the Warsaw Convention[17]. Indeed, the Group of Experts on Action against Trafficking in Human Beings (hereinafter, GRETA), which is tasked with monitoring the implementation of obligations under the Warsaw Convention by Member States[18], has consistently underscored the necessity for a comprehensive and holistic national legal framework specifically aimed at addressing human trafficking in its reports concerning Spain[19].

Upon careful examination of the timelines associated with both legislative processes, an important inquiry emerges: why did the Spanish government, cognizant of the ongoing development of a legal framework intended to specifically amend the trafficking Directive, proceed to initiate its own legislative process without awaiting the official publication of the amended Directive? This decision has resulted in the inability of the Draft Law to fully align with certain modifications albeit minimal in the amended Directive 2011/36/EU.

Considering the above, this investigation aims to analyse the transposition of the 2024 amended Anti-trafficking Directive in the Spanish legal system, which was published months after the Spanish Draft Organic Law. However, this study will concentrate exclusively on the provisions that affect the protection of trafficking victims, as they are the individuals ultimately intended to be safeguarded and have frequently been abandoned. Additionally, the research will offer recommendations and suggestions for adapting the forthcoming Spanish legislation on victim protection to ensure alignment not only with the revised Directive 2011/36/EU but also with the broader framework of International Human Rights Law.

(B) CONCEPTUALIZING HUMAN TRAFFICKING: INTERNATIONAL DEFINITIONS AND THEIR APPLICATION IN THE SPANISH LEGAL FRAMEWORK

Before proceeding with a detailed examination of the measures aimed at protecting victims of trafficking as outlined in the Spanish Draft Organic Law, as well as their alignment with the new framework of the European Union and International Human Rights Law, it is essential to clarify what is meant by human trafficking. This clarification is crucial for understanding the context and significance of the legislative provisions in question, as well as their impact on the effective protection of victims. Consequently; the

16 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 24 January 2004) 2237 *UNTS* 319.

17 Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 16 May 2005) 167 *ETS*.

18 Article 1(2) Warsaw Convention.

19 GRETA Evaluation Report on Spain, 2023 (GRETA(2023)10), at 17-32.

broader the definition of human trafficking, the greater the number of victims who will be able to benefit from and hold the rights conferred by the norm.

At the global level, the first instrument to establish a consensual international definition of human trafficking was the Palermo Protocol[20]. The Protocol introduced a definition comprising three cumulative elements: the action, the means, and the end, which refers specifically to the intention to exploit the victim[21]. Building on the framework established by the Palermo Protocol, the European Union initiated its own measures to address human trafficking. The initial instrument guiding the efforts of the European Union efforts in combating trafficking was Council Framework Decision 2002/629/JAI of July 19, 2002, on the fight against human trafficking[22]. Nevertheless, this instrument faced significant criticism due to its restrictive definition of the crime, which did not align with the minimum standards set forth in the Palermo Protocol[23].

Subsequently, nearly a decade later, Directive 2011/36/EU was adopted, which expanded upon the definition established by the Palermo Protocol. This broadened definition became one of the most notable features of the trafficking Directive, marking the beginning of a holistic approach to combating trafficking and protecting its victims. Expanding upon this broader definition of the crime, Directive (EU) 2024/1712 has led to substantial modifications in the definition of human trafficking within the European Union. Consequently, according to the reformulated Article 2 of Directive 2011/36/EU, the following will be considered as human trafficking: "The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation". Adding: "Exploitation shall include, as a minimum, the exploitation of the prostitution of others

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[20] Under Article 3(a) of the Palermo Protocol, it will be considered trafficking in human beings: "[…] the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

[21] The final element of the definition of human trafficking is the intention to exploit the individual. Characterized as *dolus specialis*, this intention aims to achieve significant economic gain. Importantly, exploitation does not need to be actualized for the crime to be considered complete; the offense is perpetrated at an early stage, requiring only the intent to exploit the victim. UNODC. *Legislative Guide for the Palermo Protocol*, 2020, at 118.

[22] Council Framework Decision 2002/629 OJ 2002 203/1.

[23] The approval of Framework Decision 2002/629/JHA not only aligned the European Union system with recent international regulatory developments but also reflected a predominantly criminal approach. As stated in its own recitals, the enactment aimed to harmonize the criminal laws of Member States with the goal of achieving greater effectiveness in the fight against human trafficking. To this end, a comprehensive approach was established that included a consensus on the definition of the constitutive elements of the criminal offense and its legal consequences, introducing effective, proportionate, and deterrent sanctions. For a critique of the criminal perspective adopted by Framework Decision 2002/629/JHA, see C. Villacampa, 'The New European Directive on the Prevention and Combating of Human Trafficking and the Protection of Victims: A Change of Direction in the Union's Policy on Human Trafficking?', 13 *Revista Electrónica de Ciencia Penal y Criminología* (2011) 1-52 at 18.

or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs, or the exploitation of surrogacy, of forced marriage, or of illegal adoption".

Regarding the first two elements the action and the means Directive (EU) 2024/1712 does not introduce substantial changes to the definition of the crime of human trafficking. However, the third and final cumulative element, which pertains to the forms of exploitation that victims may endure, represents one of the most significant innovations of Directive (EU) 2024/1712. In this context, in addition to the established forms of exploitation including sexual exploitation, forced labour, and various services such as begging, slavery, servitude, exploitation for criminal activities, and organ trafficking three new forms of exploitation have been incorporated into the definition of the crime. This expansion reflects a comprehensive approach to addressing the evolving nature of exploitation, ensuring that all manifestations are recognized and addressed within the legal framework.

Firstly, the inclusion of illegal adoption as one of the potential manifestations of human trafficking is noteworthy. While trafficking for the purpose of illegal adoptions was acknowledged as a form of exploitation in Recital (11) of Directive 2011/36/EU, it was not explicitly incorporated into the binding provisions that Member States were required to transpose into their national legal frameworks. Secondly, the exploitation of forced marriages has been added as another of the various forms that human trafficking can take. Like the previous case, trafficking for the purpose of exploiting forced marriages was also identified among the forms of exploitation mentioned in Recital (11) of Directive 2011/36/EU, despite not being explicitly addressed in the legislative text. Consequently, the significant alteration introduced by Directive (EU) 2024/1712 is the incorporation of both forms of exploitation into the substantive provisions of Directive 2011/36/EU itself. This implies that Member States are now obligated to include these forms of exploitation in their legal systems and to criminalize them accordingly.

Thirdly, the definition of human trafficking has been broadened to encompass a contentious form of exploitation: surrogacy. Unlike the previous two forms of exploitation, surrogacy was not mentioned in the preamble of Directive 2011/36/EU, rendering its inclusion a subject of considerable debate. Notably, this form of exploitation was absent from the initial legislative proposal of the European Commission. It was, in fact, the European Parliament that championed its inclusion in the definition of trafficking, ultimately achieving this outcome following complex and protracted negotiations[24].
Having reviewed the approach established by the European Directive in the fight against trafficking, the subsequent step is to evaluate the degree to which the definition of the

[24] It is important to note that, as stated in Recital (6) of Directive (EU) 2024/1712, the exploitation of surrogacy, forced marriage, or illegal adoption could already fall within the scope of offenses related to human trafficking as defined in Directive 2011/36/EU, provided that all the criteria constituting such offenses were met. However, as indicated in Recital (6), due to the severity of these practices and to address the ongoing increase in the number and significance of human trafficking offenses for purposes other than sexual or labour exploitation, surrogacy exploitation, forced marriage, and illegal adoption should be included as forms of exploitation in the amended Directive, provided they fulfil the constitutive elements of human trafficking.

crime articulated in the Spanish Draft Organic Law aligns with the framework of the European Union.

In Spain, while there is no comprehensive legislation specifically designed to regulate all aspects of combating human trafficking and protecting its victims, the crime of human trafficking is defined and recognized within the legal framework. The crime of human trafficking was established by Organic Law 5/2010, enacted on June 22, which amended Organic Law 10/1995 of November 23 concerning the Penal Code[25]. This definition was subsequently reformed in 2015 by Organic Law 1/2015 of March 30, which further modified Organic Law 10/1995[26]. On the one hand, this legislative development represented a significant initial step in distinguishing the crime of human trafficking from the prosecution of involvement in illegal or clandestine immigration[27]. On the other hand, technical improvements were necessary to align the definition of the crime with International Human Rights Law.

Thus, before addressing the three specific elements of the crime, it is important to emphasize that references to "Spanish territory" and "national or foreign victim" in the definition of the crime have been removed in the Draft Organic Law, which is a welcome step. These terms do not align with the nature of human trafficking and conflict directly with the recognized principle of non-discrimination[28]. Therefore, it remains to be seen how they will ultimately be presented in the final text, which should maintain language that allows for the inclusion of the maximum number of victims in the definition of the crime.

Regarding the three elements inherent in the definition of human trafficking namely, the action, the means, and the end the Draft Organic Law largely adheres to an identical definition of the crime as set forth in the trafficking Directive. Concerning the action and the means, there are no significant elements to highlight, as these follow precisely the provisions outlined in European legislation.

Nevertheless, regarding the third and final element, there are several noteworthy issues to highlight. According to Article 3.2 of the Draft Organic Law, exploitation is understood as the imposition of any work, service, or activity whether regulated or unregulated, lawful or unlawful required of a person in a situation of domination or lack of freedom of choice to perform it. This definition encompasses: slavery, servitude,

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25 Organic Law 5/2010, of June 22, which amends Organic Law 10/1995, of November 23, of the Penal Code.

26 Article 117 bis Spanish Penal Code: "The following will be punished with a sentence of five to eight years in prison as a perpetrator of human trafficking: anyone who, whether within Spanish territory, from Spain, in transit to or destined for it, uses violence, intimidation, or deception, or abuses a position of superiority, necessity, or vulnerability of the victim, whether national or foreign, or through the delivery or receipt of payments or benefits to obtain the consent of the person who holds control over the victim, captures, transports, transfers, accommodates, or receives the victim, including the exchange or transfer of control over those individuals, for any of the following purposes: a) The imposition of forced labour or services, slavery or practices similar to slavery, servitude, or begging; b) Sexual exploitation, including pornography; c) Exploitation for the purpose of committing criminal activities; d) The extraction of their bodily organs; e) The celebration of forced marriages".

27 C. Villacampa and C. Torres, 'Aproximación institucional a la trata de seres humanos en España valoración crítica', 41, *Estudios penales y criminológicos* (2021) 189-232 [10.15304/epc.41.6718].

28 V. Milano, 'Protección de las víctimas de trata con fines de explotación sexual: estándares internacionales en materia de enfoque de derechos humanos y retos relativos a su aplicación en España', 32 *Revista Electrónica De Estudios Internacionales* (2016) 1-54, at 24 [doi: 10.17103/reei.32.05].

and forced labour or services; begging; the commission of criminal activities; the provision of sexual services, including pornography; the extraction of organs or parts or bodily tissues; and the celebration of forced marriages or unions, irrespective of the ritual followed.

The forms of exploitation remain substantially the same as in Directive 2011/36/EU, although they have been reorganized and specified: the commission of criminal activities and begging are now encompassed within the provision of forced labour or services (a); pornography has been included in the section addressing sexual exploitation (b); the phrase "or part of bodily tissues" has been added to the section on organ trafficking (c); and forced unions are now included alongside marriages, irrespective of the ritual followed (d).

Among the forms of exploitation outlined in the Spanish legislation, there are two purposes of exploitation stipulated in the reformulated European Directive that are notably absent: the exploitation of surrogacy and illegal adoption. It is necessary that the legislative process culminating in the adoption of comprehensive legislation includes these new forms of exploitation. Firstly, this inclusion is essential to align the Spanish law with European standards in the fight against trafficking. Secondly, it ensures that victims of these egregious forms of exploitation do not find themselves unsupported when seeking assistance and protection.

Consequently, it is the responsibility of all parties involved in the legislative process to advocate for the incorporation of these forms of exploitation and to contribute to their visibility. In fact, GRETA has repeatedly alerted Spain about the fact that its legislation is primarily focused on sexual exploitation, thereby neglecting victims of trafficking in other forms of exploitation, which are increasingly numerous and prevalent[29]. In conclusion, a broader definition not only ensures greater protection but also facilitates a more effective response from the competent authorities in combating this serious crime.

It is the primary responsibility of the State to ensure the transposition of the Directive into domestic legal order. In this regard, if Spain was to omit the two forms of exploitation mentioned in the final text of the Organic Law, it would be necessary to assess whether, despite such an omission, their application would still be possible, considering the potential direct effect of Article 2.3 of the amended Directive 2011/36/EU. In such a case, the victim could invoke this provision to be recognized as a victim of the crime of human trafficking, which would allow them to access the rights provided in the Directive for persons affected by the crime.

In this context, it is necessary to first examine whether the article can be invoked and, secondly, whether it is applicable, which will depend on whether it concerns a horizontal or vertical relationship. Regarding the first question – whether the article can be invoked – the answer is affirmative, as it constitutes a clear, precise, and unconditional provision, thus meeting the requirements established by the well-established case law of the Court of Justice of the European Union (hereinafter, CJEU)[30]. Secondly, concerning

[29] GRETA, *supra* n. 17 at 66.

[30] For example, in the *Van Gend & Loos* case, the Court of Justice, now the Court of Justice of the European Union (CJEU), established the essential characteristics of the legal system of the European Union that

the type of relationship in which the article is to be applied, it is configured as a provision applicable within the framework of a vertical relationship between the State and the individual — in this case, the victim[31].

In summary, given that it is the State's responsibility to directly transpose the Directive into its domestic legal framework, and considering that, in this hypothetical scenario, such transposition would not have been carried out, the direct application of Article 2.3 of the amended Directive 2011/36/EU is possible. This is justified by the fact that it concerns a vertical relationship, where the State's failure to fulfill its duty of transposition, as required by European legal standards, necessitates the direct invocation of the European provision to ensure the protection intended, which would otherwise be covered by domestic legislation.

Nonetheless, extrapolating the situation to a context involving a horizontal relationship between private parties, where the direct application of Article 2.3 of the amended Directive 2011/36/EU would not be possible — for instance, in a dispute between the victim and their exploiter where the victim seeks to assert their rights under the Directive — the domestic jurisdictional organ handling the case could resort to an interpretation of the national law consistent with the spirit of the Directive. If such an interpretation were not feasible, the principle of State liability could then be applied, as established by consistent CJEU case law[32]. Simultaneously, either the European Commission or another Member State could bring an infringement proceeding against Spain, arguing the incorrect or incomplete transposition of the amendments to Directive 2011/36/EU[33].

In any case, Spain has a maximum period of two years to transpose Directive 2011/36/EU following the entry into force of its amendment. In this regard, Spanish legislation should not only cover the new forms of exploitation included in the 2024 Directive on trafficking in persons, but it should also go further by ensuring an open-ended enumeration similar to that of Directive 2011/36/EU. This approach would allow for a

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allow for the invocation and applicability of its provisions by individuals: they must be clear and precise — or sufficiently precise — and unconditional, meaning they should leave no room for discretion by the Member States. Furthermore, it is crucial that the beneficiary and the right to be protected are clearly identified and defined. In the *Costa v. ENEL* case, the CJEU further developed these principles and clarified the necessary requirements for a provision to have direct effect, building on previous case law and specifically applying it to the provisions of the treaties. Judgment of February 5, 1963, Van Gend & Loos, C-26/62, EU:C:1963:1; Judgment of July 15, 1964, Costa v. ENEL, C-6/64, EU:C:1964:66.

31 In the *Becker* case, the CJEU established that a Directive that has not been correctly transposed can still be applicable, provided that the provision in question meets the previously defined characteristics, such as clarity, precision, and unconditionality. Judgment of January 19, 1982, Becker, C-8/81, EU:C:1982:10. Similarly, in its ruling in the *Costanzo* case, Luxembourg determined that all state authorities are obliged to apply the provisions of a Directive, even if it has not been correctly transposed or has been transposed incorrectly. Judgment of June 22, 1989, Costanzo, C-103/88, EU:C:1989:256.

32 In the *Faccini Dori* case, the CJEU denied the application of horizontal direct effect, meaning the possibility for an individual to invoke a provision of European Union law against another individual. However, it provided subsequent solutions, such as the interpretation of national provisions in conformity with Union law and the liability of Member States in case of failure to fulfill their EU obligations. Judgment of July 14, 1994, Faccini Dori, C-91/92, EU:C:1994:292.

33 Regarding the liability of Member States for violations of Union law, see the *Brasserie du Pêcheur* case, where the CJEU established the requirements for applying the principle of Member State liability. Judgment of March 5, 1996, Brasserie du Pêcheur, C-46/93 and C-48/93, EU:C:1996:79.

comprehensive and adaptable definition that encompasses all possible manifestations of the crime of human trafficking.

(C) PROTECTING VICTIMS OF HUMAN TRAFFICKING: GENERAL MEASURES

As noted in the introductory section, the aim of this work is to examine the Draft Organic Law against human trafficking and assess its alignment with the requirements set forth by Directive 2011/36/EU, as amended in 2024. Nonetheless, it has been emphasized that this study focuses specifically on the protection of victims, who are the most affected by this crime, suffering blatant violations of their Human Rights. The protection of victims is crucial for several reasons. Firstly, human trafficking is inherently a violation of fundamental Human Rights, including the right to liberty, dignity, and security. Victims often endure physical and psychological trauma, exploitation, and dehumanization, which can have long-lasting effects on their well-being and reintegration into society. Secondly, effective victim protection measures are essential for encouraging reporting and cooperation with law enforcement authorities. When victims feel safe and supported, they are more likely to come forward, providing vital information that can aid in the prosecution of traffickers and the dismantling of trafficking networks. Furthermore, a robust framework for victim protection contributes to the overall effectiveness of Anti-trafficking efforts. By prioritizing the needs and rights of victims, legislation can promote a victim-centred approach, ensuring that policies are designed not only to combat trafficking but also to restore the dignity and rights of those affected by the phenomenon.

Therefore, before delving into the specific measures designed for the protection of victims of human trafficking, it is essential to consider the Human Rights approach within a broader context. This examination will allow for an assessment of whether the concrete measures for the protection and assistance of victims of human trafficking align with the comprehensive framework that both instruments aim to implement.

In the context of the European Union, victim protection has emerged as a crucial issue, highlighting the need to enhance the legal framework established by Directive 2011/36/EU in combating human trafficking[34]. The original proposal of the European Commission consistently stressed the importance of strengthening protection and assistance systems for trafficking victims. Nonetheless, a closer examination of the proposal of the European Commission reveals that significant advancements in Human Rights protections were either minimal or entirely absent. Furthermore, the positions of both the European Parliament and the Council — particularly the latter — did not demonstrate significant advancement in victim protection, revealing considerable discrepancies and even contradictions between both European institutions. Consequently, the amended Directive 2011/36/EU does not implement significant changes in the protection of

[34] M. Jordana 'The European Union fight against trafficking of human beings: challenges of the victim's statute', 8 *Peace & Security – Paix et Securité Internationales* (2020), 467-493 [doi: 10.25267/Paix_secur_int.2020.i8.16]; L. Palumbo, S. Marchetti, '10 years after the Directive 2011/36/EU: Lights and shadows addressing the vulnerability of trafficked and exploited migrants' 33 *Population Europe* (2022).

trafficking victims, and the number of specific measures aimed at enhancing their protection remains limited. Nonetheless, the overall legal framework demonstrates a general improvement in adopting a more holistic approach, as will be analysed in the following lines.

(1) Tailored approaches in the protection of trafficking victims

The protection of trafficking victims based on their specific needs constitutes a significant aspect of the amended anti-trafficking Directive, as recognized throughout its provisions. Recital (5) acknowledges that one of the deficiencies of the previous legal framework in the fight against trafficking was the necessity of providing a more targeted assistance to the victims of this egregious crime, as identified by the EU Strategy to Combat Trafficking in Human Beings. In response to this shortcoming, Directive 2011/36/EU incorporates various measures. One of the most notable changes introduced in the reformed Directive 2011/36/EU can be found in Article 11, addressing the protection of trafficking victims. Article 11(1) specifies that Member States must implement measures to ensure that victims receive specialized assistance and support, employing a victim-centered approach that considers gender, disability, and age considerations.

Moreover, one of the most significant additions is Article 11(4), which outlines the minimum functions to be performed by National Referral Mechanisms for trafficking victims, including the referral of these individuals to the most suitable services. Consequently, Member States must ensure that the development of such mechanisms provides appropriate assistance tailored to the specific needs of each victim. This requirement is further emphasized in Recital (17), which underscores the importance of considering the particular needs of trafficking victims with disabilities when providing support measures.

The Draft Organic Law, in Article 2, when outlining its objectives, encompasses a comprehensive approach to combating human trafficking, framed within a Human Rights perspective centered on victims. Furthermore, it emphasizes the incorporation of a gender perspective and addresses the specific needs of minors, which are to inform all actions articulated within the scope of this Organic Law.

Upon a deeper examination of the Draft Organic Law, particularly Title III, which focuses on the rights of victims, it can be observed a more sensitive approach to this issue. The wording of Article 30(2) suggests that the assistance and protection mechanisms outlined in the Draft Organic Law must be tailored to the type of exploitation experienced and to the profile of the victim. Additionally, it specifies that specialized assistance will be provided to those victims who require it, particularly considering their physical and mental health, experiences of physical, psychological, or sexual violence, pregnancy status, disability, or age. This Article aligns with the provisions set forth in the amended Article 11(1) of Directive 2011/36/EU. Nonetheless, given its current phrasing, it would be advisable to avoid a closed enumeration of the particularities or special needs that trafficking victims may require. Instead, an inclusive approach employing an open-ended enumeration would be more beneficial. Therefore, it is anticipated that this point will receive special consideration in the national legislative process to ensure that the norm reflects a holistic perspective in the fight against human trafficking and the protection of its victims.

(2) The incorporation of Human Rights principles: non-discrimination and non-conditionality

A Human Rights-based approach is essential in the fight against human trafficking, as it ensures that all efforts to combat trafficking prioritize the dignity, rights, and well-being of the individuals involved. By framing Anti-trafficking measures within this perspective, several key Human Rights principles are emphasized. These include the principles of non-discrimination, respect for human dignity, non-conditionality and non-coercion in the provision of protection measures, as well as the non-punishment of trafficking victims[35].

Nonetheless, due to limitations of space and time, a comprehensive analysis of all the principles cannot be undertaken. Therefore, only two principles will be examined: the principle of non-discrimination and the principle of non-conditionality.

In the new version of Directive 2011/36/EU, the recognition of the principle of non-discrimination in the provision of protection and assistance to victims of trafficking is particularly noteworthy. Firstly, Recital (1) stipulates that support must be provided to victims regardless of their origin. Secondly, Recital (18) elaborates on the principle of non-discrimination, stating that victims should receive assistance irrespective of their nationality, statelessness, citizenship, or place of residence, as well as the way they were exploited.

Additionally, a significant innovation in the amended Directive 2011/36/EU is its explicit reference to intersectional discrimination in Recital (4)[36]. This recital notes that human trafficking may be exacerbated when combined with discrimination based on various grounds prohibited by Union law, including gender discrimination. Consequently, Member States are urged to pay special attention to victims affected by intersectional discrimination and the resultant vulnerabilities, particularly in relation to discrimination based on racial and ethnic origin.

This incorporation is highly beneficial, as it acknowledges for the first time in a legal text of the European Union the existence of intersectional discrimination within the context of human trafficking[37]. The inclusion of this concept in the recitals is a

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35 G. Rodríguez, *La protección de la víctima de trata de personas en el ordenamiento jurídico internacional y su aplicación en la Unión Europea: hacia un estatuto de la víctima* (Doctoral Thesis, Universitat de Girona, 2024) at 141.

36 On the concept of intersectional discrimination, see: S. Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (Publications Office of the EU, Brussels, 2016) at 27-28. For a study on the importance of adopting an intersectional approach to human trafficking, see: W. Corrêa Da Silva, 'La interseccionalidad en la trata de seres humanos: un encuentro necesario para el enfoque de derechos humanos' in N. Cordero Ramos, P. Cruz Zúñiga, Pilar (eds.), *Trata de personas, género y migraciones en Andalucía (España), Costa Rica y Marruecos: Retos y propuestas para la defensa y garantía de los derechos humanos* (Dikinson, 2019), at 37.

37 The European Court of Human Rights has critically examined and recognized intersectionality as a form of discrimination. A notable example is the case of *B.S. v. Spain* (2012), in which the Strasbourg Court concluded that national courts failed to consider the specific vulnerability of the applicant, who was an African woman engaged in prostitution. As a result, the authorities did not meet their obligations under the doctrine derived from Article 14 of the European Convention on Human Rights in conjunction with Article 3, which mandates that all necessary measures be taken to determine whether a discriminatory

commendable initial step from a Human Rights perspective. However, it would have been more appropriate to mention intersectional discrimination within the substantive provisions of the Directive to grant it greater significance and applicability.

Regarding the Draft Organic Law, several welcome provisions have been introduced. Firstly, Article 30(1) states that victims, regardless of their nationality whether Spanish or foreign and irrespective of their administrative status or any other personal or social circumstances, are guaranteed the rights recognized by the Draft Organic Law. Therefore, it appears that the new law aims for full alignment with the principle of non-discrimination and, consequently, with International Human Rights Law.

Moreover, Article 2 establishes the objective of ensuring universal accessibility as a fundamental prerequisite for individuals targeted by this Organic Law. This accessibility is essential for enabling these individuals to access the procedures and benefits outlined within the law without facing barriers or discrimination, in alignment with the relevant legislation. Nonetheless, it remains to be determined whether this commitment to non-discrimination is effectively implemented in practice. The Spanish Draft Organic Law makes no mention of intersectional discrimination. It would be beneficial to include a reference to this form of discrimination, which is being increasingly recognized. Therefore, it is recommended that the Spanish legislative process will include at least a minimal reference to this form of multiple discrimination, which is frequently evident in cases of human trafficking.

Another issue closely related to a Human Rights-based approach is the application of the principle of non-conditionality in providing protection and assistance measures to trafficking victims. As Anne T. Gallagher has defended, imposing conditions on the protection afforded to victims effectively undermines the very essence of the obligation and the victims' right to receive such protection[38]. Some studies indicate that linking victim protection to the criminal investigation process introduces a range of practical complications for both victim protection and the prosecution of traffickers[39]. These investigations show that when victim protection is made contingent upon their cooperation with authorities, it can lead to unintended consequences for the prosecution of traffickers, such as undermining the credibility of victims as witnesses. Nevertheless, despite its clarity from a theoretical or academic perspective, the incorporation of this principle into international legal instruments and its application in practice can often be somewhat ambiguous[40].

The European Anti-trafficking Directive fails to adequately protect and uphold this principle, which has led to significant criticism[41]. Conversely, Article 11 of Directive 2011/36/EU, despite facing considerable backlash, continues to link the provision of

attitude may have influenced the circumstances surrounding the case, see: *B.S. v. Spain*, ECHR (2012) 47159/08, at 62-63.

38 A.T., Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York, 2011) at 289.

39 A. Brunovskis, M.L., Skilberi, 'Two Birds with One Stone? Implications of conditional assistance in victim protection and prosecution of traffickers', 6 *Anti-Trafficking Review* (2016) 13-30 at 7.

40 G. Rodríguez, *supra* n. 28 at 181.

41 M. Jordana, 'La lucha contra la trata en el contexto europeo: ¿existe un sistema Internacional de protección de víctimas verdaderamente respetuoso con los Derechos Humanos?' J. Soroeta (dir.) *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián* (Vol. XX) (Thomas Reuters Aranzadi, 2020), 331-355 at 347.

protection and assistance to the duration of criminal proceedings, being an aspect that has not been modified in the review[42]. This approach is fundamentally at odds with a Human Rights-based framework. In this regard, there was hope that the amendment process would eliminate or, at the very least, mitigate this issue. Yet, the situation has remained unchanged in the transformed Anti-trafficking Directive, which diverges markedly from the Human Rights approach that the instrument supports to promote[43].

Fortunately, Spain is also bound by the provisions set forth in the Warsaw Convention, which adopts a different and commendable perspective on this issue. According to Article 12(6) of the Council of Europe Convention, each Party shall adopt the necessarily measures to ensure that assistance to a victim is not made conditional on the victim willingness to act as a witness[44].

This provision of the Warsaw Convention is reflected in two Articles of the Draft Organic Law. On one hand, Article 2, which outlines the objectives of the norm, provides in its section (j) that it aims to ensure that the protection and assistance provided to victims is carried out with full respect for their Human Rights, without making it conditional on the ability or willingness of the victim to participate in the prosecution of the crime. On the other hand, Article 31 further elaborates on this principle by addressing the specifically disconnection of victim protection and assistance from their reporting and participation in criminal investigations. Article 31 stipulates that immediate and ongoing access to the rights mentioned in this title shall not be contingent upon the filing of a complaint or the willingness or ability of the victim to cooperate with authorities in the investigation or potential criminal proceedings.

Still, it is important to note that this Article pertains specifically to the rights outlined in Title III, which focuses on the rights of victims. Consequently, any aspects not covered within this title fall outside its scope of application. For instance, this implies that provisions for the recovery and reflection period for trafficking victims, as well as residence permits, are not subjected to the non-conditionality principle. Thus, while the incorporation of the principle is indeed a welcome development, it should be expanded to encompass all matters related to the protection of trafficking victims in order to align the Draft Organic Law with International Human Rights Law standards. This has significant consequences, as the applicability of the principle, even on paper, is already questionable in terms of its breadth. In practice, its applicability is further restricted[45].

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42 Article 11 Directive 2011/36/EU: "Member States shall take the necessary measures to ensure that specialised assistance and support are provided to victims in a victim-centred, gender , disability and child-sensitive approach before, during, and for an appropriate period of time after the conclusion of, criminal proceedings […]".

43 M. Jordana, *supra* n. 36.

44 According to the Explanatory Report of the Warsaw Convention, the drafters sought to clarify that, under the present Article of the Convention, assistance to the victim is not contingent upon their willingness to cooperate with the competent authorities in criminal investigations and proceedings. Council of Europe, *Explanatory Report of the Warsaw Convention*, 2005, at 168.

45 Reports by GRETA on the Member States of the Council of Europe demonstrate that this conditionality is a common practice. See, for example, GRETA Evaluation Report on the Netherlands, 2018 (GRETA(2018)19) at 119, and GRETA Evaluation Report on Italy, 2019 (GRETA(2018)28) at 159. For the ambiguous applicability of the principle in Spain, see: N. Torres and C. Villacampa, 'Protección jurídica y asistencia para víctimas de trata de seres humanos', 27 Revista General de Derecho Penal 2017 at 16. The authors conduct a series of interviews with members of the Spanish security forces responsible for investigating human trafficking

Indeed, practice demonstrates that there are still many States where the identification and assistance of victims remains frequently contingent upon their willingness to cooperate with the authorities. Spain is not an exception in this regard. Many Spanish civil society organizations have reported that, in some cases, identification and assistance to trafficking victims are provided only within the framework of criminal investigations[46]. In line with this, the latest GRETA report indicates that the Spanish security forces condition the identification of victims on their cooperation with ongoing investigations or judicial proceedings[47].

Thus, all these complexities are intended to be addressed through the adoption of the first comprehensive regulation on trafficking in Spain. Article 2(2)(j) explicitly indicates that unconditional assistance to victims is integral to the objectives and guiding principles of the Law, a notion that, as has already been said, is further elaborated upon in Article 31. The importance of this provision cannot be overstated, as it establishes a foundational commitment to prioritizing the well-being and rights of victims. In fact, conditioning the protection and assistance of victims proves to be a clearly counterproductive approach[48]. Therefore, this incorporation is very welcome; however, it remains to be seen how effectively it will be implemented in practice and whether the wording is maintained in the final version of the Organic Law.

(3) The creation of National Referral Mechanisms: identification and assistance to trafficking victims

Another mechanism incorporated into Directive 2011/36/EU following its 2024 amendment is the obligation for Member States to establish National Referral Mechanisms for victims. This incorporation stems from the advocacy of civil society organizations involved in the public consultation process of Directive 2011/36/EU, where the identification and protection of trafficking victims were central to the discussions[49].

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crimes. From these interviews, it can be inferred that some professionals within the police and judicial systems perceive victim assistance and protection services as a means to encourage cooperation with the justice system and to obtain information. Such a perspective instrumentalizes and dehumanizes the victims, viewing them more as sources of information than as subjects entitled to rights.

46 International Amnisty Spain, *Cadenas invisibles: identificación de víctimas de trata en España*, 2020, at 41. In this regard, Carolina Villacampa has emphasized the impmortance of the involvement of NGOs in the formal identification processes of victims and their assistance, see: C. VILLACAMPA, *Trata de seres humanos y explotación laboral: retos pendientes en la asistencia a sus víctimas*, 28 *Revista de Derecho Penal y Criminología* (2022) 433-480, at 450.

47 GRETA, *supra* n. 12 at 226. This concern was previously highlighted in the 2018 GRETA report regarding Instruction 6/2016 issued by the Secretary of State for Security, which emphasized that identification is an administrative act and, therefore, should be independent of the statements of the victims during the proceedings, see: Ministry of Interior, Secretary of State and Security, Instruction 6/2016 from the Secretary of State and Security on the actions of the State law enforcement agencies in the fight against human trafficking and in collaboration with organizations and entities with proven experience in victim assistance, 2016.

48 C. Villacampa, *supra* n. 34 at 451.

49 In the follow-up reports of Directive 2011/36/EU from 2018, 2020, and 2022, the need to enhance the protection of trafficking victims was a central point, see: Report from the Commission to the European Parliament and the Council. Second Report on Progress Made in the Fight Against Human Trafficking (2018) pursuant to Article 20 of Directive 2011/36/EU on preventing and combating human trafficking and

These organizations argued that the existing instruments were insufficient and did not ensure effective victim identification, leading to calls for significant improvements.

As a result of extensive debate on this issue, Article 11.4 of the amended Directive 2011/36/EU urges Member States to establish, through laws, regulations, or administrative provisions, one or several mechanisms aimed at the early detection, identification, assistance, and support for both identified and presumed victims. This should be done in collaboration with relevant support organizations, and a focal point must be appointed for the cross-border referral of victims.

The tasks of these referral mechanisms, in line with the amended Directive 2011/36/EU, must include at least the following: (a) Setting minimum standards for the detection and early identification of victims and adapting procedures to account for the different forms of exploitation covered by the Directive; (b) Referring victims to the most appropriate support and assistance services; (c) Establishing cooperation arrangements or protocols with asylum authorities to ensure that assistance, support, and protection are provided to trafficking victims who are also in need of international protection or wish to apply for it, taking into account the individual circumstances of the victim.

Thus, Article 11.4 delineates the tasks to be undertaken by National Referral Mechanisms, representing a significant step towards achieving a minimum level of coherence on this crucial issue across the Member States of the Union. Accordingly, an analysis will follow to assess whether the Spanish Draft Organic Law aligns with the guidelines established by the supranational regulation.

Title II of the Draft Organic Law introduces one of the major contributions of the legislative instruments, which is no other than the establishment of a National Referral Mechanism. In accordance with Article 59 of the Spanish Draft Organic Law, the National Referral Mechanism is responsible for the immediate referral of presumed victims of trafficking and exploitation to specialized assistance and protection services, as well as overseeing the identification process. In this regard, the Draft Organic Law includes the establishment of a National Referral Mechanism, as required by the amended Directive 2011/36/EU, which is a highly welcomed step. Notwithstanding, it is crucial to examine how this mechanism is structured and whether it aligns with the minimum and rather vague requirements outlined in the European Anti-trafficking Directive.

Article 59 of the Draft Organic Law establishes the National Referral Mechanism as a collegiate body affiliated with the National Rapporteur on Trafficking and Exploitation of Human Beings. It will be chaired by the National Rapporteur and composed of representatives from the Ministry of the Presidency, Justice, and Relations with Parliament, as well as from the Ministry of Equality, through the head of the Government Delegation against Gender Violence. Additionally, representatives from other departments whose

protecting its victims, COM(2018) 777 final, 2018 at 7, 12, 14; Report from the Commission to the European Parliament and the Council. Third Report on Progress Made in the Fight Against Human Trafficking (2018) pursuant to Article 20 of Directive 2011/36/EU on preventing and combating human trafficking and protecting its victims, COM(2020) 661 final, at 15-17; Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions. Report on Progress Made in the Fight Against Human Trafficking (Fourth Report), COM(2022) 736 final, at 14-15.

competences fall within the scope of this Organic Law will be included, in accordance with regulatory provisions.

Concerning the functions assigned to the Mechanism, its primary role is to refer presumed victims of trafficking to specialized assistance services, which is deemed appropriate. However, upon closer examination of who is responsible for carrying out this function, it becomes evident that the Mechanism will involve the security forces, in coordination with the labour and social security inspectorate. This raises an important issue concerning the actors involved in this critical task.

Victims of trafficking often do not feel safe when interacting with Security Forces, as they may fear potential reprisals due to their eventual irregular immigration status or crimes committed during their exploitation[50]. Therefore, it would be crucial to expand the range of actors involved in the referral process for trafficking victims, particularly at the initial stage of provisional identification. In fact, the European Anti-trafficking Directive provides for the inclusion of a broad spectrum of professionals with diverse backgrounds who can participate in this important task[51]. For instance, the involvement of healthcare professionals, social workers, educators, and even civil society representatives could be considered, as victims tend to feel safer with these professionals[52].

The second function of the Spanish National Referral Mechanism is to coordinate the identification process for trafficking victims. To this end, the Mechanism will propose guidelines and criteria aimed at achieving uniform practices across the entire national territory. Finally, the third function involves developing operational protocols, specific indicators for victim detection, and referral resource guides to assist victims.

These measures are highly welcomed, as they aim to ensure consistent identification practices throughout Spain. Additionally, it is essential to strive for uniform identification and protection standards across all European Union Member States[53]. Hence, after analysing the structure and functions of the Spanish National Referral Mechanism as outlined in the Draft Organic Law, it can be concluded that the Mechanism fails to fully align with the three minimum requirements set by the Anti-trafficking Directive. First, it establishes the minimum standards for detecting, identifying, and protecting trafficking victims. Second, regarding the referral of victims to the most appropriate services, a review of other provisions in the Draft Organic Law suggests that this obligation is indeed met. Nonetheless, it is essential to involve a broader range of actors in the referral process to ensure more personalized support for victims. Therefore, it will be important to emphasize this issue throughout the entire national legislative process.

However, regarding cooperation agreements with asylum authorities, which constitute the third and final requirement for National Referral Mechanisms outlined in the Anti-trafficking Directive, Article 59 of the Draft Organic Law fails to address this matter. While Article 45 allows trafficking victims to apply for international protection, it does

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50 G. Rodríguez, *supra* n. 28 at 240.

51 Article 11b Directive 2011/36/EU.

52 The CEDAW Committee has emphasized the crucial role of civil society in the protection of trafficking victims, see: CEDAW, *supra* n. 12 at 27(a).

53 For a systematic overview of the key indicators of human trafficking, classified according to the form of victim exploitation, see: G. Rodríguez, *supra* n. 28 at 642.

not provide for joint protocols between trafficking and asylum authorities. Similarly, Article 63, which is dedicated to cooperation and coordination, does not include specific provisions regulating the relationship between them. Therefore, while complementarity between both systems is implied, it should be more explicitly and formally outlined to ensure effective protection for trafficking victims who find themselves in an irregular situation. This issue will be addressed in the section concerning the rights of foreign victims.

In summary, the establishment of the National Referral Mechanism at the domestic level had been anticipated before the entry into force of the Anti-trafficking Directive; hence, it represents a proactive initiative of the Spanish government. However, upon examining the specific functions and responsibilities assigned to the Spanish Referral Mechanism, it becomes evident that they do not fully align with the minimum responsibilities outlined in the Directive 2011/36/EU. Given that these responsibilities are minimal, the National Referral Mechanism should extend beyond these basic requirements and specify concrete measures, as the European Directive is designed as a minimum standards instrument.

(4) The recovery and reflection period for trafficking victims

Once a potential victim of trafficking has been identified, and to ensure the effective application of the rights and services to which the victim is entitled, a recovery and reflection period is granted[54]. This period was first introduced with the adoption of Directive 2004/81/EC. Still, it was originally conceived solely as a reflection period; accordingly, it is intended only to allow the victim to contemplate and consider their potential cooperation with the authorities responsible for prosecuting the crime. This conception reflected a predominantly criminal and functional approach to trafficking victims, with a limited scope that only encompassed third-country nationals in an irregular situation who were willing to cooperate with the authorities responsible for prosecuting the crime[55].

Over time, with the adoption of Directive 2011/36/EU, an additional purpose was incorporated into the reflection period: the recovery aspect. Consequently, since then, the period now known as the "recovery and reflection" period serves a dual function. On one hand, it offers victims an opportunity to contemplate their potential cooperation

[54] A. Moreno, *La lucha contra la trata de seres humanos en la Unión Europea: análisis de los instrumentos de protección, persecución y prevención* (Doctoral Thesis, Universitat Autònoma de Barcelona, 2019) at 118.

[55] This perspective is also reflected in the preparatory documents of the instrument, as well as in the original proposal of the European Commission. In the 2002 Directive proposal, it was stated that each State should provide assistance to the victim according to their needs, covering accommodation, medical and psychological care, and potentially social support, to help them achieve the necessary material and psychological autonomy to make the decision to cooperate. Additionally, the authority responsible for the investigation and judicial proceedings would determine whether the presence of the victim was necessary in the investigation or the initiation of legal actions against the alleged perpetrators. This authority would also assess the victim's willingness to cooperate and the credibility of their disconnection from the alleged perpetrators, see: European Commission, Proposal for a Council Directive on the issuance of a short-term residence permit for victims of assistance with illegal immigration or human trafficking who cooperate with the competent authorities, of 28 May 2002 (COM(2002)71 final) at 2.1.

with the authorities responsible for investigating the crime. On the other hand, it enables them to recuperate from the influence of their exploiters. Yet, in practice, the distinction between these two objectives is often unclear, leading to frequent overlap between them[56].

After its reform, Directive 2011/36/EU continued to refer to Directive 2004/81/EC for the regulation of the recovery and reflection period, emphasizing the importance of informing victims about this aspect[57]. In this context, there was an expectation that this issue, having been one of the most contentious over the years, would be effectively addressed during the amendment process of Directive 2011/36/EU. Nevertheless, Directive (EU) 2024/1712 remains faithful to the reference to Directive 2004/81/EC, representing one of the most significant missed opportunities in the process of modifying the legal framework governing the fight against human trafficking within the European Union.

Therefore, the recovery and reflection period, in accordance with the reviewed Directive and its reference to Directive 2004/81/EC, is exclusively intended for trafficking victims who are nationals of third countries and who cooperate with law enforcement authorities. The fundamental rationale for granting this recovery and reflection period to trafficking victims lies in their vulnerability following severe violations of their most basic Human Rights[58]. Consequently, the trauma experienced by the victim must be fully considered, as it could be exacerbated if they do not receive the appropriate space and assistance. It is inexplicable that European citizens victims of trafficking victims are denied a period aimed at their rehabilitation and recovery, which directly contradicts the principle of non-discrimination, a principle that is repeatedly emphasized throughout the Directive. This period should be transformed into one available to all victims of human trafficking, resulting in a more comprehensive and inclusive approach across the European Union and within the practices of the Member States.

An illustrative example of the consequences resulting from the approach adopted by the amended Directive 2011/36/EU can be seen reflected in the provisions of the Spanish Draft Organic Law itself. Following the approach adopted in the Anti-trafficking Directive, the text presented by the Spanish government does not regulate the recovery and reflection period. In fact, the only reference to this period that can be found in the Draft Organic Law appears in the specific Final Provision (5), which pertains to the amendment of Organic Law 4/2000, of January 11, on the rights and freedoms of foreigners in Spain and their social integration[59].

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56 G. Rodríguez, *supra* n. 28 at 309.

57 Article 11.6 of Directive 2011/36/EU stipulates that the information available to victims should include, where applicable, details regarding a reflection and recovery period. However, recent documents published by the European Commission indicate that in certain countries, such as Belgium, Latvia, and Italy, there is no explicit requirement to inform the individual about this reflection period, see: European Commission, Commission Staff Working Document. Evaluation of the Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, 19 December 2022 (SWD(2022) 247 final) at 97.

58 R. Piotrowicz, 'The European legal regime on THB', in R. Piotrowicz, C. Rijken, and H.B. UHL, Heide Baerbel (eds.), *Routledge Handbook of Human Trafficking* (Routledge, New York, 2019) 14 at 43.

59 Article 45 of the Spanish Draft Organic Law outlines the guarantees for foreign victims of trafficking and exploitation in Spain. Specifically, it states that when individuals suspected of being victims of human

This Article stipulates that the recovery and reflection period will be developed through regulatory means and establishes a minimum duration of ninety days, in accordance with the provisions of the Council of Europe Convention, since the Anti-trafficking Directive does not specify a minimum duration for the recovery and reflection period and neither does Directive 2004/81/EC. During this time, the victim will be issued a temporary residence permit, and neither expulsion nor the initiation of any administrative sanctioning procedures against the victim will be permitted. Furthermore, the period may be extended when the particular circumstances of the victim warrant such an extension.

Moreover, in extraordinary circumstances, the competent Public Administration will ensure the safety and protection of other individuals in Spain with whom the victim has family or other types of connections when it can be demonstrated that their vulnerable situation in relation to the alleged traffickers poses an insurmountable obstacle to the willingness of the victim to cooperate. Notwithstanding, one critical issue warrants attention. The language of the Article reflects a clear functionalist view of the victim, suggesting that assistance will only be extended to family members when their lack of protection hinders the cooperation of the victim, thus overlooking the broader Human Rights concerns involved. This perspective implies a fundamentally flawed understanding of trafficking, perceiving the victim merely as evidence in an investigation rather than as an individual in need of care and healing. As has been said previously, numerous reports indicate that when greater attention is given to the well-being of the victim, they are more inclined to cooperate, rather than the other way around[60].

In conclusion, it should be considered that, in order to adopt a comprehensive protective framework for trafficking victims, the recovery and reflection period should be regulated within the same overarching instrument rather than relegated to a provision solely aimed at victims who are in an irregular situation. This period should be applicable to all trafficking victims, regardless of their origin or any other characteristic. Victims who are citizens of the European Union or who possess a valid residence permit should also have access to this period, providing them with the necessary space and time to heal. Consequently, once they have begun their recovery, they can then decide whether to cooperate with the authorities responsible for investigating the crime. Furthermore, any extension of this protection to family members should be considered when those individuals are in a vulnerable position in relation to the traffickers, rather than based on whether their presence poses an obstacle to the cooperation of the victim. A contrary perspective would result in a Law that fails to adopt a holistic approach and does not align with International Human Rights standards.

(D) PROTECTING VICTIMS OF HUMAN TRAFFICKING: SPECIFIC MEASURES

Having previously analysed the general protection measures for trafficking victims, the following section will focus on a detailed examination of specific measures available

trafficking or exploitation are foreign nationals, the provisions set forth in Article 59 bis of Organic Law 4/2000, regarding the rights and freedoms of foreigners in Spain and their social integration, will apply.

60 C. Villacampa, *supra* n. 34 at 451.

to trafficking victims throughout their recovery process. To provide a structured framework, this analysis will adhere to the framework set forth in the Spanish Draft Organic Law, as it offers a clear and organized basis for evaluating whether it aligns with the European Anti-trafficking Directive and other relevant legal instruments, such as the Warsaw Convention. The study will begin by reviewing the victims' rights to information and assistance, followed by an assessment of the protective, social and economic rights. It will then conclude with a review of additional protective measures specifically designed for foreign trafficking victims.

(1) Information and assistance rights

The rights to information and assistance constitute the first significant set of measures outlined in Chapter I of Title II of the Spanish Draft Organic Law, which addresses the rights of trafficking victims. This chapter sets forth the obligations of public authorities to ensure that victims are provided with clear information regarding their rights, the relevant procedures, and access to specialized assistance from the moment there is even minimal suspicion that they may be potential victims of trafficking.

The right to information is essential for trafficking victims; throughout the amended Directive 2011/36/EU, various provisions emphasize the necessity of informing victims about their rights and the services available to them[61]. Furthermore, an additional relevant instrument to consider is Directive 2012/29/EU, which pertains to the status of victims of crime and is currently under review[62]. Specifically, Article 3 of Directive 2012/29/EU recognizes the right of the victim to understand and effectively communicate all the steps to be taken within the context of criminal proceedings.

In the Draft Organic Law, Article 31 addresses the right to information for victims of trafficking. The first point establishes that this right is available to victims from the moment of their identification, ensuring that the information is conveyed in an understandable manner, with the presence of an interpreter or cultural mediator if necessary. The inclusion of a cultural mediator is particularly noteworthy and commendable, as no previous international instrument regulating human trafficking has considered the

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61 Despite the existing regulations that establish the right of victims to be informed about the legal proceedings in which they are involved and to receive legal assistance, these rights are not always guaranteed with the same ease in practice. This issue has been a concern for GRETA for several years. For example, in its latest compendium of good practices regarding labour exploitation, GRETA reiterates the importance of ensuring that victims have access to information about their rights. It emphasizes that this information must be provided in a language that is comprehensible to the victims, accompanied by competent interpretation services and specialized legal assistance. GRETA highlights that not only is this crucial for building trust with victims, but it also helps them better understand their circumstances and significantly increases the likelihood of successful investigation and prosecution. GRETA, Compendium of good practices in addressing trafficking in human beings for the purpose of labour exploitation, 2022 at 36.

62 Commission Directive 2012/29, OJ 315 L 57/73. On 12 July 2023, the European Commission introduced a proposal to reformulate the current framework of the European Union regarding the protection of victims of crime, governed by Directive 2010/29/EU. In April 2024, the European Parliament adopted its final position to initiate interinstitutional negotiations, followed by the Council of the European Union in June 2024. Consequently, the next step will be the commencement of interinstitutional negotiations. All information on the legislative process can be consulted here: 2023/0250(COD).

incorporation of this role within the measures to be adopted for the recovery of the victim. This innovation represents a significant step forward in addressing the complex cultural and linguistic barriers that often hinder victims' ability to seek assistance and fully engage in recovery processes.

Regarding the content of this information, the second point is comprehensive, stipulating that victims must be informed about all matters included in the Draft Organic Law, ranging from their basic protection to the procedures for filing a complaint, as well as potential compensations and resources. Additionally, it mandates public funding for these services to ensure the right to information is effectively realized, with specific attention to victims with disabilities or minors, guaranteeing that information is tailored to their unique conditions.

These provisions should minimize the problematic issues raised by GRETA in its follow-up report on Spain, where effective access to the right to information was questioned[63]. GRETA recommended that further training and instructions be provided to law enforcement officials on how to adequately explain victims of trafficking their rights, considering their psychological state and understanding of the Spanish legal system. Moreover, particular attention should be given to presumed victims of trafficking who are also asylum seekers, ensuring they are properly informed of their rights in a language they comprehend, with the involvement of trained professionals and guaranteeing the presence of specialized Non-Governmental Organizations (hereinafter, NGOs) at borders[64]. Additionally, steps should be taken to ensure the availability of qualified interpreters and their sensitization to human trafficking issues. It remains to be seen how the right to information will ultimately be configured in the draft law and how effectively it will be implemented in practice.

Alongside the right to information, the right to assistance emerges as a key component of Chapter III in Title II. Article 35 sets forth a series of measures aimed at providing assistance to trafficking victims, such as appropriate and secure accommodation, basic subsistence resources, specialized medical and psychological care, specialized social assistance, legal advice, immediate and urgent support through a 24-hour hotline, and outreach services via mobile units. These provisions are considerably broader than some of those outlined in Directive 2011/36/EU, which, in certain cases, make assistance contingent upon the duration of criminal proceedings or the victim's participation in them.

However, there is an issue regarding the measures to be adopted for victims of human trafficking that requires greater attention in the national framework compared to the thorough consideration given in the amended Directive 2011/36/EU. Specifically, this issue pertains to the provision of accommodation for trafficking victims, an aspect that is expected to improve during the national legislative process. A critical factor in ensuring the safety of trafficking victims is the availability of secure shelter. In many cases, while victims are being exploited, they are compelled to remain in the very locations where

63 GRETA, *supra* n. 17 at 54.

64 *Ibid*, at 63. The report, published in June 2023, highlights that this deficiency had already been noted in 2020, and no measures were taken to address the issue, not even partially. This ongoing lack of action remains a matter of significant concern.

the exploitation occurs. This not only perpetuates their victimization but also increases their vulnerability. Providing safe and secure accommodation is therefore essential for breaking this cycle, offering victims a refuge from their exploiters and a space where they can begin to rebuild their lives in safety.

As a result, access to a safe refuge is considered a fundamental need for those affected by human trafficking, crucial for their protection and recovery. The establishment of specialized shelters for these individuals emerges as one of the most notable innovations of the amended Directive 2011/36/EU, primarily advocated by the European Parliament during interinstitutional negotiations[65]. This improvement is realized through a twofold approach. First, an amendment to Article 11(5) of Directive 2011/36/EU stipulates that measures for assistance and support for victims must ensure living standards that meet their basic needs, thereby guaranteeing their sustenance through the provision of adequate and secure accommodation. Notably, the Directive expands the definition of suitable accommodation to include reception centres and other forms of adequate temporary housing.

Second, a new article dedicated exclusively to the accommodation of victims of trafficking has been added. The new article 11(6) of Directive 2011/36/EU specifies that shelters and temporary housing for victims must be provided in sufficient quantities and must be easily accessible to both presumed victims and those identified as such. Furthermore, it emphasizes that these shelters and temporary accommodations should facilitate the recovery of victims by providing appropriate living conditions aimed at aiding their reintegration into society in an independent manner. Additionally, these facilities must be equipped to meet the specific needs of children, including those who have been victims of trafficking. This language significantly enhances the availability of shelters for victims of trafficking, making them more accessible to both potential victims and those already identified, while underscoring the importance of addressing the specific needs of victims and their children.

Unlike the Anti-trafficking Directive, the Spanish Draft Organic Law is less developed on these issues. Specifically, Article 35(1)(f) of the Draft Law requires public authorities to ensure appropriate and secure accommodation, including emergency housing, from the moment a potential victim is detected, throughout the identification process, and for as long as needed after final identification. However, it does not include provisions for establishing specialized shelters or refuges specifically for trafficking victims. Since the Draft Law is still in its early stages, those involved in the legislative process should consider the provisions of the amended Directive 2011/36/EU, which Spain is obligated to transpose[66].

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65 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, A9-0285/2023, 10 December 2023 at 19.

66 In relation to this issue, Article 41.1 of the Organic Draft Law stipulates that victims of trafficking or exploitation, once definitively identified, will be considered a priority group for access to subsidized housing and housing assistance programs, in accordance with the applicable legislation. They will also have priority access to residential facilities and other care centers for individuals in situations of dependency. To this end, Article 41.2 allows public authorities to enter into agreements with accredited specialized entities to fulfill this objective.

(2) Protection and legal assistance

In accordance with Article 36 of the Draft Organic Law, presumed victims of trafficking have the right to receive protection from the moment of their detection. To ensure the effectiveness of this protection, the Spanish Security Forces are required to conduct an early and individualized risk assessment, not only for the victims themselves but also for their family members or close associates. This assessment should consider various variables, including the specific situation of each victim, the context in which the trafficking occurred, and the potential dangers that may threaten their safety.

It is necessary that the evaluation process is not limited to the State Security Forces. The scope of stakeholders involved in the risk assessment must be expanded to include professionals from diverse sectors. For instance, incorporating social workers, psychologists, lawyers, and representatives from NGOs specializing in victim support is crucial for enhancing the process. Their expertise and perspectives are essential to ensuring that the evaluation is not only thorough but also addresses the complex, multifaceted nature of the situation of the victim. This broader participation is vital for achieving a more holistic and comprehensive assessment, ultimately leading to more effective interventions and support measures.

The participation of these additional actors would allow for addressing the specific needs of victims from a multidisciplinary perspective, ensuring that not only safety aspects are considered but also emotional, psychological, and social dimensions. For instance, social workers can provide a deeper understanding of family and community dynamics, while psychologists can assess the trauma's impact on the victim and propose appropriate interventions.

Furthermore, involving NGOs that work directly with victims can facilitate the establishment of support networks and resources crucial for the recovery and reintegration of the victim into society. These organizations often possess valuable knowledge of best practices in handling cases of trafficking and exploitation, as well as closer access to the realities and needs of the victims.

In addition to the protective rights afforded to trafficking victims, a crucial pillar of their security is the preservation of their identity and privacy. Safeguarding these elements is essential not only to shield victims from further harm or retaliation by traffickers but also to help them restore a sense of safety and dignity. Ensuring confidentiality throughout the recovery process is vital for building trust, encouraging victims to seek assistance, and facilitating their reintegration into society without fear of exposure or re-victimization.

Still, within the EU regulatory framework for combating trafficking, neither the original Directive 2011/36/EU nor its amended version addresses this issue adequately. As a result, it is necessary to reference Directive 2012/29/EU, which only covers the matter in cases of particular significance. In this regard, the amendment process of Directive 2011/36/EU should have prioritized introducing substantial changes to more effectively address this critical issue, thereby strengthening the protections for trafficking victims in terms of safeguarding their identity and privacy.

Fortunately, the Spanish Draft Organic Law on trafficking does incorporate these issues in a comprehensive and thorough manner, marking a significant and welcome development. Article 37, pertaining to the right to privacy and protection of identity, addresses this matter. From the moment of detection, various measures will be implemented to safeguard the privacy and identity of suspected victims of trafficking or exploitation in all administrative and judicial proceedings. Interviews and statements will be conducted in a confidential and private manner, ensuring respect for the victims' intimacy and the protection of their personal data. Public disclosure of names, addresses, or any information that could identify the victims, including photographs, will not be permitted. Both authorities and the media must adopt the necessary measures to enforce this prohibition. Such measures represent a proactive approach to addressing the shortcomings identified in the existing Anti-trafficking Directive and underscore the commitment of Spain to improve the welfare of trafficking victims.

Additionally, medical examinations conducted throughout the process will be treated as confidential and used solely for investigative and criminal proceedings. Information exchanged between the victims and the professionals involved in the process will remain confidential and will not be shared with third parties without the victim's consent, unless required by a judicial authority within the context of criminal proceedings. Finally, the processing of personal data will be limited to the purposes established in the regulations and those for which the victim has provided consent.

These measures are crucial for protecting trafficking victims, as they ensure their privacy and safety. By fostering a secure environment for recovery, victims are more likely to feel comfortable sharing their experiences and needs. This, in turn, strengthens their trust in the authorities and the judicial system, facilitating their access to necessary assistance and promoting successful social reintegration. Furthermore, the protection of their identity helps prevent potential reprisals and stigmatization, which is essential for their healing and empowerment process.

An additional critical aspect of protecting and assisting victims of human trafficking is the provision of legal assistance and advice, which empowers them to assert their rights as conferred by law. This measure is essential for their recovery, reintegration, and the prevention of re-victimization; yet, such assistance is not always available free of charge to trafficking victims. Directive (EU) 2024/1712, while maintaining the provisions of Directive 2011/36/EU, stipulates the right to legal advice and representation in Article 12(2), establishing that such representation will be free of charge when the victim lacks sufficient financial resources. The ambiguity in this provision has led to a variety of procedures across Member States regarding the access of the victim to legal aid[67].

In Spain, the Draft Organic Law outlines in Article 38 that victims of trafficking and exploitation are entitled to free legal defence and representation in all administrative

[67] For instance, in Luxembourg and Italy, procedures differ for trafficking victims who are not citizens of the European Union, while in the Netherlands, not all forms of exploitation are addressed. However, in certain Member States, such as Greece, Croatia, Latvia, and Sweden, this assistance is provided free of charge, regardless of the financial resources of the victim. This situation constitutes a genuine violation of the principle of non-Discrimination. Consequently, it was anticipated that the amendment process for Directive 2011/36/EU would progress in this regard. European Commission, *supra* n. 45 at 101.

processes related to their trafficking and exploitation situations, in accordance with the legal provisions established in Law 1/1996 of January 10, on Free Legal Assistance. Furthermore, it mandates that Professional Bar Associations implement necessary measures to ensure the urgent appointment of specialized defence attorneys and to guarantee their immediate presence and support for the victims.

These provisions align with the recommendations made by GRETA in its latest follow-up report on Spain, which advocates for timely and effective notification of Bar Associations by authorities upon the detection of trafficking victims, the development of cooperation protocols, specialized training for lawyers to assist trafficking victims, and ensuring legal assistance for those victims who are also asylum seekers[68].

(3) Rights to reparation and compensation

Another highly significant issue for trafficking victims pertains to their compensation. Many victims experience significant financial devastation following the end of their exploitation, ranging from lost wages and confiscated earnings to debts incurred during their time as trafficking victims. Thus, compensation not only acknowledges the severe economic challenges they face but also plays a crucial role in their recovery and reintegration. This financial support can serve as a lifeline toward self-sufficiency and independence, facilitating access to vocational training and employment opportunities, ultimately enabling them to establish themselves in the labour market.

Directive (EU) 2024/1712 has introduced various modifications to address this matter more comprehensively. The earlier Articles 17 and 18 of Directive 2011/36/EU, prior to its amendment, which addressed victim compensation and trafficking prevention, have been revised and consolidated into a reformulated Article 17. Article 17 of the amended Directive 2011/36/EU stipulates that Member States are required to ensure that victims of intentional violent crimes have access to established compensation systems. Furthermore, it permits the establishment of a national fund for victims or similar mechanisms to provide compensation, in accordance with the national legislation of each Member State.

Despite the increased emphasis on compensation and the potential creation of national funds for victims, the establishment of clear and uniform guidelines for compensating trafficking victims across the European Union remains the responsibility of national legislators. Moreover, while the creation of state funds for victims is mentioned, there is no provision for a specific fund for trafficking victims, similar to those available for victims of terrorism. Such a fund would have been appropriate from a comprehensive perspective[69].

Additionally, the removal of Article 7 eliminates the possibility of funding these compensation mechanisms with assets seized from trafficking-related crimes[70]. These omissions reflect a lack of consideration for the needs and rights of trafficking victims, resulting in a persistent inconsistency in the compensation framework for victims across Member States of the European Union.

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68 GRETA, *supra* n. 17 at 63.

69 M. Jordana, *supra* n. 27 at 487.

70 In the European Union, the current instrument for the freezing and confiscation of assets is Directive 2024/1260/EU, see: European Commission Directive 2024/1260, OJ 101 L 1/28.

Considering the modifications to the European Anti-trafficking Directive, it is essential to examine its incorporation into the Spanish Draft Organic Law, as this represents one of the areas in which the Draft Organic Laws of 2022 and 2024 exhibit the most significant differences, with the latter being considerably more restrictive than the former. Chapter V of the last draft addresses the recognition of the right to comprehensive reparation for victims. Article 42 of the Draft Organic Law enshrines the right to comprehensive reparation, which signifies that trafficking victims have the right to full compensation for the harm they have suffered, including the victims' rights mentioned in Title III. This also encompasses adequate compensation, in accordance with Law 4/2015 of April 27, which establishes the statute of victims of crime.

Subsequently, Article 43 of the Draft Organic Law stipulates the right to compensation and restitution within the framework of criminal proceedings. This Article establishes that compensation awarded to victims of trafficking and exploitation will cover various aspects. First, it includes compensation for material damages incurred because of exploitation. Second, it recognizes compensation for psychological and moral damages suffered during the exploitation period, acknowledging the emotional and mental impact experienced by victims. Finally, it provides for the restitution of benefits obtained by their exploiters at the expense of the victim, ensuring that victims receive a fair share of the profits generated from their exploitation. In addition to financial compensation, the Article also empowers the national courts to order the restoration of the rights of the victim.

Furthermore, Article 43(3)(c) specifies that the compensation for victims shall include the benefits derived from their exploitation. However, as previously noted, this Article pertains to compensation and restitution within the context of criminal proceedings. Numerous reports related to human trafficking indicate that very few cases initiated as trafficking investigations lead to convictions[71]. Consequently, many victims may be left unprotected in exercising the rights established in Article 43(3)(c) of the Draft Organic Law. In this regard, Article 44 of the Draft Organic Law is particularly significant as it ensures the right to compensation and restitution for victims in cases where no judicial ruling has determined civil liability. It states that regulations will be implemented to facilitate the mechanisms and funding necessary to guarantee the effectiveness of this right.

At this point, it is crucial to highlight that in the Draft Organic Law of 2022, Article 45, which addressed the right to extrajudicial compensation and restitution, proposed the establishment of a Fund for the Compensation of Victims of Trafficking and Exploitation[72]. The creation of a specific fund for trafficking victims was one of the most

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71 European Commission, Commission Staff Working Document, Statistics and trends in trafficking in human being in the European Union in 2019-2020, Accompanying the document report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report On The Progress Made In The Fight Against Trafficking In Human Beings (Fourth Report), SWD/2022/429 final, 19 December 2022, at 13-19.

72 The fund lacked legal personality and was attached to the General Administration of the State through the Ministry of the Interior, as stated in Article 45.2. The purpose of this fund was to ensure financing for the right to compensation and restitution for victims in cases where there had been no judicial ruling on civil liability. Additionally, it was proposed to establish a Fund Management Council and a Monitoring and Control Committee, both of which were affiliated with the Ministry of the Interior. To finance the fund, a provision was included in the General State Budget Law, specifying that it would be supported by various resources. Notably, section (b) indicated that the fund would be replenished by "the sums

significant aspects of the 2022 draft. Yet, this provision was omitted without justification in the 2024 Draft Organic Law and its accompanying memorandum. This omission represents a serious setback in the protection of trafficking victims.

Thus, it is hoped that the legislative process concerning the 2024 Draft Organic Law will address this matter. It is essential to establish a specific fund for victims of trafficking, not only to meet the expectations set forth by the Directive but also to facilitate the rehabilitation of the victims. Furthermore, this fund should be created through the same Organic Law rather than via regulatory means, thereby giving greater significance to the issue.

Along with compensation and reintegration, another important aspect for the full rehabilitation of trafficking victims is long term support. This includes providing ongoing access to socio-economic opportunities, as well as creating a stable environment that fosters their reintegration into society. Without a comprehensive long-term strategy, victims may remain vulnerable to re-trafficking and may struggle to achieve true recovery and autonomy.

At this point, one significant question that is not addressed by the Directive is included in Chapter IV, on labour and economic rights. The trafficking Directive offers minimal guidance on this matter, despite its critical importance for victims. In contrast, Spanish legislation aligns more closely with international Human Rights law by recognizing the essential role of social reintegration for victims. In this regard, the Spanish legal framework introduces Article 39, which establishes the right to social and labour integration; Article 40, which pertains to access to minimum vital income support; and Article 41, which ensures access to housing. These provisions underscore the importance of facilitating not only the legal protection of victims but also their economic and social stability as vital components of their recovery and reintegration into society.

(4) Rights of foreign victims

Having considered the issues that affect all victims of human trafficking throughout their recovery process, both of a general and a more specific nature, it is crucial to assess the additional measures for victims of human trafficking who find themselves in an irregular situation. This group faces heightened vulnerability and unique challenges due to their precarious circumstances. In this context, three critical areas warrant examination: the provision of residence permits, the possibility of seeking international protection, and the adverse prospect of deportation or forced return, often euphemistically referred to by legislators[73].

confiscated and the proceeds from the sale of goods or assets seized from those responsible for trafficking crimes or related offenses, once any judicial compensations to the victims had been satisfied".

[73] In the vocabulary employed by the European Union, the term 'return' is used as a euphemism for expulsion (see: J.P. Cassarino, Jean-Pierre, 'Are Current 'Return Policies' Return Policies? A Reflection and Critique' in T. Bastia and R. Skeldon (eds.), *Routledge Handbook of Migration and Development* (Routledge, New York, 2020) at 343. For a broader discussion on the use of euphemisms in the context of migration and asylum, refer to: M. Grange, 'Smoke Screens: Is There a Correlation between Migration Euphemisms and the Language of Detention?', *Global Detention Project Working Paper No. 5*, 2013.

With respect to residence permits for victims of trafficking, the amended Directive 2011/36/EU refers to Council Directive 2004/81/EC, which addresses the issuance of residence permits to third-country nationals who are victims of human trafficking or have been subjected to assistance in illegal immigration, provided they cooperate with the competent authorities. As indicated by its title, the instrument adopts a notably functionalist view of the victim, making the granting of a residence permit contingent upon the cooperation of the victim with authorities responsible for prosecuting the crime. It was anticipated that this issue would be addressed during the amendment process of the Anti-trafficking Directive. However, the problematic situation has persisted, undermining a Human Rights-based approach to address trafficking.

The regulation of residence permits for trafficking victims in Spain aligns closely with Directive 2011/36/EU, as the Draft Organic Law does not include any specific regulations concerning residence permits for trafficking victims. Instead, the Draft Organic Law refers in its Fifth Final Provision to Article 59 bis of Organic Law 4/2000, of January 11, on the rights and freedoms of foreigners in Spain and their social integration. In fact, the Draft Organic Law aims to amend Article 59 bis of Organic Law 4/2000 with a new wording, stipulating that the competent authority, once the victim of trafficking has been definitively identified, will declare the victim exempt from administrative liability. Following this determination, the authority may offer the victim several options. The victim can choose to receive assisted return to their country of origin after provisional identification, or they may be granted a residence and work permit on exceptional grounds, taking into consideration their personal circumstances or when their cooperation is deemed necessary for investigative or criminal proceedings. Additionally, the victim will be provided with support for social integration in accordance with the provisions of the law. Pending the resolution of the residence and work permit application, a temporary authorization will be granted.

Today, the Spanish reality is that residence permits for victims of trafficking are challenging to obtain, particularly the ones based on personal circumstances[74]. Consequently, the infrequent issuance of such permits leads many trafficking victims to seek comparable protection through international protection mechanisms instead. In this regard, one of the most notable additions to Directive 2011/36/EU is Article 11a, titled 'Victims of trafficking who may require international protection'. In its first section, the provision mandates that Member States ensure complementarity and coordination between the authorities responsible for combating human trafficking and those in charge of asylum matters. The second section focuses on recognizing the right of victims to apply for international protection or an equivalent national status, even while receiving assistance, support, and protection as presumed victims of trafficking.

74 Practice shows that the majority of residence permits granted to victims of human trafficking in Spain are issued in exchange for cooperation with the justice system. As of July 2021, 38 permits had been granted for cooperation with the authorities, compared to 15 for personal circumstances. In 2020, 42 permits were issued for cooperation, and 21 for personal circumstances, while in 2019, 45 permits were granted for cooperation and 27 for personal circumstances. See: GRETA, Reply from Spain to the Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties, 2021, at 79-80.

This new article is vital because, today, in several Member States, a persistent incompatibility exists between applying for international protection and receiving assistance and protection as a victim of human trafficking, a result of the ongoing criminalization of migratory flows[75]. This situation creates a dilemma for many trafficking victims who, while participating in recovery programs, seek international protection after the conclusion of the reflection and recovery period, as they face potential deportation. Under these circumstances, they are forced to choose between forfeiting legally recognized assistance and protection or refraining from applying for international protection[76]. In response to this issue, Article 11a aims to secure and formalize the complementarity between both processes, which face significant challenges in practice.

In the Spanish legal context, the Draft Organic Law incorporated the principle of complementarity prior to the publication of the amended European Anti-trafficking Directive. This inclusion was prompted by both reports from the CEDAW Committee and GRETA, highlighting concerns regarding the practical effectiveness of this complementarity in Spain[77]. These reports highlighted that many trafficking victims, particularly those in irregular situations, were frequently compelled to choose between different forms of protection, which ultimately compromised their rights. To address this issue, Article 46 of the Draft Organic Law grants individuals identified as presumed victims of trafficking, along with their dependents, the right to apply for international protection at any time, if they meet the legal requirements. Additionally, the provision clarifies that applying for or receiving a recovery and reflection period, or a residence permit as a victim of trafficking, does not limit or restrict their right to seek and obtain international protection. In essence, the procedures aimed at providing assistance and protection to victims of trafficking do not interfere with their access to international protection mechanisms, such as refugee status, as long as the established criteria are met.

As for foreign victims of trafficking, the Draft Organic Law introduces a significant innovation through Article 47, which addresses the voluntary return of victims. Unlike the Anti-trafficking Directive, which does not provide specific guidance on the return of victims[78], this provision relies on the general framework set out in the Return Directive[79].

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75 A. Salinas de Frías, 'La insuficiente protección internacional de los migrantes irregulares víctimas de trata' 73(2) *Revista Española de Derecho Internacional (2021)* 161-175, at 163 [doi: 10.17103/redi.73.2.2021.1a.10].

76 European Parliament, *supra* n. 61 at 33.

77 CEDAW, *supra* n. 12 at 14 and 27; GRETA, *supra* n. 17 at 56 and 63.

78 It is important to note that both Directive 2011/36/EU and the current amended Directive have consistently overlooked the matter of the repatriation of victims, particularly regarding considerations of their safety. Valentina Milano has been a critical voice on this issue, see: V. Milano, *The human rights-based approach to human trafficking in international law* (Doctoral Thesis, Universitat de les Illes Balears, 2018) at 404. In fact, this deficiency was already evident in the previous Framework Decision, which led Anne T. Gallagher to assert that the proposal's inability to prohibit, or at least to cautiously warn against, repatriation in situations where the victim may face serious human rights violations constituted a potentially serious omission in the instrument. Similarly, Gallagher noted that this omission raised doubts about the proclaimed commitment of the EU to safeguard the human rights of victims of serious crimes, such as human trafficking, see: A. Gallagher, *supra* n. 30, at 170.

79 Commission Directive 2008/115, OJ 348 L 98/107. The instrument has been the subject of significant academic criticism, both for marking a regression in the stance of the European Union on Human Rights and for its insufficiency in formulating a repatriation policy grounded in consistent standards. This critique stems from the considerable discretion granted to individual states in defining key aspects of the repatriation process, see: A. Baldaccini, 'The Return and Removal of Irregular Migrants under EU

Article 47 establishes that, from the moment of their provisional identification, presumed victims of trafficking are entitled to assisted return, which ensures their safety, dignity, and respect for their fundamental rights. Furthermore, judicial authorities may determine whether the continued presence of the victim in Spain is necessary for the purposes of criminal investigations or legal proceedings. However, it makes no mention of the necessity for the victim to remain in Spain for humanitarian reasons or due to their personal situation, as provided for in Article 14(1) of the Warsaw Convention[80].

Competent authorities, under the supervision of the National Referral Mechanism, are required to implement assisted return programs or incorporate these mechanisms into existing voluntary return programs. These programs are designed to guarantee the safe return of both national and foreign victims, regardless of their residence status in Spain, provided the return is voluntary and based on the victim's informed consent. Additionally, in cases where the victim, after being informed, requests a return without participating in an assistance program, non-assisted return will be facilitated.

The inclusion of a specific provision regulating the return of trafficking victims in the Spanish Draft Organic Law is a positive development, as it prevents the application of the general framework, which often fails to adequately assess the risks of secondary victimization, the stigma associated with being a trafficking victim, or the potential for re-exploitation. However, it would be preferable to introduce specific residence permits for trafficking victims that allow them to remain in the country where they can continue their recovery process, should they wish to do so.

(E) FINAL CONSIDERATIONS

The presentation of the Draft Organic Law by the Spanish government to address human trafficking represents a significant and necessary advancement in rectifying the legal void that affects trafficking victims in Spain. This legislative framework aims not only to provide comprehensive protection for those affected but also to establish effective mechanisms for the prevention, investigation, and prosecution of these crimes, thereby ensuring the adherence to a holistic approach. Currently, Spain lacks specific legislation to confront this serious phenomenon, prompting various international institutions, such as the CEDAW Committee and GRETA, to urge the country to implement appropriate legislative measures. Therefore, the adoption of this Draft Organic Law is an urgent and

Law: An Analysis of the Returns Directive', 11 *European Journal of Migration and Law* 2009 11-17; D. Acosta, 'The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive)' *European Journal of Migration and Law* 2009 19-39. Specifically concerning Spain, it is essential to cite M. Illamola and I. Barbero, 'Deportations without the Right to Complaint: Cases from Spain' in S. Carrera and M. Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union: Complaint Mechanisms and Access to Justice* (Routledge, New York, 2020) at 34.

80 Article 14(1) Warsaw Convention: "Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both: (a) the competent authority considers that their stay is necessary owing to their personal situation; (b) the competent authority considers that their stay is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings".

necessary response to the recommendations of these bodies, reflecting the commitment of Spain in combating human trafficking.

However, it is important to consider the legislative context in which the Draft Organic Law is situated. It would have been prudent for the Spanish government to await the official publication of the European instrument. The Anti-trafficking Directive imposes obligations on Member States, requiring them to transpose its provisions into national legal systems within a specified timeframe. In this context, the Spanish government should have considered postponing the introduction of its Draft Organic Law until the European Anti-trafficking Directive amendment process was finalized, thereby ensuring full alignment with the supranational instrument.

This temporal discrepancy results in some of the advancements, albeit minimal, of the amended Directive 2011/36/EU not being reflected in the Draft Organic Law. For instance, the Anti-trafficking Directive introduces human trafficking for the purpose of surrogacy exploitation as a new form of exploitation, a provision not included in the Draft Organic Law. Consequently, this issue must be incorporated into the national legislation without exception, as it is the State's obligation to do so. In addition to this matter, other aspects of the Draft Organic Law will also need to be revised to align national legislation with the standards of the European Directive and the boarder requirements set forth by international institutions.

Regarding measures for the protection of trafficking victims, the Draft Organic Law represents a step forward by adopting a comprehensive approach, prioritizing Human Rights principles such as non-discrimination and non-conditionality, and providing tailored support that respects the individual recovery paths of each victim. A particularly noteworthy improvement lies in the recognition of the unique and personal nature of each recovery process. Additionally, it is encouraging to see significant progress in formalizing the complementarity between victim protection and the provision of international protection. This is crucial, as many trafficking victims also seek asylum or refugee status.

Nevertheless, this advancement in complementarity is undermined by deficiencies in other critical areas. One of the most concerning shortcomings is the lack of regulation regarding the recovery and reflection period for trafficking victims, which is a significant flaw in the Draft Organic Law. This period is crucial for providing victims with the necessary time and support to recover and make informed decisions about their cooperation with authorities. The absence of clear provisions on this matter represents a major oversight, limiting the effectiveness of the proposed legal framework in ensuring comprehensive protection for victims.

Another critical issue is the provision of secure accommodation for trafficking victims. Although access to safe housing is an essential component of the recovery process, the Draft Organic Law fails to adequately address this necessity. The lack of a clear and operational framework to ensure the access of the victim to secure housing can have serious consequences, exacerbating their vulnerability and hindering their social reintegration.

Furthermore, the Draft Organic Law notably lacks provisions for the establishment of national funds specifically dedicated to compensating victims of human

trafficking. This omission is particularly concerning given that the 2022 Draft Organic Law was significantly more comprehensive and detailed on this issue, proposing the creation of a national fund with specific regulations to support trafficking victims. This step backward raises concerns about the current legislative direction and highlights potential shortcomings in the commitment of the Spanish government to ensuring a holistic instrument for trafficking victims.

Finally, the role of civil society and NGOs is crucial in the fight against human trafficking and should have received greater attention in the Draft Organic Law. These organizations bring invaluable expertise and insights, advocating for the inclusion of measures that address the specific needs of victims. Their involvement is essential in shaping policies that are both victim-centered and practical. Effective collaboration between government entities, civil society, and other relevant stakeholders is key to ensuring that the legal framework is not merely symbolic but leads to tangible, effective actions that improve the lives of trafficking victims. Without such cooperation, the implementation of the law risks being incomplete and less responsive to the complexities of trafficking.

In conclusion, the publication of the Draft Organic Law on Comprehensive Protection Against Human Trafficking and Exploitation represents an important step toward recognizing and safeguarding the rights of trafficking victims in Spain. Nonetheless, a detailed analysis reveals that while the Draft Organic Law aligns with many essential measures for victim protection, it also presents significant limitations in several critical areas that must be addressed to ensure its effectiveness, particularly in relation to the comprehensive protection of trafficking victims. Therefore, it is essential that the Draft Organic Law moves forward and does not remain stagnant, as was the case with the 2022 proposal. All stakeholders involved in the legislative process must approach this task with ambition, ensuring that Spain implements a comprehensive and effective system for the protection of trafficking victims. This important legislative tool must not only align with the requirements of the European Anti-trafficking Directive but also adhere to the standards established by International Human Rights Law.

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Some international aspects in the fight against online harmful content*

María Chiara Marullo**

Abstract: The growing prevalence of hate speech and incitement to discrimination, violent content, targeting migrants, minority, ethnic communities, and other vulnerable groups, as well as its impact on mental health to harm children, teenagers and moderators, poses significant challenges to democracy and security across the globe. States are bound by international law to combat racial discrimination, xenophobia and incitement to hatred. These standards demand that states take decisive actions against speech that incites national, racial, or religious hatred, discrimination, or violence. However, regulating those contents, especially on social media platforms, becomes increasingly complex as it involves balancing fundamental rights such as freedom of expression with the responsibilities of multinational corporations. The regulation faces considerable challenges in addressing these issues in terms of competent jurisdiction and the responsibilities of the private actors involved. This paper explores these challenges in regulating harmful content online, offering a preliminary analysis of extraterritorial measures adopted by companies, and highlighting the inadequacies of self-regulation. We will specifically examine legal action taken against Meta, emphasizing the need for an effective international legal framework to address these global issues.

Keywords: Hate speech, online harmful content, social media, self-regulation, Meta

Received: November 19, 2024 *Accepted:* December 23, 2024

(A) PREMISES

Social networks, such as Meta, provide efficient platforms for spreading users' ideas potentially rising to the level of harmful content online. Platforms have some internal policies and codes of conduct to regulate and address hate speech and violent content. While these internal policies and the codes of conduct offer a glimmer of hope for controlling hate on the internet, challenges remain due to issues of jurisdiction and technological complexities (like mirror sites), making online regulation an especially daunting task.

Hate speeches and harmful contents are most contentious issues in legislation due to the potential conflict with other fundamental rights[1]. As Professor Camarero Suárez

* The present article is being published as part of the research on hate speech in the framework of the Project: UJI-2024-02 Derecho, matrimonio y factor religioso: nuevos retos, and in the framework of the Project CIGE/2022/63: Oportunidades y desafíos en la implementación de las normas de debida diligencia empresarial en materia de derechos humanos y medio ambiente.

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[1] At the supranational level, Article 10 of the European Convention on Human Rights establishes the right to freedom of expression, but this right is not absolute. It may be subject to restrictions in a democratic

notes, case law consistently emphasizes the need for balancing conflicting rights, seeking maximum protection through a proportionality test that weighs and limits these rights accordingly[2]. In this context, hate speech and violent content present a challenge for defining the boundaries of free expression[3].

While this topic cannot be fully explored here, our research starts from the premise that harmful online content includes any form of expression targeting discriminated or affected groups based on gender, sexual orientation, ethnicity, religion, or other personal or social factors, often focusing on traditionally excluded minorities. Such discourse often originates from radicalized sectors of society, fostering stigmatization and discrimination. It can also harm the mental and physical health of millions of children, teenagers, and moderators, undermining democratic coexistence, social cohesion, and intercultural integration. This study focuses on instances where hostile expressions and contents incite hate against vulnerable groups, and discrimination based on what are known as suspect categories[4]. We specifically examine social media platforms as vehicles for this harmful speech, given their rapid spread and regulatory challenges at both supranational and national levels.

Our research aims to explore the role of social media in the propagation of hate speech or violent content and assess the extraterritorial measures that companies have taken to curb its spread[5]. We will then analyze different lawsuits against Meta an emblematic case of the current challenges of regulations , arguing that the current lack of effective supranational norm and the failure of self-regulatory measures highlight the need for a more robust framework to mitigate the negative impacts of online platforms[6].

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society for reasons such as national security, public safety, or the protection of others' rights. More information at: https://www.echr.coe.int/documents/d/echr/convention_ENG.Similarly, Article 20 of the International Covenant on Civil and Political Rights prohibits advocacy of national, racial, or religious hatred that incites violence, discrimination, or hostility. More information at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights. Moreover, Article 13.5 of the American Convention on Human Rights bans propaganda for war and hate speech targeting individuals or groups based on race, color, religion, or national origin. More information at: https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf. Lastly, Article 17 of the European Convention addresses the abuse of rights, prohibiting any activities aimed at destroying or limiting the rights outlined in the Convention. More information at: https://www.echr.coe.int/documents/d/echr/convention_ENG.

2 On this subject, and being aware of the large volume of works related to the phenomenon of hate speech, we mention the latest article by professor M.V. Camarero Suárez, 'La protección contra la discriminación por identidad sexual en el matrimonio: una respuesta eficaz ante el impaction de la intolerancia', *ISTEL* (2024), and An interesting book coordinated by Professor Eulalia w. Petit de Gabriel, *Valores (y temores) del estado de derecho: libertad de expresión vs. delitos de opinión en derecho internacional*, (Aranzadi 2023).

3 A. Lamson Lucas de Souza Lehfeld, A. Martinez Perez Filho, freedom of speech and hate speech: an american perspective, *R. Dir. Gar. Fund., Vitória*, v. 23, n. 2, p. 31-56, jul./dez. (2022) DOI: http://dx.doi.org/10.18759/rdgf.v23i2.2029.

4 The United States Supreme Court has mentioned different criteria that may qualify a group as a suspect category, and established a judicial precedent for suspect classifications in the cases of *Hirabayashi v. United States*, 320 U.S. 81 (*Hirabayashi v. United States*, 320 U.S. 81 (1943). More information at: https://supreme.justia.com/cases/federal/us/320/81/. Os this issue see also, Jeremy Waldron, 'The Harm in Hate Speech', *The Oliver Wendell Holmes Lectures*, Volume (2009), https://doi.org/10.4159/harvard.9780674065086.

5 N. Alkiviadou, 'Platform liability, hate speech and the fundamental right to free speech', *Information & Communications Technology Law*, 1 11, (2024), at: https://doi.org/10.1080/13600834.2024.2411799.

6 N. Alkiviadou, 'Hate Speech on Social Media Networks: Towards a Regulatory Framework? ', *Information and Communications Technology Law*, 28 (1). (2019), at 19-35.

(B) DIGITAL PLATFORMS: POWERFUL VEHICLES FOR HATE SPEECH AND VIOLENT CONTENT

Social media holds significant potential by improving both the accessibility and quality of data that shape political decisions for the good of society. These platforms provide real-time access to extensive information, enabling decision-makers to act based on more comprehensive and up-to-date evidence[7]. Additionally, the interactive features of social networks allow for the incorporation of diverse viewpoints and the early detection of public concerns or trends[8], which play a crucial role in developing policies that are responsive and aligned with the needs of different communities[9]. At the same time, rapid connection around the globe and the lack of control by states or supranational regulation raise questions about their impacts on human rights[10]. Over recent years, scholars have noted the potential for social media posts to incite violence against individuals or groups[11], often with near impunity[12]. These factors make it increasingly difficult to control online speech, presenting significant risks to those targeted.

It is notorious how Facebook, and now Meta, created with the purpose of connecting people around the world, is being a vehicle for propaganda, among others, in the leakage of data or circulation of fake news that have direct consequences on state political campaigns. At the international level, the scandal became more evident after the discovery of how the platform was allowing the accumulation and use of large

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7 A.Muna Almaududi Ausat, 'The Role of Social Media in Shaping Public Opinion and Its In-fluence on Economic Decisions', *Technology and Society Perspectives (TACIT)* Vol. 1, No. 1, (2023), at 35 44, doi:10.61100/tacit.v1i1.37.

8 S. Arshad, S. Khurram, 'Can government's presence on social media stimulate citizens' online political participation? Investigating the influence of transparency, trust, and responsiveness', *Government Information Quarterly*,(2020).

9 Casteltrione, Isidoropaolo, 'Facebook and political participation: Virtuous circle and participation intermediaries', *Interactions: Studies in Communication & Culture* 7, (2016), at: 177 96.

10 S. González-Bailón, L. Yphtach 'Do Social Media Undermine Social Cohesion? A Critical Review', *Social Issues and Policy Review* (17), (2023), 155 180.

11 A. J. F., Puerta, 'Incitación al odio y colectivos vulnerables, del Derecho internacional al Derecho español: especial referencia al delito de incitación al odio por motivos religiosos', *Revista de la Facultad de Derecho de México*, 73(285), (2023), at: 361 382. A new study has succeeded in demonstrating that it is possible to anticipate the increase of hate crimes in Spain using only social network data. The research modeled data on police complaints of hate crimes reported in Spain between 2016 and 2018, with toxic and hateful messages posted on the same dates on X (formerly Twitter) and Facebook. The results show not only a temporal correlation between the two phenomena, but it has been able to generate a series of predictive models that allow to anticipate with some accuracy when reports will increase. More information at: C. Arcila Calderón, P.Sánchez Holgado, J. Gómez, M. Barbosa, H. Qi, A. Matilla, P. Amado, A. Guzmán, D. López-Matías & T. Fernández-Villazala, 'From online hate speech to offline hate crime: the role of inflammatory language in forecasting violence against migrant and LGBT communities', *Humanities and Social Sciences Communications*, volume 11, Article number: 1369 (2024), at: https://www.nature.com/articles/s41599-024-03899-1.

12 K. Müller, C. Schwarz, *Fanning the Flames of Hate: Social Media and Hate Crime*, (2020), available at SSRN: https://ssrn.com/abstract=3082972 or http://dx.doi.org/10.2139/ssrn.3082972. In this paper the authors investigate the link between social media and hate crime. See also, C. Naganna, A. Sreejith, 'Hate speech review in the context of online social networks', *Aggression and Violent Behavior*, Volume 4, May June 2018, (2018), at: 108-118.

amounts of users' personal data by Cambridge Analytica, a British firm hired by the Trump campaign in 2016[13].

The Secretary-General of the United Nations has highlighted that using the internet to spread hateful expression represents one of the most pressing human rights challenges emerging from technological advancements[14]. Hate messages or violent content on social networks such as Facebook, Tik Tok, Instagram, Youtube, among others, are a real threat to coexistence and security[15]. Large digital platforms can be very powerful vehicles for fake news and hate campaigns[16], especially because of the speed of the internet and its ability to reach every corner of the globe. In recent years, and in the face of pressure from the international community and civil society, efforts have been intensified to minimize the impact of the messages disseminated through social platforms. These efforts have translated into the hiring of specialized teams to detect violations of the rules prohibiting hate speech, discriminatory or terrorist messages.

The Report "Promotion and protection of the right to freedom of opinion and expression" of the General Assembly of the United Nations has established as some of the most relevant current factors in the transmission harmful content online:

1. The speed of information on the Internet;
2. The lack of control of social networks;
3. and the anonymity on the networks makes it difficult to investigate and hold the company accountable[17].

It is worth mentioning that the use of a pseudonym is considered a tool to exercise freedom of expression also in the digital world[18]. Despite this, is important to highlight that research has shown that children were most likely to report having experienced anonymous trolling, which was most prevalent on Instagram, Twitter, Pinterest and Facebook. Violent content was the next most frequent impact, "occurring with highest prevalence on TikTok and YouTube respectively", the report 'childhoods: a survey of

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13 M. Hu, 'Cambridge Analytica's black box', *Big Data & Society*, 7(2). (2020), at: https://doi.org/10.1177/2053951720938091; A. J. Brown, 'Should I Stay or Should I Leave?" *Exploring (Dis)continued Facebook Use After the Cambridge Analytica Scandal* ', *Social Media + Society*, 6(1), (2020), at:https://doi.org/10.1177/2056305120913884;

14 The Secretary-General, 'Preliminary Representation of the Secretary-General on Globalization and Its Impact on the Full Enjoyment of All Human Rights' paras 26-28, U.N. Doc A/55/342 (Aug 31 2000)

15 A. A. Siegel, *Social Media and Democracy: The State of the Field, Prospects for Reform*, (Cambridge University Press 2020), at 56-88. M. Revenga Sánchez *Libertad de expresión y discursos del odio*, (Alcalá de Henares: Universidad de Alcalá 2015), and N. Gabler, 'The Internet and Social Media Are Increasingly Divisive and Undermining of Democracy', *Alternet*, (2016).

16 Commission opens formal proceedings against Meta under the Digital Services Act related to the protection of minors on Facebook and Instagram. Facebook and Instagram were designated as Very Large Online Platforms (VLOPs), May 16, 2024. More information at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2664.

17 J. Palmieri, 'Can Social Media Corporations be held Liable Under International Law for Human Rights Atrocities?', 34, *Pace Int'l L. Rev.* 135, (2022) at: https://digitalcommons.pace.edu/pilr/vol34/iss2/4.

18 C. Véliz, 'Online Masquerade: Redesigning the Internet for FreeSpeech Through the Use of Pseudonyms', *Journal of Applied Philosophydoi*, (2018), doi:10.1111/japp.12342, at: https://philpapers.org/archive/VLIOMR.pdf.

children and parents' said[19]. However, mechanisms should be in place that allow the identity of Internet users to be known when requested by a judge[20].

Nevertheless, in relation to the phenomenon of hate speech, one of the key challenges encountered by countries in regulating and limiting freedom of speech is the different positions of States and the lack of a unanimous consensus on the concept of hate speech in international law[21].

The spread of hate speech or violent content online has prompted initiatives to regulate digital content. However, international law lacks a clear definition. The Special Rapporteur observes that many types of hate speech do not reach the level of severity outlined in Article 20, paragraph 2, of the International Covenant, which mandates that states legally prohibit any advocacy of national, racial, or religious hatred that incites discrimination, hostility, or violence.[22].

It comes as no surprise that the media can be complicit in the commission of certain abuses[23]. Even with traditional media, such as radio, Radio, corrupt governments have used it to disseminate hate speech, as well as to justify their discourse and actions against certain ethnic groups or minorities[24]. One example is the case of the genocide in Rwanda[25], one of the most terrible episodes of recent decades, which registered more than 800,000 deaths in less than 5 months[26]. It is interesting to see how the message of hate was internalized to the point of annihilating any opposition.

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19 Report Downloads Digital childhoods: a survey of children and parents https://www.childrenscommissioner.gov.uk/resource/digital-childhoods-a-survey-of-children-and-parents/

20 Ethnic and racially motivated hate speech has reached the Strasbourg Court on multiple occasions.in the Balázs v. Hungary case n(20 de octubre de 2015), stating emphatically that States parties to the Convention have an obligation to take all necessary measures to investigate racist motivations and to determine whether ethnic hatred or prejudice is behind the commission of any act of racism, the Strasbourg Court held that the State party to the Convention has an obligation to take all necessary measures to investigate racist motivations and to determine whether ethnic hatred or prejudice is behind the commission of any act of racism or ethnic prejudice lie behind the commission of any criminal act.

21 M. Hietanen,J. Eddebo, 'Towards a Definition of Hate Speech With a Focus on Online Contexts', *Journal of Communication Inquiry*, *47*(4), at: 440-458, (2023), at: https://doi.org/10.1177/01968599221124309 and F. Baider,), *Accountability Issues, Online Covert Hate Speech, and the Efficacy of Counter-Speech*, *Politics and governance*, Vol 11, No 2, (2023).

22 Sixty-sixth session Item 69 (b) of the provisional agenda, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, Sixty-sixth session. More information at: https://documents.un.org/doc/undoc/gen/n11/449/78/pdf/n1144978.pdf?OpenElement, p.9-10.

23 M. Nino 'The freedom of expression and hate speech in cyberspace', *la Comunità Internazionale*, fasc. 1/2023 pp. 33-5, Editoriale Scientifica srl, (2023).

24 *Media and Mass Atrocity: The Rwanda Genocide and Beyond*: https://www.cigionline.org/publications/media-and-mass-atrocity-rwanda-genocideand-beyond.

25 D. Rodriguez Vázquez, *El genocidio en Ruanda: análisis de los factores que influyeron en el conflicto*. Documento de Opinión, Instituto Español de Estudios Estratégicos (IEEE), (2017), at:https://www.ieee.es/Galerias/fichero/docs_opinion/2017/DIEEEO592017_Genocidio_Ruanda_DanielRguezVazquez.pdf, and W. Schabas, 'Hate speech in Rwanda. The road to genocide', in M. Lattimer, (Ed.)., *Genocide and Human Rights* (1st ed.), Routledge, 207, (2017), DOI.org/10.4324/9781351157568.

26 D. Yanagizawa-Drott, 'Propaganda and Conflict: Evidence from the Rwandan Genocide', *The Quarterly Journal of Economics*, 129(4):1947 1994,(2014)

In recent decades, the media landcape has changed and evolved, but the spread of hate speech and violent content has not only persisted but escalated. This shift is especially concerning in terms of protecting minorities and vulnerable groups.

In this regard, since 2017, the Facebook platform has been under investigation in the case of illegal acts against the Rohingya minority[27].

Facebook's role in the Rohingya crisis serves as a case study on the dangerous intersections of social media, artificial intelligence, and hate speech. The platform, with over 1.8 billion active users worldwide, became the primary communication tool in Myanmar, where the internet is almost synonymous with Facebook. In this Country, Facebook has become "a near-ubiquitous communications tool, following the opening up of the economy". Given its far-reaching impact, the platform's misuse to disseminate dangerous speech has effectively contributed to sustaining institutionalized discrimination against the Rohingya community[28]. In this regard, this dominance allowed the platform to become a powerful vector for the dissemination of hate speech, particularly against the Rohingya minority, which exacerbated the existing ethnic tensions and served as a channel for justificatory discourses that contributed to the atrocities committed against them[29].

Myanmar's military attacks civilians on since 2017 are a considered a genocide for the control of key cities in Rakhine state[30]. The platform became a tool for government officials, the military and radical Buddhist groups to propagate misinformation and hateful ideologies. Propaganda pages linked to figures like Ashin Wirathu, referred to as the "Burmese Hitler" due to his virulent anti-Muslim rhetoric, proliferated on Facebook. These pages, such as the notorious *Kalar Beheading Gang*, spread dehumanizing messages that portrayed the Rohingya as invaders and threats to Myanmar's national identity. These false narratives fueled widespread animosity toward the Rohingya and contributed to justifying the brutal military campaigns against them.

One key issue identified in the spread of hate speech through Facebook in Myanmar is the platform's reliance on Artificial Intelligence-driven content moderation[31]. The automated systems designed to flag harmful content failed to keep pace with the volume

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27 U.N. investigators cite Facebook role in Myanmar crisis, en: https://www.reuters.com/article/us-myanmar-rohingya-facebook/u-n-investigatorscite-facebook-role-in-myanmar-crisis-idUSKCN1GO2PN. And J.Young, P. Swamy and D. Danks, *Beyond AI: Responses to Hate Speech and Disinformation*, at: http://jessica-young.com/research/Beyond-AI-Responses-toHate-Speech-and-Disinformation.pdf.

28 On this subject see: Social Media, Artificial Intelligence, and Hate Speech in Myanmar Case Study, This case study was utilized at an AI and Human Rights workshop, held at the Data & Society Research Institute on April 26-27, 2018. More information at: https://datasociety.net/wp-content/uploads/2018/09/Social-Media-Artificial-Intelligence-and-Hate-Speech-in-Myanmar_Case-Study_Final.pdf.

29 L. Arenal, 'Limitaciones y alcance de la responsabilidad de las empresas proveedoras de servicios en el discurso de odio online. El caso de Meta en la incitación al genocidio Rohingya', *Cuadernos de Derecho Transactional*, vol. 15, n.2, pp.141-166. (2023).

30 F. J. Zamora Cabot and M. C. Marullo, 'El conflicto rohingya y sus proyecciones jurídicas: aspectos destacados', *Ordine internazionale e diritti umani*, pp. 461-484, (2020).

31 Report Amnisty International: *Myanmar: Facebook's systems promoted violence against Rohingya; Meta owes reparations.* More information at: https://www.amnesty.org/en/latest/news/2022/09/myanmar-facebooks-systems-promoted-violence-against-rohingya-meta-owes-reparations-new-report/.

and context-specific nature of the hate speech emerging in Myanmar[32]. Facebook's Artificial Intelligence struggled to accurately interpret content in Burmese and other local languages, allowing large amounts of inflammatory and dangerous rhetoric to go unchecked. According to Data & Society's report, this technological shortcoming highlights the risks of over-relying on Artificial Intelligence for content moderation, particularly in contexts where local linguistic and cultural nuances are critical for identifying harmful content[33].

While Facebook's role in amplifying hate speech is well documented, the platform's failure lies not only in its Artificial Intelligence systems but also in its human oversight[34]. Facebook was slow to act on repeated warnings from civil society groups and international organizations about the rise of hate speech on its platform. As the Data & Society report highlights, Facebook's reliance on under-resourced and inadequately trained human moderators exacerbated the problem, particularly in regions like Myanmar, where understanding of the local political and cultural dynamics was essential for identifying harmful content. In sum, the platform's response to these failures has been characterized as reactive rather than proactive, leading to criticism for its lack of accountability[35].

The case of Myanmar also illustrates the broader challenges posed by the global nature of platforms like Facebook, which are governed by algorithms and content moderation policies designed in one cultural context but applied universally[36]. The automated systems, which are often effective in English-speaking and Western contexts, proved woefully inadequate in Myanmar[37]. This failure underscores the importance of developing Artificial Intelligence systems that are sensitive to local languages and contexts to prevent the amplification of harmful speech in conflict zones. This negligence facilitated the spread of propaganda that dehumanized the Rohingya, labeling them as outsiders and enemies, thus justifying their mistreatment. The consequences of this unchecked spread of hate speech and violent content have led to international calls for greater regulation of social media platforms, particularly in conflict-affected regions[38].

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32 C.Crystal, *Facebook, Telegram, and the Ongoing Struggle Against Online Hate Speech*
Case studies from Myanmar and Ethiopia show how online violence can exacerbate conflict and genocide—and what social media companies can do in response https://carnegieendowment.org/research/2023/09/facebook-telegram-and-the-ongoing-struggle-against-online-hate-speech?lang=en; J Sablosky 'Dangerous organizations: Facebook's content moderation decisions and ethnic visibility in Myanmar'. *Media, Culture & Society*, 43(6): 1017 1042, (2021).

33 *Content OR context moderation, Community-Reliant, and Industrial Approaches.* More information at: https://datasociety.net/wp-content/uploads/2018/11/DS_Content_or_Context_Moderation.pdf

34 Amnesty InternAational: Myanmar: *The social atrocity: Meta and the right to remedy for the Rohingya*, 2022. More information at: https://www.amnesty.org/en/documents/asa16/5933/2022/en/.

35 Myanmar: UN Fact-Finding Mission releases its full account of massive violations by military in Rakhine, Kachin and Shan States, 2018, https://www.ohchr.org/en/press-releases/2018/09/myanmar-un-fact-finding-mission-releases-its-full-account-massive-violations.

36 See 'From online hate speech to offline hate crime: the role of inflammatory language in forecasting violence against migrant and LGBT communities', supra note 13.

37 C. Crystal, supra note 34.

38 See, United Nations, *Hate speech and real harm*, https://www.un.org/en/hate-speech/understanding-hate-speech/hate-speech-and-real-harm#collapseFour.

In 2019, Facebook was also implicated in the massacre of Muslims in a mosque in New Zealand by an extremist who spread the video live[39]. Or in the Molly case[40], which has also laid the groundwork for specific UK legislation to improve moderation measures on social networks and provide for more effective measures to combat child injury and suicide.

Given the social concern about the rejection of certain religions or against certain minorities or the impacts on mental and physical health, it is urgent to analyze the incidence of the so-called hate speech and violent content on social networks, and how to effective address this problem[41].

(C) SUPRANATIONAL EFFORTS TO COMBAT HARMFUL CONTENT ONLINE

The UN has launched multiple initiatives to address hate speech, including Resolution 16/18[42] and the Rabat Plan of Action, which help distinguish between blasphemy and hate speech[43]. The Rabat Plan provides a six-part test to differentiate between offensive speech and illegal hate speech, considering context, speaker, intent, content, reach, and likelihood of harm. In 2018, the UN Secretary-General introduced a strategy to combat rising global hate speech through social and political measures, without advocating for legal restrictions on speech[44]. Resolution 16/18, together with its intergovernmental

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39 More information at: https://www.cnbc.com/2019/03/19/australias-pm-restrictsocial-media-after-christchurch-mosque-attack.html. Consultado el día 2 de abril de 2019.

40 Due to the platform's algorithm, Molly Russell, the 14-year-old girl who decided to end her life, was receiving suicide-related images. On this issue see, A. Orben, T. Dienlin, A. K. Przybylski, 'From online hate speech *Social media's enduring effect on adolescent life satisfaction*'From online hate speech, *Proceedings of the National Academy of Sciences of the United States of America*, 116(21), 10226 10228. (2019), doi: 10.1073/pnas.1902058116. C. Rodway, S. G. Tham, N. Richards, S. Ibrahim, P. Turnbull, N. Kapur and L. Appleby, 'Online harms? Suicide-related online experience: a UK-wide case series study of young people who die by suicide ', *Psychol Med*. (2023), Jul;53(10): doi: 10.1017/S0033291722001258. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10388316/.

41 B. Di Fátima (Ed.), *Hate Speech on Social Media, A Global Approach*, (LabCom Books & EdiPUCE, 2023), at: https://labcomca.ubi.pt/wp-content/uploads/2023/05/Hate-Speech-on-Social-Media.pdf.

42 Among others, Resolution adopted by the Human Rights Council* 16/18 Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief, Human Rights Council Sixteenth session Agenda item 9 Racism, racial discrimination, xenophobia and related form of intolerance, follow-up and implementation of the Durban Declaration and Programme of Action, more information at: https://documents.un.org/doc/resolution/gen/g11/127/27/pdf/g1112727.pdf. General Assembly of the United Nations, 20/8. The promotion, protection and enjoyment of human rights on the Internet, 16 July 2012, https://documents.un.org/doc/resolution/gen/g12/153/25/pdf/g1215325.pdf.
On this issue, see U. Kohl, 'Platform regulation of hate speech a transatlantic speech compromise?', *Journal of Media Law*, (2022), DOI: 10.1080/17577632.2022.2082520.

43 The Rabat Plan of Action, 5 October 2012, Freedom of opinion and expression, 'The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence brings together the conclusions and recommendations from several OHCHR expert workshops.", https://www.ohchr.org/en/documents/outcome-documents/rabat-plan-action.

44 The UN Strategy and Plan of Action, more information at: https://www.un.org/en/hate-speech/un-strategy-and-plan-of-action-on-hate-speech. The initiative has two primary goals. The first is to strengthen UN efforts in addressing the root causes and underlying factors of hate speech. This aligns with the Secretary-General's prevention agenda, which aims to tackle violence, marginalization, and discrimination by

implementation mechanism, the Istanbul Process[45], serves as the primary international framework for addressing hate speech. The Council of Europe's Additional Protocol to the Convention on Cybercrime[46] is the only document specifically crafted to address online hate-related activities. Focused on the criminalization of racist and xenophobic acts committed through computer systems, the Protocol was adopted in 2003 and came into force in 2006; it addresses the criminalization of racist and xenophobic acts committed via computer systems, and acknowledges the risk of misuse or abuse of such systems to disseminate racist and xenophobic propaganda. While attentive to concerns about free expression, the Council underscores the need for regulation. Organizations like UNESCO have also further supported civil society-based action plans to prevent violent extremism and promote tolerance[47].

An interesting initiative is the development of the Santa Clara Principles on transparency and accountability in content moderation'[48]. In May 2018, a group of organizations, advocates, and academics joined forces to establish these principles in response to increasing worries about the opaque and unaccountable practices of internet platforms in developing and implementing their content moderation policies. The principles set forth baseline requirements that tech companies must follow to ensure sufficient transparency and accountability in their approaches to removing user content or suspending accounts that breach their guidelines.

> *The Principles emerged from a collaborative endeavour involving human rights organisations, advocates, and academic experts. They provide a set of standards for social media platforms, emphasising the need for meaningful transparency and accountability in content moderation, guided by a human rights-centered approach. It is notable that major social media companies have endorsed these principles*[49]

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emphasizing early warning, early action, and preventive approaches to human rights. The second goal is to support effective UN responses to the societal impact of hate speech. To achieve this, the initiative balances two perspectives. While it adopts a broad view of what qualifies as incitement to discrimination, hostility, and violence, it focuses on fostering positive counter-narratives rather than restricting freedom of expression. The plan of action outlines 13 commitments the UN aims to undertake, such as monitoring and analyzing hate speech's root causes, providing support for its victims, using mediation strategies, improving the use of technology and education, collaborating with social media companies, enhancing UN staff skills, and engaging in advocacy to spotlight concerning hate speech trends.

45 The Istanbul Process is the dedicated mechanism for follow-up on the implementation of the action plan set out in Human Rights Council resolution 16/18 and its counterpart at the General Assembly, resolution 66/167. More information at: https://www.istanbulprocess1618.info/about/.

46 Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems Strasbourg, 28.I.2003, https://rm.coe.int/168008160f.

47 On this point see also, Organization for Security and Co-operation in Europe Vienna, August 2018, The Role of Civil Society in Preventing and Countering Violent Extremism and Radicalization that Lead to Terrorism A Guidebook for South-Eastern Europe, and the United Nations Development Programme, Preventing Violent Extremism Through Promoting Inclusive Development, Tolerance And Respect For Diversity. A development response to addressing radicalization and violent extremism, https://www.undp.org/sites/g/files/zskgke326/files/publications/Discussion%20Paper%20-%20Preventing%20Violent%20Extremism%20by%20Promoting%20Inclusive%20%20Development.pdf

48 See the Santa Clara Principles https://santaclaraprinciples.org/.

49 A. Hatano, 'Regulating Online Hate Speech through the Prism of Human Rights Law: The Potential of Localised Content Moderation', *The Australian Year Book of International Law Online*, (2023), at: https://brill.com/view/journals/auso/41/1/article-p127_6.xml#ref_FN0000068.

Other interesting initiatives are the Recommendation of the Council on Children in the Digital Environment where the principles for a safe and beneficial digital environment for children are established[50] and the G7 Digital and Technology Track Annex 3: Safety Principles[51].

At the European level, the European Commission's assessment of the Code of Conduct on hate speech online[52], launched in 2016, highlights the significant strides made by major platforms in combating hate speech, but also points to areas for improvement[53]. The Code was established to ensure faster removal of illegal content, particularly hate speech targeting various minority groups. Major tech platforms like Facebook, Twitter, Google, Microsoft, and others voluntarily signed the Code, committing to a set of guidelines designed to tackle the spread of illegal and harmful content. One of the key goals of the Code of Conduct is to enhance transparency and promote cooperation between platforms, civil society, and authorities to ensure quicker and more efficient action against hate speech. According to the 2019 assessment, platforms improved their response times significantly[54]. The removal rate of hate speech content that had been flagged by users within 24 hours rose to 72%, compared to just 28% in 2016, which constitutes a remarkable increase. However, while these numbers are promising, the report stresses that platforms need to continue refining their community standards and moderation processes.

The evaluation also emphasizes the increasing importance of artificial intelligence and automated tools in identifying and moderating hate speech. The report highlights that automated tool are becoming a more effective way to detect and act upon harmful content, with many platforms deploying such technologies to supplement human moderation efforts. Despite this progress, the report notes that there is still insufficient data on the volume of hate speech being flagged and removed. This gap in data collection impedes a more detailed understanding of the nature and scope of the problem.

Another concern raised in the assessment is the need for platforms to enhance their collaboration with trusted flaggers, which are external organizations and experts who

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50 More information at: OECD Legal Instruments, Recommendation of the Council on Children in the Digital Environment, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0389.

51 Ministerial and Other Meetings G7/8 Digital and Technology Ministers, G7 Digital and Technology Track Annex 3: G7 Internet Safety Principles, 2021 at: https://g7.utoronto.ca/ict/2021-annex_3-internet-safety.html.

52 European Commission. Code of conduct on countering illegal hate speech online. https://ec.europa.eu/newsroom/just/document.cfm?doc_id=42985

53 About Islamophobia, N. P. Guedes, A. A Padrón, A. A., 'Herramientas jurídicas para combatir la islamofobia en la Unión Europea', *Revista Científica Universitaria Ad Hoc*, 2(5), at: 48-58 (2021).

54 Assessment of the Code of Conduct on Hate Speech on line State of Play, Brussels, 27 September 2019 (OR. en), European Commission To: Permanent Representatives Committee/Council, https://commission.europa.eu/document/download/a5c92394-8e76-434a-9f3a-3a4977d399bb_en?filename=assessment_of_the_code_of_conduct_on_hate_speech_on_line_-_state_of_play_.pdf, and the Monitoring rounds Factsheet 7th monitoring round of the Code of Conduct at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en. See also, report IPSOS-UNESCO Study on the impact of online disinformation during election campaigns. Survey on the impact of online disinformation and hate speech September 2023, a global survey on the impact of online disinformation and hate speech, https://www.ipsos.com/sites/default/files/ct/news/documents/2023-11/unesco-ipsos-online-disinformation-hate-speech.pdf.

identify illegal content. This collaboration has proven effective, with trusted flaggers often reporting hate speech more quickly and accurately. However, the report stresses that such collaboration must be further strengthened to ensure better oversight and to improve the overall response to flagged content.

Additionally, the European Commission's assessment touches on the need for greater transparency and accountability from platforms regarding their content moderation policies. While platforms have made strides in adhering to the Code of Conduct, they must do more to provide clear information about their content removal processes and the decisions made when handling reported content. This is crucial for ensuring public trust and ensuring that moderation efforts are consistent and aligned with legal requirements. Despite these advancements, the Commission's assessment acknowledges that the current framework, while helpful, is not sufficient to fully address the challenges of online hate speech. The document calls for ongoing improvements and monitoring of the Code's implementation, with an emphasis on the need for stronger regulatory measures.

It also advocates for better coordination between national authorities, the platforms, and civil society to ensure that hate speech is effectively tackled across the EU. Looking ahead, the European Commission plans to continue its work in developing and refining online hate speech regulations. The Code of Conduct has laid the foundation for these efforts, but the growing prevalence of harmful content online means that a more robust approach is required. This includes not only technological innovations but also better alignment of legal frameworks, stronger collaboration with external stakeholders, and greater transparency in decision-making processes. These efforts aim to ensure that the EU remains a leader in the fight against online hate speech, while also preserving the core values of freedom of expression and privacy[55].

Also of major interest is The European Commission's strategy for online platforms revolves around fostering an environment that promotes fair competition, innovation, and user protection. At its core, the Commission emphasizes four guiding principles: Level Playing Field: Ensuring all digital services are subject to comparable regulations, enabling fair competition. Responsible Behavior: Platforms must act responsibly, safeguarding fundamental rights and societal values. Trust and Transparency: Platforms must be transparent about their operations, including content moderation and data use, to build user trust. Open and Non-Discriminatory Markets: Encouraging open markets while maintaining a fair, non-discriminatory approach to data use and platform access[56].

These principles are aimed at ensuring a balanced, secure, and innovative digital ecosystem in the EU, while addressing the rapid pace of technological advancement. However, the challenges lie in implementing these principles effectively, ensuring consistency across member states, and adapting to emerging digital trends. The

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55 E. Nave, L.Lane, *'Countering online hate speech: How does human rights due diligence impact terms of service?* ', *Computer Law & Security Review*, Volume 51, (2023), at: https://doi.org/10.1016/j.clsr.2023.105884.

56 Shaping Europe's digital future. Online Platforms. "The European Commission aims to foster an environment where online platforms thrive, treat users fairly and take action to limit the spread of illegal content". More information at: https://digital-strategy.ec.europa.eu/en/policies/online-platforms.

Commission's ongoing efforts seek to establish a framework that benefits both users and businesses, while fostering innovation.

In this strategy, the Digital Service Act[57]introduced by the European Commission in December 2020plays a central role. introduced by the European Commission in December 2020. This Act constitutes regulatory proposal aimed at standardizing the definition of illegal content across platforms and establishing procedures for its removal. As a result, the decision to remove online content is delegated to each platform a private entity that, in turn, entrusts the function of censorship to individuals who must make decisions based on broad, self-regulation standards.. Furthermore, these decisions are made in a matter of seconds, despite the fact that a constitutional right is at stake: freedom of expression:

> *The EU's digital services act (DSA) helps combat propaganda, misinformation and fake news online by introducing strict requirements for online platforms: accountability for illegal content and fines for non-compliance, transparency in how algorithms work, user reporting tools and stricter ad rules, risk assessments on harmful information, crisis response to limit fake info during emergencies, independent audits of efforts against illegal content*[58].

The Digital Services Act applies to all online intermediaries in the EU[59]. Facebook and Instagram were designated as Very Large Online Platforms under the EU's Digital Services Act[60], as they both have more than 45 million monthly active users in the EU. As Very Large Online Platforms, Facebook and Instagram had to start complying with a series of obligations set out in the norm. However, there are currently no binding rules to stop online hate speech, either at the European level.

Other very relevant aspects are the regional efforts to regulate the work of moderators of digital platforms. Unfortunately, this work can lead to numerous problems due to the precarious working conditions of moderators and the effects on their mental health. In the report of the European Agency OASH, *Occupational safety and health risks of online content review work provided through digital labour platforms*[61], the risks faced by moderators are mentioned: A) Emerging risks and B) Psychosocial risks and stress.

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57 The Digital Services Act, Ensuring a safe and accountable online environment, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en.

58 Digital Service Act, 'The EU's digital services act (DSA) aims to create a safer, more transparent internet. By making online platforms accountable for the way they manage and moderate content, the DSA helps combat the spread of harmful content online'. https://www.consilium.europa.eu/es/policies/how-the-eu-combats-harmful-content-online/

59 On the the extraterritorial implications of the Digital Services Act, see Laureline Lemoine & Mathias Vermeulen (AWO) analysis, 'As the enforcement of the Digital Services Act (DSA) is gathering speed, a number of non-EU based civil society and research organizations have wondered to what extent the DSA can have an impact on their work. This blog post provides a concise overview of the areas and provisions within the Digital Services Act that are most pertinent to the issue of extraterritorial application of the Regulation', at: https://dsa-observatory.eu/2023/11/01/the-extraterritorial-implications-of-the-digital-services-act/.
N. Ikiviadou, 'Platform liability, hate speech and the fundamental right to free speech', *Information & Communications Technology Law*, 1 11. (2024), at: https://doi.org/10.1080/13600834.2024.2411799.

60 More information at: DSA: Very large online platforms and search engines, https://digital-strategy.ec.europa.eu/en/policies/dsa-vlops.

61 Occupational safety and health risks of online content review work provided through digital labour platforms. More information at: https://osha.europa.eu/sites/default/files/2022-03/OSH_implications_of_online_content.pdf.

Initially, content review and moderation on social media platforms were primarily managed by volunteers from the community of users. However, with the exponential growth in both the amount of content and the number of users, the task has become much more complex. Content moderators now face the challenge of reviewing vast amounts of posts, images, and videos, some of which may be live on the platform in real time. These workers must identify, categorize, verify, and validate content. This can involve tasks such as tagging objects in photos or videos and categorizing text based on keywords. Moderators are given only a few seconds to go through each step and decide whether specific content should be allowed on the platform. The content under review can include pornography, violent images, homophobic, misogynistic, or racist posts, scams, hate speech, conspiracy theories, harassment, threats, cyberbullying, and other illegal or abusive material. We can affirm that the online content review work provided through digital labour platforms is stressful, emotionally and physically demanding, and can lead to musculoskeletal disorders[62]. Digital labour platforms do not address such severe occupational safety and health (OSH) risks, or do so in a limited way. This will lead to a reconsideration of the position of European institutions regarding occupational diseases.

(D) EXTRATERRITORIAL MEASURES IN STATE REGULATION

Moving on to analyze some developments on this topic from a state's perspective, we have to start from a premise: States have different conceptions of what exactly freedom of expression on social networks should entail and the limits that can be imposed on it[63]. However, there is a growing positioning on the minimum elements for combating hate speech when the latter can have a significant impact on human rights. Furthermore, the extraterritorial nature national norms means that non-territorial companies are also subject to their provisions. This global reach poses significant challenges, as tech companies must navigate compliance with various laws across multiple jurisdictions, all of which may have conflicting standards for content moderation.

A study made in 2021 proved a link between hateful content on Facebook inciting violence against refugees and the increase in actual physical violence on migrants on EU countries[64]. From this perspective, we question whether the state measures, which are also applied beyond the territory — such as in the country where the company is based — are actually effective, or if, on the contrary, they are failing to control and mitigate the negative impacts of hate speech on social media.

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62 M.C. Urzi Brancati, A. Pesole and E. Fernandez Macias, *New evidence on platform workers in Europe*, EUR 29958 EN, Publications Office of the European Union, Luxembourg, (2020), ISBN 978-92-76-12949-3 (online), doi:10.2760/459278 (online), JRC118570, Available at: https://publications.jrc.ec.europa.eu/repository/handle/JRC118570.

63 M. García Santos, 'El límite entre la libertad de expresión y la incitación al odio: análisis de las sentencias del Tribunal Europeo de Derechos Humanos', *Comillas Journal of International Relations*, nº. 10, (2017), R. PALOMINO, 'Libertad religiosa y libertad de expresión', *Ius Canonicum*, XLIX, nº. 98, (2009).

64 M. Cinelli, M., A. Pelicon, I. Mozetič, I. *et al. Dynamics of online hate and misinformation*, *Sci Rep* 11, 22083, (2021), https://doi.org/10.1038/s41598-021-01487-w.

The French online hate speech bill, adopted in May 2020, mandates platforms to remove illegal content such as racism and antisemitism within 24 hours of receiving a user complaint. If platforms fail to comply, they face hefty fines, potentially up to €1.25 million. While the bill aims to combat the rising tide of hate speech online, critics argue it risks over-censorship and might infringe on freedom of expression, leading to the suppression of legitimate speech. The law exemplifies France's stringent approach to online content regulation in Europe.

In Germany, the NetzDG (Netzwerkdurchsetzungsgesetz), or Facebook Act, is a law passed in 2018 aimed at enhancing the enforcement of legal accountability for social media platforms. The legislation primarily targets major platforms, including Facebook, Twitter, YouTube, and other social networks with over 2 million users within Germany[65]. It was introduced in response to growing concerns over the spread of harmful and illegal content, such as hate speech, extremist propaganda, and misinformation that were being disseminated rapidly through social media channels. The central aim of the norm is to ensure that social media platforms take immediate and effective action against illegal content.

The law imposes strict duties on these platforms to monitor, report, and remove content that breaches German laws, particularly those concerning hate speech, violent extremism, and other forms of illegal online behavior.

Under this framework, platforms are required to establish efficient reporting systems; Platforms must offer users an accessible and simple process for reporting illegal content. This applies mainly to hate speech, content that promotes violence, or terrorist content. Once a report is submitted, platforms are required to review the flagged content within 24 hours if it is clearly illegal, and remove it within 7 days. If the content is less obvious but potentially unlawful, platforms are given up to 7 days to assess and act on it. The law mandates that platforms produce detailed biannual transparency reports. These reports must outline the number of user complaints received, how many pieces of content were removed or blocked, and the platform's response to those complaints. This is intended to foster greater accountability and transparency[66]. If a platform fails to comply with the law's requirements such as not removing illegal content promptly or failing to submit transparency reports it may face heavy fines. The maximum penalty for non-compliance is €50 million[67]. The text clarified that the fines could only be levied against firms that "systematically" evaded the law.

The NetzDG primarily targets content that is explicitly illegal under German law. This includes:

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65 T. Kasakowskij, J. Fürst, J. Fischer, K.J. Fietkiewicz, 'Network enforcement as denunciation endorsement? A critical study on legal enforcement in social media', *Telematics and Informatics*, Volume 46, (2020)https://doi.org/10.1016/j.tele.2019.101317.

66 P. Zurth, T*he* 'German NetzDG as Role Model or Cautionary Tale? Implications for the Debate on Social Media Liability', *31 Fordham Intell. Prop. Media & Ent. L.J.* 1084, (2021).

67 S. Maaß, J. Wortelker, A. Rott, ' Evaluating the regulation of social media: An empirical study of the German NetzDG and Facebook', *Telecommunications Policy*, Volume 48, Issue 5, (2024), https://doi.org/10.1016/j.telpol.2024.102719.

1. Hate Speech: Content that incites discrimination, hostility, or violence against individuals or groups based on protected characteristics, such as race, ethnicity, religion, or gender.
2. Terrorist Content: Posts that promote or glorify terrorist activities or groups.
3. Child Sexual Exploitation: Content that involves the abuse or exploitation of children[68].

The law ensures that freedom of expression remains intact by excluding content that does not meet the thresholds of illegality, thus safeguarding legitimate political and social discourse[69]. Nevertheless, despite its intention to combat harmful content, the NetzDG has faced significant criticism[70]. A major concern is the potential for over-censorship[71]. Platforms, fearing the possibility of hefty fines, may adopt an overly cautious approach, leading to the removal of content that does not necessarily breach legal standards. This could result in legitimate expressions, political opinions, and controversial but lawful content being unnecessarily censored, infringing upon freedom of speech. Another concern is the operational burden placed on platforms, especially smaller ones[72]. While large social networks may have the resources to comply with the stringent requirements, smaller platforms may struggle to establish effective content moderation systems[73]. The law's scope and demands may unintentionally create a disparity in how platforms manage and enforce the law, which could also discourage new entrants to the market[74].

Though the NetzDG applies only to platforms operating in Germany, its impact has reverberated globally. The law has become a point of reference for other countries considering similar approaches to regulating harmful content online. Several nations, particularly within the European Union, have studied its provisions and effectiveness, and some have moved towards adopting their own regulatory frameworks inspired by Germany's model[75].

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68 More information at: Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz-NetzDG) https://www.gesetze-im-internet.de/netzdg/BJNR335210017.html.

69 H. Tworek and P. Leerssen, *An Analysis of Germany's NetzDG Law*, Transatlantic Working Group, (Amsterdam University 2019), More information at: https://pure.uva.nl/ws/files/40293503/NetzDG_Tworek_Leerssen_April_2019.pdf.

70 C. Donaldson, 'Militant Moralism: The Hegemonic Consequences of German Content Moderation', *German Law Journal*,25(3), at: 497-513, (2024), doi:10.1017/glj.2024.18.

71 Op. Cit. P. Zurth, supra note 69, And J. Ogaki, *German Content Moderation and Platform Liability Policies*, (2024), More information at: https://jsis.washington.edu/news/german-content-moderation-and-platform-liability-policies/.

72 R. Griffin, 'New School Speech Regulation and Online Hate Speech: A Case Study of Germany's NetzDG', *SSRN Electronic Journal*, 2021ff10.2139/ssrn.3920386.

73 L. M. Neudert, 'Reclaiming Digital Sovereignty: Policy and Power Dynamics Behind Germany's NetzDG', *Journal of Information Policy*, (2024), at:https://doi.org/10.5325/jinfopoli.14.2024.0013.

74 W. Echikson and O. Knodt (2018), 'Germany's NetzDG: A key test for combatting online hate', research Paper No. 2018/09 CEPS, November 2018, https://cdn.ceps.eu/wp-content/uploads/2018/11/RR%20No2018-09_Germany's%20NetzDG.pdf.

75 A. Brown, *Models of Governance of Online Hate Speech On the emergence of collaborative governance and the challenges of giving redress to targets of online hate speech within a human rights framework in Europe*, Documents and Publications, Production Department (SPDP), Council of Europe 2020. More information at: https://rm.coe.int/models-of-governance-of-online-hate-speech/168096671d.

The extraterritorial nature of the law also complicates things for companies operating internationally. Platforms must comply with the law's requirements for their German users, even if they are headquartered outside of Germany, potentially leading to challenges in reconciling conflicting regulatory standards across different jurisdictions[76]. This Act represents a critical step in regulating harmful online content and increasing the responsibility of social media platforms. By imposing clear duties on platforms to monitor and remove illegal content, it seeks to protect users from online harm while maintaining a balance with freedom of expression. However, the law is not without its challenges, particularly concerning its potential to infringe upon free speech and the burden it places on smaller platforms:

> *Supporters see the legislation as a necessary and efficient response to the threat of online hatred and extremism. Critics view it as an attempt to privatise a new 'draconian' censorship regime, forcing social media platforms to respond to this new painful liability with unnecessary takedowns. This study shows that the reality is in between these extremes. NetzDG has not provoked mass requests for takedowns. Nor has it forced internet platforms to adopt a 'take down, ask later' approach. Removal rates among the big three platforms ranged from 21.2% for Facebook to only 10.8% for Twitter. At the same time, it remains uncertain whether NetzDG has achieved significant results in reaching its stated goal of preventing hate speech. Evidence suggests that platforms are wriggling around strict compliance. Consider Facebook. The social network makes it difficult to fill out NetzDG complaints. Instead, Facebook prefers to cite their murkily defined community standards to take down vast amounts of content* [77].

As such, the NetzDG continues to be a subject of debate, both within Germany and internationally, with its outcomes likely shaping the future of online content regulation globally.

Another regulation we can mention is the Australian norm on hate speech[78] a law that imposed stringent penalties on platforms like Facebook, YouTube, and Instagram for failing to remove violent or terrorist content. In this context, the legislator has implemented some of the most progressive legal measures to address hate speech and violent content against individuals and indigenous Peoples. Among the broader population, studies reveal that approximately 14% of adults have been subjected to online hate speech[79].

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76 O. Butler and S. Turenne 'The regulation of hate speech online and its enforcement a comparative outlook', *Journal of Media Law*, 14(1), at: 20 24, (2022), at: https://doi.org/10.1080/17577632.2022.20922. On the topic of internet jurisdiction and extraterritoriality, see the paper: M. Geist, 'Is there a there there? Toward greater certainty for internet jurisdictio' (2001), at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=266932.

77 W. Echikson and O. Knodt, 'Germany's NetzDG: A key test for combatting online hate', Supra note 76.

78 The Online Safety Act (the Act) No. 76, 2021 Compilation No. 2, Compilation date: 14 October 2024, Includes amendments: Act No. 39, 2024 https://www.legislation.gov.au/C2021A00076/latest/text. See Online Safety report. https://www.esafety.gov.au/sites/default/files/2020-01/Hate%20speech-Report.pdf?v=1731426825835.

79 See the eSafety Commissioner (eSafety) in Australia Report, Online hate speech, Findings from Australia, New Zealand and Europe, 2019, https://www.esafety.gov.au/sites/default/files/2020-01/Hate%20speech-Report.pdf?v=1731672547851. K. Gelber and L McNamara 'The Effects of Civil Hate Speech Laws: Lessons from Australia', *Law & Society Review*, 49(3):631-664. (2015), doi:10.1111/lasr.12152 and M. Smith, M. Nolan, and J. Gaffey, 'Online safety and social media regulation in Australia: eSafety Commissioner v X Corp.', *Griffith Law Review*, at: 1 17, (2024). https://doi.org/10.1080/10383441.2024.2405760.

The legislation mandates fines of up to 10% of the platform's annual global revenue and potential prison sentences for executives responsible for failing to activate control mechanisms. This type of legislation points to the growing recognition that platforms must be held accountable for the content they host and the role they play in facilitating or exacerbating violence[80].

In addition, the UK Online Safety Bill[81] to address the growing concerns over the spread of harmful content on digital platforms, from social media networks to search engines. The bill targets online harm such as cyberbullying, hate speech, terrorist content, and disinformation, requiring platforms to take active measures to prevent, detect, and remove such content. Under the bill, companies would be legally obligated to protect their users from harm, and failure to comply would result in substantial penalties. The bill proposes that platforms must have a clear and accessible reporting mechanism for users, along with robust content moderation policies. A key feature of the bill is its focus on "duty of care"[82], which holds tech companies accountable for the safety of their users, especially minors. This duty is central to the bill's goal of balancing user safety with the protection of freedom of expression.

The Bill's approach is to place a duty of care on internet service providers of both user-to-user services in which users interact with each other online (CHAPTER 2). Providers of user-to-user services: duties of care). The duty of care is framed in broad terms in the Bill, but it is composed of three distinct duties to protect users from illegal content, to take additional protective measures to make their site safe and to take additional measures to protect all users from content that is harmful without being illegal, if the service is of a sufficient reach and magnitude[83].

However, critics argue that there is a risk of overreach, with the potential to lead to overzealous content moderation, which could stifle free speech[84]. Supporters of the bill argue that it holds these companies accountable for fostering safer online environments[85]. However, critics have pointed out that platforms may resort to overly

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80 A. Brown, *Models of Governance of Online Hate Speech On the emergence of collaborative governance and the challenges of giving redress to targets of online hate speech within a human rights framework in Europe*. Supra note 77.

81 Online Safety Act 2023, Government Bill, Originated in the House of Commons, Sessions 2021-22, 2022-23. More information at: https://bills.parliament.uk/bills/3137.

82 'The Online Safety Bill extends services' duty of care to include the regulation of legal but harmful material. We argue both that this extension overburdens developers with responsibility at pain of penalty for legal content and that the specific framing of this provision risks a regulatory slippery slope toward wider censorship', Markus Trengove, Emre Kazim, Denise Almeida, Airlie Hilliard, Sara Zannone, Elizabeth Lomas, A critical review of the Online Safety Bill, Patterns, Volume 3, Issue 8, 2022, https://doi.org/10.1016/j.patter.2022.100544.

83 More information at: https://www.legislation.gov.uk/ukpga/2023/50/enacted.

84 On this topic: Peter Guest, The UK's Controversial Online Safety Act Is Now LawThe UK government says its Online Safety Act will protect people, particularly children, on the internet. Critics say it's ineffective against dangerous misinformation and may be a threat to privacy, 2023, https://www.wired.com/story/the-uks-controversial-online-safety-act-is-now-law/.

85 'National Society for the Prevention of Cruelty to Children hailed the bill's passage as 'a momentous day for children," there has been strong pushback from civil liberties groups as well as tech companies' C. Chin-Rothmann, T. Rajic and E. Brown, *Critical Questions, A New Chapter in Content Moderation: Unpacking the UK Online Safety Bill*, (2023), at: https://www.csis.org/analysis/new-chapter-content-moderation-unpacking-uk-online-safety-bill.

restrictive content moderation policies or even censorship to avoid penalties, which could unintentionally infringe on users' right to free speech[86]. Additionally, there is concern over whether platforms have the capacity and expertise to moderate complex content effectively, especially in diverse cultural and social contexts.

It has faced others critics from various stakeholders.

> *As expected, the Government's intention to show "global leadership with our groundbreaking laws to usher in a new age of accountability for tech and bring fairness and accountability to the online world" was met by support from the child protection community, but suspicion and warnings from digital rights and civil society organisations. So, is the Bill world-leading as the Government puts it, or is it introducing "state-backed censorship and monitoring on a scale never seen before in a liberal democracy", "collateral censorship, the creation of free speech martyrs, the inspiration it would provide to authoritarian regimes", "trying to legislate the impossible — a safe Internet without strong encryption"?* [87].

For one, the definition of harm under the bill is broad, and this vagueness could lead to inconsistent enforcement. Different platforms may interpret the regulations differently, leading to uneven outcomes. Some critics fear that tech companies, under the threat of hefty fines, may remove content that doesn't necessarily violate the law but could be deemed controversial or provocative and:

> *Those who think the Bill is unworkable point to its length, complexity, dependence on secondary legislation, and the operational challenges and costs of implementing its requirements — a process which is not expected to begin until mid-2024.14 It is argued that — in contrast to physical injury — there is no objective way of ascertaining that emotional or psychological harm has occurred, making it impossible to determine whether service providers have discharged their duties of care.15 At the same time, controversies of interpretation are said to be a likely consequence of relying on flexible standards and introducing categories such as "legal-but-harmful" content and "content of democratic importance"* [88].

The fine line between protecting users and over-censoring content is one of the key debates surrounding the bill[89].

The Online Safety Bill set a precedent for other countries grappling with online safety concerns. If successful, it inspired similar legislation in other jurisdictions, particularly in the United States. This could lead to a more global regulatory framework for online platforms, but it also raises questions about international jurisdiction and the differing standards in various countries regarding free speech and online content.

We end this section by mentioning the U.S. Children's Online Privacy Protection Rule, COPPA, a norm that will also have important impacts on holding large platforms accountable. This rule requires the Federal Trade Commission to create and enforce

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86 B. Kira and L. Schertel Mendes, *A Primer on the UK Online Safety Act* (November 13, 2023). Verfassungsblog, DOI: 10.59704/2120f79b5f59e60b, at https://ssrn.com/abstract=4632326.

87 E. Harbinja, *The UK's Online Safety Bill: Safe, Harmful, Unworkable?,* (2021), at: https://verfassungsblog.de/uk-osb/.

88 https://www.bennettinstitute.cam.ac.uk/wp-content/uploads/2022/09/Policy-Brief-Online-Safety-Bill.pdf

89 See the 7 key issues from the Online Safety Bill report, may 2024, at: https://parentzone.org.uk/article/seven-key-issues-from-the-online-safety-bill-report.

regulations regarding children's online privacy and applies to operators of general audience websites or online services that have actual knowledge they are collecting, using, or disclosing personal information from children under the age of 13, as well as to websites or online services that are aware they are collecting personal information from users of another website or online service directed at children.

Operators subject to COPPA must: Post a clear and comprehensive online privacy policy detailing their practices regarding personal information collected from children and provide direct notice to parents and obtain verifiable parental consent, with limited exceptions, before collecting personal information from children online. This rule allows parents to consent to the collection and internal use of their child's information, while prohibiting the operator from disclosing that information to third parties and provides parents with access to their child's personal information so they can review it and/or request its deletion

The personal information collected online from a child is retained only for as long as necessary to fulfill the purpose for which it was collected, and deleted using reasonable measures to prevent unauthorized access or use. At the time of entering into an agreement with a customer for the provision of interactive computer services, the provider must inform the customer, in a manner it deems appropriate, that parental control tools are commercially available. These tools can help the customer restrict access to content that may be harmful to minors. The notice must either identify or give the customer access to information about the providers offering these protective services.

(E) FRAMING THE FIGHT IN LEGAL TERMS: META CASES

This section focuses on the analysis of some relevant cases against online platforms. For the sake of brevity and to maintain focus, the analysis shall be circumscribed to the cases against the platform META, an American multinational technology based California. The company owns and operates Facebook, Instagram, and WhatsApp, among other products and services.

To address these cases, we will first examine recent policies and measures established by Meta to address hate speech and violent content in the last few years. According to its website, its principles are:

> *We stand for and guide our approach to how we build technology for people and their relationships. Give People a Voice, People deserve to be heard and to have a voice — even when that means defending the right of people we disagree with. Build Connection and Community, Our services help people connect, and when they're at their best, they bring people closer together. Serve Everyone, We work to make technology accessible to everyone, and our business model is ads so our services can be free. Keep People Safe and Protect Privacy, We have a responsibility to promote the best of what people can do together by keeping people safe and preventing harm. Promote Economic Opportunity, Our tools level the playing field so businesses grow, create jobs and strengthen the economy*.[90]

[90] More information at: https://about.meta.com/company-info/.

After the events in Myanmar and the special rapporteur reports on the crimes in the country[91], which showed the correlation of the events with the activities carried out on the platform, on 2018 Meta established an Independent Assessment of the Human Rights Impact of Facebook in Myanmar:

> *Facebook stands against hate and violence, including in Myanmar, and supports justice for international crimes. We're working with the UN's Independent Investigative Mechanism for Myanmar, which has a mandate to collect evidence with appropriate safeguards in place, and assist accountability efforts. Through this work, we've begun to lawfully provide data to the IIMM that we preserved back in 2018. As these investigations proceed, we will continue to coordinate with them to provide relevant information as they investigate international crimes in Myanmar. The assessment was completed by BSR (Business for Social Responsibility) — an independent non-profit organization with expertise in human rights practices and policies — in accordance with the UN Guiding Principles on Business and Human Rights and our pledge as a member of the Global Network Initiative. The report concludes that, prior to this year, we weren't doing enough to help prevent our platform from being used to foment division and incite offline violence. We agree that we can and should do more. BSR recommends that Facebook adopt a stand-alone human rights policy, establish formalized governance structures to oversee the company's human rights strategy, and provide regular updates on progress made. BSR urges Facebook to improve enforcement of our Community Standards, the policies that outline what is and isn't allowed on Facebook. Core to this process is continued development of a team that understands the local Myanmar context and includes policy, product, and operations expertise.*[92]

Since 2018, META also established a strategy called remove, reduce, inform[93] to manage content across our platforms and created a Safety center[94]. The online safety center reflects the Facebook Community Standards and Instagram Community Guidelines and works with the support of human and technology review teams[95]. In the Facebook hate speech standards, the platform has established two levels[96].

Tier 1 content that cannot be published,

Tier 2 content to be reviewed.

Tier 1: Content aimed at an individual or group of individuals (including all groups, except those classified as non-protected for being involved in violent crimes, sexual offenses, or representing less than half of a group) based on their protected characteristic(s) or immigration status, whether in written or visual form.

Tier 2: Content targeting a person or group of people on the basis of their protected characteristic.

Related to the violent content, the platform established:

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91 A/78/527: Report of the Special Rapporteur on the situation of human rights in Myanmar, at: https://www.ohchr.org/en/documents/country-reports/a78527-report-special-rapporteur-situation-human-rights-myanmar.

92 More information at: https://about.fb.com/news/2018/11/myanmar-hria/.

93 More information at: https://transparency.meta.com/es-es/policies/improving/prioritizing-content-review./

94 More information at: https://about.meta.com/actions/safety.

95 More information at: https://transparency.meta.com/enforcement/detecting-violations/how-review-teams-work/.

96 More information at: https://transparency.meta.com/es-es/policies/community-standards/hate-speech/.

> *To protect users from such content, we remove the most graphic content and add warning labels to other graphic content so that people are aware it may be sensitive or disturbing before they click through. We may also restrict the ability for users under 18 to view such content (or "age-gate" the content). We recognize that users may share content in order to shed light on or condemn acts such as human rights abuses or armed conflict. Our policies consider when content shared in this context and allow room for discussion and awareness raising accordingly. In ads, we provide additional protections. For example, content that has been deemed sensitive or disturbing is not eligible to run in ads. We also prohibit ads from including images and videos that are shocking, gruesome, or otherwise sensational*[97].

Something similar is established in the Instagram community standards: *We're working to remove content that has the potential to contribute to real-world harm, including through our policies prohibiting coordination of harm, sale of medical masks and related goods, hate speech, bullying and harassment and misinformation that contributes to the risk of imminent violence or physical harm*[98].

These functions are developed under the auspices of artificial intelligent systems. Each day, users upload millions of posts that undergo automated review by the artificial intelligence systems, assessing the suitability of content before it goes live. These systems are trained to detect images associated with terrorism, child sexual exploitation, and other harmful content. However, automated pre-detection is more the exception than the norm. Most content moderation relies on human agents who apply internal guidelines and extensive training to manage problematic material. Tens of thousands of these moderators work globally, typically through outsourcing and customer service firms like Teleperformance and Accenture. Due to the overwhelming volume of daily reports, moderators often have less than a minute to make decisions on flagged content. This intense pressure, combined with limited time and inadequate resources, frequently results in moderation errors. These mistakes can have two adverse outcomes: allowing harmful content to remain online or removing content that doesn't actually violate guidelines undermining both users' freedom of expression and their right to fair process.

It is worth mentioning that Meta subcontracts companies for the tasks in the different states of moderation, that is, for the search and detection of inappropriate content that may have been published by a user on its platform. In the vast majority of cases, these companies do not have specific rules on how to detect and what content to block[99]. In fact, as evidenced by the reports, [100] Facebook's measures for detecting and removing hate speech or violent content are largely ineffective. For instance, since 2018, Facebook has continued to approve advertisements containing hate speech that incite violence and

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97 More information at: https://transparency.meta.com/es-es/policies/community-standards/violent-graphic-content/.

98 More information at: https://help.instagram.com/477434105621119?cms_id=477434105621119.

99 J. Espíndola, *Attributing Responsibility to Big Tech for Mass Atrocity: Social Media and Transitional Justice*, (Cambridge University Press 2024), doi:10.1017/S1537592724001282.

100 UN Independent International Fact-Finding Mission on Myanmar calls on UN Member States to remain vigilant in the face of the continued threat of genocide. 23 October 2019. https://www.ohchr.org/en/press-releases/2019/10/un-independent-international-fact-finding-mission-myanmar-calls-un-member?LangID=E&NewsID=25197.

genocide against the Rohingya[101]. At the same time, on meta's guidelines or on norms at companies subcontracted for moderation tasks do not contemplate specific rules to protect the mental health of moderators[102].Furthermore, the aforementioned guidelines fail to outline concrete measures or strategies to ensure that moderators can carry out their work without experiencing harmful mental repercussions.[103].

On 2021 Meta endorsed these guarantees of due diligence, vowing to "pay particular attention to the rights and needs of users from groups or populations that may be at heightened risk of becoming vulnerable or marginalized"[104].

For all these reasons, Meta, owner of Facebook, is increasingly accused of enabling human rights violations[105]. The proliferation of hate speech and violent content in its digital platforms has been in the background of recent episodes of mass atrocities. The rise of hate speech also presents multiple judicial challenges when it comes to determining Meta's responsibility for the circulation of such content, its failure to remove it, and its accountability for the mental harm caused to moderators.

The extraterritorial nature of social media platforms poses challenges to traditional judicial legal systems. Meta, based in the United States, operates globally, and the content that circulates on its platforms often has an international impact. The issue, therefore, is whether national courts can hold a foreign multinational accountable under their own laws for actions that affect citizens in other countries. In the J*ohn Doe and Jane Doe against Meta*[106], the plaintiffs argue that international human rights law applies, and courts in the USA have jurisdiction over Meta's operations, given the widespread harm caused by the company's inaction. The plaintiffs contend that Meta violated rights guaranteed under the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), particularly concerning freedom from discrimination and violence.

However, this lawsuit also highlights a significant gap in the application of international human rights law to multinational companies. Traditionally, international human rights law focuses on state obligations to protect individuals from harm, but this case challenges the assumption that corporations, especially those operating across borders, are exempt from such standards. The central legal argument is that Meta's platforms, through their design and lack of effective moderation, allowed the dissemination of hate speech that led to tangible consequences, including violence against ethnic minorities.

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101 Global Witness report at: https://www.globalwitness.org/en/campaigns/digital-threats/rohingya-facebook-hate-speech/.

102 Casey Newton, The Trauma Floor, The secret lives of Facebook moderators in America, https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona.

103 Meta sued in Kenya over claims of exploitation and poor working conditions, https://edition.cnn.com/2022/05/10/tech/meta-sued-in-kenya-lgs-intl/index.html.

104 Meta 2021, Corporate Human Rights Policy, at: https:// about.fb.com/wp-content/uploads/2021/03/Facebooks-Corporate-Human-Rights-Policy.pdf.

105 N. Hakim, 'How Social Media Companies Could Be Complicit in Incitement to Genocide', *Chicago Journal of International Law* (21)1: 83 117. (2020),

106 Superior Court Of The State Of California for the County Of San Mateo, Jane Doe, individually and on behalf of all others similarly situated, META Platforms, INC. (f/k/a Facebook, Inc.), a Delaware corporation, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3596&context=historical.

One of the most critical aspects of this lawsuit is the issue of extraterritorial jurisdiction. Meta's operations span across multiple countries, and the harmful content on its platforms often affects individuals worldwide. The lawsuit raises the question: can a US court hold a company based in the US accountable for actions that harm individuals in other countries?

The plaintiffs assert that the extraterritorial application of international human rights law is necessary in this case. They argue that given the global impact of Meta's platforms, international legal standards should apply regardless of where the company is based. This could have significant implications for future cases involving multinational corporations that operate across borders. If the courts accept the plaintiffs' argument, it could set a precedent for holding tech companies accountable under international law, regardless of where they are headquartered or where the harm originated.

In the *Multistate complaint against Meta*[107], the plaintiffs claim that Meta's platforms have been used to alter the psychological and social realities of a generation of young Americans. This lawsuit is not only about Meta's inability to enforce its own policies but also about how its business model exacerbates the problem, in violation of the rules protecting minors and consumers, creating irreparable damage to society. Meta, like other social media giants, uses algorithms designed to maximize user engagement, often prioritizing sensationalist content. This model, according to the plaintiffs, amplifies hateful speech and extreme content, which ultimately contributes to societal harm:

> *Meta has harnessed powerful and unprecedented technologies to entice, engage, and ultimately ensnare youth and teens. Its motive is profit, and in seeking to maximize its financial gains. Meta has repeatedly misled the public about the substantial dangers of its social media platforms. It has concealed the ways in which these platforms exploit and manipulate its most vulnerable consumers: teenager and children. And it has ignored the sweeping damage these platforms have caused to the mental and physical health of our nation's youth. In doing so, Meta engaged in, and continues to engage in, deceptive an unlawful conduct in violation of state and federal law*[108].

A significant part of the plaintiffs' argument is Meta's failure use algorithms function[109] on a user-by-user basis and to adequately moderate the content posted on its platforms. Although Meta has established community standards that prohibit hate speech and harmful content, the plaintiffs argue that these standards are not enforced consistently. In many cases, harmful content remains online for extended periods, and the moderation process, they claim, is both inefficient and biased. Facebook has options for moderating its algorithms' tendency to promote hate speech and misinformation, but it rejects those options because the production of more engaging content takes precedence. In the case Doev. Meta:

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107 Multistate complaint against Meta. The United State District Court for the Northern district of California, case 4:23 cv-05448. More information at: https://es.scribd.com/document/679809777/Meta-Multistate-Complaint.

108 Superior Court Of The State Of California for the county Of San Mateo, Jane Doe, individually and on behalf of all others similarly situated, META PLATFORMS, INC.

109 R. Gorwa, Robert, R. Binns, and C. Katzenbach, 'Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance', *Big Data & Society* 7(1), (2020), at: http://doi.org/10.1177/2053951719897945

> *Facebook designed its system and the underlying algorithms and in a manner that rewarded users for posting, and thereby encouraged and trained them to post, increasingly extreme and outrageous hate speech, misinformation, and conspiracy theories attacking particular groups. The design of Facebook's algorithms and product resulted in the proliferation and intensification of hate speech, misinformation, and conspiracy theories attacking the Rohingya in Burma, radicalizing users, causing injury to Plaintiff and the Class, as described above. Accordingly, through the design of its algorithms and product, Facebook (1) contributed to the development and creation of such hate speech and misinformation and (2) radicalized users, causing them to tolerate, support, and even participate in the persecution of and ethnic violence against Plaintiff and the Class.*

The algorithms engage and then increasingly display similar material to maximize the time spent on the platform. This function applies not only to material generated by users but also to advertisements. Meta denies that its recommendation algorithms are intentionally designed to be addictive or to push emotionally distressing content. However, Meta is aware that its algorithms are structured to encourage addictive behavior and amplify such content. By misrepresenting and omitting information about how these algorithms promote harmful material, Meta prevents users, particularly parents of young users, from making fully informed decisions about their engagement with its social media platforms.:

> *Meta's Recommendation Algorithms are optimized to promote user engagement. Serving harmful or disturbing content has been shown to keep young users on the Platforms longer. Accordingly, the Recommendation Algorithms predictably and routinely present young users with psychologically and emotionally distressing content that induces them to spend increased time on the Social Media Platforms. And, once a user has interacted with such harmful content, the Recommendation Algorithm feeds that user additional similar content. […] Again, though, Meta's public statements regarding its algorithms' amplification of distressing and problematic content did not reflect Meta's true awareness of these problems*[110].

We can see that at the core of the lawsuits is the assertion that Meta's business model, which prioritizes user engagement over content moderation, exacerbates the problem. Algorithms on platforms are designed to increase user interaction by promoting content that elicits strong reactions, often amplifying sensationalist and extreme content. The algorithms reward divisive and inflammatory speech because it generates more engagement. The plaintiffs assert that this model is not only negligent but also demonstrates a deliberate indifference to the harm caused by the spread of hate speech. Furthermore, the lawsuits critique Meta's self-regulation efforts. Despite having extensive content moderation guidelines, Meta's voluntary measures have been insufficient, especially given the scale of its global operations. The plaintiffs argue that Meta has consistently failed to address harmful content and that its internal guidelines are either too vague or inconsistently enforced. This inconsistency has allowed harmful speech to flourish on the platform, contributing to real-world violence and discrimination. The plaintiffs argue that self-regulation is no longer an adequate means of addressing the issue of hate speech, and external regulatory measures are required to hold Meta accountable.

In the same line, Meta Platforms must face *a lawsuit from the state of Massachusetts*[111], which claims that the company deliberately implemented features on its Instagram

[110] 177 and 183.

[111] More information at: https://fingfx.thomsonreuters.com/gfx/legaldocs/dwvkkdqyjvm/10182024meta.pdf

platform to hook young users and misled the public regarding the risks these features posed to teenagers' mental health.

Meta was also sued in Kenya over claims of exploitation mental health and poor working conditions of moderators[112], accused the company of failing to protect them from psychological injuries resulting from their exposure to graphic and violent imagery[113]. Moderators must repeatedly review content involving terrorism, suicides, self-harm, civilian beheadings by terrorist groups, and torture tasks performed under intense time pressure that require rapid decisions to approve or remove material. The lawsuit highlights the psychosocial risks associated with these duties[114]. Recently, a Barcelona-based company subcontracted by Meta to provide content moderation services for Facebook and Instagram has been held accountable by a Spanish court for psychological harm experienced by an employee[115]. This marks the first instance in Spain where a content moderation company has been found responsible for the mental health impact on a worker.

(F) CONCLUSION: THE NEED FOR INTERNATIONAL LEGAL REVOLUTION ON THE PLATFORMS CONTENT

Meta's lawsuits represent a pivotal moment in the ongoing conversation about the role of tech companies in moderating online speech. It underscores the urgent need for an international legal framework that holds multinational corporations accountable for their actions, particularly when it comes to harmful content that spreads across borders. The case also challenges the adequacy of self-regulation in the tech industry and advocates for a more robust, external regulatory framework that can effectively address the challenges posed by social media platforms.

As the lawsuit progresses, it may set an important precedent for how courts will address the accountability of tech companies in the digital age. The outcome of this case could pave the way for stronger international regulations governing online speech, especially in cases involving racial discrimination and incitement to violence. In the long run, this lawsuit could represent a turning point in the way we understand the responsibilities of multinational corporations, and the legal obligations they bear in protecting human rights in the digital realm.

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112 T. Meskill, *Facebook content moderator speaks about mental health impact of her job*, RTE, 12 May 2021, (2021), Available at: https://www.rte.ie/news/ireland/2021/0512/1221241-online

113 Eurofound, *Employment and Working Conditions of Selected Types of Platform Work*, Luxembourg: Publications Office of the European Union, (2018) Available online at: https://www.eurofound.europa.eu/publications/report/2018/employment-and-workingconditions-of-selected-types-of-platform-work.

114 More information at: https://www.reuters.com/world/africa/kenya-court-rules-meta-can-be-sued-over-layoffs-by-contractor-2024-09-20/#:~:text=NAIROBI%2C%20Sept%2020%20(Reuters),content%20moderators%20by%20a%20contractor.
https://web.archive.org/web/20230608141240/https://www.theguardian.com/global-development/2023/jun/07/a-watershed-meta-ordered-to-offer-mental-health-care-to-moderators-in-kenya

115 M. T.Igartua Miró, ' Sobre la Síndrome de burnout de moderador de contenidos en línea como accidente de trabajo Comentario a la Sentencia del Juzgado de lo Social n.º 28 de Barcelona 13/2024, de 12 de enero', *Revista de Trabajo y Seguridad Social CEF* N.º 480 Mayo-Junio 2024, (2024).

In our view, these lawsuits raise broader questions about the role of international law in regulating global companies. As social media platforms like Facebook, Instagram, and Twitter become integral to public discourse, the legal framework governing these companies must evolve to reflect their global impact. Traditional notions of jurisdiction and accountability must be adapted to address the challenges posed by multinational corporations and their influence on global societies. At the same time, those cases are a critical test of how international human rights law and private international law intersect. It calls for a reevaluation and a revolution of the regulatory frameworks that govern multinational corporations and offers a glimpse into the future of tech industry accountability. As the digital landscape continues to evolve, legal systems must adapt to ensure that platforms like Meta are held accountable for the impact they have on societies worldwide.

SYbIL | Spanish Yearbook of International Law

Surrogacy in Spain. Is it really forbidden?

Carmen Azcárraga Monzonís*

Abstract: Surrogacy contracts are declared to be null and void in Spain by Law 14/2006, but this rule does not prevent the access to this practice in countries having accepted it from a substantive point of view. Spaniards are travelling abroad to satisfy their desire to become parents through surrogacy and this reality has generated problems that the authorities have had to deal with in the absence of a legal regime covering cross-border cases. The existing administrative doctrine and the case law of Spanish courts, including the Supreme Court and the Constitutional Court, have not provided for uniform criteria for addressing situations that are being granted efficacy in Spain while at the same time are raising serious human rights concerns. The purpose of this paper is to examine the current situation in this matter, with the main objective of answering this question: Is surrogacy really forbidden in Spain?

Keywords: surrogacy parentage cross-border surrogacy agreements human rights best interest of the child gestational women gender perspective intended parents.

Received: December 11, 2024 *Accepted:* January 9, 2025

(A) SURROGACY IN SPAIN: AN INCONSISTENT LEGAL FRAMEWORK THAT LEADS TO INCONSISTENT RESULTS

The legal treatment of surrogacy in Spain has been a controversial matter for years and continues to raise questions and concerns due to an unsatisfactory existing legal framework. Domestic cases seem to be legally clear, but the Spanish legislator has not yet focused seriously on cross-border cases, this leading to an undesirable legal uncertainty for all the persons involved as well as to unwanted results, especially from the perspective of the rights of children and gestational women.

The purpose of this article is to highlight the main developments of the legal treatment of surrogacy in Spain through the critical analysis of the existing substantive legislation and the main results that this legislation and the case law interpreting it have produced in our country. Considering all these elements, our efforts will be devoted to answer the following question: Is surrogacy really forbidden in Spain?

(1) Surrogacy in Spanish Law: Article 10 Law 14/2006 and its Interpretation by the Supreme Court

Surrogacy is explicitly regulated in the Spanish legal system in Article 10 Law 14/2006, 26 May 2006, on Assisted Human Reproductive Techniques (Law 14/2006).[1] The

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most widespread interpretation of this article supports that surrogacy is prohibited in Spain, this primarily based on its two first paragraphs. The first one states that surrogacy contracts, either altruistic or commercial, shall not have efficacy in Spain: "*The contract under which surrogacy is agreed, with or without a price, by a woman who renounces to maternal parentage in favour of the other contracting party or a third party, shall be null and void*." The second paragraph, consistently with the first one, states that "*The parentage of children born by surrogacy shall be determined by birth*."[2]

The rules on surrogacy in Law 14/2006 therefore appear to be clear and easy to apply in practice. The arrangements according to which a woman (the gestational mother) agrees to bear a child for another person or persons (the intended parents), who intend to become the child's legal parent(s) after birth, shall be null and void and consequently cannot entail a parentage relationship. In these situations, parentage can only be established in relation to the woman who gives birth in accordance with the principle "*mater semper certa est*". Hence, these rules should prevent citizens to make use of surrogacy because carrying out this practice should not produce the meant civil effects, i.e. the establishment of the filiation of the child in favour of the intentional parents. However, reality shows that this prohibition is not working in practice, at least in the international arena, where surrogacy contracts are now commonplace in cross-border private relationships.

From the Spanish point of view, the above situation is mainly due to serious inconsistencies in the existing regulatory framework despite the prohibition that emerges from these first two paragraphs of Article 10 Law 14/2006 and the case law of the Supreme Court, which has strongly condemned this practice to the detriment of the rights of the children concerned, as will be explained later but not in a sufficiently dissuasive manner, given the facts. The Spanish Supreme Court has dealt with this issue on several occasions but only two judgments of the Civil Chamber have specifically addressed the recognition of parentage through surrogacy, a claim that should be distinguished from the establishment of parentage through alternative solutions accepted in Spanish law or from the possible recognition of partial or indirect effects, as will also be explained later. This section will be devoted to the analysis of these two Judgments, which were rendered in February 2014 and March 2022, regarding respectively to children born in the United States of America (USA) and Mexico.

The Civil Chamber of the Supreme Court rendered its first judgment dealing with the possible recognition of parentage in international surrogacy agreements on 6 February 2014 (STS 835/2013).[3] The case concerned a same-sex couple who requested the registration of a pair of twins born in California (USA) before the Spanish Consulate in Los Angeles. Their request was rejected, and the decision was appealed before the (then called) General Directorate of the Registries and the Notaries (DGRN, currently named General Directorate of Legal Certainty and Public Faith), where the case was resolved in the positive. The Public Prosecutor challenged this decision and the Court of First Instance n. 15 of Valencia ruled in the negative again, thus preventing the registration

146226OB-I00, financed by Agencia Estatal de Investigación (AEI) and Fondo Europeo de Desarrollo Regional (FEDER). Main researcher: Prof. Mercedes Soto Moya.

1 Law 14/2006, 26 May 2006, on Assisted Human Reproduction Techniques (BOE no. 126, 27 May 2006).

2 Translation of the author.

3 STS 835/2013, 6 February 2014.

of these children in Spain. The intended parents challenged the decision before the Provincial High Court of Valencia, which confirmed the challenged rejection. This judgment was subsequently challenged before the Supreme Court, where, again, the request for registration was refused, although not unanimously.

While five of the magistrates ruled against the registration, four of them issued a dissenting opinion supporting the opposite solution. This latter fact has caused great concern in the debate, as the outcome for the lives of those children (and their prospective parents) would have been completely different if the five/four positions had been reversed. The arguments provided for in this Judgment, this including those supported by the dissenting magistrates, evidence the controversial nature of this topic and the difficulties in reaching a definitive solution as to its treatment under the current regulation.

The cassation appeal that gave rise to this Judgment was based on a single ground: infringement of Article 14 of the Spanish Constitution (CE) for violation of the principle of equality, in relation to the minors' right to a unique identity and their best interests, as enshrined in the 1989 Convention on the Rights of the Child. The Supreme Court's reasoning was based on a correct premise: the legal technique to be applied to address this problem was not the conflict of laws, but the recognition of foreign decisions. In other words, the Spanish authority did not have to consider which law was applicable to the case, but rather that a decision adopted by a foreign authority already existed and the key question was whether such a decision could be recognised and deploy effects in the Spanish legal system.

The Supreme Court acknowledges that it is a reality that people move from one country to another and, as a consequence of that, they come into contact with different legal systems, with the possibility of choosing different legal responses; however, it points out that this choice is limited by "the respect for public policy, basically understood as the system of individual rights and freedoms guaranteed by the Constitution and in the international human rights conventions ratified by Spain and the values and principles that they embody".[4] Hence, as the Court explains, although the control of legality cannot be understood as absolute, since this would make recognition impossible, it must imply respect for these rules, principles and values.

On this basis, the Court argues that Article 10 Law 14/2006 is included in Spain's international public policy and furthermore, that the reality that surrogacy implies is not accepted in our legal system nor in the majority of those systems based on similar principles and values, because it involves the violation of the dignity of the pregnant woman and the child, who are objectified, it commercialises gestation and parentage, it allows certain intermediaries to do business with them, and it allows the exploitation of the state of need of poor young women. Furthermore, the Court upheld that it is not possible to register the minors as a "peripheral" consequence of the null contract, since this claim refers precisely to the direct and principal consequence of the contract, and therefore the dissociation between the contract and the parentage could not be admitted.[5]

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4 Translation of the author.

5 Agrees with this position J.R. De Verda Beamonte, 'Inscripción de hijos nacidos mediante gestación por sustitución (a propósito de la sentencia del Juzgado de Primera Instancia número 15 de Valencia, de 15 de septiembre de 2010)', 7501 *Diario La Ley* (2010), at 6.

Consequently, the Court dismissed the appeal against the Judgment of the Provincial High Court of Valencia and urged the Public Prosecutor's Office to take the relevant actions to determine, as far as possible, the correct parentage of the minors and to protect them taking into consideration, where appropriate, their effective integration into a "*de facto*" family.

As noted above, four out of nine magistrates issued a dissenting opinion (*Voto particular*) supporting the opposite solution. Several interesting and thought-provoking aspects are worth highlighting. Firstly, the judges agree with the ruling that the technique to be applied is the recognition of foreign decisions, but precisely for this reason, the application of Article 10 Law 14/2006 should not be considered, since the paternity had already been determined by a foreign authority. Therefore, the contract cannot be the cause for refusing recognition but, where appropriate, the consideration that the foreign decision violates the Spanish public policy, this understood from the perspective of the best interests of the child. Therefore, in this matter public policy should not be assessed from the perspective of the contradiction with the internal rule, but from the point of view of the necessary protection of the interests of the child.

On the other hand, the dissenting opinion also refers to the profiles of the persons involved in this type of transactions. In first place, pregnant women and intended parents, who should not be subject of generalisations. Regarding women, the magistrates consider that their capacity to consent should not be underestimated without further consideration, since it is given before a judicial authority in charge of ensuring their free will and in full knowledge of the consequences. They deem the agreement between the parties to be voluntary and free, so that the woman is hardly being exploited or objectified against her will. As regards the intended parents, surrogacy is a particularly important manifestation of the right to procreate for some people who are genetically unable to have their own child, as is the case for same-sex couples, such as the family referred to in this judgment. And finally, regarding the child, from their point of view, surrogacy does not violate his best interest since he is born into a loving family.

Furthermore, this opinion points out that the current trend in Comparative Law favours regularisation and flexibility, and it also recalls on an important interpretative criterion for the application of public policy which is ignored in this judgment: the importance of assessing its possible violation on a case-by-case basis. The ruling does not consider the circumstances of the case; it protects the Spanish public policy in a preventive manner, beyond the facts heard by the Chamber. By doing so, the magistrates denounce that the needs of the children concerned by this decision have been neglected. They have been placed in an "uncertain legal limbo" while they grow up creating "irreversible emotional and family ties". The protection that the ruling claims to offer these minors by urging the Public Prosecutor's Office to act is considered insufficient by these magistrates, who defend that public policy covers the right to non-discrimination based on parentage and therefore "the illegal nature of parentage does not justify any differential treatment". In fact, it is rather contradictory to read how the Judgment recognises that the rejection of the registration of the parentage established in the California registry may be detrimental to the legal position of the children while at the same time it has no objection to sacrifice their expectations considering that they are not left unprotected because there are other means to do so.

In 2015, the Supreme Court had a new opportunity to take position on this same case through the incident of nullity of the proceedings brought by the appellants, which was resolved by a writ issued on 2 February 2015 (ATS 335/2015).[6] They considered, as did the dissenting opinion of the previous decision, that the debate had been diverted from a civil registry issue to the consequences of the unlawfulness of surrogacy in Spain, as if the occasion had been taken as an opportunity to issue an exemplary judgment. The Supreme Court refused to declare the nullity of the Judgment, stating, moreover, that in the context of the right to family privacy, it is not appropriate to extrapolate the case law of the European Court of Human Rights (ECHR)[7] established in the *Labassee and Mennesson v. France* cases[8] (both Judgments of 26 June 2014, i.e. after the STS 835/2013) because the Spanish and French legislations were not comparable. While French Law did not allow for the recognition of this parentage by any means, Spanish Law does provide for other ways of establishing it in these cases.

One last interesting issue about this case: the question remains as to whether the outcome would have been different if the appellants had provided the judgment issued under the California Family Code the Supreme Court Judgment refers to, which was not brought into the proceedings[9] as required by the DGRN Instruction on the Registration Regime of Parentage of Children Born Through Surrogacy of 5 October 2010, that will be explained later.

The second Judgment by the Civil Chamber of the Supreme Court on this matter, dated 31 March 2022 (STS 1153/2022),[10] was adopted unanimously; with no dissenting opinion. This second case concerned a single parent (a woman) who concluded a surrogacy contract in the State of Tabasco (Mexico) without any genetic link. The child was born in Mexico in 2015 and after some time living together in Spain, the grandparent of the child filled a claim before a court of first instance of Madrid in January 2018 claiming the parentage of her daughter towards the child through possession of status

6 ATS 335/2015, 2 February 2015.

7 See for further information about these Judgments, *inter alia* J. Carrascosa González and A.L. Calvo Caravaca, 'Gestación por sustitución y Derecho internacional privado. Más allá del Tribunal Supremo y del Tribunal Europeo de Derechos Humanos', 7-2 *Cuadernos de Derecho Transnacional* (2015) 45-113; F. Río Santos, 'La jurisprudencia del TEDH en materia de gestación por sustitución y su influencia en la jurisprudencia española', 6 *Actualidad Civil* (2017), 84-94; M.O. Godoy Vázquez, 'La gestación subrogada en la jurisprudencia del TEDH, TJUE y Tribunal Supremo', 34 *Anuario de la Facultad de Derecho* (2018) 111-131; S. Quicios Molina, 'Regulación por el ordenamiento español de la gestación por sustitución: dónde estamos y hasta dónde podemos llegar', 1 *Revista de Derecho Privado* (2019) 3-46, at 16-18 [DOI: https://doi.org/10.30462/RDP-2019-01-01-676]; G. Lazcoz Moratinos and A. Gutiérrez-Solana Journoud, 'La invisible situación jurídica de las mujeres para el TEDH ante la maternidad subrogada en la primera Opinión Consultiva del Protocolo nº 16, 11-2 *Cuadernos de Derecho Transnacional* (2019) 673-692 [DOI: https://doi.org/10.20318/cdt.2019.5012]; J.M. Díaz Fraile, 'La gestación por sustitución ante el Registro Civil español. Evolución de la doctrina de la DGRN y de la jurisprudencia española y europea', VI-1 *Revista de Derecho Civil* (2019) 53-131, at 118 ff.

8 *Labasse v. France*, ECHR (2014); *Mennesson v. France*, ECHR (2014).

9 In fact, the California Family Code requires a judicial decision for extinguishing the bond with the gestational woman and her partner, where appropriate and establishing it with the intentional parents. A. Quiñones Escámez, 'El contrato de gestación por sustitución no determina la filiación sino la intervención de una autoridad pública conforme a la ley', 2 *InDret. El orden público interno, europeo e internacional civil. Homenaje a la Dra. Nuria Bouza* (2017) 201-251, at 205.

10 STS 1153/2022, 31 March 2022.

(*posesión de estado*). The Court rejected the parentage claim but encouraged the intended mother to apply for guardianship or foster care as a preliminary step to adoption.

This Judgment was challenged by the father of the intended mother before the Provincial High Court of Madrid, which ruled in December 2020 in favour of the registration of the child and the confirmation of the parentage. The Public Prosecutor challenged this decision before the Supreme Court, which ruled against the establishment of the parentage by possession of status with similar arguments to those used in 2014 in the STS 835/2013 analysed above. The facts of the two cases are therefore different, but the outcome remains the same: the Supreme Court rules against the parentage claim, because surrogacy is considered to violate Spanish public policy and the rights of pregnant women and children, who are said to be commodified.

The legal reasoning of the Supreme Court can be disputed from two different perspectives considering precisely the consequences for the two most vulnerable groups of persons in commercial surrogacy contracts: surrogate women and children.

Starting with the children, from our point of view the general solution rejecting the registration or the establishment of the parentage of the particular children concerned neglects their best interest in both judgments.[11] By rejecting these claims the Court seeks to dissuade other prospective parents to resort to surrogacy abroad and makes this message prevail over the best possible solution for those children, which should have consisted in confirming legally the *de facto* families in which they were being raised. Conversely thereof, the STS 1153/2022 explicitly states that rejecting the parentage claim through possession of status while encouraging the adoption of the child by the intended mother is a balanced solution. It satisfies his best interests and at the same time it seeks to safeguard fundamental rights the ECHR has also encouraged to protect, such as the rights of gestational women and children in general. The Spanish Supreme Court considers that their rights would be seriously harmed if the practice of commercial surrogacy is enhanced by making it easier for surrogacy agencies to operate, and this would happen in case they can ensure to their potential clients the almost automatic recognition in Spain of the parentage resulting from the surrogacy contract. Therefore, the Court decided to give precedence to the deterrent message to the detriment of the interests of that child because the legal confirmation of his *de facto* family would have been more respectful with his needs.

As a result, the Court's reasoning in the two Judgments seeks to protect the children's rights in general terms but does not fulfil adequately the protection of the children involved in these two cases. In the same vein, the protection of gestational mothers in this field is far from being at the centre of legal operators' concerns, who have primarily focused so far on the children's rights and the cross-border recognition of parentage. And such recognition as we have seen it is happening in Spain , even if it is reasonable once the child is born and a *de facto* family has been created, fosters the exploitation of women who accept this practice due to economic needs, because this outcome encourages the future parents to travel abroad knowing that the

[11] C. Azcárraga Monzonís, 'La gestación por sustitución en el Derecho Internacional Privado español. Un ejemplo más de la controvertida aplicación de conceptos jurídicos indeterminados', 17 *Anuario Español de Derecho Internacional Privado* (2017) 673-710, at 680.

parentage will be recognized at some point, sooner or later, in the foreign country or once back in Spain, despite the prohibition of Law 14/2006 and the Judgments of the Supreme Court.

The above situation is deeply unsatisfactory from a gender perspective but as the growing existence of reproductive tourism threatens women's rights,[12] at least the discussion about the consequences of commercial surrogacy for surrogate women and the need to address this issue from a gender perspective to avoid or prevent abuse and exploitation is beginning to emerge in the doctrine.[13] In fact, the STS 1153/2022 has boosted this discussion because it provides for interesting (and worrying) information that enables to deepen into the functioning of commercial surrogacy in some countries. It reproduces some clauses of the contract signed in Mexico that force these women to accept decisions based on non-medical grounds thus neglecting their health (or the child's health) and severely restricting their sexual and reproductive rights. Some examples: Clause 14: "In the event that the surrogate woman suffers any life-threatening illness or injury (such as brain death), the intended mother has the right to keep her alive with medical life support, with the aim of saving the foetus until the doctor determines that he is ready for birth." […] Clause 16: "The surrogate woman agrees to undergo a caesarean section for the birth of the child, unless the doctor recommends a vaginal birth." […] Clause 18: "The surrogate woman agrees that she will only undergo an abortion when a doctor determines with a written certificate that her life or health is in danger."[14] These examples show in which terms surrogate women accept those conditions. The children born through surrogacy shall be protected but the gender perspective also urges to be addressed in this field.

In conclusion, the two judgments of the Civil Chamber of the Supreme Court rendered in 2014 and 2022 have not been dissuasive enough to prevent the use of this practice abroad despite the general position against surrogacy they both upheld. But this is not the only element in the equation that is allowing international surrogacy to become a usual phenomenon in Spain. Some other elements are shaping the present state of affairs facilitating its recognition in cross-border cases. On the one hand, our domestic model includes some solutions that are leading to the establishment of parentage (2) or at least to granting some sort of effects under the doctrine of the mitigated public policy (3). On the other hand, the treatment of surrogacy contracts is not being uniform before Spanish courts (4), resulting in erratic case law that favours legal uncertainty in an already unclear legal framework.

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12 R. Espinosa Calabuig, 'Sorority, equality and European Private International Law', 1 *Freedom, Security & Justice: European Legal Studies* (2023) 113-131, at 127 [doi:10.26321/R.ESPINOSA.CALABUIG.01.2023.05].

13 G. Lazcoz Moratinos and A. Gutiérrez-Solana Journoud, 'La invisible situación jurídica de las mujeres para el TEDH ante la maternidad subrogada en la primera Opinión Consultiva del Protocolo nº 16', 11-2 *Cuadernos de Derecho Transnacional* (2019) 673-692; R. Espinosa Calabuig, 'La (olvidada) perspectiva de género en el derecho internacional privado', 3 *Freedom, Security & Justice: European Legal Studies. Rivista quadrimestrale on line sullo Spazio europeo di libertà, sicurezza e giustizia* (2019) 36-57, at 50-54; C. Azcárraga Monzonís, 'La gestación por sustitución en España. Aspectos sustantivos e internacionales', in M.J. Antunes and D. Lopes (coord.), *Gestação de substituição: perspetivas internacionais* (Faculdade de Direito da Universidade de Coimbra, Coimbra, 2021) 43-71.

14 Translation of the author.

(2) Solutions Leading to the Establishment of Parentage

The group of solutions that have led to the establishment of parentage in cross-border surrogacy cases despite the general prohibition of this practice in Law 14/2006 include: (a) Paternity claims, (b) Recognition of foreign judgments and (c) Adoption of the child.

(a) Paternity Claims

The third paragraph of Article 10 Law 14/2006 states that "*Paternity claim remains available for the biological father under the general rules* [of the Spanish Legislation]." Consequently, the legislator leaves the door open to the recognition of parentage in those cases where there is a biological link between the intended father and the child, a solution which favours genetic fathers and raises the question about the different treatment granted to these cases depending on the existence of a biological link or not.

This solution collides with the nullity of surrogacy contracts and the intention of the legislator to prevent their legal efficacy and raises uncertainty in the general prohibition system set up in Spain. However, at the same time it is coherent with the general rules on parentage allowed in our country due to the existence of a biologic factor, as well as with the rule on the acquisition of Spanish nationality based on the *ius sanguinis* criterion.

Regarding the regulation on parentage, Articles 112 ff of the Spanish Civil Code (Cc)[15] and Articles 764 ff Civil Procedural Law 1/2000 (LECiv)[16] governing parentage procedures are to be applied regardless of the previous existence of a surrogacy contract. This is deemed null and void but the biological link with the child, if properly evidenced, is an uncontested fact that is granted legal effects in Spain. Under Article 764 LECiv, the legal determination or the challenge of parentage may be claimed before the courts in the cases provided for in the civil legislation. Article 113 Cc states that parentage can be accredited by different means: by registration in the Civil Registry, by the document or judgment that legally determines it, by the presumption of matrimonial paternity and, in the absence of the previous means, by possession of status. Furthermore, in accordance with Article 115 Cc, maternal and paternal matrimonial parentage shall be legally determined by the registration of the birth together with the marriage of the parents or by final judgment. Therefore, Spanish law offers other solutions besides the direct registration of parentage in the Civil Registry, allowing access to the courts through different civil actions.

On the other hand, the establishment of parentage by means of a paternity claim is also consistent with the rules on the acquisition of Spanish nationality. Spanish nationality can be obtained through different means. A first distinction must be done regarding nationality of origin *versus* derivative nationality. While the first option refers to situations where Spanish nationality is granted by the law, the second one refers to

[15] Royal Decree publishing the Civil Code, 24 July 1889 (Gaceta de Madrid no. 206, 25 July 1889).
[16] Civil Procedural Law 1/2000, 7 January 2000 (BOE no. 7, 8 January 2000).

the acquisition of Spanish citizenship by foreigners, who are granted the possibility to apply for it if they meet the specific requirements stated for four different means: acquisition of Spanish nationality by option, by discretionary conferral, by residence or by possession of status. All of them are regulated in Articles 17 ff Cc, where the blood relate is conferred importance in the acquisition of the nationality of origin. Article 17.1 a) Cc embraces the *ius sanguinis* criterion when stating that those "*born of a Spanish father or mother*" are granted the Spanish nationality. Therefore, the establishment of parentage should not be denied to children having genetic linkage with intended parents because of two main reasons: firstly, the rule does not require parentage to be established for obtaining the Spanish nationality by law (it does not say "*hijos de padre/madre español*" but "*nacidos de padre/madre español*"), and, secondly, this decision would discriminate people holding the Spanish nationality on birth grounds. And this is prohibited *inter alia* by Article 14 CE, as is well known.[17]

And what about children not having a biological link with the intended parents? The parentage determination is obviously more difficult to establish in cases where there is not a biological relation. This fact hampers the direct bridge between surrogacy and a possible judicial claim aiming at confirming the parentage between a child and his prospective non-biological parents, thus possibly leading to an unsatisfactory solution from the premise under which the swift establishment of parentage is more respectful with the best interest of the child. Furthermore, in these cases, more doubts may be raised when it comes to confirming parentage, as was the case in the ECHR Judgment *Paradiso Campanelli v. Italy* ruled in 2017[18] as well as in the above studied STS 1153/2022. The children did not share the biological link with the intended parents in any of these cases and this led to a judicial journey marked by multiple rejections. By contrast, other recent decisions like the Judgment of the Supreme Court of 16 May 2023 (STS 754/2023), or the Judgment of the Constitutional Court of 27 February 2024 (STC 28/2024), evidence that the existence of the genetic link unquestionably opens the door to the recognition of surrogacy in international cases, thus confirming the rule embodied in Article 10.3 Law 14/2006. Both Judgments will be addressed later.

(b) Recognition of Foreign Judgments

Along with Article 10.3 Law 14/2006, a second approach that has led to the recognition of parentage derived from surrogacy in the Spanish system derives from the DGRN Instruction on the Registration Regime of Parentage of Children Born Through Surrogacy of 5 October 2010.[19] This Instruction contains administrative guidelines addressed to Spanish consular authorities, establishing the requirements to allow the registration of parentage of the children born abroad as a result of surrogacy where at least one of

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17 Art. 14 CE: "*Spaniards are equal before the law, without any discrimination based on birth, race, sex, religion, opinion or any other personal or social condition or circumstance.*"

18 *Paradiso Campanelli v. Italy*, ECHR (2017). A.M. Ruiz Martín, 'El caso Campanelli y Paradiso ante el Tribunal Europeo de Derechos Humanos: el concepto de familia de facto y su aportación al debate de la gestación por sustitución', 11-2 *Cuadernos de Derecho Transnacional* (2019) 778-791.

19 DGRN Instruction on the Registration Regime of Parentage of Children Born Through Surrogacy of 5 October 2010 (BOE no. 243, 7 October 2010).

the intended parents holds the Spanish nationality. For the registration to be accepted before the Civil Registry, the Instruction requires a foreign judicial decision (*resolución judicial*) establishing the parentage, issued by the competent court, a condition which has been based on two different grounds.

On the one hand, the Instruction states that the intervention of a foreign judge guarantees the fulfilment of the foreign law and the respect for the rights of the parties involved, above all the ones the gestational woman is granted in the country of origin. According to this administrative Instruction, this requirement makes it possible to verify her full legal capacity and her valid consent, as well as any other requirements provided for in the regulation of the country of origin. It also allows attesting that there is no simulation in the surrogacy contract concealing international trafficking of minors. On the other hand, the said Instruction grounds this additional requirement on the third paragraph of Article 10 of Law 14/2006, which refers to the general rules on the determination of filiation by requiring the exercise of procedural actions and the consequent judicial resolution for the establishment of the parentage of minors born through surrogacy. The Instruction ensures that this protects the interests of the minor, facilitating the cross-border continuity of the parentage relationship declared by a foreign court, provided that such a decision is recognized in Spain.

The existence of this administrative doctrine has provided legal certainty and predictability to some cases but at the same time it suffers from negative aspects. Firstly, because an administrative body has taken on the role of legislator in a field where fundamental rights are at stake so that the adoption of a superior rule of law adopted by the true legislator would be desirable.[20] Secondly, since providing a different treatment to the children depending on whether it is possible or not to obtain such a judgment under the relevant foreign law contravenes the prohibition to discriminate on birth grounds under the mentioned Article 14 CE as well as under Article 2 of the Convention on the Rights of the Child of 1989.[21] Thirdly, this additional requirement contravenes the referred rule on the *ius sanguinis* acquisition of Spanish nationality as well because the Spanish nationality should not be refused to children having a genetic link with Spanish parents if such judicial resolution cannot be obtained. This fact depends on the legislation of the country of origin and children should not be discriminated on this ground.

Once the foreign decision has been issued and its recognition has been sought before the Spanish authorities, two possible procedures are provided for depending on the nature of the procedure that took place in the country of origin: if it derives from a contentious procedure *exequatur* will be required; if the decision has been issued following a procedure comparable to a Spanish procedure of voluntary jurisdiction, it will be subject to incidental recognition by the Civil Registrar as a prior requirement to

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[20] A. Durán Ayago, 'Una encrucijada judicial y una reforma legal por hacer: problemas jurídicos de la gestación por sustitución en España. A propósito del auto del Tribunal Supremo de 2 de febrero de 2015', 2 *Bitacora Millenium DIPr* (2015) 1-16, at 62 [DOI: https:/doi.org/10.36151/MDIPR.2015.010].

[21] BOE no. 313, 31 December 1990. Art. 2.1 Convention on the Rights of the Child: "*States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status*".

its registration. The Instruction requires such incidental control to verify the following aspects: the regularity and formal authenticity of the foreign judicial decision and of any other documents that may have been presented; that the court of origin has based its international jurisdiction on criteria equivalent to those contemplated in Spanish law; that the procedural rights of the parties have been guaranteed, in particular, those entitled to the gestational woman; that there has been no violation of the best interests of the child and of this woman (in particular, it must verify that the latter's consent has been obtained freely and voluntarily, without error, fraud or violence and that she has sufficient natural capacity); that the judicial decision is final and that the consents given are irrevocable, or, if they are subject to a period of revocability according to the applicable foreign legislation, that this period has elapsed without the person with recognised power of revocation having exercised it.

This Instruction was intended to be replaced by another one adopted in 2019 (DGRN Instruction of 14 February 2019),[22] even more favourable to the recognition of effects, which was annulled a few days later without even being published in the Spanish Official Journal by a second Instruction (DGRN Instruction of 18 February 2019) that reinstated the validity of the one adopted in 2010.[23] The DGRN Instruction of 14 February 2019 probably derived from the media pressure related to the situation that some Spanish families were living in Ukraine when the Spanish authorities decided at that time to stop the recognition of children born in this country by surrogacy.[24] The guidelines for consular registration contained some interesting novelties that favoured these applications taking into account the diversity of possible situations at origin.[25] Some of them have even been considered as the possible basis for a future regulation.[26]

On the one hand, some novelties referred to the solution already foreseen in the 2010 Instruction, that is the possible recognition of a court decision establishing the parentage relationship issued in the country of origin (through *exequatur* or incidental recognition), which was given greater safeguards in the Instruction of 14 February 2019. For instance, the public policy control aimed more intensively at protecting the women and children rights. Firstly, because the consent of the gestational woman, besides making sure that it had been obtained freely and voluntarily, without error, fraud or violence, with sufficient information and awareness of the scope of her declaration of will, and with sufficient natural capacity, as a novelty had to be confirmed after the birth of the child. Secondly, it embodied for the first time the child's right to know his or her biological origins. And thirdly, and equally novel, in line with adoption procedures, the authorities were compelled to confirm that there were no serious reasons for the

[22] DGRN Instruction of 14 February 2019, accessed 5 December 2024.

[23] DGRN Instruction of 18 February 2019. BOE no. 45, 21 February 2019.

[24] For further information see A. Ortega Giménez, M.E. Cobas Cobiella and L.S. Heredia Sánchez, 'Los contratos de gestación subrogada en España. A propósito del debate surgido por la paralización de las inscripciones de nacimiento por el Consulado español en Kiev', 9281 *Diario La Ley* (2018).

[25] P. Jiménez Blanco, 'La "crisis" de la gestación por sustitución en Ucrania y el caos en el Ministerio de Justicia (comentario a las Instrucciones de la DGRN de 14 y 18 de febrero de 2019)', 37 *Revista Electrónica de Estudios Internacionales* (2019), 24-31, at 25.

[26] A. Durán Ayago, 'Gestación por sustitución en España: a hard case needs law. De por qué la jurisprudencia no puede resolver este problema', 11-2 *Cuadernos de Derecho Transnacional* (2019) 575-582, at 579 [DOI: https://doi.org/10.20318/cdt.2019.4977].

parents' lack of suitability to assume the guardianship and protective functions of parental authority, due to their age, state of health or other reasons.

On the other hand, the Instruction dated 14 February 2019 included more solutions besides the recognition of a foreign judgment establishing the parentage. In the event that the identity of the pregnant mother (being a foreigner and the birth having occurred abroad) was stated in the foreign registration certificate or in the declaration and medical certificate of the birth, the Spanish Civil Registry was declared to be competent to register the birth if the parentage of the child with a Spanish parent was confirmed. This accreditation could be carried out by judgment rendered in a parentage procedure or through the paternity recognition by any means provided for by the Spanish Civil Code, supplemented by other sufficient evidence to prove beyond doubt the reality of this paternal filiation, such as a DNA test as a preferential (not exclusive) means of proof. Once the paternal parentage confirmed, if the maternal parentage also wanted to be established the intended mother could start the adoption procedure in Spain.

Finally, this overturned Instruction also contained another interesting solution regarding the establishment of maternity in favour of the intended mother, alone or as a member of a same-sex couple. A groundbreaking solution that challenged the "untouchable principle" by which maternity is determined by childbirth[27] based on the need to protect the child if the surrogate mother confirmed that she did not want to take care of him, a will that had to be clarified by her declaration or from the terms of the surrogacy contract. If all these circumstances were met and the intended mother had a genetic link with the child because she had provided her egg, the DGRN proposed the analogous application of Article 10.3 Law 14/2006 in the same way as for paternity, in order to be able to recognise and register in the Spanish Civil Registry the maternal filiation in favour of the woman whose genetic material had been used.

However, as already announced, these additional solutions never entered into force because on 18 February 2019 another Instruction was published rendering ineffective the previous one and confirming the application of the one issued in 2010. Therefore, the solution under which a judicial resolution must be provided to the Consular authorities for the registration to be accepted became effective again as the only way to guarantee the recognition from the country of origin. As an alternative option in the absence of a foreign judgment, the Instruction of 18 February 2019 declares that the applicant may obtain from the local authorities, if appropriate, the child's passport and permits to travel to Spain. This solution has been said to transform the problem of determination of parentage into an immigration issue[28] which may even give rise to statelessness cases because meeting these requirements will depend on the legislation of the birth country.[29]

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27 Mª B. Andreu Martínez, 'Una nueva vuelta de tuerca en la inscripción de menores nacidos mediante gestación subrogada en el extranjero: la Instrucción de la DGRN de 18 de febrero de 2019', 10 bis *Actualidad Jurídica Iberoamericana* (2019), 64-85, at 76.

28 P. Jiménez Blanco, *supra*, n. 25, at 28.

29 A.L. Calvo Caravaca and J. Carrascosa González, 'Notas críticas en torno a la Instrucción de la Dirección General de Registros y del Notariado de 5 de octubre de 2010 sobre régimen registral de la filiación de los nacidos mediante gestación por sustitución', 3-1 *Cuadernos de Derecho Transnacional* (2011) 247-262, at 248. Furthermore, in page 257 of this contribution the authors recall that under Article 17.1 CC the existence of "rational indications of the physical generation by a Spanish progenitor" should be enough to obtain the Spanish nationality since the wording of the rule does not require the previous establishment of

If the family manages to return to Spain with the child, the corresponding proceedings for the registration of parentage must be initiated, with the intervention of the Public Prosecutor's Office, or legal action shall be brought to claim parentage.

The brief Instruction of 18 February 2019 based its restrictive decision on the fact that this phenomenon entails a serious violation of the rights of children and gestational women. It upholds that it is necessary to provide a treatment permitting to assess all the circumstances that arise in each case, especially in view of the clear abuses against women that have occurred and the unlawfulness of the lucrative activity of the mediating agencies that operate in this field.[30] In fact, surrogacy companies are operating with impunity in the reproductive industry despite the information currently available on the existence of these abuses and the additional legal measures existing in Spain against surrogacy besides the nullity of contracts stated in Law 14/2006, this including rules on criminal liability and administrative prosecution of advertising.

Article 221 of the Spanish Criminal Code[31] makes it a criminal offence that shall be punished with imprisonment of one to five years and special disqualification from exercising the right of parental authority, guardianship, curatorship or custody for a period of four to 10 years, to hand over a child to another person even if there is no relationship of parentage or kinship, by means of financial compensation, evading the legal procedures of guardianship, foster care or adoption, with the aim of establishing a relationship similar to parentage. The same penalty is foreseen for the person who receives the child and for the intermediary, even if the delivery of the child has taken place in a foreign country. Nevertheless, the figures show that this rule has not yet been a major obstacle for people who decide to go abroad for surrogacy.[32]

Some other measures were adopted in 2023 to raise public awareness of the illegality of surrogacy, but these have also proved to be clearly insufficient. Article 32.2 of Organic Law 2/2010 on sexual and reproductive health and the voluntary interruption of pregnancy,[33] as drafted by Organic Law 1/2023,[34] states that information on the illegality of surrogacy shall be promoted through institutional campaigns. And Article 33 of the same Law of 2010, which was also added in 2023, proclaims the prohibition of the commercial promotion of gestational surrogacy, so that the Administration shall bring legal action aimed at declaring the unlawfulness of advertising that promotes commercial practices for gestational surrogacy and its cessation. The same Law dated

parentage ("*nacidos de españoles*" and not "*hijos de españoles*"). In the same vein, others support that any means of proof accepted in our legal system should be accepted in this regard (for instance, a DNA test as allowed in the Instruction of 14 February 2019). A.J. Vela Sánchez, 'Análisis estupefacto de la Instrucción de la DGRN de 18 de febrero de 2019, sobre actualización del régimen registral de la filiación de los nacidos mediante gestación por sustitución', 9453 *Diario La Ley* (2019), at 13.

30 Against this view, *Ibid.*, at 5. Vela Sánchez considers the criticism levelled against mediating agencies to be unfair and disproportionate.

31 Organic Law 10/1995, 23 November 1995, of the Criminal Code (BOE no. 281, 24 November 1995).

32 Newtral Figures period 2010-2022, accessed 5 December 2024.

33 Organic Law 2/2010, 3 March 2010, on sexual and reproductive health and the voluntary interruption of pregnancy (BOE no. 55, 4 March 2010).

34 Organic Law 1/2023, 28 February 2023, amending the Organic Law 2/2010, 3 March 2010, on sexual and reproductive health and the voluntary interruption of pregnancy (BOE no. 51, 1 March 2023).

2023 added a new paragraph in Article 3 a) of Law 34/1988 on Advertising[35] stating that, besides other actions, advertising that promotes commercial practices for gestational surrogacy is unlawful in Spain.

In brief, if our model is really based on the prohibition of surrogacy, it will be necessary to adopt a stronger restrictive regulation for addressing cross-border cases. In the meantime, the administrative doctrine explained in this section will continue to be an avenue of recognition, in addition to the claim of paternity and the possible adoption of the child, as we will see below.

(c) Adoption of the Child

International surrogacy has also been granted efficacy in Spain through the possibility of adopting the child. This solution has not always been embraced by Spanish courts,[36] but adoption has said to be a suitable solution by the Spanish Supreme Court in the same judgments where it has fiercely opposed to surrogacy denouncing the commodification of women and children. Despite this forceful position, it ends up accepting and even fostering the establishment of parentage through other legal institutions such as adoption. This solution has been particularly welcome in this field regarding the adoption of the couple's biological child, as regulated in Articles 175 and 176.2.2 Cc. It has also been supported by the ECHR and the Spanish Constitutional Court.

The ECHR issued an Advisory Opinion in 2019 requested by the French *Cour de Cassation* urging the contracting states to regulate the determination of parentage with the intended mother as the legal mother in the birth certificate legally issued abroad when the parentage with the biological father has already been established. The ECHR has declared that states are not obliged to register the details of the birth certificate to establish this legal bond in favour of the intended mother; adoption may serve as an appropriate means of recognizing that relationship provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests.[37]

This doctrine has been subsequently applied in several Judgments regarding different contracting states[38] and it has also been followed by the Spanish Supreme Court when encouraging the adoption as an appropriate means of establishing parentage in cross-border surrogacy cases following the refusal to recognize or establish parentage. However,

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35 Law 34/1988, 11 November 1988, General Advertising (BOE no. 274, 15 November 1988).

36 In AAP Barcelona 565/2018 the Court dealt with the adoption of two children born in Thailand through surrogacy. The adoption claim was filed by the same-sex couple of the biological father, who appeared as the legal father in the birth certificate issued by the Spanish Consulate in Bangkok. The Provincial High Court of Barcelona referred to the nullity of the surrogacy contract and the violation of Spanish public policy and ended up focusing on the terms of the contract for rejecting the adoption: under the Catalan Civil Code the biological mother is granted a period of six weeks for confirming the adoption of the child while the contract only granted her three days after birth.

37 ECHR Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, 10 April 2019, accessed 5 December 2024.

38 ECHR case-law on surrogacy, given before and after the referred Advisory Opinion, accessed 5 December 2024.

it is important to stress that this solution fulfils the ECHR doctrine provided that the domestic procedure ensures that it can be implemented "promptly and effectively", but undefined legal concepts are very difficult to assess. The STS 1153/2022 upheld that this was the case when the establishment of parentage through possession of status was rejected and the Court encouraged the plaintiff to adopt a child born in 2015, thus seven years later at the time this Judgment was rendered. Seven years "legal limbo" and counting… However swift this adoption procedure was going to be, was this decision respectful with the child's best interests? Probably not. Faster solutions for the establishment of parentage would be desirable in these cases not to affect the best interest of these children.

The Spanish Constitutional Court has also recently confirmed the adequacy of adoption for the establishment of parentage in cross-border surrogacy cases. The Court ruled on this matter for the first time some months ago, by STC 28/2024 of 27 February 2024.[39] The plaintiff sought the constitution of the adoption of the biological son of her spouse, a child born in Kiev (Ukraine) through surrogacy in 2016. The documents issued in Ukraine showed the Spanish couple as the legal parents while the documents issued by the Spanish authorities showed the Spanish husband as the legal father and the Ukrainian woman as the legal mother, following the registration of the birth of the child in those same terms at the Consular Civil Registry of the Spanish Embassy in Kiev. The child obtained the Spanish passport issued by the Spanish consular authority in Ukraine. Once in Spain, the Spanish mother sought the adoption of her husband's child before Spanish courts. The voluntary jurisdiction procedure (n. 451-2017) was heard by the Court of First Instance n. 28 of Madrid, which confirmed the establishment of the adoptive parentage in January 2018.[40] The Court rejected the application of Article 10 Law 14/2006 to this case and based its decision on the previously explained case law of the Spanish Supreme Court that has supported other means of establishing the parentage, such as paternity claim or adoption, precisely.

In May 2019 the first instance decision was overturned on appeal by the Madrid Provincial High Court,[41] after the Public Prosecutor had lodged the corresponding appeal primarily grounded on the violation of several international legal instruments of different scope and the existence of international legal fraud regarding the paternal parentage.[42] According to this court, the fraud in the attribution of parentage arising from a contract that should be considered null and void as contrary to Spanish public policy, cannot lead to the establishment of parentage in favour of the father. He should go through the appropriate channels to determine the biological link in accordance with Spanish law and, once parentage with the husband had been determined before a court, adoption in favour of his wife could be requested.

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39 STC 28/2024, 27 February 2024.

40 AJPI 28 Madrid 15/2018, 15 January 2018.

41 AAP Madrid no. 279/2019, 30 May 2019.

42 Legal fraud is regulated in Spanish Private International Law in Art. 12.4 CC: "*The use of a conflict rule in order to circumvent a mandatory Spanish rule shall be considered as fraud of law*". This provision has been interpreted in an extensive manner including the circumvention in bad faith of any rule of the Spanish legal system. See C. Esplugues Mota and G. Palao Moreno, *Derecho internacional privado* (17th edition, Tirant Lo Blanch, Valencia, 2023), at 261. In the absence of an explicit solution for international cases, Article 6.4 CC is to be applied: "*Acts carried out under a rule which pursue a result prohibited by, or contrary to, the legal system shall be deemed to be carried out on legal fraud and shall not prevent the due application of the rule which it was sought to circumvent.*" Translations of the author.

The decision of the Madrid Provincial High Court was challenged before the Constitutional Court alleging the infringement of the right to effective judicial protection, in terms of the right to a reasoned and well-founded judicial decision and the right to a due process (Article 24 CE). The appellants also claimed that their sons were being treated differently since the adoptive parentage of the youngest one, also born in Kiev, had already been confirmed by the same Court of First Instance n. 28 of Madrid.[43] Strangely enough, the Public Prosecutor did not challenge this decision unlike decided in the brother's case.

From our point of view, the starting point of the reasoning of the Constitutional Court is correct: the case did not involve the possible refusal to register the birth and parentage of a minor in the Spanish Civil Registry based on certificates from a foreign registry nor the refusal to recognize parentage relations declared by a foreign court, but the adoption by the wife of the husband's son as registered in the Spanish Civil Registry, where the registered data are presumed to be correct.[44] The Court upholds the fulfilment of the requirements for the adoption to be constituted[45] and in order not to prolong the situation of legal uncertainty the child had been suffering, it simply declares the nullity of the decision of the Provincial High Court and confirms the adoptive parentage originally established by the Court of First Instance.

The fact that the Court explicitly adopted the fastest solution to avoid undue delay affecting the child deserves special attention. The legal uncertainty surrounding this matter together with the controversial application of undefined legal concepts, such as public policy or best interest of the child,[46] have hampered in many cases the adoption of prompt measures thus leaving many children in an undesirable legal limbo for too long. The time factor is important in this context, as derived from the ECHR case law. This idea is thoroughly clarified in the recent case *C. v. Italy* of 31 August 2023,[47] where the Court noted that the domestic courts had been unable to take a swift decision to protect the applicant's interest in having her legal relationship with her biological father established. The child, aged four, had been kept since birth in a state of protracted uncertainty as to her personal identity and, as she had no legally established parentage, was considered a stateless person in Italy. The Court therefore held that, despite the margin of appreciation afforded to the State, the Italian authorities had failed to fulfil their positive obligation to ensure the applicant's right to respect for her private life under the Convention. Hence, the States are sovereign for regulating the possible recognition of legal parentage derived from surrogacy agreements but the best interests of the child demand effectiveness and celerity in this determination.[48]

43 AJPI Madrid no. 265/2018, 21 June 2018.

44 See Art. 113 Cc and Art. 16 and 19 Law 20/2011, 21 July 2011, of the Civil Registry (BOE no. 175, 22 July 2011).

45 Art. 175 and 176.2.2 Cc.

46 C. Azcárraga Monzonís, 'La gestación por sustitución en el Derecho Internacional Privado español. …', *supra* n. 11, 673-710.

47 C. v. Italy (n. 47196/21) ECHR (2023), accessed 5 December 2024.

48 A.J. Vela Sánchez, 'El Tribunal Constitucional ampara a una madre de intención a quien se denegó la adopción del hijo de su marido nacido de convenio de gestación por sustitución. A propósito de la Nota informativa del Tribunal Constitucional nº 19/2024, de 27 de febrero', 10487 *Diario La Ley* (2024), at 7.

Along with the need for swift action, the importance of implementing the gender perspective in this field has also been highlighted by the magistrate who issued a dissenting opinion to the STC 28/2024. Mrs María Luisa Balaguer asserts that the Court's reasoning lacks gender perspective. Its approach makes invisible the structural problem that exists in the Spanish legal system regarding foreign women who are not protected by the basic guarantees of our constitutional system. The Court considers the rights of the child as well as the rights of the adoptive mother, but forgets about the rights of gestational women, whose voices are not heard by Spanish courts whereas they should at least be protected by the Constitutional Court. She considers that the accurate interpretation of public policy in this matter should be articulated on two fundamental ideas: on the one hand, an adequate understanding of the best interests of the minor, not implying the automatic recognition of the effects of a contract that is null and void in Spain; and, on the other hand, a correct evaluation of the conditions under which the contract has been signed in the country of origin assessing the gender approach and the rights of the pregnant woman.

The magistrate confirms that the existing legal framework in this field is defective and leads to considerable legal uncertainty. This situation should prompt the legislator to act effectively and immediately bearing in mind the constitutional limits that she points out in this opinion, but until the legislator provides for a regulation, she assumes that the role of judicial authorities becomes crucial. And in this sense, she argues that the judicial interpretation of the existing framework should be based on four essential elements: 1) the best interests of the child, individually considered; 2) the best interests of children to be protected from actions that violate their dignity as a group; 3) the guarantee of the principle of human dignity of both the child and his biological mother; and 4) the guarantee of the rights of the biological mother, so that it can be concluded that they were not violated in the course of the entire gestational process.

Taking the above into account, we agree with the magistrate that the Constitutional Court has probably lost a very good opportunity for shaping the public policy concept in cross-border surrogacy cases based on constitutional arguments, seeking the proper balance of the constitutional values at stake. However, even though this approach would have been desirable, we also believe that the Court has rightly focused on the specific situation it was requested to, unlike the Supreme Court Judgments rendered in 2014 and 2022, which were clearly general and exemplary and did not focus on the needs of the children involved in those cases. Because once the child is born and the *de facto* family has been created abroad, is there really any room for any solution other than the recognition or establishment of parentage in Spain?

Regarding this case, the Constitutional Court's approach has led to the confirmation of the adoptive parentage in favour of the wife of the biological father under the general rules governing the adoption and consequently, surrogacy has become effective again in the Spanish system by circumventing the prohibition of Law 14/2006. This doctrine has been said to confirm the validity of surrogacy agreements entered by Spanish citizens abroad, as well as the feasibility and admissibility of the determination of legal parentage in these cases.[49] In brief, it is a fact that paternity claims, the recognition of

[49] A.J. Vela Sánchez, 'Tribunal Constitucional español y convenio de gestación por sustitución. A propósito de la Sentencia del Tribunal Constitucional 28/2024, de 27 de febrero', 10507 *Diario La Ley* (2024), at 4 and 10.

foreign judgments and the possible adoption of the child ensure the recognition or the establishment of parentage in Spain of children born abroad through surrogacy. Along with this, other scenarios in which the Spanish authorities have also accepted other peripheral or indirect effects under the doctrine of the mitigated public policy will be addressed in the next section.

(3) Mitigated Public Policy

Surrogacy has deployed some peripheral effects in Spain in cross-border cases despite its general prohibition in our legislation. The *ordre public atténué* doctrine has been primarily applied in the field of (a) social security and maternity/paternity benefits, and recently, the Supreme Court has upheld another positive outcome in relation to (b) the change of the child's place of birth.

(a) Social Security Benefits

Surrogacy has been granted efficacy in Spain in the field of social security benefits. The Social Chamber of the Supreme Court has unified doctrine in a positive sense granting the maternity/paternity benefit in cross-border surrogacy cases and in doing so it has provided for a unified criterion that clarifies the situation in Spain in this field on the basis of the necessary protection of all children under the principle of the best interest of the child, despite the opposite positions ruled in lower instances and the absence of an explicit reference to surrogacy in the relevant legislation.[50]

The *ordre public atténué* doctrine was applied by the Social Chamber of the Supreme Court for the first time in two cases ruled in 2016 regarding children born in the United States of America (California, USA) and India. The first Judgment of 25 October 2016 referred to a Spaniard who contracted assisted reproduction in India using his genetic material (STS 881/2016);[51] the second Judgment of 16 November 2016 involved a Spanish female worker with a child registered at the Spanish Consulate in Los Angeles (STS 953/2016).[52] Although the Spanish Social Security initially refused the requested benefits, the Supreme Court upheld the applicants, holding that the rules shall be interpreted in an integrated manner, in the light of the case law of the ECHR, the European Court of Justice (ECJ)[53] and various international, constitutional and regulatory provisions.

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50 N. Sirvent Hernández, 'Gestación por sustitución y derecho a prestaciones de seguridad social: razones para una regulación urgente', 205 *Revista Española de Derecho del Trabajo* (2018) 69-104, at 4, 19, 21-22.

51 STS 881/2016, 25 October 2016. It contains three dissenting opinions; one of them in favour of dismissing the appeal due to legal fraud.

52 STS 953/2016, 16 November 2016. It contains two dissenting opinions in favour of dismissing the appeal.

53 ECJ Judgments in Cases C-167/12 (ECLI:EU:C:2014:169) and C-363/2012 (ECLI:EU:C:2014:159), both dated 18 March 2014. Further analysis in J. Gorelli Hernández, 'La prestación por maternidad en los casos de gestación por sustitución o maternidad subrogada (vientres de alquiler)', 1 *Revista Aranzadi Doctrinal* (2017); M.J. Moreno Pueyo, 'Maternidad subrogada y prestación de maternidad', 116 *Revista del Ministerio de Empleo y Seguridad Social* (2015) 21-56, at 35 ff; A. Hernández Rodríguez, 'Determinación de la filiación de los nacidos en el extranjero mediante gestación por sustitución: ¿Hacia una nueva regulación legal en España?', 6-2 *Cuadernos de Derecho Transnacional* (2014) 147-174, at 165 ff.

This Chamber has considered that the existence of a family unit in which the children have *de facto* family relations with the appellants should lead to a solution allowing the development and protection of those family bonds. Hence, granting the maternity/paternity benefit is deemed to be a suitable means of doing so. If this protection is not granted to a child born after a surrogacy contract, this would result in discrimination on birth grounds, in contravention of Articles 14 and 39.2 CE, the latter of which provides that public authorities shall ensure the full protection of children, equal before the law regardless of their parentage.[54]

In brief, the Supreme Court has ruled in this order that there is no evidence of fraudulent or criminal behaviour, beyond the unlawfulness involved in surrogacy itself,[55] and that caring for the children should be the predominant point of view when it comes to social security benefits. It is considered that in this area the focus should not be put on the prohibitions of registration or on the surrogacy contract itself and that two perfectly distinct levels should be distinguished: on the one hand, the one concerning the surrogacy contract and its nullity, and, on the other hand, the situation of the child. The nullity of the contract cannot undermine the child, among other reasons, because our Labour Law already recognizes certain effects in cases of legal transactions affected by nullity,[56] furthermore it is also open to foreign institutions declared by foreign judicial or administrative resolutions whose purpose and legal effects are those foreseen for adoption and pre-adoptive fostering[57] and, above all, because the best interests of children must guide any decision affecting them.

However, the aforementioned Judgments, far from being unanimous, are accompanied by dissenting opinions that symmetrically question the reasoning underlying the result reached by the majority of the Chamber.[58] This shows, once again, the controversial nature of this matter and the need for the legislator to take the lead in setting clear criteria in this area. Especially considering that, in addition, this positive doctrine of the Social Chamber of the Supreme Court experienced in 2019 a period of uncertainty because of the novelties brought by the Royal Law-Decree 6/2019.[59] This regulation merged the former maternity and paternity benefits into a single "childbirth and childcare benefit" (*prestación por nacimiento y cuidado de menor*) and extended the periods of entitlement to the parent other than the biological mother as well as the requirements for accessing the benefit.

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54 STS 953/2016 (FJ 9).

55 STS 881/2016 (FJ 9): In this case, there is no evidence of fraudulent conduct, abuse of rights or illegal obtaining of benefits that could alter the result, as would have occurred if a duplication of benefits was sought or in cases where there was a conflict between biological and intended parents.

56 STS 953/2016 (FJ 9): by recognising the right to remuneration for time already worked under a contract that turns out to be void, by establishing a widow's pension in certain cases of marriage annulment or by limiting the effects of the absence of a work permit.

57 Art. 2.2 Royal Decree 295/2009, 6 March 2009, on the economic benefits of the Social Security system for maternity, paternity, risk during pregnancy and risk during breastfeeding (BOE no. 69, 21 March 2009).

58 J.R. Mercader Uguina, 'La creación por el Tribunal Supremo de la prestación por maternidad subrogada: a propósito de las ssts de 25 de octubre de 2016 y de 16 de noviembre de 2016', 9-1 *Cuadernos de Derecho Transnacional* (2017) 454-467, at 460.

59 Royal Law-Decree 6/2019, 1 March 2019, on urgent measures to guarantee equal treatment and opportunities between women and men in employment and occupation (BOE no. 57, 7 March 2019).

In principle, it follows that all births are covered by this benefit, but the key question seems to be what is meant by the term "biological mother", whether it is a mother who has given birth by biological birth or, in a broader sense, a mother who has a genetic link with the child, regardless of the method used.[60] Some authors have wondered about the correct interpretation of this new rule and have expressed doubts as to whether an integrative solution to situations arising from surrogacy could continue to be supported until future jurisprudence clarifies the situation.[61] To date, however, it appears that despite the absence of an explicit regulation covering these cases and the amendment that took place in 2019, the interpretation remains the one defended by the Supreme Court since 2016.[62] In our view, this is the right position because every child should be entitled the right to benefit from the proper care regardless of his origin.

(b) Changing the Place of Birth of the Adopted Child

On 17 September 2024, the Civil Chamber of the Supreme Court (STS 1141/2024)[63] upheld the position of a Spanish married couple who entered a surrogacy contract in Ukraine. This Judgment exemplifies the situation where surrogacy is not the object of the controversy as such nor directly accepted (nor rejected) but it is indeed granted a positive treatment based on the mitigated public policy despite the prohibition of surrogacy contracts in our legal system. In this case, the ruling takes place in the framework of the Civil Registry after the legal parentage had already been confirmed by both parents (paternal biological parentage and maternal adoptive parentage following the adoption of the husband's child the biological father's child). These parents of a child born in Ukraine applied for the transfer of the birth registration of the minor from the Central Civil Registry to the Civil Registry of their domicile requesting the modification of his place of birth (Kiev) to the place of the parents' domicile (Barcelona). They also requested that neither the surrogacy nor the adoption were included in the birth registration.

The Civil Registry refused to change the place of birth, and this refusal was subsequently confirmed by the General Directorate of Legal Certainty and Public Faith on 21 February 2022, so the parents challenged the decision before the competent courts. This claim was dismissed first in November 2022 by the Court of First Instance n. 51 of Barcelona and then by the Provincial High Court of Barcelona in June 2023, so that they appealed in cassation before the Supreme Court. The Supreme Court has upheld the parents' position, which was based on two main arguments. On the one hand, the appellants plead the infringement of substantive rules of the Civil Code (Article 4 Cc on

60 D. Tomás Mataix, 'La problemática derivada del reconocimiento de los efectos del contrato de gestación subrogada desde la perspectiva del Derecho del trabajo y de la Seguridad Social', 11-2 *Cuadernos de Derecho Transnacional* (2019) 348-359, at 357.

61 *Ibid.*, pp. 357-358; L. Sales Pallarés, 'La pérdida del interés (superior del menor) cuando se nace por gestación subrogada', 11-2 *Cuadernos de Derecho Transnacional* (2019) 326-347, at 340.

62 E. García Testal, 'Prestaciones por nacimiento y conciliación de la vida laboral y familiar', in R. Roqueta Buj and J. García Ortega (dir), *Derecho de la Seguridad Social I* (Tirant Lo Blanch, Valencia, 2024), 323, at 326-327.

63 STS 1141/2024, 17 September 2024.

the analogical application of rules) and the (former) Civil Registry Law,[64] claiming that the requirements of *de facto* and *de jure* identity with international adoptions where the transfer of the place of birth was explicitly contemplated were met; on the other hand, they plead the infringement of the child's right to personal and family privacy and the free development of his personality.

The Supreme Court endorsed that the fact that the child was born through surrogacy was not relevant in the case under appeal since the parentage of the child had not been established on the surrogacy contract but on the biological link between the child and his father and the maternal parentage on the adoption of the spouse's child. These two ways of determining parentage are allowed in the Spanish legal system and the Court stressed that they respect the dignity of the child. Taking the above into account, it asserted that the possible violation of public policy was not a problem in this case despite the existence of a surrogacy contract at the origin because the biological link of the paternity and the subsequent maternal adoption led to a different situation than the one prohibited in Article 10 Law 14/2006.

On these premises, the Supreme Court considered applicable by analogy the provisions of the Civil Registry Law that allowed this change of the place of birth in intercountry adoptions. Analogously, although the referred adoption has no cross-border nature, the place of birth of the child in a remote country with which the parents have no other relationship, would also denote the adoptive nature of the filiation and the circumstances of the origin of the minor. The registration of a specific place of birth abroad, which would appear on the national identity document or passport, would violate the right to privacy of the minor, as it would reveal the existence of the adoption and the circumstances relating to his particularly sensitive origin (in this case, having been conceived by surrogacy) and would constitute discrimination with respect to other parentages (namely, intercountry adoption).

Even though this rationale is refutable on the basis of the children's right to know their origins,[65] this interpretation goes in line with several provisions of the Spanish Constitution like Article 18.1 CE, insofar as it allows the effectiveness of the right to personal and family privacy of the minor. Also, the above-mentioned Article 14 CE, that prohibits discrimination based on birth, and Article 39.2 CE, which refers to the protection by public authorities of all children, who shall be treated equally before the law regardless of their parentage.

The new Civil Registry Law 20/2011,[66] does not foresee this same provision explicitly but this kind of requests seeking the change of the place of birth of a child born abroad who is adopted in Spain could still be pled under Articles 77 and 307 of the Regulation

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64 Art. 20.1 of the former Civil Registry Law of 1957 (BOE no. 151, 10 June 1957): "*In case of international adoption, the adopter or adopters may request by mutual agreement that the new registration includes their domicile in Spain as the place of birth of the adopted child.*" Translation of the author.

65 Art. 180 Civil Code, paragraphs 5 and 6. See C. Azcárraga Monzonís, 'La adopción nacional e internacional desde la perspectiva autonómica. El caso de la Comunidad Valenciana', 17 *Actualidad Jurídica Iberoamericana* (2022) 1034-1069, at 1061 ff. It has also been asserted that surrogacy is incompatible with the children's right to know their origins in G. Iruegas Prada, 'El derecho a conocer sus orígenes: una manifestación del interés superior del menor', 37 *Revista Boliviana de Derecho* (2024) 476-499, at 494.

66 Civil Registry Law 20/2011, 21 July 2011 (BOE no. 175, 22 July 2011).

of the Civil Registry Law of 1958.[67] Therefore, the recognition of some sort of effects based on the analogous treatment of surrogacy to intercountry adoptions is still possible in our legal system when it comes to this particular issue the change of place of birth . Concerning other aspects, we believe that making these two legal institutions equivalent is far from being possible and that it is very dangerous to go on exploring possible parallels.

International adoptions are now subject to very strict procedures involving the authorities of the two countries concerned (the country of residence of the adoptive family and the country of residence of the child), who are responsible for ensuring that all the conditions for the adoption are met, that the consents are strictly checked, that the biological mother has given her consent after the birth of the child and the adoptive parents are eligible and suitable to adopt.[68] By contrast, as seen in this research, surrogacy cases raise serious concerns about the violation of fundamental rights. Therefore, whereas intercountry adoption and cross-border surrogacy may have some minor parallels, they cannot be made equivalent in the present state of affairs. For now, this new ruling of the Supreme Court evidences another positive inclination towards the indirect recognition of surrogacy in our system based on the mitigated public policy doctrine and moreover, this is due to an interpretation which considers the parallels with intercountry adoption, an institution that is now fully established in our system which also underwent a normative evolution until its full recognition in Spain. Is this happening again?

(4) The Inconsistent Treatment of Surrogacy Contracts in Case Law

"Surrogacy contracts" refer in general to a wide category of agreements that include different legal relationships among the various persons involved in commercial surrogacy cases. These may refer to, first, the contract signed between the intended parents and the gestational woman, second, the one between the gestational woman and the agency, and third, between the agency and the intended parents. Which ones are covered by Article 10.1 Law 14/2006 and therefore are deemed to be null and void?

To answer this question, it is relevant to start reminding the content of Article 10.1 Law 14/2006: "*The contract under which surrogacy is agreed, with or without a price, by a woman who renounces to maternal parentage in favour of the other contracting party or a third party, shall be null and void.*" The wording of the rule, and therefore the nullity it enshrines, seems to cover two types of contracts. On the one hand, the one concluded between the intended parents and the gestational woman; and on the other hand, the one agreed between this woman and the agency, since the provision refers to contracts under which a woman renounces to maternal parentage "*in favour of the other contracting party* (woman/intended parent/s) *or a third party* (woman/intermediary agency)." Hence,

[67] Decree of 14 November 1958 on the Regulation of the Civil Registry Law (BOE no. 296, 11 December 1958). J.J. Pretel Serrano, 'Comentario a la sentencia del Tribunal Supremo 1141/2024, de 17 de septiembre', 5 October 2024, accessed 5 December 2024.

[68] See The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (BOE no. 182, 1 August 1995), which establishes a network of Central Authorities appointed by the contracting parties.

the material scope of application of Article 10 Law 14/2006 raises doubts about the third kind of contract referred to above, thus extending those doubts also to their possible nullity in Spanish law: does the nullity also cover the contract signed between the intended parents and the intermediary agency?

In principle, this agreement could be qualified as a contract for the provision of services. However, several recent decisions like the Judgment of the Provincial High Court of Barcelona of 15 January 2019 (SAP Barcelona 74/2019)[69] show a very different scenario. This Judgment relates how the company SUBROGALIA, S.L. commits to a result (the birth of a baby) even including a clause in its contracts guaranteeing the success of the transaction. This decision concerns two contracts concluded in Spain between two couples and the company in question with the aim of assisting them during the procedure, which was expected to finish with a baby born in Mexico. In this case, as also happened in the previous procedure that took place before the Court of First Instance n. 55 of Barcelona, the Provincial High Court did not deal with the validity or nullity of the contracts. Surprisingly enough, it assessed the possible contractual breaches in their enforcement without even questioning whether they should deploy efficacity or not.[70]

The two families filed a lawsuit against the company because the purpose of the contract was not fulfilled. They did not achieve to get a baby, so they claimed the existence of a breach of contract and its termination for this reason, claiming the refund of the amounts they had already paid and compensation for damages. Furthermore, among other circumstances that occurred during the procedure that prevented the fulfilment of the contracts, the Mexican State of Tabasco forbid surrogacy at the time, so the company proposed them to continue in the USA changing the economic terms previously agreed. So, are these contracts valid in our country considering the treatment they are given in this judgment? Do they fall within the scope of application of Article 10 Law 14/2006? If so, they should have been declared null and void and therefore not granted any legal consequence nor being object of a contractual breach procedure. At least, this seemed clear enough regarding the contracts signed in Mexico between the parents and the gestational women, which were also provided by the parties in the procedure heard before the Provincial High Court. However, again, the court did not consider their possible nullity either.

These same doubts also arise regarding the Judgment of the Supreme Court of 16 May 2023 (STS 754/2023),[71] where the reasoning of the Court does not include any assessment or criticism regarding the possible nullity of the contracts. The plaintiff brought a double action for the establishment of parentage of the plaintiff's paternity in respect of the two biological children of his former partner and the paternity of his former partner in respect of the plaintiff's two biological children, all of whom were born through surrogacy. The claim was rejected by the Court of First Instance n. 4 of Pozuelo de Alarcón (Madrid) and by the Provincial High Court of Madrid. The latter court

[69] SAP Barcelona 74/2019, 15 January 2019. See also SAP Barcelona 14112/2019, 28 November 2019.

[70] M.E. Sánchez Jordán, 'La necesaria doble aproximación a la gestación subrogada. En particular, de los olvidados contratos de gestación por sustitución', 4 *Indret: Revista para el Análisis del Derecho* (2020) 116-146, at 126.

[71] STS 754/2023, 16 May 2023.

asserted that the parentage was not denied due to the nullity of the surrogacy contract according to Article 10 Law 14/2006 but because neither of the fathers had participated in the contract signed by the other or manifested the acceptance to undertake the surrogacy procedure of the other member of the couple. Again, the possible nullity of the contract was not considered to be a relevant element, because in this case the children's parentage was already recognized in the Spanish legal system and was not questioned before the Court.

The Supreme Court recalls that there was no legal uncertainty concerning parentage of all the children involved, the two pair of brothers, because it had already been established in relation to each biological father separately before the case was even brought before the Court of First Instance. Possession of status is declared not to be applicable because the parties were perfectly aware of the separate parentage they had established with their respective children and furthermore they would have been able to legalise the cross parentage for years through other means, such as the adoption of the couple's children. Moreover, the claim was filed after the couple had split and the socio-affective bond of the children with each other and with the partner of their respective fathers was not deemed in itself the basis for the establishment of legal parentage, and even less so when this legal situation, and the rights and obligations it entails, did not exist before the break-up of the cohabitation.

In brief, the claim pursued to extend the parentage based on legal solutions accepted by the Spanish legislation and it was rejected in every instance without even questioning the nullity of the original surrogacy contracts. It can therefore be concluded that the Supreme Court has already heard cases in which the implementation of effects of surrogacy contracts performed abroad has been standardized as a basis on which elucidate subsequent issues, either parentage itself as happens in this case or other minor issues like the change of the place of birth as explained in a previous epigraph. The validity of these contracts is not questioned neither on the basis of Article 10.1 Law 14/2006 nor regarding the possible breach of essential contractual elements.[72]

Hence, the inconsistent treatment of surrogacy contracts before Spanish courts leads to question the real scope of their nullity. While some declare them null and void, others hear cases on breaches of contract. It is obvious that under the current regulation not enough is being done to prevent the development of this practice in our country if no more measures are adopted to limit this kind of commercial transactions. The next question that arises in this respect is whether it is really in the Spanish legislator's intention to prohibit this practice. In the meantime, it seems that the judicial power is not being clear enough in establishing the desirable boundaries. By doing so, the message sent, both to society in general, and to future litigants in similar cases, is that surrogacy and the economic and legal-contractual activity that takes place around it, are perfectly valid in our country.[73]

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[72] M.E. Sánchez Jordán, *supra* n. 70, at 135. The author claims that, according to Spanish law, the nullity of these contracts is also due to the breach of some essential contractual elements relating to consent and its object.

[73] A. Gálvez Criado, '¿Sigue siendo nulo en España el contrato de gestación subrogada? Una duda razonable', 9444 *Diario La Ley* (2019), at 9. The author differentiates the cases in which the child is born from those in which there is not a child to protect. In the latter case, the one tackled by the Barcelona Provincial High

(B) IS SURROGACY FORBIDDEN IN SPAIN?

In a nutshell, a contract that is expressly prohibited in the Spanish legislation is becoming effective in our country in cross-border cases, so that the initial question can only be answered in the negative: surrogacy is not prohibited in Spain. This breach of the general rule occurs in cross-border cases, sometimes in the context of the recognition of judgments, sometimes because of paternity claims, sometimes with the aim of establishing parentage, sometimes to obtain other types of effects such as social security benefits or damages for breach of contract, but in the end all these possibilities are accepted despite the general prohibition established by Article 10 Law 14/2006. This confirms the existence of serious inconsistencies in the Spanish current legal framework and evidences a complex panorama that generates legal uncertainty for which the legislator is responsible, and which is solely within its competence to resolve. As Mrs Balaguer accurately asserted in the STC 28/2024, "it is contrary to the legal certainty of Article 9.3 of the Spanish Constitution that the same legislator that prohibits a practice in Spain does not provide sufficient restrictions for equivalent practices carried out outside our country, because this legalizes de facto, through inaction and by way of the necessary protection of minors, what is considered illegal in our system".[74]

Legislative action is therefore imperative, as is ensuring that the relevant legislative measures are taken from a human rights perspective. Any legislation adopted in this area should seek to limit what is seen by many as a serious problem of human rights abuse. Indeed, it is clear that the human rights of children and women are threatened by this practice and any measure adopted in this area should seek to address this worrying situation.

As far as children are concerned, we share the ECHR's position in favour of the confirmation of parentage, as swift as possible so as not to prejudice the rights of children. In this vein, the various solutions offered by the Spanish system seem to protect them from a legal point of view, since the parental link with the intentional parents is guaranteed by the various means described above, at least in cases where a biological relation with the child can be proven. This approach is necessary because establishing parentage by birth, as provided for by Article 10.2 Law 14/2006 if this provision is applicable at all to cross-border cases , makes no sense within a legal system that also includes different ways to establish parentage beyond this traditional approach. The "*mater semper certa est*" principle allows for exceptions in the Spanish model, as should be the case here, at least in cross-border cases, for the sake of the best interests of the child.

Article 10.3 Law 14/2006 on paternity claims by biological fathers provides a more coherent solution within the Spanish system. The State's wide discretion in the matter of legal parentage is limited where there is a biological link between the parents and the child. However, it is more complicated to bet on a solution when there is no genetic

Court, he considers that it seems that purely contractual legal conflicts can be raised regardless of the nullity of the contract "thus normalising without the slightest qualm an economic activity that consists of agreeing a specific (and large) remuneration for services that are contrary to our laws".

74 Translation of the author.

link with the prospective parents. Should the creation of a *de facto* family be sufficient to establish parentage? Should the temporal criterion i.e. the length of time the child has lived with the intended parents be relevant in establishing parentage, for instance through possession of status? These criteria, if applicable, should be confirmed or disregarded by the legislator.

As for women who accept these transactions, it is well known that, apart from the few altruistic cases that have occurred in some countries, the vast majority of them accept abusive conditions to satisfy the parental desires of citizens living abroad, so that in our opinion it is safe to say that this reality is a breeding ground for new forms of modern slavery. And, just as serious, the Spanish legislator is allowing it to happen. The STS 835/2013 already referred to the undesirable commodification of women and the STS 1153/2022 boosted the gender perspective by reproducing literally some of the clauses included in the surrogacy contract performed in Mexico. The woman's sexual and reproductive rights were completely nullified and her right to health was eroded, severely undermining her dignity and free development, thus calling into question a real and valid free consent.

However, this accurate reasoning was the basis for an inappropriate final decision as was also the case in the 2014 Judgment which prevented the best interests of the children involved from being adequately protected. These two Judgments rejected the claims because they ruled against surrogacy in general, forgetting the rights of the children whose lives depended on such decisions. Consequently, the possible future regulation governing cross-border surrogacy cases should ponder two elements for achieving a proper balance in the treatment of the cases where children already exist. On the one hand, the human rights perspective and in particular, the gender perspective; but also, on the other hand, which is the best solution for the child the case refers to. This requires a case-by-case assessment by legal operators and leads to another interesting point for discussion: should the solutions be different depending on the presence or absence of a child? Probably. As mentioned above, once the child has been born and the *de facto* family has been created abroad, and in many cases has been living in Spain for a long time, we believe that there is no room for any other solution than the recognition of parentage. The *fait accompli* doctrine is the only respectful solution for children's rights, but unfortunately, not for impoverished women because it does not allow to assess the situation that led to the conception of the child, often associated with a woman in need, forced by her life circumstances to enter this kind of transactions.[75]

As we have seen, many aspects remain to be resolved in a desirable future regulation. However, despite the urgency of adopting regulatory standards for international cases, there are currently no national legislative or policy initiatives dealing with cross-border surrogacy cases. Do they exist at international level? If so, have they addressed this issue from the gender perspective? Promoting cooperation within international bodies with the objective of harmonising rules for cross-border cases is particularly useful for citizens involved in private international relationships. However, discussing and reaching common views on sensitive issues such as this one is extremely difficult and may lead to a consensus that could be far from the ideal solution from a human rights perspective.

[75] C. Azcárraga Monzonís, 'La gestación por sustitución en España…', *supra* n. 13, at 66.

The work done so far by the EU or the Hague Conference on Private International Law (HCCH) is extremely important because the current legal uncertainty needs to be addressed from a legal perspective. If the national legislator does not promote this legislative action, we are forced to examine what is happening at the international level. Let us take a brief look at the work developed so far by these two organisations in this field; this will help us to conclude this study with some final remarks.

(C) WORK IN PROGRESS AT INTERNATIONAL LEVEL AND CONCLUDING REMARKS

The EU has shown a strong position against commercial surrogacy since time ago. The European Parliament Resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter[76] condemned the practice of surrogacy because it "undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity" and considered "that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments".

More recently, in its Resolution of 5 May 2022 on the impact of the war against Ukraine on women,[77] it recalled "the serious impact of surrogacy on women, their rights and their health, the negative consequences for gender equality and the challenges stemming from the cross-border implications of this practice, as has been the case for the women and children affected by the war against Ukraine" and asked "the EU and its Member States to investigate the dimensions of this industry, the socio-economic context and the situation of pregnant women, as well as the consequences for their physical and mental health and for the well-being of babies" and "the introduction of binding measures to address surrogacy, protecting women's and newborns' rights".

Therefore, the position of the EU against commercial surrogacy is crystal clear. Indeed, it has been confirmed at legislative level with Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, [78] that has included surrogacy in the concept of "exploitation" stated in Article 2 Directive 2011/36/EU.[79] The current wording of this provision, paragraph 3, reads as follows: "*Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs*, or the exploitation of surrogacy, *of forced marriage, or of illegal adoption*". The

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76 EP Resolution of 17 December 2015 (2015/2229(INI)).

77 EP Resolution of 5 May 2022 (2022/2633(RSP)).

78 Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (OJ L 2024/1712, 24 June 2024).

79 Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (OJ L 101, 15 April 2011).

question remains as to whether this regulation will have an impact on the substantive law of the EU Member States that currently accept this practice, albeit in the altruistic modality, and/or the possible consequences that this regulation may have on the possible recognition of cases that have taken place abroad.

To date, however, the gender perspective takes a back seat in European PIL. The fact that the child may already have been born by the time the case is considered determines the outcome. Once born, the focus is on the protection of these children and the possible recognition or establishment of parentage in cross-border relationships regardless of the way they were born or conceived or the type of family they are part of. In this vein, the ECJ has supported the recognition of social security benefits[80] and the new Proposal for a Regulation on parentage does not exclude surrogacy from its scope of application. The inclusion within its scope of protection of surrogate-born children and the requirement of the cross-border recognition of rainbow families have proved to be the two main points of contention but the Proposal had to include all children and, above all, the children of "alternative families" given that the latter are disproportionately affected by the problem of non-recognition of parenthood in the EU.[81]

The Proposal for a Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood of 2022[82] covers all PIL questions whilst leaves untouched the substantive family laws of the EU Member States. For its purposes, parentage may be biological, genetic, by adoption or by operation of law. It covers the recognition of a child's parentage irrespective of the way he was conceived or born and his type of family. Nonetheless, it is imperative to recall that according to Article 3.3 "*This Regulation shall not apply to the recognition of court decisions establishing parenthood given in a third State, or to the recognition or, as the case may be, acceptance of authentic instruments establishing or proving parenthood drawn up or registered in a third State.*"

Recognition of cases arising in third countries would certainly have provided a quicker outcome for these families, but EU law is not yet ready to accept common standards for the recognition of decisions from outside the EU. However, the doors have not been closed to establishing parentage before European national courts in cases taken place abroad by starting the parentage procedure on EU territory, because under this Proposal "the parenthood may feature elements of connection also with third States"[83] beyond the PIL field of recognition. This happens, for instance, when establishing the parentage derived from a cross-border surrogacy arrangement where the child's residence is located in the EU (Article 6 general jurisdiction) and the case is governed by the Law of a third state that accepts this practice in the commercial modality as the law of the state of birth or the law of the state of the habitual residence

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80 See *supra* n. 53.

81 A. Tryfonidou, 'The cross-border legal recognition of parenthood under European law: current law and future prospects', 46-2, Journal of Social Welfare and Family Law (2024) 267-285, at 279-280 [https://doi.org/10.1080/09649069.2024.2344936].

82 COM(2022) 695 final, accessed 5 December 2024.

83 D. Danielli, 'Third-State connections" in the proposal for an EU regulation on parenthood: more than a regime of circulation of the status between Member States?", 15-2 *Cuadernos de Derecho Transnacional* (2023) 1387-1399, at 1393.

of the person giving birth (Articles 16 universal application and 17 applicable law).

Indeed, it has been argued that the applicable law rules of Article 17 clearly aim at preserving the validity of parentage in the context of assisted reproductive technology or international surrogacy arrangements[84] and to this end it is very interesting to read how the two paragraphs of this Article ensure a positive outcome in cross-border cases for the two parents of biparental families. It embodies several options for establishing parentage once the *de facto* family is in the EU and this outcome guarantees the continuity of parentage throughout the EU. All this in light of Recital 18, which incorporates the ECHR doctrine, and with the possible recourse to public policy but limited by the right to non-discrimination and the best interests of the child (Articles 22.2 applicable law and 31.1 recognition).

Once this positive result has been obtained in one Member State, that "recognised parentage" will become a "circulating parentage" in the EU.[85] To this end, the rules on recognition and the creation of a European Certificate of Parentage ensure circulation within the EU. This outcome respects the rights of children as it preserves the continuity of their parentage in cross-border cases, a position that is in line with the international trend in this area but, at the same time lacks from gender perspective because it does not address the exploitation of women that is taking place. We agree that it is necessary to respect the transnational identity of children and to stop ignoring the existence of all types of families that exist today. Among other negative consequences, the opposite solution prevents the child from acquiring the nationality of the non-recognised parent or inheriting that parent's property, while the non-recognised parent does not benefit from any administrative privileges in relation to the child, such as travelling alone with him, consenting to medical care, or opening a bank account for the child.[86] In doing so, however, the legislator leaves the gender perspective out of the fight, a serious concern that would also need to be addressed legally.

Truth is that one of the grounds for refusal of recognition stated in Article 31 of the Proposal could be interpreted as taking the position of the pregnant woman into account, albeit weakly. The recognition of a court decision given in another EU Member State shall be refused (…) "c) *upon application by any person claiming that the court decision infringes his fatherhood or her motherhood over the child if it was given without such person having been given an opportunity to be heard.*" Yet, although it can be seen as a step forward, this is not enough from the human rights perspective. These women may have had the legal capacity to sign these contracts and may have been given the opportunity to be heard, but the struggle is for their consent to be considered truly valid.

Consequently, in the EU, as happens in the Spanish model, the inconsistency of opposing surrogacy as contrary to human rights and then facilitating the recognition of these situations in international private relations cannot be overlooked. Again,

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84 European Group for Private International Law, "Observations on the Proposal for a Council Regulation in matters of Parenthood", 2023, at 2. Accessed 5 December 2024.

85 S. Álvarez González, 'La propuesta de Reglamento europeo sobre filiación. Una presentación crítica', 10-3 *Revista de Derecho Civil* (2023) 171-200, at 196.

86 A. Tryfonidou, *supra,* n. 81, at 269.

substantive law does not go in line with PIL. Substantive law prohibits and PIL accepts. If the prohibition does not reach cross-border relationships, it might be advisable to envisage an *ex-ante* system to be applied prior to the birth of the children in parallel with the system facilitating the cross-border recognition of parentage after their birth assuming that this practice is unstoppable nowadays at the international level. The *ex-ante* or "a priori" system has been considered at the HCCH, where the cross-border recognition of parentage has been under discussion for more than a decade. [87] Let us examine the progress that has been made regarding possible future instruments on parentage and surrogacy agreements.

The first "Preliminary note" on this topic drawn up by the HCCH Permanent Bureau was published in March 2011.[88] During seven years the Experts' Group (EG) discussed just about the convenience and feasibility of adopting an international legal instrument about parentage and international surrogacy agreements. They agreed upon the possible adoption of a Convention on parentage and a separate Protocol on international surrogacy agreements. As regarding the latter, one of the main points of discussion was whether to go for an a priori or an a posteriori system.[89] The experts ensured that a number of states might be attracted to an a priori model (along the lines of the 1993 Intercountry Adoption Convention) because it would better protect human rights, but they also concluded that an a posteriori model would be more feasible.

The a priori approach, based on a cooperation system, favours reducing risk of placing receiving States in the difficult situation of having either to (i) recognise the child's legal parentage and encourage those abusive practices or (ii) not recognise the child's legal parentage thus penalising that child for the adults' failure to adhere to the uniform safeguards. But at the same time, the higher degree of public authority involvement required in cross-border cooperation mechanisms (both for states that regulate and that prohibit),[90] as well as the fact that it would imply the acceptance of these practices before they have occurred, made difficult to envisage a model focused on future situations that will encourage citizens residing in countries where this practice is prohibited to use surrogacy abroad. With all these arguments in mind, the further discussion focused on the a posteriori approach, which remains the main option in the work now being undertaken by the Working Group on Parentage/Surrogacy (WG) made up of representatives appointed by the states .

Following the mandate of the Council on General Affairs and Policy of the HCCH, the first meeting of the WG took place in November 2023. The WG started its consideration of draft provisions for one new instrument as mandated by the Council, if possible by focusing on possible rules on the recognition of judicial decisions, and in particular to what extent they could be applied to different scenarios of establishment,

87 Click for all the information about this legislative work, accessed 5 December 2024.

88 Permanent Bureau HCCH, Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements, March 2011, accessed 5 December 2024.

89 HCCH, Parentage/Surrogacy Experts' Group, 'Final Report, The feasibility of one or more private international law instruments on legal parentage', 1 November 2022, at 29 and 54, accessed 5 December 2024.

90 Major changes in (most States') domestic law; agreeing on uniform minimum safeguards and standards; and a more elaborate system of cross-border cooperation, which would require substantial government resources and involvement in individual cases. *Ibid.*, at 29.

contestation and/or termination of legal parentage. It also identified some scenarios that may require specific rules, like precisely legal parentage established as a result of a surrogacy arrangement.[91] In the second meeting held in April 2024, the WG dealt with many relevant issues, including a preliminary discussion on safeguards and standards on the basis of the 2022 EG Final Report. This discussion focused on the desirability and feasibility of including safeguards for different case scenarios in a possible instrument on the recognition of judgments on legal parentage. The Group discussed various safeguards or standards, and how these could be included in an instrument (e.g., as part of a definition, as conditions for recognition, as grounds for refusal, as general obligations).[92]

This issue is of particular interest in this context, according to the Final Report of the EC, where the aforementioned safeguards and standards are listed.[93] The system would take better account of the gender perspective by including some of them as grounds for refusal or conditions for recognition.[94] For instance, the consent to the surrogacy agreement of the surrogate mother (and her partner), to be given before/after birth, freely, in writing, informed and not having been withdrawn; eligibility and suitability of the intended parents according to the law of the state of origin, which includes, at a minimum, the intended parents to be adults with full capacity and that they have no previous criminal convictions for offences against children; or genetic connection to at least one of the intended parents and/or the gamete of the surrogate mother not having been used to conceive the child. Furthermore, the importance of preventing surrogacy from constituting or leading to the sale or trafficking of human beings and the need to uphold the right of children to know their origins have also been highlighted.[95]

From 4 to 8 November 2024, the WG met for the third time. Pursuant to its mandate, the WG continued its consideration of draft provisions for one new instrument on legal parentage generally, including legal parentage resulting from international surrogacy agreements. The Report about this meeting is not available yet. In brief, although the work undertaken at the HCCH has been considered more cautious than the European Proposal[96] and the internal forecasts are not overly optimistic,[97] if these global rules are adopted in the future, they will probably complement the EU regulation, as they will

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91 Working Group on Parentage/Surrogacy, Report of the first meeting (13-17 November 2023), at 5, accessed 5 December 2024

92 Working Group on Parentage/Surrogacy, Report of the second meeting (8-12 April 2024), at 3, accessed 5 December 2024.

93 Final Report of Parentage / Surrogacy Experts' Group, *supra* n. 89, at 32 ff.

94 *Ibid.*, at 34-35. Conditions for recognition: for each individual case, the child's legal parentage would be recognised by operation of law but only if those safeguards/standards were met. Grounds for refusal: for each individual case, the child's validly established legal parentage would be recognised by operation of law but the requested State could refuse this recognition if these safeguards/standards were not met.

95 L. Martínez-Mora Charlebois, 'La protección internacional de las personas, en particular los niños, niñas y adolescentes, a través de los Convenios de La Haya', in S. Adroher Biosca, B. Campuzano Díaz and G. Palao Moreno (coord.), *Un Derecho Internacional Privado centrado en los derechos de las personas* (Tirant Lo Blanch, Valencia, 2024), 49-80, at 77.

96 E. Rodríguez Pineau, 'La propuesta de reglamento europeo sobre filiación en situaciones transfronterizas', 6 *Cuadernos de Derecho Privado* (2023) 148-180, at 156.

97 L. Martínez-Mora Charlebois, *supra* n. 95, at 78. Mrs Martínez Mora, HCCH First Secretary, believes that "perhaps the most feasible would seem to adopt a PIL instrument with some basic guarantees that constitute red lines for countries. If further and more comprehensive protection is required, this will be

cover the cross-border recognition of parentage established in non-EU countries. But the final outcomes must ensure a proper balance between the continuity of parentage in cross-border relationships and the human rights of the children and women involved. This a very difficult task to undertake in the current international arena but inaction is not an option. Given that the legal solutions to improve the existing legal framework do not seem to come from the Spanish legislator, we will have to wait and see what these international initiatives will bring.

left to states and other bodies." She recognises that "this will clearly be unsatisfactory for both sides, but it may be the only way to reach consensus."

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Agora

International litigation in public interest: the case of climate change

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International climate litigation as a case of international litigation in public interest

Ángel J. Rodrigo Hernández[1]
Beatriz Vázquez Rodríguez[2]

(A) INTRODUCTION

The works that make up this agora are the result, fundamentally, of the International Seminar on *International Litigation in the Public Interest: The Case of Climate Change*, held at the Pompeu Fabra University on November 28, 2024. The organization of this seminar therefore had a double affiliation. On the one hand, it was proposed and organized by the Editorial Board of the *Spanish Yearbook of International Law* as an agora; that is, as a set of research works in which, from different perspectives, different aspects of a subject, topic or problem are addressed. In this case, an attempt was made to address in a monographic way a highly topical issue such as international (and internal) litigation in the field of climate change.[3] On the other hand, it was another research activity in the area of Public International Law and International Relations of the Pompeu Fabra University, which is part of the research project of the Ministry of Science and Innovation on 'Public Interest Norms in the 21st Century', which is being carried out by its members in three specific material areas: climate change, cyberspace and international migration.[4]

The objectives of the International Seminar were threefold. The first was to provide a state of the art on international climate litigation, in particular on its possibilities and also on its limitations. The second was to examine the conceptual, political and procedural particularities that international climate litigation presents both in the different international courts and in the material areas in which it is raised: law of the sea, human rights, investments, etc. And the third objective was to identify and

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[3] There is no definition accepted by international law doctrine on climate litigation, as noted by K. McKenzie, G. Medici-Colombo, L. Wegener and F. Sindico, "Climate change litigation: on definition to rule them all…?", in F. Sindico, K. McKenzie, G. Medici-Colombo and L. Wegener (eds.), *Research Handbook on Climate Change Litigation*, Cheltenham, Edward Elgar, 2024. These authors propose a broad definition of climate litigation based on four terms: litigation, understood in a broad sense; climate change; it includes domestic cases that include national, federal or smaller disputes; and international (pp. 9-11).

[4] The Concept Paper for this project can be viewed at A.J. Rodrigo and C. García Segura, *Las normas de interés público en el siglo XXI*, ORBIS WorkingPapers, 2024, Nº 11, pp. 1-47.

explore the performance of some of the responses offered by international climate litigation.

The subject of study of the International Seminar, 'international climate litigation', constitutes a type of dispute that is part of a broader current trend that can be called 'international litigation in the public interest'. Therefore, before presenting the structure and content of the agora, it seems appropriate to contextualize this topic within the framework of the evolution of international law towards a genuine *Public* International Law as a result of the incorporation of concepts, norms, obligations, institutions and procedures that constitute its public dimension.

(B) INTERNATIONAL LITIGATION IN THE PUBLIC INTEREST AS A MANIFESTATION OF THE PUBLIC DIMENSION OF INTERNATIONAL LAW

The legal means of resolving disputes in International Law have a bilateral structure. However, the growing practice in the last decade that has sought to protect collective interests goes beyond the limits of said bilateral architecture. This practice, which can be called 'international litigation in the public interest', has revealed the significant difficulties that its activation, operation and possibilities of success have within the framework of the aforementioned bilateral architecture of the legal means of resolving international disputes.

(1) The bilateral architecture of legal means of peaceful settlement of international disputes

Legal means of settlement of international disputes (arbitration and judicial settlement) generally reflected and reinforced the traditional bilateral structure of classical International Law. Within the institutional and procedural framework of such means, international disputes had a bilateral character; the obligations in dispute also had a bilateral structure based on reciprocity (*do ut des*); and the parties to such disputes were, in general, two, whether State against State, company against State, or individual against State.

However, the practice followed in and before different international courts has exceeded this bilateral structure. There have been an increasing number of cases with different characteristics that have strained the seams of such means. This is a practice in which claims have been filed not only by injured States but also by non-injured States, non-state actors or indigenous peoples. These seek to protect different collective interests such as the protection of whales, nuclear disarmament, self-determination of peoples, the prevention and punishment of genocide, the fight against torture, tackling climate change, and the rights of indigenous peoples, among others. In addition, the violation of public interest norms is invoked. These cases are heard either in contentious jurisdiction, where there has been a kind of rediscovery of the compromissory clauses of multilateral treaties for the protection of general interests, or through an increase in requests for advisory opinions in the different international courts. This practice can be called 'international litigation in the public interest'.

(2) Concept and characteristics of international litigation in the public interest

Yura Suedi and Justine Bendel have proposed the expression 'public interest litigation' to describe the practice mentioned above for several reasons:

> "First, the term "public" indicates a stemming beyond the terms "common interests" or "community interests" which are strongly associated with, and limited to, states. We wish to emphasize, through this more all-encompassing term, that in international law, litigation for the public will arguably impact all actors beyond states. Second, the term "public" also reinforces the public nature (as opposed to private) of the matter connecting the beneficiaries in question, as discussed already, underscoring the "quality of publicness" inherent to international law. Third, in the context of international law where the practice is questioned, contested and sparsely used, the term "public interest litigation" places emphasis on the legitimacy of preserving the interests of the public."[5]

Taking this notion as a starting point, this paper tentatively proposes the following definition of international litigation in the public interest. This definition is aimed at defending the global public interest, in any of its manifestations, in which the application of public interest norms is invoked and in which the extension of the *ius standi* to present international claims is possible.

From this provisional definition, several characteristics of international litigation in the public interest can be identified. The first is its international character. Such claims can be presented in the different international legal means of resolving disputes in international law, whether they are the various international courts (the International Court of Justice, the Tribunal for the Law of the Sea), the courts for the protection of human rights or, even, in the International Criminal Court), in arbitration courts (international or mixed), or in the Dispute Settlement Body of the World Trade Organization. The second is that these disputes concern one of the various manifestations of the global public interest, be it the *Global Commons*, the *Global Public Goods* (such as the climate system) or one of the shared global values, whether fundamental (the prohibition of genocide or torture) or not.[6] The third feature is that the potential beneficiaries of these claims, the 'public', may be not only individual States or groups of States but also certain communities within a State (the Rohingya within Myanmar, for example, or indigenous peoples), individuals or even the international community as a whole. The fourth is that the substantive norms whose violation is alleged are norms of public interest, whether of ordinary legal authority (the majority) or of enhanced legal authority such as peremptory norms of general international law (*ius cogens*).[7] Public interest norms

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5 Y. Suedi y J. Bendel, "Public Interest Litigation: A Pipe Dream or the Future of International Litigation?", in J. Bendel and Y. Suedi (eds), *Public Interest Litigation in International Law*, London, Routledge, 2024, pp. 34-72, in particular, p. 46.

6 A.J. Rodrigo, "Las normas de interés público en el Derecho internacional", *Cursos de Derecho internacional y Relaciones Internacionales de Vitoria-Gasteiz 2024*, Valencia, Tirant lo Blanch, 2025 (in press), section 2 on the global public interest.

7 A.J. Rodrigo, "Las normas de interés público en el Derecho internacional", *op. cit.*, 2025, Section 3 on 'public interest norms'. These norms can be defined as "those international legal norms that aim to regulate and protect either the collective interests of a group of States or persons or the general

may create interdependent obligations, such as the obligation to negotiate nuclear disarmament (Article VI of the Nuclear Non-Proliferation Treaty) invoked in the case brought by the Marshall Islands,[8] or obligations of an integral structure that are *erga omnes partes* (derived from conventional norms contained in multilateral treaties) such as the obligations to prevent and punish the crime of genocide,[9] the obligation to punish the crime of torture,[10] or *erga omnes* obligations such as those derived from the norms of *ius cogens* that recognize the right to self-determination of peoples.[11] And the fifth characteristic of international litigation in the public interest is that it is the result of the extension of *ius standi* to present international claims. Thus, the international legal system allows and practice shows that *ius standi* may be held not only by the injured State (Article 42 ARSIWA) but also by States other than the injured State (Article 48 ARSIWA); international organizations in the case of advisory opinions; certain non-state actors, if they meet certain requirements, in the area of human rights protection; and the requirement of being a victim has been relaxed in the case of individuals in order to have *ius standi* in some international jurisdictions for the protection of human rights.[12]

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interests of the international community (in short, the global public interest), from which collective obligations are derived that are either interdependent or have an integral structure and that have a vocation for universality".

8 Judge Tomka, in his separate opinion on the case *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgement of 5 October 2016, said that:

"In other words, the performance of the obligation by a State is conditional on the performance of the same obligation by the other States. In the field of nuclear disarmament, it is unrealistic to expect that a State will disarm unilaterally. International law does not impose such an obligation. It rather provides for achieving that goal through negotiations in good faith, through the co-operation of all States" (para. 35).

This same judge recognizes that:

"The issues raised in the present proceedings are not of a bilateral nature between the Marshall Islands and the United Kingdom. I am convinced that the Court cannot meaningfully engage in a consideration of the United Kingdom's conduct when other States whose conduct would necessarily also be at issue are not present before the Court to explain their positions and actions (para. 40).

This case illustrates the limits of the Court's function, resulting from the fact that it has evolved from international arbitration, which is traditionally focused on bilateral disputes. The Statute of the Court is expressly based on the Statute of its predecessor, the Permanent Court of International Justice…" (para 41)

9 Order on Provisional Measures of 23 January 2020 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar)*, para. 41; also, the judgment on preliminary objections of 22 July 2022 in the same case, in which it stated that:

" The common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes partes*. Responsibility for an alleged breach of obligations *erga omnes partes* under the Genocide Convention may be invoked through the institution of proceedings before the Court, regardless of whether a special interest can be demonstrated. If a special interest were required for that purpose, in many situations no State would be in a position to make a claim. For these reasons, Myanmar's purported distinction between the entitlement to invoke responsibility under the Genocide Convention and standing to pursue a claim for this purpose before the Court has no basis in law". (para. 108)

10 Judgment of 20 July de 2012 in the case on *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil* 2012, páras. 68-69

11 Advisory opinion of 19 July 2024 on *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, paras. 232-233.

12 Cfr. the work of Enrique Martínez Pérez, "The Relaxation (if Not Exclusion) of Victim Status before the ECtHR in Climate Litigation" in this Agora.

(3) The difficulties of international litigation in the public interest within the framework of the bilateral architecture of legal means of dispute resolution

This growing practice of international litigation in the public interest has to face various types of resistance, reservations, difficulties and criticisms. Y. Suedi and J. Bendel identify three: conceptual reservations about the very idea of public interest; political reservations about the motives behind litigation in the public interest; and procedural reservations justified because the structure of international courts is not designed to accommodate this type of litigation.[13]

Conceptual reservations affect the very notion of public interest because this notion is questioned due to its difficulty in explaining the aggregation of individuals or States within International Law.[14] These authors defend the public interest within the framework of International Law because it is possible for an aggregation of individuals or States to both share interests and reformulate them within this legal system. They also identify who the potential beneficiaries of public interest litigation may be: a community of individuals within a nation, a group of States party to a multilateral treaty, the international community of States, or the international community beyond States.

Political reservations are argued around the criticism of the strategic use of public interest litigation because the courts are used as 'forms of protest' to promote structural change, which may provoke a rejection in international judicial institutions.[15] Y. Suedi and J. Bendel defend public interest litigation on three grounds: because it balances the positions of the parties in disputes; because it offers new opportunities to international courts to reaffirm their legitimacy; and because it benefits the courts' own relevance within the international legal order.[16]

Procedural reservations are explained because international courts, institutionally designed to hear bilateral disputes, have difficulties in procedurally accommodating public interest litigation. The main procedural limits arise, firstly, in matters of access to the courts, both due to difficulties affecting the jurisdiction of the courts (consent of States to this specific type of dispute and the *Monetary Gold* principle) and those relating to *ius standi*.[17] Public interest litigation challenges and expands the classic rules, but in any case, it is not equivalent to the *actio popularis*. Secondly, there are also procedural limits on participation, since traditional mechanisms need to be made more flexible and adapted to facilitate the intervention of third parties and the participation of civil

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13 Y. Suedi and J. Bendel, *op. cit.*, 2024, pp. 35-63.

14 M. Esnault, "On the Pertinence of 'Public Interest' for International Litigation", in Y. Suedi and J. Bendel, *op. cit.*, 2024, pp. 9-33.

15 K. Casper, L. Fournier, R. Harvey, M. Jomnker-Argueta, K. Valente and A. Sharma, "Breaking the mould in the strategic design and implementation of climate change", in F. Sindico, K. McKenzie, G. Medici-Colombo and L. Wegener (eds.), *op. cit.*, 2024, pp. 37-56. These authors propose "that 'strategic' litigation comprises cases where the individual claimants are motivated by an aim to bring about broader societal shifts beyond their own concerns. In climate litigation, claimants are living the experience of climate impacts. What is strategic is also inextricable from the visions of success and justice of those on the frontlines of climate change" (p. 39).

16 Y. Suedi and J. Bendel, *op. cit.*, 2024, pp. 46-51.

17 Cfr. also the work of Sergio Salinas, "Procedural Challenges: *Ius Standi* and Causality" in this Agora.

society. And finally, the limitations also affect enforcement in areas such as remedies and the application of court decisions, since they are only binding on the litigating parties.[18]

These authors, after identifying the difficulties, conclude that such reservations and limitations are surmountable because the concepts must be clarified, the procedures must be adjusted, made more flexible or adapted and politics is inevitable and inherent to international law. Therefore, they affirm, litigation in the public interest is more than a pipe dream and will increase in the coming years.[19]

(C) STRUCTURE AND CONTENT OF THE AGORA ON INTERNATIONAL CLIMATE LITIGATION

The works resulting from the International Seminar on International Climate Litigation that make up this agora examine and identify both the possibilities and the limitations that arise in international courts. To address the object of study, the agora is structured in four parts.

The first section groups contributions that enrich the understanding of the current state of climate litigation, as well as its potentialities and restrictions. Along these lines, Professor Enrique Martínez Pérez, in his work entitled "The Relaxation (if Not Exclusion) of Victim Status before the ECtHR in Climate Litigation", analyses the evolution of victim status before the European Court of Human Rights (ECHR), arguing that, although certain requirements for organizations to access climate justice have been relaxed, the conditions for individuals to be considered victims have become stricter. This could limit access to justice for those suffering the consequences of climate change, while recognizing the complexity of the phenomenon and the need to address collective claims.

Next, Susana Borràs Pentinat, in her contribution "Promises of Climate Litigation for Climate Justice", argues that for a climate lawsuit to effectively contribute to climate justice, it is essential to address the "triple injustices" associated with climate change, which involve the unequal distribution of its effects, disproportionate responsibility and the unequal costs of mitigation and adaptation to this phenomenon. This implies conceiving climate change as a justice dilemma that disproportionately affects the most vulnerable populations, who are the least responsible for greenhouse gas emissions.

Subsequently, in "Identifying the Limits of International Climate Litigation," Xavier Farré Fabregat concludes that, in order to understand the evolving phenomenon of climate litigation, it is essential to analyze the international legal framework and recognize the structural limitations of international law that hinder the ability of these disputes to generate significant changes. Three limitations stand out: the primacy of international investment law, which restricts the application of environmental principles; the clear division between North and South in climate litigation, which hinders global cooperation; and the limited capacity of climate litigation to produce positive results, often attenuated by socioeconomic and regulatory factors.

[18] Y. Suedi and J. Bendel, *op. cit.*, 2024, pp. 51-63.
[19] *Ibid*, p. 64.

The second part is composed of contributions that analyze international obligations related to climate change, as well as their identification and interpretation by international courts. Professor Eulalia W. Petit de Gabriel raises a question in her contribution "He Who Laughs Last Laughs Best? Climate Change Obligations in the Request of the Advisory Opinion of the ICJ", suggesting that climate change represents a significant challenge for the international community and law, and that the International Court of Justice (ICJ) should consider obligations related to this phenomenon in its advisory opinion, taking into account both interactions between States and the rights of individuals and future generations. In this regard, the need for the ICJ to adopt a bold but cautious approach is emphasized, considering the complexities and implications of public interest litigation in the framework of climate obligations that combine environmental and human rights norms.

Gastón Medici-Colombo, in his analysis "Mapping Climate Change Obligations in the Request of the Advisory Opinion of the Inter-American Court of Human Rights", presents a study on climate-related human rights obligations from the perspective of the Inter-American Human Rights System (IAHRS), anticipating the advisory opinion to be issued by the Inter-American Court of Human Rights (IACtHR) in 2025. The author suggests that, given the breadth of the request submitted by Chile and Colombia, as well as the flexibility of the IACtHR in its advisory role, it is necessary to resort to the Court's previous jurisprudence to offer a useful and informed approach. The IACtHR is expected to complement general climate-related obligations with specific obligations for vulnerable groups and to apply, in answering the request, the "Inter-American framework on environment-related obligations" to climate change. Furthermore, the author contends that the peculiar features of the recognized right to a healthy environment will significantly influence the definition and scope of the climate-related obligations.

Finally, Eduardo Jiménez Pineda, in his work "The UNCLOS as a Legal Living Instrument to Combat Climate Change and Its Deleterious Effects: The Specific Obligations of State Parties According to the Interpretation of ITLOS", argues that the advisory opinion issued by the International Tribunal for the Law of the Sea on 21 May 2024 represents a significant contribution to the interpretation of international maritime law in the context of climate change. Although not binding, this unanimous decision of the Tribunal clearly sets out the specific obligations of States Parties under the United Nations Convention on the Law of the Sea (UNCLOS) in relation to the prevention of marine pollution and the protection of the marine environment from the effects of climate change.

The third part brings together works that address the possibilities and limitations of international law in the field of climate change, in the context of international human rights protection bodies. This section includes Professor Sergio Salinas' research on "Procedural Challenges: Ius Standi and Causality", where he concludes that, despite the complexities and obstacles that climate change presents in the context of human rights litigation, international human rights protection bodies adopt a proactive approach that allows individuals to present their claims. Although there are limitations in access to courts, it is postulated that it is possible to overcome the challenges related to causality through a normative approach that emphasizes the positive obligations of States.

For Corina Heri, in her analysis "The ECtHR's *KlimaSeniorinnen* Judgment: A Cautious Model for Strategic Climate Litigation", the *KlimaSeniorinnen* judgment of the European Court of Human Rights represents "A Cautious Model" for future climate litigation, despite its limitations, such as the lack of recognition of the right to a healthy environment.

Finally, Pau de Vilchez Moragues, in "Judicial Review of Climate Plans. A Growing Consensus", discusses the diversity of the climate litigation phenomenon in terms of actors and legal arguments, arguing that courts no longer view climate change as a taboo subject and that they recognize the importance of establishing and implementing appropriate climate plans.

Finally, the fourth part includes papers that offer a Private International Law perspective, although they were not presented at the international seminar, thus complementing the analysis of the topic in the agora. Among them is "Climate Change Litigation through the Prism of Private International Law" by Eduardo Álvarez-Armas, who examines the European Union rules on international jurisdiction and choice of law in relation to damages associated with climate change.

Furthermore, Ana Crespo Hernández, in her work "International Climate Litigation against Companies: Issues of Applicable Law", concludes that international climate litigation is on the rise and is not a passing trend, suggesting that the situation could improve with the new Due Diligence Directive.

Following that line, Professor Lorena Sales Pallarés, in "What We Talk about When We Talk about…Corporate Sustainability Due Diligence (CSDD) and Climate Change Litigation", argues that the principle of due diligence has evolved towards international human rights standards, becoming a valuable tool to hold companies and States accountable for their environmental and social impacts.

(D) FINAL REFLECTIONS

This agora offers a current and varied panoramic view of the current situation of climate litigation (international and, to a certain extent, also domestic). The different works that comprise it confirm both the difficulties that were pointed out lines above and the possibility of overcoming them. Some of the most recent cases can be interpreted and assessed in this direction.

One of the main ideas that can be extracted from the set of works is that, although climate litigation (international and also domestic) may not be the ideal strategy for the fight against climate change, it can be much more productive than skeptics imagine. Practice shows that climate litigation is another tool to deal with climate change that has, at least, two types of positive consequences. Some, perhaps the most obvious, are those derived from the direct objective of the controversies themselves. But there are also other types of consequences derived from climate litigation such as the activation of other legal, political and economic options and the mobilization of material and ideational resources with the same objective. These indirect effects can often be more effective than the climate litigation itself.

We therefore believe that the objective of the International Seminar and that of the agora itself have been largely achieved. Furthermore, the Seminar held at the Pompeu Fabra University provided a space for oral presentations, debate and even controversy in an environment of cordial disagreement that contributed to improving the results of the individual works.

Finally, we would like to sincerely thank all the participants and attendees at the seminar for their collaboration, effort and availability.

SYbIL | Spanish Yearbook of International Law

The relaxation (if not exclusion) of victim status before the ECtHR in climate litigation

Enrique J. Martínez Pérez*

Abstract: The purpose of this paper is to analyse the victim requirement of Article 34 of the European Convention in the case law of the first climate litigation before the ECtHR. On the one hand, we will examine what we consider to be a tightening of the conditions in the case of individuals, and on the other, we will analyse the relaxation of these requirements in the case of associations.

Keywords: ECtHR, Victim, Locus standi, climate change, collective action, association, private and family life, mitigation measures.

(A) INTRODUCTION.

The preamble with which the European Court of Human Rights (ECtHR) began its ruling in the case of *Verein KlimaSeniorinnen Schweiz v. Switzerland* prepared us, as it said, to find ourselves with a new approach, given the particularities of climate change, far removed from the solid environmental case-law[1]. It is, in our view, a clear example of the technique of *distinguishing*, which is rare in the Court's case-law, allowing it to depart from previous decisions in the face of disparate factual situations[2]. Certainly, the Court was not faced with an environmental issue with similar to those of previous claims, so it advised as a preliminary point, before entering into the merits of the case, that the issues raised had never before been addressed by the Court. Consequently, environmental case-law would be of limited value because they dealt with very different challenges[3].

Indeed, the Court, which had come from examining environmental situations whose consequences on individuals or groups of individuals were identifiable and focused, was now, in this case, dealing with effects or risks on an indefinite number of people, affecting not only the enjoyment of rights at present but also in the future[4]. Unlike polluting events due to local sources, major greenhouse gas emissions generated in the jurisdiction of a given State are only responsible for causing part of the damage, so the

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1 *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [GC] nº. 53600/20, § 410, 9 April 2024.

2 See R. Siltala, *Theory of Precedent: from Analytical Positivism to a Post-Analytical Philosophy of Law* (Hart Publishing, Oxford, 2000) at 73.

3 Para 414.

4 Para 479.

causal link between the actions and omissions of State authorities is necessarily indirect and weaker, as the Court itself pointed out[5].

The multitude of unique considerations to be addressed by the Court depended, in any event, on how the status of victim was to be assessed, as the application was brought not only by individuals but also by associations. The decision it took, moreover, was to condition the admissibility of other applications before the Grand Chamber (*Carême v. France*[6]; *Duarte Agostinho and Others* v. *Portugal and 32 States*[7]) and those pending before the Court[8]. Certainly, it seems to me that its decision on this point has not definitively resolved, far from it, what the limits to the right to petition are, although we can unquestionably confirm a certain relaxation of the requirements regarding the standing of associations, which may lead, in the future, to a change in the strategies of climate litigation.

(B) RECOGNITION OF THE IMPACT OF CLIMATE CHANGE ON HUMAN RIGHTS

As the United Nations has been pointing out for years, the effects of climate change can impede the enjoyment of human rights[9], including the right to life, the right to adequate food, the right to the highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the right to safe drinking water and sanitation, the right to work and the right to development. They also disproportionately affect certain vulnerable groups (persons with disabilities, women, older persons)[10]. The monitoring bodies have recognised this situation. Thus, the Human Rights Committee has considered that certain effects of climate change (rising sea levels) pose a real risk of violating the right to life[11], while recognising that the impairment of rights by a State's actions or omissions in relation to carbon emissions are reasonably foreseeable[12].

In this sense, and on the conclusions of the *Intergovernmental Panel on Climate Change*, the ECtHR has pointed out in this case that anthropogenic climate change poses a serious current and future threat to the enjoyment of the human rights guaranteed in the European Convention[13]. It further considers that mortality and morbidity have increased, especially among the most vulnerable groups. For these reasons, it indicates

5 Para 439.
6 *Carême v. France* (dec.) [GC], nº. 7189/21, 9 April 2024.
7 *Duarte Agostinho and Others v. Portugal and 32 Others* (dec.) [GC], nº. 39371/20, 9 April 2024.
8 ECHR, *Factsheet-Climate change*, April 2024, available at https://www.echr.coe.int/documents/d/echr/FS_Climate_change_ENG.
9 See J. H. Knox, 'Linking Human Rights and Climate Change at the United Nation', 33 *Harvard Environmental Law Review* (2009) , at 477-498.
10 Human Rights Council Resolution 41/21, *Human rights and climate change*, 12 July 2019, doc. A/HRC/RES/41/21.
11 *Teitiota v. New Zealand*, communication nº. 2728/2016, of 24 October 2019, doc. CCPR/C/127/D/2728/2016, para. 8.6.
12 *Chiara Sacchi et al. v. Argentina*, communication nº. 104/2019, of 22 September 2021, doc. CRC/C/88/D/104/2019, para 10.14.
13 Para 436.

that there is a legally relevant causal link between the actions and omissions of States and the harm affecting individuals[14].

However, this recognition is not sufficient, at least in the European system, to determine the responsibility of a State. Despite being an instrument for the collective guarantee of human rights, certain limits have been imposed on the right of individual petition, firstly by the Convention itself requiring the condition of victim and then by the jurisprudential configuration of the requirement of personal involvement in the violation[15].

(C) COMPETENCE RATIONE PERSONAE: INDIVIDUALS AND NON-GOVERNMENTAL ORGANISATIONS.

According to Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, applicants, who may be a person, a non-governmental organisation or a group of individuals, must demonstrate that they are *victims of* a violation of a treaty right. This is a particularity of the European system that is not reproduced in other treaty provisions. Such a requirement is not contemplated, for example, in Article 44 of the American Convention on Human Rights, where a distinction is made between victim and petitioner, where it is not necessary to demonstrate a personal interest in the latter case, so that complaints can be lodged both in one's own name and in that of third parties[16].

In the case of person, it must be shown that the individuals are directly and personally affected by the alleged violation, that there is a sufficiently close link between the claimant and the harm suffered[17]. It is not possible to allege a general deterioration of the environment, as there must be a negative effect or impact (or a real and imminent risk) on the individual's life (Art.2) or on their private or family sphere (Art.8)[18].

And in the case of associations, they cannot, in principle, be direct victims of a violation of certain rights, which are only held by natural persons, such as the right to life, health or privacy, which are often precisely those that arise in environmental cases[19]. Nuisances or problems alleged under Article 8 cannot be invoked as natural persons do, not even respect for the home, merely because the organisation's headquarters are located close to the activity or installation in question, as long as the nuisance does not affect individuals[20]. They could, however, claim infringement of others, many of them of a procedural nature, such as the right to effective judicial protection[21].

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14 Para 478.

15 See F. Voeffray, *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationals* (Graduate Institute Publications, Geneva, 2004), at 77.

16 See L. Burgorgue-Larsen and A. Úbeda de Torres, *Les grandes décisions de la Cour Interaméricaine des Droits de L'homme* (Bruylant, Brussels, 2008) at 127-132.

17 *Caron et autres c. France (déc.)*, nº. 48629/08, 29 June 2010, para. 1.

18 *Kyrtatos v. Greece*, nº. 41666/1998, § 52, 22 May 2003.

19 *Sdruženi Jihočeské Matky v. Czech Republic (déc.)*, nº. 19101/03, 10 July 2006, para. 2.1.

20 *Asselbourg and Others v. Luxembourg (déc.)*, nº. 29121/95, 29 June 1999, para. 1.

21 *Gorraiz Lizarraga and Others v. Spain*, nº. 62543/00, § 45-46, 27 April 2004.

The effects of pollution must reach a minimum threshold of severity, which is relative and depends on the circumstances of the case, such as the intensity and duration of the pollution and its physical or psychological effects[22]. Environmental damage is considered to be intolerable or extremely serious when acceptable levels of exposure or quality are exceeded. This may be caused either by a concentration of polluting substances or by the continuous repetition of episodes of noise pollution[23]. Trivial damage is not allowed, that is environmental nuisances of a small magnitude that the individual would have to bear because they are of minor importance[24], i.e. damage that is insignificant in comparison with what the Court calls 'environmental hazards inherent to in life in every modern city'[25].

The European system is not intended to prevent potential violations of the Convention. Petitions examine, in principle, violations that have already occurred. Only in exceptional cases are potential or future violations admitted, in view of the seriousness and irreparable nature of the injury[26]. For example, where the execution of an extradition order may infringe torture or inhuman treatment contrary to Article 3 of the Convention[27]. In environmental matters, claims alleging the potential nature of the injury have been unsuccessful, probably because the threats are of a diffuse nature[28]. The best-known claim is the *Tauira* case, concerning nuclear testing in the Pacific. Faced with the risks of radioactive contamination to the health and lives of individuals, the Court ruled that in order to qualify as a victim, a person must present reasonable and convincing evidence of the likelihood of a violation affecting them personally, not mere suspicion or conjecture. A mere invocation of the risks inherent in the use of nuclear energy is not enough; a degree of likelihood that harm will occur, in the absence of sufficient precautions, from the resumption of nuclear testing, and provided that the eventual consequences are not too remote, is required[29].

(D) THE TIGHTENING OF THE VICTIM STATUS OF INDIVIDUALS.

To the traditional restrictive interpretation of the condition of victim in environmental cases, the Court will add in this situation, for different reasons, new requirements in the case of climate claims, which will further narrow the circle of individuals who will be able to sue States for lack of action or inadequate measures in this area.

The first reason given is that the number of people potentially affected by climate change is indeterminate. The complaints concern general measures affecting the population at large, the consequences of which are not limited to certain identifiable

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22 *Fadeyeva v. Russia*, nº. 55723/00, § 68-69, 9 June 2005.

23 *Udovičić v. Croatia*, nº. 27310/09, § 140, 24 April 2014.

24 See F. Simón Yarza, *Medio ambiente y derechos fundamentales* (Centro de Estudios Políticos y Constitucionales, Madrid 2012), at 258.

25 *Hardy and Maile v. United Kingdom*, nº. 31965/07, § 188, 14 February 2012.

26 *Lambert and Others France* [GC], nº. 46043/14, § 115, 5 June 2015

27 *Soering v. United Kingdom*, nº. 14038/88, § 85, 7 July 1989.

28 E. Martínez Pérez, *La tutela ambiental en los sistemas regionales de protección de los derechos humanos* (Tirant lo Blanch, Valencia, 2017), at 17.

29 *Tauira and Others v. France*, nº. 28204/95, Commission Decision of 4 December 1995. Decisions and Reports (DR) 83-B, p. 131.

individuals or groups. Legal proceedings will be eminently prospective because they will have an effect beyond individual rights[30]. The special focus is determined, secondly, because 'in the climate-change context, everyone may be, one way or another and to some degree, directly affected, or at a real risk of being directly affected, by the adverse effects of climate change'. Consequently, there are potentially a large number of people who may be victims[31]. And third, expanding the number of victims could undermine national constitutional principles and the separation of powers by giving rise to very broad access to the courts that would drive changes in national climate change policies[32].

All these reasons lead the Court to limit access to potential and indirect victims in the context of climate change, despite the fact that both figures are admitted in its case law, as we have seen. It should be recalled that, although the Convention does not allow individuals to complain about a provision in domestic law simply because, without having directly suffered its effects, it appears to them to be violated, an individual 'that a Law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risks being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation'[33]. In addition, it provides for the status of (indirect) victim to anyone who is harmed by the violation or who has a valid and personal interest in the cessation of the violation[34]. However, for the Court, none of these can be applied to the area of climate change because any "category of persons" will have a "legitimate personal interest" in being affected by current and future risks, so it would not serve as a limiting criterion[35].

The result of these considerations explains the requirements which have already been recognised in case-law with two conditions to be proven by persons: on the one hand, 'the applicant must be subject to a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk of) adverse consequences of governmental action or inaction affecting the applicant must be significant'; and, on the other hand, 'there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm'[36]. And, furthermore, it warns that the threshold for meeting these requirements will be particularly high. Among other requirements, the local situation and the existence of individual particularities and vulnerabilities must be taken into account, in addition to 'the nature and scope of the applicant's Convention complaint, the actuality/remoteness and/or probability of the adverse effects of climate change in time, the specific impact on the applicant's life, health or well-being, the magnitude and duration of the harmful effects, the scope of the risk (localised or general),[37].

I consider that the Court, as it has already done in other environmental cases, is subjecting the individual victims to a veritable *probatio diabolica*, which is almost

30 Para 479.
31 Para 483.
32 Para 484.
33 *Tănase v. Moldova* [GC], nº 7/08 , § 104, 27 April 2010.
34 *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09 , § 47, 7 November 2013.
35 Para 485.
36 Para 487.
37 Para 488.

impossible to prove. Firstly, because the higher threshold of severity under Article 2 is maintained in order to verify whether the environmental aggressions have affected the health of the appellants[38], in that the interference must be capable of causing the death of the person[39]. It must therefore be a *real* threat, that is to say, serious, accredited, sufficiently verifiable and *imminent*, there must be a physical and temporal proximity of the threat that provokes the risk[40]. But this threshold is also extended to the scope of Article 8, which despite being considered as a 'right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and'[41], requires a very strict *individualised* test based on the seriousness and urgency[42]. Thus, while recognising that the adverse effects of climate change (in particular heatwaves) affect older women in Switzerland, subject to particular risk, with increased hospitalisations, and demonstrated increased mortality rates and illness, it finds that the applicants did not suffer critical medical problems because of them[43].

Furthermore, it includes at this stage of the assessment of evidence the general and personal adaptation measures[44] as a relevant element to exclude victim status. If this is the case, in the future, States that do not take measures to limit the foreseeable risks arising from climate change (e.g. by failing to provide practical information on how to respond to a heatwave) would be more likely to be found responsible of violating these treaty rights. Otherwise, it will be difficult to prove victim status.

(E) THE RELAXATION OF THE VICTIM STATUS OF ASSOCIATIONS.

In the wake of normative developments in various international legal instruments, notably the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998), the ECtHR has been strengthening the *locus standi* of associations to access justice in environmental matters. Despite the aforementioned limitations, it has affirmed that 'in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively'[45] . Consequently, and on the basis of an evolving systemic interpretation in line with the european and international normative context and state practice, they recognise the standing of associations in climate disputes before the ECtHR.

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38 See S. Lecomte and C. Moisan, 'Le droit a la vie et l'environnement', *in* L Robert, L (dir.), *L'environnement et la Convention européenne des droits de l'homme* (Bruylant, Brussels, 2013), at 21.

39 See N. de Sadeleer, 'Les droits fondamentaux au secours de la protection de l'environnement: examen du droit l'UE et de la CEDH', *in* L Robert, L (dir.), *L'environnement et la Convention européenne des droits de l'homme* (Bruylant, Brussels, 2013), at 105-130.

40 Para 512.

41 Para 519.

42 Para 531.

43 Para 533.

44 Para 533.

45 *Gorraiz Lizarraga and others v. Spain*, nº. 62543/00, § 38, 27 April 2004.

I recognise, as does the Court, that we are dealing with a global and complex phenomenon, with multiple causes, which affects not only the present generation but also future generations, and that, for this reason, it is necessary to strengthen decision-making, which must be done through collective action mechanisms[46]. Likewise, these are judicial processes that deal with very complex issues of law and fact, where evidence requires significant logistical and financial resources[47]. And that they seek not only to protect those currently affected by climate change, but also those individuals whose enjoyment of Convention rights may be seriously and irreversibly affected in the future[48].

Thus, it is, in principle, not surprising that *locus standi* is recognised for associations that meet these requirements: (a) lawfully established in the jurisdiction concerned or have standing to act there; (b) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and c) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change [49].

On the basis of these premises, however, the question must be asked as to who the victims are, i.e. whether the association itself, its members or other persons affected. In line with its established case law, the Court recognises that an association cannot be considered a victim under Articles 2 and 8 of the Convention for nuisance or health problems resulting from climate change, which can only affect natural persons[50]. With regard to members, the Court recognises, in exceptional circumstances, the associations' *locus standi* to bring applications on their behalf. These are cases involving individuals who are vulnerable because of their age, gender or disability. However, in all the cases admitted by the ECtHR, the association represented a (deceased) *victim*, which is not the case here[51]. Was the application brought on behalf of members who are currently affected by climate change? An affirmative answer would certainly be inconsistent, as they would include the women who were denied victim status, unless, as has been pointed out by the doctrine, the test of claims when representing individuals is different, and of course much less demanding[52]. However, it should be indicated what kind of test. We have always advocated, because I believe it is also a possibility envisaged by the ECtHR, a simplified test, for example through a combination of indirect evidence and strong

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46 Para 489.

47 Para 497.

48 Para 499.

49 Para 502.

50 Para 496.

51 *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], nº. 47848/08, §§ 111-113, 17 July 2014; *Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania, no. 2959/11*, §§ 42-46, 24 March 2015.

52 See H. Corina, 'KlimaSeniorinnen, the prohibition of actio popularis cases, and future generations a false dilemma?', *EJIL: Talk!*, December 19, 2024 (available at https://www.ejiltalk.org/klimaseniorinnen-the-prohibition-of-actio-popularis-cases-and-future-generations-a-false-dilemma)

presumptions[53]. However, none of this is indicated in the judgment. On the contrary, it is advocated to recognise them as having standing as representatives of the persons whose rights have been or will be affected (omitting victim status), given the common concern of humanity and the need to promote burden sharing between generations in this context of climate change[54].

And a final interpretation: did the association then represent the rights of future generations? It seems that, in principle, only claims of living persons, within the jurisdiction of a State, can be brought under Article 34 of the Convention, so that no reference would be made to the unborn[55]. Are we talking about today's children? The conditions set out in the jurisprudence of potential victims should be required, i.e. the likelihood of a serious violation affecting them personally in an immediate way. Is this the case? For some authors it is, because children would be victims because of the present risks of serious harm materialising that would directly affect them throughout their lives compared to adults[56]. If we accept this theory, we would be subjecting vulnerable victims (older persons and children) to asymmetrical tests that are difficult to sustain, since it fails to understand why in one case a high level of severity has been reached and in others it has not; why the consequences are remote in one case and not in another; and, above all, why adaptation measures, which relieve the State of responsibility, cannot apply equally to future generations.

(F) IS THIS A CASE OF *ACTIO POPULARIS*?

The European system of human rights protection does not allow *actio popularis*, claims in defence of a general or public interest without identifying a personal harm[57], so the victims affected by the violation they invoke must be identified[58]. It does not allow claims based on general dangers, in the abstract review of the relevant legislation and practice[59]. The judgement recognises its prohibition on many occasions, contrasting the general deterioration of the environment with the harmful effects on individuals[60]. And warning that it does not admit individual or collective complaints about legislative provisions that may contravene the Convention without applicants who have been directly affected[61].

In my view, we are certainly not dealing with a class action, because the complaint is not filed for the protection of a general interest. However, it is a complaint that serves to indirectly protect collective interests, of the majority of the population, which is not

53 *Grimkovskaya v. Ukraine*, nº. 38182/03, § 60-62, 21 July 2011.
54 Para 494.
55 Para 420.
56 See L. George, 'The European Court's Legitimacy After KlimaSeniorinnen', 5 European Convention on Human Rights Law Review (2024), at 444-453.
57 *L'Erablière A.S.B.L. v. Belgium*, nº. 49230/07, § 25 29, 24 February 2009.
58 *Sdruženi Jihočeské Matky v. Czech Republic (dec.)*, nº 19101/03, 10 July 2006.
59 *Roman Zakharov v. Russia* [GC], nº. 47143/06 , § 164, 4 December 2015.
60 Para 446.
61 Para 460.

prohibited by the Court's jurisprudence. Instead, what is apparent is an abstract control of the regulatory framework, without dwelling on any justification of personal damage.

We believe then that at no point, despite the fact that the claim was brought on behalf of individuals, has the relationship between *ius standi* and the victim requirement been explained, leaving aside the question of causation. We understand the Court's position that, in the interests of the proper administration of justice, it must modulate the requirements for victim status in the light of domestic restrictions on access to justice, but this should certainly be done by strengthening the guarantees protected under Articles 6 (right to a fair trial) and 13 (right to an effective remedy).

Although it may seem otherwise, I believe that the Court, with this decision, is closing the door to limit the flow of complaints in the context of climate change because, on the one hand, it sets stringent requirements for individual applications, rescuing the most restrictive jurisprudence on the subject while, on the other hand, it warns that it will not allow restrictions on access to the courts for either individuals or associations. Otherwise, it is possible that it will be the Court itself that in the first instance will review the climate regulatory framework, which, as we have seen, leaves little margin of appreciation to the States[62]. It would not be surprising to see in the coming years a gradual reduction in the procedural obstacles to bringing actions in the context of climate change at the domestic level, which will also lead to a huge reduction in the number of complaints brought before the Court.

[62] Partly Concurring Partly Dissenting Opinion of Judge Eicke, para 50.

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Promises of climate litigation for climate justice

Susana Borràs-Pentinat*

Abstract: The raise of climate litigation in many parts of the world highlights how people are increasingly turning to the courts to hold governments and the private sector accountable, transforming litigation into a key mechanism for ensuring climate action. However, this contribution questions to what extent climate litigation can be a valid tool for achieving climate justice, as a response to the challenges posed by climate change for many populations in the Global South, in situations of multidimensional vulnerability, and who have contributed the least to the climate crisis. In this regard, only some cases of climate litigation prove to be promising in addressing climate injustices, through the complaints made extraterritorially by vulnerable populations from the Global South in the pursuit not only of the corresponding responsibilities of industrialized countries or their companies, but also of the necessary reparations to protect their rights against the unequal impacts of climate change. The rethinking of states' extraterritorial jurisdiction in the context of climate change, recognizing their control over the climate source, can bridge the gap between emitters and individuals affected by climate change for the achievement of climate justice.

Keywords: climate justice; climate litigation; multidimensional vulnerabilities; inequalities; climate responsibilities; extraterritoriality.

(A) INTRODUCTION

The total number of climate change-related legal cases has more than doubled since 2017 and continues to grow worldwide. This is evidenced by the latest report from the Sabin Center for Climate Change, the *Global trends in climate change litigation: 2024 snapshot*, which highlights the increase in such lawsuits globally, with the U.S. having the highest number of cases recorded (1,745) in 2024, followed by the UK with 24 cases, Brazil (10) and Germany (7)[1]. There is also a significant increase in lawsuits against companies, particularly for lack of credibility regarding their climate commitments and investments, known as climate-washing. According to the United Nations Environment Programme report "*Global Climate Litigation Report. 2023 Status Review*"[2], the number of cases recorded for this reason was 22, compared to 10 in 2020. This report also refers

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1 Sabin Center for Climate Change, *Global trends in climate change litigation: 2024 snapshot* (2024). Available at: https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2024-snapshot/. Accessed 24 November 2024.

2 United Nations Environment Programme Report *Global Climate Litigation Report. 2023 Status Review* (UNEP: Nairobi, 2023): https://doi.org/10.59117/20.500.11822/43008.

to litigation for a just transition as an emerging trend, where plaintiffs challenge the way climate action is implemented, demanding a balance between the measures taken and the rights of affected people and communities[3]. Quantitatively, these data highlight that climate litigation is becoming an essential part of pushing for climate action, improving climate governance, and emphasizing the growing importance of science and scientists in providing the necessary evidence to support legal decisions. However, it also underscores the efforts of citizens to counter the insufficient governmental action to protect those who suffer the most from the impacts of climate change.

In this regard, this contribution represents a reflection on the possibilities of climate litigation in terms of contributing to the achievement of climate justice. The analysis starts with the concepts of environmental justice and climate justice, in order to consider the existing inequalities and multidimensional vulnerabilities[4] in the current context of climate emergency. This is complemented by a brief analysis of some of the most relevant climate litigation cases that integrate extraterritoriality to argue how these cases have been the most promising, so far, for achieving climate justice.

(B) FROM ENVIRONMENTAL JUSTICE TO CLIMATE JUSTICE: THE CLAIMS OF INEQUALITIES

The notion of "justice" is a fundamental part of the social contract, crucial for ensuring that no one is left behind and for fostering a virtuous connection between economic growth, social inclusion, and environmental sustainability[5]. The link between the concept of justice and the environment has its roots in the civil resistance movement that emerged in the United States in the 1980s, which focused its demands on protecting health and the environment[6] from the disposal of toxic waste in the most impoverished and racialized communities, primarily African American[7].

This initial environmental justice movement, focused on environmental discrimination, has evolved to integrate not only the consequences of the unjust distribution of

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3 *Ibid.*

4 The concept of multidimensional vulnerability has been established by the United Nations, which has proposed the development and application of a Multidimensional Vulnerability Index (MVI). The MVI is a vital tool to help less developed states access concessional finance, improve their national long-term planning, repay their debts and/or subscribe to insurance and compensation schemes for climate disasters. See Multidimensional Vulnerability Index and the Final Report of High-Level Panel on the Development of a Multidimensional Vulnerability Index. Available at: https://www.un.org/ohrlls/mvi. Accessed 6 November 2024.

5 United Nations Development Programme (UNDP), *Justicia y Desarrollo Sostenible: El testeo del indicador global de acceso a justicia en el marco de una encuesta nacional de pobreza*, Ciudad Autónoma de Buenos Aires: Programa de las Naciones Unidas para el Desarrollo-PNUD (2023), at 20. Available at: https://www.undp.org/es/argentina/publicaciones/justicia-y-desarrollo-sostenible. Accessed 14 November 2024.

6 D. E. Camacho (Ed.), *Environmental Injustices, Political Struggles: Race, Class and the Environment* (Duke University Press, 1998): https://doi.org/10.2307/j.ctv1168c8g.

7 R. D. Bullard, 'Anatomy of environmental racism and the environmental justice movement', in *Confronting environmental racism: Voices from the grassroots* (1993) 15, 15-39. See also L. W. Cole, S. R. Foster, *From the ground up: Environmental racism and the rise of the environmental justice movement* (Vol. 34. New York: NYU Press, 2021): https://www.jstor.org/stable/j.ctt9qgj6v and E. M. McGurty, 'From NIMBY to civil rights: The origins of the environmental justice movement', *Environmental History*, 2.3 (1997), at 301-323: https://doi.org/10.2307/3985352.

environmental harms and benefits but also to expose their underlying causes, thus connecting the three core dimensions of justice: distributive, procedural, and recognition[8].

Although the distributive aspects of justice can be seen as an indication of injustice, meaning that environmental harm is disproportionately suffered by certain groups in society, Schlosberg points out that these groups or individuals must be recognized before any redistribution can take place[9]. This also applies to the procedural dimension of justice: if a group or individual must be protected, they must be recognized. Recognition justice refers to the existence of social structures that reinforce unjust outcomes in society, recognizing that certain cultural and institutional norms and practices can give unequal representation to certain groups, depriving them of the common good and/or protection. Distributive justice, on the other hand, considers the fair and equitable distribution of environmental goods and benefits for all people, aiming to understand how environmental harms or benefits are experienced in society[10]. And procedural justice focuses on the fact that participation in decision-making is not always equal, and some groups and individuals may be excluded. Along with these dimensions of environmental justice, McCauley and Heffron add restorative justice as a fourth dimension, aimed at correcting historical development trajectories that have created structural forms of injustice[11]. Thus, restorative justice aims to restore the dignity of those affected and serve as an alternative to litigation related to loss and damage[12].

The integration of these dimensions within the context of the institutional framework makes it necessary to think about the concept of environmental justice in a broader way. In this regard, according to the United Nations Development Programme (UNDP), three pillars can be identified in relation to environmental justice: 1. normative frameworks at the international, national, and local levels that, with a human rights approach, go beyond the mere criminalization of those who commit environmental crimes; 2. strengthened institutions to monitor, control, and implement environmental regulations that have access mechanisms for all communities and sectors; and 3. effective access to justice for all stakeholders when environmental rights are violated[13].

Thus, environmental justice is a concept that has evolved towards the pursuit of "fair treatment and participation of people of all races, cultures, nations, and socioeconomic

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8 D. Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature*, (2007) Vol. 9780199286: https://doi.org/10.1093/acprof:oso/9780199286294.001.0001.

9 *Ibid*.

10 S. Hughes, M. Hoffmann, 'Just urban transitions: toward a research agenda', *Wiley Interdisciplinary Reviews: Climate Change* (2020): https://doi.org/10.1002/wcc.640. See also V. Bellver Capella, 'El movimiento por la justicia ambiental. Entre el ecologismo y los derechos humanos', *Anuario de Filosofía del Derecho* (1997), no. 13-14, at 327-348: https://revistas.mjusticia.gob.es/index.php/AFD/article/view/1596. Accessed 26 November 2024.

11 D. McCauley, R. Heffron, 'Just transition: integrating climate, energy and environmental justice', in *Energy Policy* (2018), 119, at 1-7: https://doi.org/10.1016/j.enpol.2018.04.014.

12 S. A. Robinson, D. Carlson, 'A just alternative to litigation: applying restorative justice to climate-related loss and damage', in *Third World Quarterly* (2021) at 1-12: https://doi.org/10.1080/01436597.2021.1877128.

13 United Nations Development Programme (UNDP), *Environmental Justice comparative Experiences in Legal Empowerment* (2014). Available at: https://www.undp.org/publications/environmental-justice-comparative-experiences-legal-empowerment. Also see United Nations Development Programme (UNDP), *Environmental justice: securing our right to a clean, healthy and sustainable environment* (2022). Available at: ttps://www.undp.org/publications/environmental-justice-securing-our-right-clean-healthy-and-sustainable-environment. Accessed 21 November 2024.

backgrounds in the development, implementation, and enforcement of environmental programs, laws, and policies"[14]. Additionally, its implementation requires accountability in environmental matters, focusing on the respect, protection, and enforcement of environmental rights, as well as the promotion of the rule of environmental law. From these principles, the concept of "climate justice" has emerged.

(C) CLIMATE JUSTICE AND THE MULTIMENSIONAL VULNERABILITIES

The term "climate justice" was first used in a 1999 report titled *Greenhouse Gangsters vs. Climate Justice*, produced by the Corporate Watch group based in San Francisco[15]. This report was primarily an analysis of the oil industry and its disproportionate political influence, but it also made an initial attempt to define a multifaceted approach to climate justice, which included the following aspects: analysing the causes of global warming and holding corporations accountable; opposing the destructive impacts of oil exploitation and supporting affected communities, including those most impacted by the increase in climate-related disasters; observing environmental justice movements and organized work to develop strategies that support a just transition away from fossil fuels; and reversing challenging corporate globalization and the disproportionate influence of international financial institutions such as the World Bank and the World Trade Organization. Thus, Corporate Watch understood that

> "Climate justice means, first and foremost, eliminating the causes of global warming and allowing the Earth to continue to nurture our lives and the lives of all living things. This means radically reducing emissions of carbon dioxide and other greenhouse gases.
>
> Climate justice means opposing the destruction caused by greenhouse gases at every step of the production and distribution process, from a moratorium on new oil exploration to stopping the poisoning of communities by refinery emissions, from drastic domestic reductions in automobile emissions to the promotion of efficient and effective public transport"[16].

Years later, it was the International Bar Association (2014) that adopted the following definition of climate change justice:

> "To ensure communities, individuals and governments have substantive legal and procedural rights relating to the enjoyment of a safe, clean, healthy and sustainable environment and the means to take or cause measures to be taken within their national legislative and judicial systems, where necessary, at regional and international levels, to mitigate sources of climate change and provide for adaptation to its effects in a manner that respects human rights"[17].

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14 UNDP (2022), *ibid.*, at 13.

15 K. Bruno, J. Karliner and C. Brotsky, *Greenhouse Gangsters vs. Climate Justice* (Transnational Resource & Action Center, San Francisco, 1999).

16 *Ibid.*

17 International Bar Association. *Achieving Justice and Human Rights in an Era of Climate Disruption*. (London: IBA, 2014). Available at: file://sbs2k8/RedirectedFolders/accintern/My%20Documents/Downloads/Climate%20Change%20Justice%20and%2 0Human%20rights%20report%20full.pdf. Accessed 21 November 2024.

The Summary for Policy Makers of Working Group II of the Intergovernmental Panel on Climate Change stated, as part of its Sixth Assessment Report, that climate justice

> "(…) generally, includes three principles: distributive justice, which refers to the allocation of burdens and benefits among people, nations and generations; procedural justice, which refers to who decides and participates in decision-making; and recognition, which entails basic respect, strong commitment and fair consideration of diverse cultures and perspectives"[18].

According to a 2022 report by the Intergovernmental Panel on Climate Change, 'climate justice encompasses justice that links development and human rights to achieve a rights-based approach to addressing climate change'[19]. In this regard, according to the latest update of its Sixth Assessment Report published in March 2023, it argues (i) that activities that prioritise equity, climate justice, and inclusion lead to more sustainable outcomes and promote resilient development; (ii) that scaling up climate action will mobilise high and low-cost options needed to combat climate change, especially in the energy and infrastructure sectors (high confidence); and (iii) that climate justice movements have in many cases had positive results and will have a catalytic effect on climate governance ambition (medium confidence).

Thus, age, race, gender, class, and other factors help to understand why the climate crisis is a multidimensional crisis and, above all, one of inequality. Moreover, understanding these realities of inequality that contribute to a situation of climate vulnerability is essential to articulate a legal framework sensitive to the foundation of climate justice, informing about the causes and consequences of climate change, its perpetrators and its victims, and providing mechanisms for protection and reparations for climate-related damages and losses, in order to restore justice in the context of the climate emergency. In this regard, the roots of this climate crisis are interconnected with the issue of environmental justice, encompassing a wide range of economic and social realities, making it artificial to treat them separately. Economic and social inequalities are linked to the causes of the climate emergency, as they jointly emerge from a colonial and capitalist process characterized by the concentration and domination of power. Very often, these inequalities are based on personal and social factors (race, social class, gender, ethnicity, and origin), creating a context of greater vulnerability to the risks and effects of climate change. At the same time, climate justice, like the environmental justice movement, emphasizes the importance of empowering individuals and groups who are particularly affected by environmental degradation and are at greater risk of suffering from it, including indigenous peoples, women, children, the elderly, people with disabilities, and those living in poverty[20]. However, climate justice also introduces

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[18] IPCC, *Summary for Policymakers* [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem (eds.)]. In: *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. (Cambridge University Press, Cambridge, UK and New York, NY, USA, 2022), at 7, 3 33, doi:10.1017/9781009325844.001.

[19] *Ibid.*

[20] United Nations. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Resolution A/HRC/34/49 of 19 January

a somewhat novel component in environmental justice, which is the role of youth advocating for intergenerational equity, and has played a prominent role in climate litigation.

Consequently, the effects of climate change are often measured by other factors, such as poverty, existing infrastructure, and the responsiveness of political authorities, interacting with existing inequalities and vulnerabilities, producing what Leichenko and O'Brien term "double exposure"[21]. In addition, the extraction of fossil fuels and the industry surrounding it often directly harm the same interests (such as health and access to land) that are affected by greenhouse gas emissions.

For this reason, climate change and its effects cannot be explained and addressed from an abstract or homogeneous perspective, especially without considering justice, equity, and rights as the foundation of climate justice. However, despite the importance of determining these multidimensional vulnerabilities intersecting with climate change, they have scarcely influenced the articulation of legal obligations under the international climate regime, which has traditionally developed without acknowledging the social dimensions of climate change. This partly explains the increase in climate litigation cases. For this reason, and as discussed below, it is necessary to determine whether this judicial intervention leads to climate justice.

(D) IS CLIMATE LITIGATION CLIMATE JUSTICE?

Although there is no single, unified concept of "climate justice"[22], it is generally understood as a concept based on the principles of equity, non-discrimination, equal participation, transparency, justice, accountability, and access to justice. This includes issues of equity and equality within a nation's populations, between nations, and among populations of different generations[23].

All these elements are not integrated into the concept of "climate litigation". In fact, a sector of academic doctrine emphasizes the difference between climate litigation and climate justice[24]. Following the approach adopted by the Sabin Center for Climate Change Law at Columbia University, two criteria are used to identify court cases as "climate litigation" namely: i) a case must have been presented before a judicial body (although certain examples of administrative matters or research requests are included); and ii) climate change legislation, policy, or science must be a material issue of fact or law in the case[25].

2017. Available at: www.ohchr.org/en/documents/thematic-reports/ahrc3449-report-special-rapporteur-issue-human-rights-obligations. Accessed 6 November 2024.

21 R. Leichenko, K. O'Brien, *Environmental Change and Globalization: Double Exposures* (New York: Oxford University Pressy, 2008): https://doi.org/10.1093/acprof:oso/9780195177329.001.0001.

22 *Ibid*.

23 C. Okereke, 'Climate justice and the international regime', in *Wiley interdisciplinary reviews: climate change* (2010) 1.3, at 462-474: https://doi.org/10.1002/wcc.52.

24 C. Beauregard, D. Carlson, S. Robinson, C. Cobb, and M. Patton, 'Climate justice and rights-based litigation in a post-Paris world', 21 *Climate Policy* (2021), at 652-665: https://doi.org/10.1080/14693062.2020.1867047.

25 Sabin Center for Climate Change Law, *Climate Change Litigation Databases.* Available at: https://climatecasechart.com/about/. Accessed 12 November 2024.

Thus, climate justice does not necessarily appear to be the ultimate goal of climate litigation. In general, when considering the dimensions of climate justice, it can be observed that most climate litigations focus on mitigation (distributive dimension) by providing civil society with a possible avenue to address the inadequate responses of governments and the private sector to the climate crisis, forcing governments and corporate actors to pursue more ambitious goals for climate change mitigation and adaptation. While civil society's participation is instrumentalized as a legal-political strategy, there is little emphasis on recognizing the most vulnerable population groups (recognition justice), such as children and youth, women's groups, local communities, and Indigenous Peoples, among others. Despite taking a prominent leadership role in filing these climate litigations and driving climate governance reform in an increasing number of countries around the world, these groups lack significant participation in the decision-making process (procedural justice). Even less emphasis is placed on restorative justice as a legal approach, beyond the strategic one, to highlight equity and accountability in addressing the climate crisis.

Despite these apparent limitations, climate litigation can be a potentially relevant tool in contributing to the realization of climate justice.

(E) WHAT ARE THE PROMISING DEVELOPMENTS IN CLIMATE LITIGATION?

As mentioned, climate justice is often understood as justice related to responsibility for climate change and its impacts, or as justice concerning the effects of responses to climate change. Thus, climate litigation has focused, according to the Grantham Research Institute[26], on the types of behaviours that the cases aim to discourage or encourage, but not necessarily on the inequalities, vulnerabilities, and/or intersectionalities regarding the effects of climate change, which are collateral. And, of course, much less on responsibilities and reparations/restorations.

Most climate litigation cases have focused on three objectives: challenging deficiencies in a national government's global climate response or the inadequate implementation of existing climate laws (government framework cases)[27]; challenging statements made by public and private actors about their contributions to climate action and the energy transition due to their misleading or exaggerated nature ("climate-washing" cases); and challenging the flow of funding toward projects and activities that are not aligned with climate action ("turning off the taps" cases)[28].

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[26] For instance, see the case Federal Court of Australia Australian Securities and Investments Commission v Vanguard Investments Australia Ltd [2024] FCA 308 File number(s): VID 563 of 2023, 28 March 2024. Sabin Center for Climate Change Law, *Climate Change Litigation Databases, Ibid.*

[27] For instance, see the case Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others, *"Verein KlimaSeniorinnen Schweiz v. Bundesrat"*. Filing Date: 2016. Reporter Info: No. A-2992/2017. Sabin Center for Climate Change Law, *Climate Change Litigation Databases, Ibid.*

[28] For instance, see the case Jubilee v EFA and NAIF, 2023. Reporter Info: NSD724/2023. Sabin Center for Climate Change Law, *Climate Change Litigation Databases, Ibid.*

According to Farhana Sultana, climate justice goes beyond climate litigation, as it represents a critical perspective that challenges dominant discourses built on oppression, grounded in solidarity and collective action[29], to address these climate inequalities that determine greater exposure, risk, and lower climate resilience capacity[30].

However, climate litigation can be used to advance climate justice[31], when the discourse of rights, vulnerabilities, and climate responsibilities is properly integrated. In this regard, some cases can be highlighted as reflections of the promises of climate litigation and those that have best integrated the dimensions of climate justice. Many of these cases are paradigmatic in that they incorporate an element of extraterritoriality, meaning cases in which human rights violations, vulnerabilities, and historical and current responsibilities are addressed, exceeding the jurisdiction of one state, by their victims and/or perpetrators[32]. These cases clearly reflect the inequalities and vulnerabilities borne, especially by populations in the Global South[33], who are less responsible for contributing to climate change. But they also provide a view of state jurisdiction as 'source control' according to Principle 21 of the 1972 Stockholm Declaration[34] and Principle 2 of the 1992 Rio Declaration on Environment and Development[35], which include the customary obligation that states may not cause environmental damage beyond their borders. In concrete, states have the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction"[36]. The lack of control by states over activities producing greenhouse gas emissions in their territory or under their control causes significant climate harm to other states, thereby violating international law.

In this regard, and without claiming exhaustiveness, one of the first extraterritorial climate litigation cases responding to the call for climate justice is the *Inuit petition*. In 2005, the Inuit Circumpolar Conference, representing the Inuit people of the Arctic

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29 F. Sultana, 'Critical climate justice', in 188 *The Geographical Journal* (2022), at 118-124: https://doi.org/10.1111/geoj.12417.

30 J. R. Elliot, J. Pais, 'Race, class, and Hurricane Katrina: Social differences in human response to disaster', in *Social Science Research* (2006), at 295-321: https://doi.org/10.1016/j.ssresearch.2006.02.003 and Y. Park, J. Miller, 'The social ecology of Hurricane Katrina: Re-writing the discourse of 'natural' disasters', in *Smith College Studies in Social Work* (2006), at 9-24: https://doi.org/10.1300/J497v76n03_02.

31 C. Beauregard, D. Carlson, S. Robinson, C. Cobb, and M. Patton, 'Climate justice and rights-based litigation in a post-Paris world', *cit. supra*.

32 A. Savaresi, J. Auz, "Climate change litigation and human rights: pushing the boundaries", 9 *Climate Law*, n. 3 (2019), at 244-262: https://doi.org/10.1163/18786561-00903006.

33 The 'Global South' is not a homogenous group of countries, as it integrates a wide variety of countries with a great diversity in terms of legal development and capacity. According to the Sabin Center for Climate Change Law, the G77 countries + China integrates the Global South countries. See Sabin Center for Climate Change Law, *Climate Change Litigation Databases, Ibid.*

34 UN General Assembly, *United Nations Conference on the Human Environment*, A/RES/2994, UN General Assembly, 15 December 1972.

35 UN General Assembly, *Report of the United Nations Conference on environment and development*, Rio de Janeiro, 3-14 June 1992, Annex I: Rio Declaration on environment and development, A/CONF.151/26 (Vol. I) 12 August 1992.

36 The origin of this principle is to be found in the Trail Smelter Arbitration Case (USA/Canadá), Award of March 11, 1941. ONU. RIAA, vol. III, at 1974-1980. Also mentioned by the ICJ in the Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), 25 September 1997, ICJ Rep (1997); Pulp Mills on the River Uruguay (Argentina v. Uruguay), ICJ Rep (2006). And in the advisory jurisdiction: Legality of the Use of nuclear weapons in Armed Conflict, Advisory Opinion of 8 July 1996, ICJ Rep (1996), at 225.

regions, filed a petition before the Inter-American Commission on Human Rights against the United States[37], arguing that the carbon emissions from the United States had contributed to global warming to such an extent that climate change threatens their ancestral way of life. The petition argued that this violated the right to maintain cultural integrity, the right to a clean environment, the right to use and enjoy property without undue interference, and the rights to life, the preservation of health, physical integrity, and security, among other rights recognized by the Universal Declaration of Human Rights and the American Convention on Human Rights[38]. Therefore, it urged the Commission to adopt measures to address these violations suffered by the Inuit people as a result of global warming caused by the greenhouse gas emissions of the United States, as well as to recommend that the United States adopt mandatory limits on its greenhouse gas emissions and cooperate with the international community to prevent dangerous anthropogenic interference in the climate system, in accordance with Article 2 of the 1992 United Nations Framework Convention on Climate Change. The petition also requested that the Commission declare that the United States has the obligation to work with the Inuit people to develop an adaptation plan to address the inevitable impacts of climate change and to consider the impact of its emissions on the Arctic and the Inuit before approving any government actions. However, despite these arguments, the Inuit's petition was rejected by the IACHR in November 2006 for lack of sufficient evidence of the harm caused. Two months later, on February 1, the Commission decided to reopen the case, giving the opportunity to hear the Inuit representatives in a hearing in March 2007.

Another case worth mentioning was presented in 2015 before the Philippine Commission on Human Rights (CHRP) by survivors of Typhoon Haiyan and other civil society groups to establish an investigation into the responsibility of 47 "major carbon emitters" such as Shell, BP, and Chevron, for the impacts of climate change, and to determine how they could be legally held accountable for the climate damage caused through their greenhouse gas emissions, as reported by the Climate Accountability Institute study[39], thus violating the human rights of Filipinos. On May 6, 2022, the Commission released its findings from the investigation into the world's largest producers of crude oil, natural gas, coal, and cement (Major Carbon Emitters)[40]. Among other matters, it identified key elements for climate justice, namely the responsibility of corporations in contributing to climate change and the resulting human rights violations, framing climate change as a human rights issue rather than a civil or political one. In this report, the Commission stated that "Climate justice requires fairness and equity in how people are treated, linking development and human rights to achieve a rights-

37 Petition to the Inter American Commission on Human Rights seeking relief from Violations resulting from Global Warming caused by Acts and Omissions of The United States, n. P-1413-05.

38 Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess.,1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948) y American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force, July 8th, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

39 R. Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010'. 122 *Climatic Change* (2013), n. 1-2, at 229-241: https://doi.org/10.1007/s10584-013-0986-y.

40 Commission on Human Rights of the Philippines, *National Inquiry on Climate Change* (2022). See: https://chr2bucket.storage.googleapis.com/wp-content/uploads/2022/12/08152514/CHRP_National-Inquiry-on-Climate-Change-Report.pdf. Accessed 24 November 2024.

based approach to addressing climate change"[41] with a commitment to achieving climate justice, particularly for those most affected but least responsible for the climate crises.

In the same vein, the still-pending case of *Saul Luciano Lliuya vs. RWE AG*[42] offers a promising view of climate litigation from the perspective of climate justice. The lawsuit was filed in 2015 by Peruvian farmer Saúl Lliuya against RWE, the largest electricity producer in Germany. This case was the first to bring a company to court for its involvement in climate change, based on the before mentioned "Carbon Majors" study[43]. Lliuya's lawsuit, supported by the NGO Germanwatch, argued that RWE, having consciously contributed to climate change by emitting large volumes of greenhouse gases, was partly responsible for the melting of mountain glaciers near his city, Huaraz. Specifically, the melting posed an acute threat: Palcacocha, a glacial lake located above Huaraz, had experienced a substantial increase in volume since 1975, which had dramatically accelerated since 2003. Lliuya presented several legal theories in support of his claim, including one that characterized RWE's emissions as a nuisance for which the plaintiff had incurred compensable costs to mitigate. Acknowledging that RWE was a contributor to emissions responsible for climate change and, thus, the growth of the lake, Lliuya asked the court to order RWE to reimburse a portion of the costs he and the authorities in Huaraz would have to incur to establish flood protections. The calculated portion amounted to 0.47% of the total cost, the same percentage as the estimated contribution of RWE to global industrial greenhouse gas emissions since the start of industrialization (from 1751 onward). Although the case is still pending, it is expected to be relevant in terms of recognizing the company's historical and current responsibilities, the duty to repair damages caused by climate change, and the acknowledgment of climate vulnerabilities as key factors of climate justice. At least in this case, it has inspired the initiation of other similar cases, such as *Asmania et al. vs. Holcim*[44], which is also promising in terms of climate justice. In this case, four fishermen from Indonesia filed a lawsuit in 2023 against the Swiss cement company Holcim (formerly Lafarge Holcim from 2015 to 2021), arguing that Holcim's historical emissions, reported by the *Carbon Majors* study[45], are contributing to the rise in sea levels and threatening to submerge their home, Pulau Pari, by 2050. The plaintiffs are requesting proportional compensation from Holcim for the climate change-related damages in Pari; a 43% reduction in CO_2 emissions by 2030 and a 69% reduction by 2040, compared to 2019 levels, along with financial contributions to adaptation measures in Pari.

Regardless of the outcome, whether favourable or not for the plaintiffs, all these cases are undoubtedly novel and unprecedented in terms of climate justice, as they raise historical, current, and extraterritorial climate responsibilities of states and corporations,

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41 *Ibid.*

42 Case No. 2 O 285/15 Essen Regional Court and S aul Luciano Lliuya v. RWE (2017) 2017l130 Case No 2-O-28515. See L. García Álvarez, 'El caso Huaraz: David contra Goliat o "Saúl L. contra RWE AG": Un precedente clave en la justicia climática', 40 *Revista Aranzadi de derecho ambiental* (2018), at 63-101: https://hdl.handle.net/10433/19522.

43 R. Heede, *cit. supra*.

44 *Case Asmania et al. vs Holcim,* 2022. See Climate Case Chart at: https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/. Accessed 2 December 2024.

45 R. Heede, *cit. supra*. Also see P. Griffin, *The Carbon Majors Database: CDP Carbon Majors Report 2017* (Londres: CPD UK, 2017).

forcing the link of attribution and causality between actions and omissions regarding climate damages, alongside the claim for compensation, in order to achieve climate justice, setting a promising trend for covering the climate damages and losses borne by populations in the Global South.

Equally promising are the cases based on damages to future generations, specifically addressing intergenerational climate justice from an extraterritorial perspective. In this sense, the *Chiara Sacci case and others v. Argentina, Brazil, France, Germany, and Turkey* (Committee on the Rights of the Child, 2019) was the first attempt to hold several State parties to an international human rights treaty accountable for human rights violations related to climate change. The lawsuit was filed by sixteen children under the third Optional Protocol to the Convention on the Rights of the Child (CRC OP3) on September 23, 2019. The child plaintiffs argued that the five defendant states Germany, Argentina, Brazil, France, and Turkey had failed to fulfil their obligations under the Convention on the Rights of the Child (CRC) by causing and perpetuating the climate crisis, leading to ongoing violations of their rights under the Convention. The ruling of the Committee on the Rights of the Child follows the Inter-American Court of Human Rights' approach on extraterritoriality[46], emphasizing foreseeable harm as the applicable standard to determine jurisdiction in climate change cases. It also understands that the test of 'effective control' is inapplicable in the context of climate change, thus rejecting the defendant states' (particularly France's) argument that establishing jurisdiction would require the person invoking a violation of their rights to reside in a territory over which the state has effective control. Regarding the foreseeability requirement, it is based on the understanding that both 'general acceptance' and climate change science are sufficient to demonstrate that climate change has adverse effects on the enjoyment of rights both within and outside the territory of a State.

All of these cases have in common the need to highlight the climate vulnerabilities and inequalities faced by many people in different parts of the world. At the same time, they allow us to observe how the limitations inherent in climate litigation have been an obstacle to achieving climate justice, despite the promising initiatives on which they were based and despite placing a greater burden on the victims of climate change to demonstrate their vulnerabilities and the attribution of responsibilities.

Consequently, the effects-based approach proposed by these cases, in which a State has control over a situation that produces extraterritorial effects, opens the door to future, more progressive decisions in international climate change litigation and perhaps it would contribute to thus fundamentally shifting the burden of proof to the defendant (mostly the victims). The proliferation of these cases, together with the ongoing advisory proceedings on climate change before the Inter-American Court of Human Rights, the International Court of Justice, and the Tribunal on the Law of the Sea, can contribute to declare the 'extraterritorial obligations' of States, which can result in extra-contractual responsibilities, as a consequence of their acts or omissions, which impact on the enjoyment of human rights outside their own territorial limits. In this

[46] Inter-American Court of Human Rights Advisory Opinion OC-23/17 of November 15, 2017 requested by the Republic of Colombia. See at: https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf. Accessed 6 December 2024.

sense, these cases are relevant to overcome issues of extraterritoriality, going beyond traditional legal doctrines that limit the achievement of climate justice in the courts.

(F) CONCLUSION: WHAT ELEMENTS SHOULD A CLIMATE LAWSUIT HAVE IN ORDER TO CONTRIBUTE TO CLIMATE JUSTICE?

Despite the traditionally existing limitations in climate litigation, it is an instrument that can contribute to climate justice, especially in cases characterized by extraterritoriality. While it is not yet clear what the opportunities are for this type of "extraterritorial" climate litigation, it is the most promising in terms of climate justice.

In any case, from the perspective of climate justice, climate litigation should address the so-called 'triple injustices' of climate change, namely, the unequal distribution of impacts, the unequal responsibility for climate change, and the unequal costs associated with mitigation and adaptation[47], where those least responsible for greenhouse gas emissions are also the most vulnerable to its impacts and the most disadvantaged by responses to climate change[48].

The first element is that climate change must be presented as a justice issue arising from the unequal distribution of its adverse effects between countries and generations, different contributions to greenhouse gas emissions, varying degrees of exposure to the consequences of climate change, and unequal capacities to adapt to climate impacts or access climate solutions.

The second element is that the term 'justice' must be considered an essential component of the concept of climate justice, meaning it should include a range of issues related to the legal protection of those in contexts of multidimensional vulnerability to the adverse effects of climate change. This would include, as some authors like Brown Weiss[49], Meyer[50], and Knappe and Renn[51] refer to, the intergenerational dimension of justice to highlight the duties of one generation toward another, particularly concerning climate change, in relation to the obligations toward the young and children who are already living (or to be born), whose current and future lives are negatively affected by rapidly changing environmental conditions.

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47 J. T. Roberts, T. B. C. Parks, 'A climate of injustice: global inequality, north-south politics, and climate policy', in 1 *Global environmental accord* (2015), The MIT Press: https://www.jstor.org/stable/41622756.

48 D. Krause, 'Transformative approaches to address climate change and achieve climate justice', in *Routledge handbook of climate justice* (2018) (Routledge).

49 E. Brown Weiss, 'Climate Change, Intergenerational Equity, and International Law', in 9 *Vermont Journal of Environmental Law* (2008), at 615-627: https://doi.org/10.2307/vermjenvilaw.9.3.615.

50 L. H. Meyer, 'Intergenerational justice", in *The Stanford Encyclopedia of Philosophy*, (2021) (Summer Edition).

51 H. Knappe, O. Renn, 'Politicization of intergenerational justice: how youth actors translate sustainable futures', in *European Journal of Futures Research* (2022) 10, 6: https://doi.org/10.1186/s40309-022-00194-7. See also S. Caney, 'Justice and future generations', in 21 *Annual Review of Political Science* (2018), at 475-493: https://doi.org/10.1146/annurev-polisci-052715-111749.

And, based on the principles of environmental justice mentioned above, the third element would be to determine (i) responsibility for causing climate change and its impacts, or (ii) the effects of responses to climate change[52].

Therefore, climate justice specifically requires not only establishing "extraterritorial" responsibilities, but also ensuring that mitigation and adaptation strategies, to be just, must primarily aim to benefit the most threatened populations and nations with the greatest needs.

Considering these prior ideas, a climate litigation based on climate justice has transformative potential, at least in contributing to reflection on the inequalities and addressing them, focusing on their exterritorial causes and consequences, paying particular attention to how climate change affects people and their rights in different, unequal, and disproportionate ways, as well as repairing the resulting injustices in a fair and equitable manner.

[52] P. Newell, S. Srivastava, L. O. Naess, G. A. Torres Contreras, R. Price, 'Towards transformative climate justice: An emerging research agenda', in 12 *WIREs Climate Change* (2021), at 6: https://doi.org/10.1002/wcc.733.

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Identifying the limits of climate change litigation

Xavier Farré-Fabregat*

Abstract: Climate change litigation is awakening a lot of interest and hope within both academia and civil society. While certainly chalking out an empowering avenue to force governments and companies to take more ambitious actions, it clashes with structural limits present in international law. These limits appear in litigation and impede the adoption of transformative measures with a universal reach. Without disregarding that the praxis of climate litigation can also contribute to solidify some of these very same limits, this article analyses the appearance of three of them: the primacy enjoyed by international investment law over international environmental law, the North-South divide, and the intricacies of implementation.

Keywords: climate change litigation limits international law Global North-South regime fragmentation

(A) INTRODUCTION

The unprecedented pace at which humans are dangerously altering the stable climate conditions on earth is extremely worrying[1]. Because governments are not taking the urgent measures required in the remaining window of opportunity to avoid entering in unchartered waters[2], for the last ten years litigation has sought to influence the direction of climate change governance. To provide the necessary transformative change that would guarantee a transition matching the urgency of the situation, climate litigation is not only battling the passivity of (the most polluting) states, but it is also encountering structural limits embedded in international law. This article aims to assess how three relevant limits, visible once a critical approach towards international law is adopted, appear in climate litigation: the primacy of the investment regime over its environmental counterpart, the persisting discrimination of the Global South, and the complexity surrounding the always laborious task of implementation. Unpacking these three limits does not automatically imply that the result of climate change litigation is

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1 Only under the most optimistic pledge-based scenario, run by the Intergovernmental Panel on Climate Change (IPCC), warming has stabilized by 2100 (to an increase of 1'9ºC with a 66% change) [*in* United Nations Environmental Programme (UNEP), *Emissions Gap Report 2024: No more hot air… please! With a massive gap between rhetoric and reality, countries draft new climate commitments* (2024), at 33].

2 As UNEP clearly states, "unless global emissions in 2030 are brought below the levels implied by existing policies and current [Nationally Determined Contributions], it will become impossible to reach a pathway that would limit global warming to 1'5ºC […] and strongly increase the challenge of limiting warming to 2ºC"" [*ibid,* at XII].

perforce determined; these limits are deeply-rooted and are difficult to overcome, but climate litigation can (consciously) engage with them, seeking to modify or also to keep the status quo and the role reserved to the regime that, at first sight, should be essential: international environmental law. Understanding how these limits appear in litigation is of utmost importance to gauge the feasibility of the expectations placed on a judiciary-led climate transition, to expose the existent imbalances in international law and to, most importantly, fine-tune the practice and strategies of this climate juridical phenomenon.

(B) THE LIMITS OF INTERNATIONAL (ENVIRONMENTAL) LAW

Identifying the limits of climate change litigation requires the unavoidable exercise, as it would happen with litigation of any other nature, of a prior diagnosis about the problem that this legal action aims to solve in this case, climate change. Namely, this assessment has to expose the role that international law plays in the production and management of climate change. In this section, by initially resorting to Anne Orford's critical analysis of international law[3], as well as the legalism she imbues it with, I explain three main limits through which international law fails to properly address climate change: the centrality of the investment regime, the inadequate differentiation of the Global South, and the complexity of implementation.

In dominant international law, built mostly from (and in order to foster an) international liberalism, the environmental question as well as its social equivalent is separated from the legal regimes of trade, security, investment and the use of force[4]. While addressing all these four regimes would unveil relevant international legal constraints that reduce the margin of maneuver to tackle climate change[5], and

[3] Orford's analysis is attentive to the concrete manifestations of politico-legal concepts and practices forming the backbone where international law is found (better said, along the lines of her work, 'made' when it is claimed to be 'found'), while also fleshing out its relation with political economy assumptions and preferences [*see*, *inter alia*, A. Orford, 'International Law and the Limits of History', in W. Werner, M. de Hoon, and A. Galán (eds.) *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press, Cambridge, 2017), at 312 *and* A. Orford, 'Food Security, Freed trade, and the Battle for the State', 11 *Journal of International Law and International Relations* (2015) 1-67, at 28-37]

[4] A. Orford, 'International Law and the Social Question', 5 *Annual TMC Asser Lecture* (2020), 1-50, at 3 and 46. Orford does not clarify if this separation emanates from the legal practice by specialized international lawyers, that ends up creating such regimes as it is implicitly chalked out in the first page of this footnote , or if such practice forcefully takes place within pre-established boundaries resulting from sophisticated mechanisms of enforcement that create these regimes which is suggested in the second page of this same footnote.

[5] Some of the most illustrative restrictions can be mentioned. Regarding the regime of the use of force, under the Paris Agreement, it is voluntary for state parties to include the energy uses at their bases and military equipment (such as road transport, aviation and ships) in their nationally determined contributions, but other activities carried out during (the preparation of) an armed conflict or related with the military equipment procurement, among others, do not have to be included in case this voluntary reporting takes places [*see* R. E. Pezzot, 'The Silence of the Lambs and the Wartime GHGs Emissions', *EJIL: Talk!*, published 26 March 2024, available electronically at https://opiniojuris.org/2024/03/26/the-silence-of-the-lambs-and-the-wartime-ghgs-emissions/]. As to the security regime, the universal recognition of the right to a healthy environment by the UN General Assembly on July 2022 deleted the adjective *safe* while keeping the qualifiers *clean*, *healthy* and *sustainable* present in previous draft versions because of many state pressures [M. Limon, 'United Nations recognition of the universal right to a clean, healthy and

also acknowledging the existent relevant debate about the problematic and mutating function of such fragmentation[6], the first limit is exclusively focused, for reasons of space, on the leading role of the investment regime.

International investment law is mainly centred on investment protection, being disengaged from its operating environmental context and traditionally indifferent to the detrimental effects of the activities it enables[7]. This regime presents an asymmetry between the wide range of rights investors enjoy and the reduced responsibilities based on social expectations they are subject to far from amounting to clear-cut traditional obligations since they are not based exactly in law and hence cannot be qualified as legally binding; a decoupling imaginary, rooting this asymmetry, slows down heading towards finding (the extension of) investors' obligations under international law as some recent arbitration awards, without unanimity, have displayed[8]. Against this background, in interpreting international investment agreements that investors claim have been violated by states, "arbitrators tend to treat them as an autonomous and self-contained regime that prevails over other regulatory regimes"[9]. The simultaneous submission of states to the human rights and environmental regimes, on the one hand, and international investment law, on the other hand, can generate an incompatibility (in the fulfillment) of obligations, with the practice of arbitral tribunals as a key factor informing states' decisions in the midst of this dilemma[10]. Although the content of

sustainable environment: An eyewitness account', 31 *RECIEL* (2022) 155-170, at 168]. Moreover, the majority of the debates surrounding the *securitization* of climate change in the UN Security Council by expanding the interpretative reach of chapters VI and VII of the UN Charter "reveal a deep contradiction" in (not) identifying how the conditions that in first place permit climate change are brought about [E. Cusato, 'Of violence and (in)visibility: the securitisation of climate change in international law', 10 *London Review of International Law* (2022) 203 242, at 230]. Finally, the trade regime might present more willingness to interact with the environmental regime meriting, the rationale of this interaction, a deeper analysis , but even structural rules devised to make both compatible still present a notable interpretative stalemate [*see* G. Marín-Durán, 'Securing compatibility of carbon border adjustments with the multilateral climate and trade regimes', 72 *International and Comparative Law Quarterly* (2023) 73-103, at 95].

6 There are scholars who, with a less pessimist view, consider the existence of these different regimes as a stage in the development and application of international law. In this sense, the existence of these separate regimes is part of a dynamic process, not always temporally ordered, of law-creation and implementation in certain thematic areas which does not exclude fertilization and linkage between regimes [M. A. Young, 'Introduction: The Productive Friction between Regimes', in M. A. Young (ed.) *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, Cambridge, 2012), at 9-10]. Following this logic, it is believed that international courts might have started a process of regime harmonization, producing a coordination between norms and knowledge of the regimes that might collide [A. Peters, 'The refinement of international law: From fragmentation to regime interaction and politicization', 15 *International Journal of Constitutional Law* (2018) 671-704].

7 K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, New York, 2013), at 132-133.

8 N. Perrone, 'Bridging the Gap between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment', 7 *Business and Human Rights Journal* (2022) 375-396, at 392 and 394. Along these lines, *see* Working Group…, *infra* n. 9, at paragraphs 41, 63 and 65.

9 Working Group on the issue of human rights and transnational corporations and other business enterprises, 'Human rights-compatible international investment agreements', A/76/238, 27 July 2021, at paragraph 17.

10 Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, 'Effects of foreign debt and other related financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights', A/72/153, 17 July 2017, at paragraph 8.

the award is bargained more often than what it is widely presumed especially if it is not considered legitimate and it hides strong distributive concerns [11], it strongly influences the span of options states might adopt to meet their environmental duties. In the field of energy transition programmes, for example, investor-state dispute settlement mechanisms are producing a considerable level of inconsistency in the design and implementation of greener policies due to the (alleged) breach of contractual rights possessed by the investors behind the extractive sector[12].

It should be nuanced that this does not entail that the investment regime is inherently and inevitably contrary to progressive climate policies. Nevertheless, its current structure and practice quasi-exclusively focused on monetization leave aside the implementation of measures fostering an energetic transition and strengthens the payment of compensations to investors. This occurs even in proceedings where investors use arguments of environmental protection in relation to the benefits associated with the promotion of renewable energy initially sponsored by governments[13].

The second limit is also, to a considerable extent, explained by the context of regime fragmentation. International environmental law's foundational purpose is to tackle the negative effects of the (trans)actions allowed by these other regimes, especially international trade law, being an added layer of (post)protective regulation over legal rules that have previously organized processes producing negative externalities to the environment[14]. In the ensuing small margin of maneuver it possesses, international environmental law has also been, at critical times, complicit in allowing and accentuating the injustice of these effects[15], especially through the authoritative position acquired by market concepts[16]. Albeit this scenario might be progressively changing in part thanks to climate litigation [17], among these imbalances it stands out the incapacity that international environmental law presents to internalize the environmental problems that have an immediate and negatively differentiated impact over the Global South[18]. This economic-geographic divide is certainly more porous than the way it is often treated by critical scholars, but the environmental legal regime still confers a predominant position

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11 T. St John *et al.*, 'Bargaining in the Shadow of Awards', 35 *The European Journal of International Law* (2024) 603 622, at 615-616.

12 Working Group on the issue of human rights and transnational corporations and other business enterprises, 'Extractive sector, just transition and human rights', A/78/155, 11 July 2023, at paragraphs 14-16 and 18.

13 N. Perrone, 'International Investment Agreements and Climate Change: What is the Role that International Investment Agreements Play in the Transition to a Green Economy?', Asia-Pacific Economic Cooperation Investment Experts' Group, July 2024, at paragraphs 133-135.

14 J. Viñuales, *The Organisation of the Anthropocene: In Our Hands?* (Brill, Leiden, 2019), at 9 and 26.

15 L. J. Kotzé, L. Du Toit, and D. French, 'Friend or foe? International environmental law and its structural complicity in the Anthropocene's climate injustices', 11 *Oñati Socio-Legal Series* (2021) 180-206, at 191-192.

16 N. S. Ghaleigh, 'Thoughts on 'Theory', International Law and Environmental Law Scholarship', 30 *Journal of Environmental Law* (2018) 543 555, at 552.

17 *See*, for example, how C. Voigt ['The Power of the Paris Agreement', 32 *RECIEL* (2023) 237-249, at 239] acknowledges that it is not impossible, even though she initials warns that it seems unlikely, that an international court requires more of states than the obligations they accepted to be subject to under the Paris Agreement.

18 S. Atapattu and C. G. Gonzalez, 'The North-South Divide in International Environmental Law: Framing the Issues', in S. Alam *et al.*, (eds), *International Environmental Law and the Global South* (Cambridge University Press, Cambridge, 2015), at 10.

to the North as the source of acceptable meaning[19]. The unfinished legal structure of *loss and damage* within international climate change law epitomizes such dominance.

Included as a climate pillar in the Paris Agreement, a COP decision clearly stated that the loss and damage of article 8 "does not involve or provide a basis for any liability or compensation"[20]. Beyond the limited role that this confers to historical emissions by developed countries, focusing more on their current capabilities and taking the(ir) lead in the operationalization of funding[21], its relative importance compared to other pillars is clear through its inclusion in the Paris Rulebook under the umbrella of adaptation[22]. Such flexible approach is primarily possible because there is no formal definition of loss and damage, which can be explained by international law's difficulties to commensurate the different ways loss is experienced let alone the deeper underlying issue of valuing loss to nature beyond its perception as a resource[23]. Moreover, the interim trustee role conceded to the World Bank has not been welcomed by many countries of the Global South[24]. Lastly, all this, together with the voluntary character of the fund[25], make the operationalization of a loss and damage adjusted to the real needs of the Global South cumbersome.

The ghost of implementation, always chasing international law, is the third limit. States, as the mainstream narrative goes, willingly disregard, on many occasions, the obligations they consented to be bound or the measures adjudicated by courts. Along these lines, the quandaries faced by international courts to enforce their rulings[26], the varied success of requesting organs in seeking the implementation of an advisory opinion by the ICJ[27] and the states' intermittent compliance with international law are problematics at the core of the academic research unpacking implementation[28]. This epistemological stance

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19 U. Natarajan and K. Khoday, 'Locating Nature: Making and Unmaking International Law', 27 *Leiden Journal of International Law* (2014) 573-593, at 581 and 585.

20 UNFCCC, 'Decision 1/CP.21, Adoption of the Paris Agreement', UN Doc FCCC/CP/2015/10/Add.1, 29 January 2016, at paragraph 51.

21 A. M. Blanco and P. Toussaint, 'Addressing Loss and Damage at COP29 and Beyond', *Völkerrechtsblog*, published 13 November 2024, available electronically at https://voelkerrechtsblog.org/addressing-loss-and-damage-at-cop29-and-beyond/.

22 V. Pekkarinen, P. Toussaint and H. van Asselt, 'Loss and Damage after Paris', 13 *Carbon & Climate Law Review* (2019) 31-49, at 36. In this sense, states are not obliged to include loss and damage in their NDCs.

23 U. Natarajan, 'Measuring the Immeasurable: Loss and Damage from Climate Change in International Law', in S. L. Seck and M. Doelle (eds), *Research Handbook on International, National, and Transnational Responses to Loss & Damage* (Edward Elgar Publishing, Cheltenham, 2021).

24 E. Shumway, 'Observations from COP28 on the Loss and Damage Fund', *A Sabin Center Blog*, published 20 december 2023, available electronically at https://blogs.law.columbia.edu/climatechange/2023/12/20/observations-from-cop28-on-the-loss-and-damage-fund/.

25 *See* how decision 1/CP.28 "*urge*[*s*] developed country Parties to continue to provide support and encourage[*s*] other Parties to provide, or continue to provide support, on a voluntary basis, for activities to address loss and damage" [*in* UNFCCC, 'Decision 1/CP.28, Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2 3 of decisions 2/CP.27 and 2/CMA.4', UN Doc FCCC/CP/2023/11/Add.1, 6 December 2023, at paragraph 12].

26 *See*, analyzing the United Nations' international law of enforcement and the ICJ, A. Tanzi, 'Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations', 6 European Journal of International Law' (1995) 539 572.

27 E. Sthoeger, 'How do States React to Advisory Opinions? Rejection, Implementation, and what Lies in Between', 17 *AJIL Unbound* (2023) 292-297, at 294.

28 For a detailed theorization of noncompliance, *see* J. K. Cogan, 'Noncompliance and the International Rule of Law', 31 *The Yale Journal of International Law* (2006) 189-210.

is normally taken to capture the application of legal regimes considered problem-solving such as human rights or humanitarian law. However, and accepting the intricacies fencing in what is implementation[29], this stance ignores the (more frequent) implementation of those regimes that enjoy primacy over others in a fragmented legal context. In addition, and getting considerable distance from classical positivist lenses, it also brushes aside international law's operation through every day practices, which are often ascribed to other normative orders of less extraordinary character; namely, by means of its universalization, international law has percolated into domestic and regional legal fields that are enframed as local autonomous affairs[30]. As a result of the combination of these different observations, implementation is a limit not only because there are obligations not complied which is certainly the case , but also because discerning what measures are (to be) implemented is an elusive endeavour. In this article, especially in the fourth section, implementation is addressed through this latter version.

International environmental law has been historically based on the implicit assumption that it is enough to establish legal objectives, general principles and commitments in the agreements reached, containing few provisions on implementation and leaving to contracting states the implementation of measures in accordance with their national sovereignty on environmental matters[31]. This helps to explain the vast amount of governance gaps in the environmental regime[32]. To fill the void left by the lack of classical mechanisms of enforcement, reporting and supervision by international institutions of an intergovernmental character have been deployed and reckoned as a positive solution[33]; at the end of the day, though, these institutions cannot enforce their findings. This procedural avenue to ensure effective implementation is also destabilized by the complexity to identify, especially in relation to climate change, concrete substantive obligations. In this sense, the silence of the United Nations Framework Convention on Climate Change[34] and the Paris Agreement[35] on key areas, such as fossil fuels, illustrate that their duties are not exhaustive[36]. Certainly, finding obligations beyond what the text of the Paris Agreement does not mention cannot be entirely ruled out[37]. In this direction, but in a more reformist fashion, it seems more likely that its existent ambiguous obligations can be strengthened and concretized if placed in the wide tapestry of inter-locking obligations at the international realm[38]. That

29 B. Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Michigan Journal of International Law* (1998) 345-372.

30 L. Eslava, 'Istanbul vignettes: observing the everyday operation of international law', 2 *London Review of International Law* (2014): 3-47.

31 L. Krämer, 'The Time for Lofty Speeches is Over It Is Time for Implementation: The Problem of 50 Years of Application of International Environmental Law', 13 *Revista Catalana de Dret Ambiental* (2022) 1-25, at 4.

32 Secretary General of the UN, 'Gaps in international environmental law and environment-related instruments: towards a global pact for the environment', A/73/419, 30 November 2018, at paragraphs 7 and 86.

33 A. E. Boyle, 'Saving the World? Implementation and Enforcement of International Environmental Law through International Institutions', 3 *Journal of Environmental Law* (1991) 229-245, at 231-232.

34 United Nations Framework Convention on Climate Change, 1771 *UNTS 107* (adopted 9 May 1992, entered into force 21 March 1994).

35 Paris Agreement, 3156 *UNTS 79* (adopted 12 December 2015, entered into force 4 November 2016).

36 Centre for International Environmental Law, 'Obligations of States in Respect of Climate Change (Request for Advisory Opinion)', *Written Statement*, 20 March 2024, at paragraph 50.

37 *See* C. Voigt, *supra* n. 17.

38 L. Rajamani, 'Interpreting the Paris Agreement in its Normative Environment', 77 *Current Legal Problems* (2024) 167-200.

said, the operationalization of the measures often adjectivized as 'objective' through which these obligations would be fulfilled cannot be fathomed without looking at (national) courts. Their frequent usage due to the lack of sufficient action by states, paired with their dual especial role as creators of state practice and international law enforcers[39], makes them relevant in, first, delimiting what has to be implemented and, second, orienting the meaning of agreements. Nevertheless, courts' internal legal constraints, the environmental distributive justice through which they gather elements from the set of inter-locking obligations[40], and the repetition of these very same inter-locking obligations in their findings without concretizing how they ought to be narrowed down, can provoke the adjudication of measures which remain rather superficial.

(C) CLIMATE CHANGE LITIGATION

Climate litigation is a growing phenomenon affecting, unconsciously or on purpose, the governance of climate change. Namely, it has a regulatory impact in so far as it shapes the development, on one side, of the aggregate behavior of different subjects and, on the other side, the design and implementation of policies related with mitigation and adaptation[41]. The promotion of citizen's engagement in the management of the environment by means of access rights[42], wherein access to justice and hence litigation is the right most mobilized as well as culturally dominant[43], helps to explain the notoriety it has acquired.

Quantitative analyses seem to show that in the last decade climate litigation has been widely used. From the 2666 climate cases that the Sabin Center's database has identified between 1986 and May 2024, 70% were initiated in 2015[44]. The amount of cases is not *per se* an indicator of the intent to regulate by means of litigation, for just a case or few can have a considerable legal impact by reaching different economic systems and reorganizing the hierarchy between existent norms[45]. Nevertheless, the wave of climate

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39 A. Roberts, 'Comparative International Law? The role of National Courts in creating and enforcing international law', 60 *International and Comparative Law Quarterly* (2011) 57-92, at 62-63.

40 *See* P. Galvao-Ferreira, 'Differentiation in International Environmental Law: Has Pragmatism Displaced Considerations of Justice', in N. Craik *et al.* (eds.) *Global Environmental Change and Innovation in International Law* (Cambridge University Press, Cambridge, 2018).

41 J. Peel and H. M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, Cambridge, 2015), at 32-35.

42 Mainly established through these two agreements: Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) *and* Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 march 2018, entered into force 22 April 2021).

43 C. Abbot and M. Lee, 'NGOs shaping public participation through law: the Aarhus Convention and Legal Mobilisation', 36 *Journal of International Environmental Law* (2024) 85-106, at 93 and 103.

44 J. Setzer and C. Higham, 'Global trends in climate change litigation: 2024 snapshot', Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy (2024) 1-55, at 10.

45 This is the logic behind the cases motivated by the belief that there is a regulatory capture [J. Jaria-Manzano, 'La Litigació Climàtica a Espanya: Una propspectiva', IX *Revista Catalana de Dret Ambiental* (2018) 1-34, at 15-16]. Such strategy can also be used by certain (informal) actors who aim to keep such capture when the legislator or the executive pass ambitious laws or policies that run against their structural interests [*see*

cases initiated in 2015 suggests that tribunals have become more than exceptional *loci* of contestation; the combination of high-profile cases with their comparatively understudied but incremental low-profile counterparts can influence the climate legal ordering by means of a (coordinated or organic) butterfly effect[46]. It should also be acknowledged, though, that investigations empirically assessing to what extent these cases have a meaningful impact remain in their infancy[47].

The direction and depth of this regulatory impact is strongly affected by the limits in international law explained in the previous section, true. All the same, they do not determine entirely the fate of litigation; a fair gauging of how litigation engages with them requires factoring in two preliminary considerations.

First, litigation is the second-best option to tackle climate change, with multilateral environmental agreements as long as they are complete, with precise obligations and with compliance mechanisms being the first option[48]. While this perspective can lower the expectations placed on climate litigation[49], this is not incompatible with a positive perception regarding its potential and, consequently, it does not have to be confused with an overall skepticism as to its necessity. At the same time, the notion of success is a complex issue due to the multiplicity of results, contexts and strategies of social mobilization in which litigation takes place[50].

Second, the type of litigation, and how it is conceived, delineates the role played by international law's limits. Litigation, in the legal context of rights of access, can be understood as the correction of the asymmetries in the behavior (and exchange of information) of the private sector regarding the management and effect over the environment, but without calling into question the underlying market structures allowing such conducts[51]. If litigation aims to go beyond this friction-polishing role, it can try to play a catalyzing function with the objective of profoundly modifying existing systemic laws or setting watershed precedents[52]. National courts have witnessed quite

UNEP, 'Environmental Rule of Law: Tracking Progress and Charting Future Directions', Nairobi (2023), at 137-138].

46 C. V. Piedrahíta and S. Gloppen, 'The Quest for Butterfly Climate Adjudication', in C. Rodríguez-Garavito (ed.) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization can Bolster Climate Action* (Cambridge University Press, Cambridge, 2022), at 117.

47 *See* J. Peel, A. Palmer and R. Markey-Towler, 'Review of literature on impacts of climate litigation. Report', *Children's Investment Fund Foundation* (2022).

48 L. Rajamani, 'Climate Litigation: The Second-Best Option for Governing Climate Change', *British Institute of International and Comparative Law, International Virtual Summit: Our Future in the Balance. The role of Courts and Tribunals*, filmed online 7 June 2021, available electronically at https://www.youtube.com/watch?v=riS6baHuWrc

49 The urgency to avoid an extremely dangerous climate change might not be matched by the slow process behind obtaining and extending juridical victories to many jurisdictions. In this sense, an environmental agreement, with the features mentioned, could be operationalized faster. For a scrutiny of the pace and the drag in the implementation of the Paris Agreement, *see* L. Rajamani, *supra* n. 38, at 175-176.

50 P. De Vilchez, 'Panorama de Litigios Climáticos en el Mundo', 26 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* (2022) 349-381, at 361-362.

51 A. Gupta and M. Mason, 'A Transparency Turn in Global Environmental Governance', in A. Gupta and M. Mason (eds.) *Transparency in Global Environmental Governance: Critical Perspectives* (MIT Press, Cambridge, 2014), at 8 and 10.

52 S. Bookman, 'Catalytic Climate Litigation: Rights and Statutes', 43 *Oxford Journal of Legal Studies* (2023) 598-628, at 602-603. For a vision of what a transformative framing to overcome the limit of traditional

some cases of this type; a number of scholars argue that international climate change law has only been partially used (to present the case facts) due to the centrality conferred to human rights law, domestic law and the identification of an international consensus of a non-legal nature[53], while others argue that the domestic norms applied by domestic courts overlap with international laws, incorporating the substance of the latter and, hence, producing an implicit consubstantial alignment with them when invoked in a case[54]. In this sense, litigation might aim at filling regulatory gaps[55] in a way that shakes the interpretation of what was settled-law, but it can also expose the inner problems in laws not containing any gap. Nonetheless, it also exists a defensive type of litigation non-aligned with climate objectives trying to obstruct the application of laws and policies adopted to reduce greenhouse gases emissions, primarily for financial and ideological reasons[56]. These cases, initiated by actors who would lose the legal shelter allowing their privileged relation with nature, rely on the judiciary precedents developed in a socio-economic context that disregarded the realities of climate change[57]. Albeit having passed unnoticed in academia, the (few) existent research point that non-climate-aligned litigation is significant within the states' environmental agencies concession of permits and issuing of concrete rules[58].

This second preliminary consideration is the most relevant to understand how the three limits in international law appear in climate change litigation. Litigation can try to erode the primacy of the investment regime by means of high and low-profile cases or keep it through legal argumentation seeking to maintain its hierarchy such as non-aligned litigation or even the one centered on correcting asymmetries. This way, the praxis of litigation also chalks outs its endogenous limits that relate with the external ones. While the (geographical) practice of litigation is pivotal for the limit dividing the Global North and South hence being easy to attribute a big part of the blame for the lack of cases to the litigants , the indeterminacy of international climate legal norms that would differentially benefit Global South countries creates a paralysis of potential climate national laws that could be justiciable. Moreover, and bearing in mind the first preliminary consideration, the context and strategies of social mobilization in the Southern countries provoke the overlook of certain cases that are not explicitly framed in climate (Northern) terms.

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collective action could look like, *see* L. Mai, 'Navigating transformations: Climate change and international law', 37 *Leiden Journal of International Law* (2024) 1-22, at 6.

53 A. Buser, 'National climate litigation and the international rule of law', 36 *Leiden Journal of International Law* (2023) 593-615, at 607-608.

54 André Nollkaemper, 'International climate law in national courts: from avoidance to alignment', *Keynote talk at the ESIL Research Forum*, 18 April 2024.

55 Secretary General of the United Nations, *supra* n. 32, at 7.

56 J. Setzer and C. Higham, 'Global Trends in Climate Change Litigation: 2022 Snapshot', *Grantham Research Institute on Climate Change and the Environment* and *Centre for Climate Change Economics and Policy* (2022) 1-47, at 7.

57 N. Rogers, 'Climate Change Litigation and the Awfulness of Lawfulness', 38 *Alternative Law Journal* (2013) 20-24.

58 D. Markell and J. B. Ruhl, "An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual", 64 *Florida Law Review* (2012) 25-86, at 66.

(D) THE APPERANCE OF LIMITS IN CLIMATE CHANGE LITIGATION

In the vast number of existing climate cases, the appearance of any of the three limits can curtail the positive impact of litigation in different ways. This section tries to depict how they appear and their legal effect in litigation. Firstly, it is explained how the investment regime affects certain principles of international environmental law and the measures states can take. Secondly, the three forms the North-South divide adopts in climate litigation are presented: the subject-matter of the cases, their juridical geography and their partial extra-territoriality. And thirdly, the difficulty in identifying general measures and the static vision of science when filling the content of 'necessary measures' represent the limit of implementation.

The first limit unequivocally appears in the non-climate-aligned litigation[59]. The last annual report from the *Grantham Research Institute* notes that from the 230 new cases registered in 2023, 21% were of this type[60]. In this type of litigation, the fossil fuel industry, and its use of the investor-state dispute settlement, stands out by winning 72% of the cases at the merits stage and obtaining 77.000 million of dollars in compensation[61]. At the same time, the lack of information regarding the total amount of cases especially those arbitrations that take place outside the International Centre for Settlement of Investment Disputes and the United Nations Commission on International Trade Law and the partial disclosure or absolute seal of the arbitrations which are known to exist[62] render the real impact of dispute settlement difficult to gauge. This uncertainty can contribute to the dissuasive effect that anti-climate arbitration around the world exerts over states, to the extent that it is not surprising that they lessen the ambition of climate measures in order to avoid facing similar disputes[63].

The autonomy conferred to (the adjudication of) international investment law alters the application of basic principles of international environmental law to the climate context. First of all, in recent years, the polluter pays principle has been reversed in investor-state dispute settlements, for polluters are getting paid[64]. These compensations can frustrate a proper application of the principle given that investors should bear the costs associated with stopping their polluting activities; a flexible approach, in which losses for phasing-

59 Up until 2018, in 35% of the cases accumulated at the international level, without counting the ones occurring in the United States, the applicants were corporations that wanted to stop projects and climate laws [*see* M. Nachmany and J. Setzer, 'Global trends in climate change legislation and litigation: 2018 snapshot', *Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy* (2018) 1-8, at 5.

60 J. Setzer and C. Higham, *supra* n. 44, at 40. It should be nuanced that 21% of these are just transition cases, briefly explained [ibid, at 6].

61 Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 'Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights', A/78/168, 13 July 2023, at paragraph 5.

62 Lea Di Salvatore, 'Investor State Disputes in the Fossil Fuel Industry', *International Institute of Sustainable Development* (31 December 2021), at 13.

63 K. Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement', 7 *Transnational Environmental Law* (2018) 229-250, at 233. This is known as *internalization of the regulatory chill*.

64 Special Rapporteur, *supra* n. 61, at 41. *See* L. Cotula, *infra* n. 70, at 789.

out policies are treated as compensable, could allow the deduction of the environmental damage from the compensation to be paid by a state[65]. Equally important is how the precautionary principle is related with the facts of the case. By way of illustration, in controversies where states adopt measures related with limiting the production of oil as part of but not as the sole result of public participation processes, arbitral tribunals can render these as politically motivated and far from reasonable environmental policies[66]. Following this logic, as it happens in *Rockhopper v. Italy*, and because of its non-technical nature, civic engagement cannot scrutinize the stringency of an environmental impact assessment and the posterior governmental concession, even if it brings new information and concerns which are formalized through domestic law[67]. Thereby, the principle of precaution only operates until the environmental impact assessment is carried out, not enabling a meaningful participatory information-gathering that can call attention to rigorous scientific data that might have been neglected[68].

Against this backdrop, it seems quite logic to expect that, once in the midst of arbitrations of this type, states resort to international climate change law to balance the advantage that investment treaties confers to investors. Nonetheless, at this moment in time, states seldom invoke the climate change regime, just using it to contextualize the factual background of the dispute but not to substantiate the (alleged) legal entitlement behind their pro-climate stabilization policies[69]. This could indicate that the primacy of the investment regime is significantly embedded within the imaginary of (a part of) the state(s); it should not be forgotten that the power to reform the laws in a more climate-friendly and less ambiguous direction whereby such adjudication take place lies, formally, on states[70]. Overall, this vision, and practice, of international investment law turns a blind eye on its belonging to the meta-regime of public international law, meaning that other obligations not contained in investment agreements should be born in mind by arbitrators[71].

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65 Y. Zheng, 'Rethinking the 'Full Reparation' Standard in Energy Investment Arbitration', 27 *Journal of International Economic* Law (2024) 500-520, at 515.

66 One of the most relevant legal reasons that can explain the difficulty by public state agencies to wind down production lies in the extraction-based emissions accounting of the international climate change regime, according to which greenhouse gas emissions will only be reflected in the national accounts of the state where they are combusted and not where these fossil fuels were extracted and produced [*see* UNEP, 'The Production Gap: The discrepancy between countries' planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C' (2019), at 23].

67 A. Arcuri, K. Tienhaara and L. Pellegrini, 'Investment law v. supply-side climate policies: insights from Rockhopper v. Italy and Lone Pine v. Canada', 24 *International Environmental Agreements* (2024) 193-216, at 201 and 205-206.

68 Special Rapporteur on the promotion and protection of human rights in the context of climate change, 'Access to information on climate change and human rights', A/79/176 (18 July 2024), at 52-53.

69 C. Martini, 'From Fact to Applicable Law: What Role for the International Climate Change Regime in Investor-State Arbitration?', *Canadian Yearbook of International Law/Annuaire canadien de droit International* (2024) 1-36, at 13.

70 See how L. Cotula ['International Investment Law and Climate Change: Reframing the ISDS Reform Agenda', 24 *Journal of World Investment and Trade* (2023) 766-791, at 779] explains that the issue is not whether investors should receive compensation or access to remedy, but the special terms such as an overall lack of differentiation between high and low-carbon activities or the dubious compatibility of acknowledging a potential environmental damage while allowing to obtain a compensation for that same activity through which they operate.

71 Independent Expert on the effects of foreign debt, *supra* n. 10, at paragraph 22.

The second limit could intuitively be imputed to non-climate-aligned litigation, but applications submitted with a rather opposite intention also run the risk of entrenching structural problems of the Global South. From the miscellaneous of forms that this limit can adopt in these cases, the incoming paragraphs flesh three of them out. First, almost all climate litigation hinges upon mitigation and to a much lesser extent upon adaptation[72]. In this sense, litigation related with the third pillar of climate action — that is, loss and damage — is marginal and, being very generous, in its early stages[73]. A possible explanation of the few loss and damage cases might be found in its legal underdevelopment, combined with its conceptual indeterminacy, in successive Conference of the Parties to the United Nations Framework Convention on Climate Change. Nevertheless, if litigation is conceived as an exercise to fill in legal gaps, it looks as if the progressive increase of loss and damage litigation foreseen in 2020[74] never came to fruition. This implies that, up until now, global climate-aligned litigation is not in a position to offer (effective) resources to citizens of states, or to states as subjects of international law, that have historically contributed the least to climate change and that are already suffering its consequences the most[75]. At first sight, the pattern of climate change litigation in the Global South, which tends to use human rights and constitutional doctrines but rarely mobilizes national legislation on climate mitigation[76], could address this regulatory substantive disregard[77]. However, only 15% of the 160 climate cases worldwide that are based on human rights contain arguments related with loss and damage[78]. Therefore, the current meager loss and damage litigation can proffer bargaining power to citizens and states[79] but seems to fall short of providing a solid expectation of remedies to be followed by new applications.

The geographical location of the cases gives shape to the second form, with only 8% of them taking place in the Global South[80]. On one hand, and without disregarding

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72 It is crucial to point that mitigation obligations of the Paris Agreement do not carry the same urgency in the Global South as they do in the Global North [*in* K. Bouwer *et al.*, 'Africa, Climate Justice and the Role of the Court', in K. Bouwer *et al.* (eds) *Climate Litigation and Justice in Africa* (Bristol University Press, Bristol, 2024), at 2.

73 M. A. Tigre and M. Wewerinke-Singh, 'Beyond the North South divide: Litigation's role in resolving climate change loss and damage claims', 32 *RECIEL* (2023) 439-452, at 440.

74 M. Wewerinke-Singh and H. D. Salili, 'Between negotiations and litigation: Vanuatu's perspective on loss and damage from climate change', 20 *Climate Policy* (2019) 681-692, at 688.

75 Secretary-General of the United Nations, 'Analytical study on the impact of loss and damage from the adverse effects of climate change on the full enjoyment of human rights, exploring equity-based approaches and solutions to addressing the same', A/HRC/57/30 (28 August 2024), at paragraphs 24-25.

76 J. Lin and J. Peel, *Litigating Climate Change in the Global South* (Oxford University Press, Oxford, 2024) at 63. Namely, these authors conclude that 62'5% of the 128 cases in the Global South are constitutional and human rights-based.

77 R. B. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness', 108 *The American Journal of International Law* (2014) 211-270, at 224.

78 M. Wewerinke-Singh, 'The Rising Tide of Rights: Addressing Climate Loss and Damage through Rights-Based Litigation', 12 *Transnational Environmental Law* (2023) 537-556, at 542. Most of these 24 cases that constitute this 15% take place in domestic courts in the Global South or have been initiated by Southern countries before international courts.

79 A. Shrivastava and F. Derler, 'A Global South Perspective on Loss and Damage Litigation', *Völkerrechtsblog*, published on 27 June 2024, electronically available at https://verfassungsblog.de/a-global-south-perspective-on-loss-and-damage-litigation/.

80 J. Setzer and C. Higham, *supra* n. 44, at 13.

existing procedural barriers[81] and epistemological restrictions provoking that potential climate litigation flies under the databases' radars[82], this judiciary underrepresentation is problematic due to the scientific consensus pointing that these states will be disproportionately affected by climate change's effects. On the other hand, it seems that there is a growth of cases in the Global South, especially in certain states[83]; in itself, this is not negative, on the contrary. Nevertheless, in cases where citizens accuse their Global South governments of climate inaction, if obligations of cooperation are not extended, the remedies adjudicated may be questionable from a climate justice standpoint[84]; by defraying the compensation or measures ordered, the Global South would incur a much higher economic burden than what it is responsible in relation to its historic contribution of emissions. Certainly, climate litigation in the Global North could help, in a decentralized vein, to slowly ascertain and deepen obligations of cooperation before waiting for an international agreement to do so explicitly[85], while simultaneously wasting away certain assumptions often invoked before a judge representing the principle of competence[86]. Yet, unless advisory opinions in international courts, soon to be decided, unravel obligations of cooperation rather rigorously, it is difficult to predict whether a wave of domestic sentences will confer centrality to these obligations.

The third form that the second limit adopts lies in the obstacles that citizens of the Global South face to initiate judiciary proceedings in the countries of origin of transnational corporations headquartered in the Global North. This creates a sort of partial extra-territoriality. Tribunals in the Global North can recognize the extra-territoriality of the emissions carried out by these companies, ordering a reduction of the emissions outside the borders of the state where the trial is occurring. However, this very same extra-territoriality does not confer standing to citizens from these very same countries where the reduction is applied[87]. This is what happens in *Milieudefensie*

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81 Among the different obstacles that citizens can face in the Global South, having a bank account or a tax declaration is a participation requirement not that easily met [Special Rapporteur on the promotion and protection of human rights in the context of climate change, 'Exploring approaches to enhance climate change legislation, supporting climate change litigation and advancing the principle of intergenerational justice', A/78/255 (28 July 2023), at paragraph 35].

82 *See* T. Field ['Towards a Risk-Thematic Approach for African Climate Litigation', in K. Bouwer *et al.*, 'Africa, Climate Justice and the Role of the Court', in K. Bouwer et al. (eds) *Climate Litigation and Justice in Africa* (Bristol University Press, Bristol, 2024), at 22 and 34], who holds that a visibility approach decides whether a case falls within the category of climate change. This approach does not take into account litigation in Africa gathering two criteria: first, litigation informed by climate-related risks but which does not, even tangentially, refer to climate change (such as cases about water security, drought, veldfire and flooding); second, this judiciary proceeding has implications for mitigation and adaptation.

83 J. Setzer and C. Higham, *supra* n. 44, at 14.

84 J. Auz, 'Two Reputed Allies: Reconciling Climate Justice and Litigation in the Global South', in C. Rodríguez-Garavito (ed.) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action of Globalization and Human Rights* (Cambridge University Press, Cambridge, 2022), at 148.

85 J. Jahn, 'Domestic courts as guarantors of international climate cooperation: Insights from the German Constitutional Court's climate decision', 21 *International Journal of Constitutional Law* (2023) 859-883, at 874.

86 *See* G. Medici-Colombo, *La Litigación Climática sobre Proyectos: ¿Hacia un punto de inflexión en el control judicial sobre la autorización de actividades carbono-intensivas?* (Tirant Lo Blanch, Valencia, 2024), at 546.

87 This occurs in a context, created by the current international climate legal regime, wherein emissions are attributed to the State where GHG emissions are emitted [*see* UNEP, *supra* n. 66]. However, recent climate litigation has been successful in including the extra-territorial emissions of some projects (such as the

v Shell, where the non-Dutch are not allowed to participate in the proceedings[88], or in *Neubauer*, where the cooperation aforementioned is not extended to confer standing to citizens from Nepal and Bangladesh[89]. While in more classical human rights abuses by corporations, extra-territorial litigation by any damaged non-national is slowly making its way thanks to the expansion of the duty of care, standing in climate litigation is still linked to the interests of people within the domestic jurisdiction[90].

The third limit, concerning the implementation of climate change sentences, is not analysed from the standpoint of states' compliance with the remedies awarded, but by introducing two elements that pose problems in the endeavour of determining what is to be implemented. Litigation with positive outcomes is not always synonym of well-defined measures to follow. In cases challenging even if indirectly the overall climate policy of a state, the reluctance of certain courts to order measures indicating how to comply with a judgment the so-called consequentialist measures is an issue. This is what happens in a much awaited case such as *KlimaSeniorinnen*, where the European Court of Human Rights follows a declaratory approach in finding a violation of the obligation to regulate in relation to article 8 of the European Convention of Human Rights due to Switzerland's deficient mitigation action, but it does not prescribe as the claimants asked any general measure setting detailed emissions pathways that could match the structural nature of climate change[91]. Taking into account the recognized wide margin of appreciation for the choice of means to further regulate its mitigation[92], the multiple combinations of many paragraphs of the judgment can generate different general measures differing significantly[93].

An often forgotten point of contention lies in the static vision that law tends to confer to science. Tribunals often use the expression 'necessary measures' to give teeth to the obligations that states possess. To determine the objective content of these measures, the best available science "should be considered and weighed together with" other relevant factors, namely international rules and the available means and capabilities of

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production of fossil fuels to be consumed elsewhere) when deciding about their impact, displaying that while this is not a mandatory requirement under international law, it is, at the same time, not forbidden [G. Medici-Colombo, *supra* n. 86, at 535-538].

88 *Vereniging Milieudefensie and others v. Royal Dutch Shell*, District Court of the Hague, May 26, 2021, ECLI:NL:RBDHA:2021:5339 Royal Dutch Shell, paragraphs 4.2.1-4.2.6].

89 J. Jahn, *supra* n. 85, at 881.

90 D. Palombo, 'Business, Human Rights and Climate Change: The Gradual Expansion of the Duty of Care', 44 *Oxford Journal of Legal Studies* (2024) 889-919, at 902 and 915. Having said that, two active cases can expand the extra-territorial reach of climate litigation: *Luciano Lliuya v RWE AG* (initiated in 2015 in the District Court of Essen, Germany, by a Peruvian farmer and currently ongoing in the Higher Regional Court of Hamm) and *Asamania and others v Holcim* (starting the proceedings in 2022 by four inhabitants of Indonesia in the Cantonal Court of Zug, Switzerland, which has granted free legal aid to the plaintiffs).

91 C. Heri, 'Too Big to Remedy? What Climate Cases Tell Us About the Remedial Role of Human Rights', 5 *European Convention on Human Rights Law Review* (2024) 400-422, at 407 and 408. Heri also lays out whether the lack of any explicit general measure under article 46 of the ECHR can be counterbalanced by prescriptive paragraphs in the merits of the judgment [at 417].

92 *Verein KlimaSeniorinnen and Others v Switzerland* [gc] 53600/20 (ECtHR, 9 April 2024), at paragraph 543.

93 B. Çali and C. Bhardwai, 'Watch this space: Executing Article 8 Compliant Climate Mitigation Legislation in Verein KlimaSeniorinnen v. Switzerland' *EJIL: Talk!*, published 13 November 2024, available electronically at https://www.ejiltalk.org/watch-this-space-executing-article-8-compliant-climate-mitigation-legislation-in-verein-klimaseniorinnen-v-switzerland/.

the state concerned[94]. The logic is that what science requires is not outright translated into a battery of laws and policies; international commitments and the socio-economic reality of each state restrict what can be done. This equation contains an assumption whereby what tribunals find that science requires is only bargained with social factors (international law and the situation of a state). Nevertheless, this balance between science and other factors does not only take place once certain knowledge meets the scientific standards and it is formalized as such; previously, its creation can also be mediated by social categories assumed to be natural[95], can be crossed by possible data imbalances[96], and hence it can incorporate certain normative visions which will be legally treated as science. These normative visions will incorporate a concrete political economy establishing a (continuing) framework, distributing natural and economic resources, within which *objective* measures will be found. For example, the large use and scalability of negative emission technologies is an essential assumption in IPCC scenarios employed to determine the remaining carbon budget to avoid a 2°C increase of the temperature[97]. While some climate cases have (passively) problematized the use of these technologies[98], when (article 2.1.a of) the Paris Agreement is invoked so as to force or compel a state to improve its climate policies, this assumption is activated as a scientific truth not to be weighted in itself but against other social factors.

An exciting recipe to open the playing field for making the juridical identification of science more dynamic, representative and democratic, and hence more scientific, is citizen sensing. In certain matters and under concrete circumstances, citizen sensing aims to make citizens part of the data collection process not only to expand the access to information but also its underlying source[99]. While this could widen the spectrum of what is *objective* under the best available science, and attach it closer to the need for progress[100], one cannot stop wondering whether many market-based mechanisms, with

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94 *Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, ITLOS Reports 2024, at paragraphs 213 and 207.

95 *See*, for example, how the international biodiversity legal regime initially understood exclusively the manipulation of germplasm through the intervention of breeders and scientists, treating the millennial labour of indigenous people as non-manipulation hence considering that their work did not amount to a scientific manipulation [*see* M. Fredriksson, 'Dilemmas of protection: decolonising the regulation of genetic resources as cultural heritage', 27 *International Journal of Heritage Studies* (2021) 720-733, at 724 and 725]. It is true, that later, with the Convention on Biological Diversity and the Nagoya Protocol, this was partially addressed. For a more general overview, *see* J. Wilkens, A. R. C. Datchoua-Tirvaudey, 'Researching climate justice: a decolonial approach to global climate governance', 98 *International Affairs* (2022) 125-143, at 132.

96 *See* how Africa is under-represented in many datasets behind climate change attributions and projections, which can be resorted in cases [T. L. Field, *supra* n. 82, at 26-27].

97 A. Larkin *et al.*, 'What if negative emission technologies fail at scale? Implications of the Paris Agreement for big emitting nations', 18 *Climate Policy* (2018) 690-714, at 697 *and Neubauer et al. versus Germany*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Order of the First Senate, March 24, 2021, Case No. BvR 2656/18/1, [official English translation provided by the Court], at paragraph 33.

98 *Urgenda Foundation v. the Netherlands*, Dutch Supreme Court [Hoge Raad], Judgment of December 20 2019, No. 19/00135, ECLI:NL:HR:2019:2006.Urgenda, at paragraph 7.25; and *Milieudefensie*, *supra* n. 88, at paragraph 4.4.30.

99 A. B. Suman, 'Citizen Sensing from a Legal Standpoint: Legitimizing the Practice under the Aarhus Framework', 18 *Journal for European Environmental & Planning Law* (2021) 8-38.

100 UN Special Rapporteur, *supra* n. 68, at paragraph 52.

the mounting evidence about their impact[101], could merit the adjective of *objective* if analyzed *in toto* and thoroughly.

(E) CONCLUSIONS

Mapping the international legal landscape where climate change litigation develops is key to fathom what can be expected from such unrelenting phenomenon. In doing so, structural limits of international law appear, affecting the possibilities of ambitious litigation to bring about its desired change and allowing conservative demands to perpetuate the status quo. This article has analyzed the effects of three of these limits. First, the primacy attributed to international investment law prevents relying on the environmental principles of polluter pays and precaution in arbitration between investors and states, watering down the progressive measures (deemed doable to be) adopted by states due to the fear of facing an opposing dispute settlement in which international environmental law would be conspicuous by its absence. Second, the North-South divide is quite visible in climate litigation. While international climate change law does not provide a detailed and operationalizable framework for loss and damage, the praxis of climate litigation, by honing in on mitigation and by presenting obstacles in furthering obligations of cooperation in the Global North, does not seem to alter this second limit. A full recognition of extra-territorial jurisdiction could be of significant help in that regard, but unless pending cases provoke a radical jurisprudential change, extra-territoriality will remain partial. Last but not least, climate change litigation can produce positive outcomes together with generic findings that can admit the application of multiple measures, some more diluted than others. In this sense, while the best available science should illuminate the objective content that these measures ought to have, its balance with other socio-economic factors and the implicit normative charge that it can contain run the risk of mobilizing a static, and at times conservative, vision of these measures.

Outlining the appearance of these limits in climate litigation is compatible with acknowledging the success of certain cases within a structural international legal context restraining the scope of these very same victories. In the light of the receptivity shown by a non-negligible number of courts to advance in climate governance, fleshing out how these limits appear in climate cases can help to reveal how less moderated rulings could be moulded.

[101] *See* P. Greenfield, 'Revealed: more than 90% of rainforest carbon offsets by biggest certifier are worthless, analysis shows', *The Guardian*, 18 January 2023, electronically available at https://www.theguardian.com/environment/2023/jan/18/revealed-forest-carbon-offsets-biggest-provider-worthless-verra-aoe.

SYbIL | Spanish Yearbook of International Law

He Who Laughs Last Laughs Best? A Contemporary Crusade on Public Interest, Climate Change and the Request of the Advisory Opinion of the ICJ

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Abstract: Climate change presents a significant challenge for both the international community and international law, constituting a clear public interest. In particular, the ICJ has been requested to provide an advisory opinion on the obligations related to climate change and the ramifications of their breach, considering not only interactions between states but also the rights and interests of peoples and individuals from both present and future generations. The ICJ is anticipated to be the last to deliver its advisory opinion, after the rulings of the International Tribunal of the Law of the Sea and the Inter-American Court of Human Rights. This paper is not envisioned as a predictor of the Court's potential pronouncements, but rather as a discussion on the issues the Court should relate, considering the current advances in public-interest international litigation and the anticipation of future contentious cases before the Court. As climate change obligations arise from merging environmental and human rights rules into an evolving legal realm, their occasionally oppositional dynamics should be central to the deliberations on substantive obligations. Concurrently, distinctive procedural challenges may loom contingent on how the Court addresses the substantive rules and obligations of states concerning climate change. This paper concludes with a reflection on the necessity for a bold Court, although with a prudent approach to the potentially extensive implications of public interest litigation.

Keywords: Public Interest in International Law, Climate Change, Advisory Opinion, Human Rights, Common But Differentiated Responsibilities (CBDR), *Erga Omnes* Obligations

(A) A ROADMAP TO PUBLIC INTEREST, CLIMATE CHANGE, CHANGE, AND ADVISORY PROCEEDINGS

The traditional understanding of international legal relations, characterised as reciprocal or synallagmatic, either within bilateral or multilateral bonds, has been enhanced by the existence of common interests.[1] These are embodied in public goods

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Multiple bibliographical references in the same footnote are ordered chronologically, and then alphabetically.

1 Specifically on environmental rules as a common concern, see J. Brunnée, 'Common Areas, Common Heritage, and Common Concern', in D. Bodansky, J. Brunnée & E. Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, Oxford, 2008) 550, at 553-556.

and universal values, governed by contemporary international rules encompassing areas such as human rights, environmental protection, and more to come, such as future international rules on prospective domains like artificial intelligence or cyberspace. In these fields, the eventually compromised state legal rights and interests may appear diffuse and not readily individualised. Sometimes, the directly impacted parties are individuals, irrespective of nationality, extending even to future generations, rather than the existing states themselves. Consequently, the settlement of disputes concerning the safeguarding of these common interests has traversed an evolutionary trajectory to adapt to these transformations.

(1) A Contemporary Crusade: Fighting for (on behalf of) Public Interest

Within domestic forums, public interest litigation (PIL) entails legal action "designed to serve (…) in cases where those affected by a wrong cannot afford to bring legal action themselves or for who for other reasons do not have access to the legal system. PIL is unique in that these legal actions can be brought by third parties, including NGOs, on behalf of a large group of affected persons or on behalf of the general public."[2] As such, this approach reflects a predominantly procedural understanding, with PIL addressing factual and legal standing deficiencies (*ius standi*).

Recently, a trend has emerged in public international law concerning PIL, which is predicated either upon interstate claims presented before international tribunals or through both individual and interstate applications to human rights courts. Consequently, scholarly literature addressing this trend is rapidly expanding.[3] The majority of these cases focus on the concept of *erga omnes* obligations, the ius standi in interstate proceedings, and thereby an expanded responsibility framework for *erga omnes* obligations. In that line, legal militia have assembled to combat genocide, which is viewed as the true moral and legal crusade of our era.[4]

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2 European Center for Constitutional and Human Rights, at https://www.ecchr.eu/en/glossary/public-interest-litigation/.

3 A discernible evolution in approach can be observed between 2010's and 2020's: E. Katselli, *The Problem of Enforcement in International Law. Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge, 2010); and S. Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law', 21 *European Journal of International Law* (2010) 387 419 [https://doi.org/10.1093/ejil/chq038]; F. Lenzerini & A. F. Vrdoljak, *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart Publishing, Oxford, 2014); T. Ruys, 'Legal Standing and Public Interest Litigation Are All *Erga Omnes* Breaches Equal?', 20 *Chinese Journal of International Law* (2021), 457 498 [https://doi.org/10.1093/chinesejil/jmab030]; S. Thin, 'Community Interest and the International Public Legal Order' 68 Netherlands International Law Review (2021) 35 59 [https://doi.org/10.1007/s40802-021-00186-7]; J. Bendel & Y. Suedi (Eds.), *Public Interest Litigation in International Law* (Routledge, 1st ed., 2023) [https://doi.org/10.4324/9781003433460]. Although literature in journals is becoming abundant, an excellent reading to start with, specifically focussed on the ICJ, may be found in the 'Symposium: Public Interest Litigation at the International Court of Justice', in The Law & Practice of International Courts and Tribunals (Volume 22, Issue 2, 2023), at. 229-337.

4 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 7 states intervening)*, application of 11 November 2019, ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, application of 29 December 2023; ICJ, *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, application of 1 March 2024.

The notable distinction from the aforementioned domestic PIL is that the international perspective on PIL incorporates a substantive aspect alongside the procedural dimension. It not only pertains to an *expanded* legal ius standi, but concurrently *confines* it to the upholding of obligations of an *erga omnes* character, intended to protect common interests. International PIL constitutes not solely a procedural instrument, but particularly a mechanism for asserting and safeguarding public goods and universal values.

While the advisory function does not encompass a singular problem-solving scenario in the strict sense of litigation, it addresses the definition of rights and obligations in abstract terms and, consequently, delineates the roadmap for potential future contentious disputes. Consequently, the advisory function of international courts and tribunals is congruent with the promotion of public interests. Historically, advisory opinions (AO), often referred to as the "soft litigation strategy",[5] have articulated a range of International Law (IL) principles driven by statehood concerns (such as sovereignty and self-determination), human-centered issues, or both,[6] which reflect common interests. Presently, the advisory function of several international tribunals is particularly focused on determining states' climate change obligations, an uncontested instance for PIL.[7]

Between 12 December 2022 and 4 April 2023, the international litigation arena experienced a significant influx of requests for AO from the International Tribunal of the Law of the Sea (ITLOS),[8] the Inter-American Court of Human Rights (IACtHr),[9] and the International Court of Justice (ICJ),[10] in that specific sequence, concerning state obligations related to climate change. Simultaneously, several individual applications were under review at that precise time by the European Court of Human Rights (ECtHR)

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5 M. Stavridi, 'The Advisory Function of the International Court of Justice: Are states Resorting to Advisory Proceedings as a "Soft" Litigation Strategy?', *Journal of Public and International Affairs* (22 April 2024).

6 For the ICJ, suffice it to mention the very recent Advisory Opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, of 19 July 2924 and the previous Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, of 25 February 2019. The connection between AO and PIL looming natural in a sense, it should not be deemed automatic, as the cases of ICJ's AO on UN Administrative matters showcase. In the case of ITLOS, the low number of AO already delivered does not allow to determine the PIL profile of the advisory function. In our opinion, the InterAmerican Court of Human Rights Advisory Function results in a clear exercise for continuing PIL. This connexion, nevertheless, is to be further explored. An initial question could be 'What qualifies an advisory proceeding as PIL: the very nature of the proceedings, the participation there-in or the nature of the topic under analysis?'.

7 The body of scholarly literature concerning climate change litigation is expanding rapidly, providing both domestic comparative analyses and international frameworks. These extend across various domains including human rights, trade, and criminal responsibility, as well as more traditional interstate jurisdictions such ITLOS and ICJ. For a comprehensive review, refer to I. Alogna, Ch. Bakker, and J.-P. Gauci (eds.), *Climate Change Litigation: Global Perspectives* (Brill, 2021).

8 ITLOS, Case n. 31, *Request for an Advisory Opinion submitted by the Commission of Small Island states on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, introduced on 12 December 2022.

9 IACtHR, *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile*, 9 January 2023.

10 A/RES/77/276, 4 April 2023, *Request for an advisory opinion of the International Court of Justice on the obligations of states in respect of climate change*, ICJ, *Obligations of states in respect of Climate Change*, Request for Advisory Opinion, 12 April 2023.

against one,[11] or even multiple,[12] state parties to the European Convention on Human Rights (ECHR) pertaining to climate change-related cases.

While the ECtHR rendered decisions on the three principal climate change cases submitted to the Grand Chamber on 9 April 2024,[13] and the request to the ITLOS was honored on 21 May 2024,[14] the proceedings before the IACtHR and the ICJ remain unresolved. It appears that the AO from the ICJ may be the final one to be issued. This is because the ICJ request was the last to be submitted, and the schedule for the written and oral proceedings is progressing accordingly.[15]

(2) Pursuing the ICJ's Holy Grail on Climate-Change state Obligations

Pursuant to the request,[16] the Court is tasked with addressing an intricate array of obligations about climate change.

> (a) What are the obligations of states under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for states and for present and future generations?
>
> (b) What are the legal consequences under these obligations for states where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, concerning:
>
> (i) states, including, in particular, small island developing states, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
>
> (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

In the instance of the IACtHR's AO request, intellectual stimulation is already provided through the written submissions and the public recordings of oral

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11 ECHR, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* (no.53600/20); ECHR, *Müllner v. Austria* (no. 18859/21); ECHR, *Carême v. France* (no. 7189/21); ECHR, *Greenpeace Nordic and Others v. Norway* (no. 34068/21); ECHR, *The Norwegian Grandparents' Climate Campaign and Others v. Norway* (no. 19026/21); ECHR, *Engels v. Germany* (no. 46906/22).

12 ECHR, *Duarte Agostinho and Others v. Portugal and 32 Others* (no. 39371/20); ECHR, *Uricchio v. Italy and 31 other states* (application no. 14615/21) and ECHR, *De Conto v. Italy and 32 other states* (no. 14620/21); ECHR, *Soubeste and 4 other applications v. Austria and 11 other states* (nos. 31925/22, 31932/22, 31938/22, 31943/22, and 31947/22).

13 On that date, the ECHR adopted inadmissibility decisions on *Duarte Agostinho and Others* and *Carême*, while a judgement was passed concerning *Verein Klimaseniorinnen Schweiz and Others*.

14 ITLOS, Case n. 31, *Request for an Advisory Opinion submitted by the Commission of Small Island states on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion of 21 May 2024, along with five declarations from the Judges Jesus, Pawlak, Kulyk, Kittichaisaree and Infante Caffi.

15 While the Inter American Court held oral audiences between 23 and 25 April 20224 in Barbados and on 24 and between 26 and 28 May 2024 in Brazil, the ICJ will hold oral proceedings from 2 to 13 December 2024 in The Hague.

16 For an examination of the request's historical context, consult M. Wewerinke-Singh, A. Garg & J. Hartmann, 'The advisory proceedings on climate change before the International Court of Justice. Questions of International Law', 102 *QIL, Zoom-in* (2023) 23-43, at 25-28.

presentations.[17] Conversely, the ICJ has yet to disclose the 91 written submissions received and the 62 written comments subsequently logged.[18] One hundred and ten participants are scheduled to present their oral arguments, comprising ninety-eight state delegations,[19] which include a joint statement from five Nordic countries, alongside twelve organizations. Meanwhile, beyond analysing the phrasing of the request,[20] there exists minimal public material from the ICJ's proceedings to scrutinize at the time of this reflection. Investigating the potential content of the forthcoming ICJ's AO on climate change becomes an almost unattainable pursuit, akin to a quest for the Holy Grail.

However, a positive aspect emerges, as the open context provides substantial room for personal musing. Lacking prophetic abilities, this should not be interpreted as a prognostic or clairvoyance. We present several reflections that the Court is neither obliged nor anticipated to consider in her advisory opinion according to the request *ad literam.* Considering the concept of PIL and established practices in international litigation, two distinct sets of questions should be examined, explicitly or implicitly.

On the one hand, letter a) of the request invites the Court to elaborate on the substantive aspects of the legal regulation concerning climate change. We do not intend to replace the Court's function; instead, we aim to scrutinize a transverse agenda concerning the substantive dimension of climate change and PIL (B. *Hidden in Plain Sight: Substantive Public Interest of Climate Change*). We will address letter b) of the request, focusing on the ramifications of a breach of the obligations, thereby providing a framework to develop insights on the procedural dimension of a prospective AO, in line with current practice associating PIL predominantly with procedural matters, such as *ius standi*. (C. *Going Too Far Too Quickly? Procedural Public Interest on Climate Change*).

The exercise delineated in Sections B and C might initially seem ambitious, given that the CIJ is unlikely to address the issues in the proposed way. However, we intend to conclude with a realistic and balanced approach. The opportunities and implications of the various potential pathways, whether expansive or limited, will be evaluated despite

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17 All written contributions were made public before the oral proceedings, at https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634. The oral audiences video can be viewed at https://vimeo.com/corteidh.

18 According to Article 106 of the Rules of the Court, the written contributions and comments may be made public at the discretion of the Court, either 'on or after the opening of the oral proceedings.' However, certain contributions, mostly from nongovernmental institutions, have already been disseminated and published by specialized think tanks, such as the Sabin Center for Climate Change. Practice Direction XII establishes that 'Where an international nongovernmental organization submits a written statement and/or document in advisory proceedings on its own initiative, such statement and/or document is not to be considered part of the case file'. Those documents will be made accessible, although they will be treated as 'publications'.

19 Exceptionally, two states who submitted written statements will not participate in the oral arguments (Madagascar, Argentina). On the other hand, an additional 14 countries and one organization that did not file written statements will participate in the oral arguments (Cote d'Ivoire, Dominica, Fiji, Guatemala, Jamaica, Malawi, Maldives, Myanmar, the Pacific Community, Palestine, Panama, Senegal, Sudan, Syria, and Zambia). See Jon McGowan, '88 Countries Will Present Oral Arguments In International Court's Climate Change Opinion', *Forbes* (22 October 2024) updated with the ICJ Press Release 2024/72, of 8 November 2024.

20 A comparison between the requests to the ICJ's and IACtHR's is also detrimental to our effort. While the questions referred to the regional HR Court are extremely detailed, exposed throughout 14 pages, the request submitted to the ICJ is barely described in two hundred words.

the current uncertainty regarding the Court's stance at the time of delivering her AO (D. *Getting to a Close: a Public-Interest-In-Waiting at the Court*).

(B) HIDDEN IN PLAIN SIGHT: SUBSTANTIVE PUBLIC INTEREST OF CLIMATE CHANGE

As previously noted, this discussion will not delve into the particular obligations that the International Court is tasked with interpreting, including those related to prevention, precaution, reduction, control, monitoring, restoration, due diligence, and cooperation. The advisory opinion delivered by ITLOS in 2024[21] provides a judicious and relevant precedent for anticipating the International Court of Justice's approach towards the intricacies of climate change obligations. This is particularly pertinent as the General Assembly has situated the ICJ's inquiry within the framework of the United Nations Convention on the Law of the Sea and the obligation to safeguard and maintain the marine environment, among other legal references.

Two cross-cutting issues, hidden in plain view, have attracted our attention. First, climate change transcends the boundaries of traditional environmental legal issues, extending into other disparate legal domains.[22] As the text of the request depicts, it is the case for human rights law, wherein extraterritoriality increasingly assumes the role of a standard rather than an anomaly (*1. Something Larger than Environmental Obligations: Climate Change, Human Rights, and Extraterritoriality*). Second, the notion of common but differentiated responsibilities (CBDR) should be acknowledged as an integrated catalyst, transforming homogeneous, monolithic climate change rules into a diverse spectrum of varied responsibilities (*2. Same Rules for an Asymmetric Outcome: the Common But Differentiated Responsibilities Principle*).

(1) Something Larger than Environmental Obligations: Climate Change, Human Rights, and Extraterritoriality

The International Court of Justice (ICJ) has established a significant body of jurisprudence on environmental issues. However, the judicial engagement with climate change introduces a broader perspective. It encompasses the protection of a more extensive range of shared interests and values about the living conditions of current and future generations in a manner comparable to the Court's deliberation on the legality of the threat or use of nuclear weapons in 1996.[23] In particular, this includes examining

[21] We defer to the ITLOS' advisory opinion itself, along with the contribution of Prof. Dr. Eduardo Jiménez Pineda to this Agora, entitled 'The UNCLOS as a legal living instrument to combat climate change and its deleterious effects: the specific obligations of state Parties according to the interpretation of ITLOS'.

[22] R. M. Fernández Egea, 'La función consultiva de la CIJ al servicio de la lucha contra el cambio climático', in S. Torrecuadrada García-Lozano and E. M. Rubio Fernández (dirs), *La contribución de la Corte Internacional de Justicia al imperio del derecho internacional en tiempos convulsos: Aproximaciones críticas* (Thomsom Reuteres, Aranzadi, 2023) 209, at 230; [https://doi.org/10.1093/ejil/chq038]; F. Jiménez García, 'Cambio climático antropogénico, litigación climática y activismo judicial: hacia un consenso emergente de protección de derechos humanos y generaciones futuras respecto a un medio ambiente sano y sostenible', 46 *REEI* (2023) 7-61, at 28-42 [DOI: 10.36151/reei.46.01].

[23] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996.

potential related human rights violations, not being excluded the hardships and implications for human populations due to possible inundation and the disappearance of territorial states.

In this context, the legal framework circumscribing the AO is of utmost importance. While the ITLOS advisory opinion had a clear and constricted legal reference, the Convention on the Law of the Sea (the "UNCLOS"), the Interamerican Court was expressly requested to consider an enlarged set of rules, including the Paris Agreement.[24] Besides, the IACtHR has abundant practice to broaden its legal referential framework outside the American Convention of Human Rights through the so-called Interamerican *corpus iuris*. Having already reached out to environmental treaties and customary rules in the recent La Oroya decision[25], the Court will easily include these as an interpretative tool for the forthcoming AO. The request to the ICJ frames a wide legal landscape to which refer when analysing the climate change state obligations:

> Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

Nevertheless, even in its absence, the ICJ appears best positioned among the three tribunals for the bigger picture on overarching obligations related to climate change, considering that, unlike the other two court's jurisdiction, ICJ's is not constrained *ratione materiae*.

Climate change is attributed to both natural and anthropogenic causes. The Advisory Opinion seeks to define state obligations to mitigate the anthropogenic causes of climate change and their effects. Conceptually, substantive rules on climate change could be embodied in specific norms for that matter, which are presently non-existent. Therefore, state legal obligations regarding climate change and its detrimental effects must be extracted from existing obligations across a range of subjects. Undoubtedly, the Court must prioritize environmental law as the central framework from which limitations and consequences arise. Additionally, given the direct correlation between climate change and human living conditions, the regime in question must necessarily be linked to fundamental obligations in human rights (HR) law as well as international humanitarian law, in the context of armed conflict.

While the human rights international law regime, from a regional perspective, constitutes the eminent domain for the IACtHR, the other two Courts have a different involvement in

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[24] IACtHR, *supra* n. 9. Besides some references throughout the introduction (in page 2, and references in notes 2, 7 and 31), the question A.2 specifically refers to the Paris Agreement.

[25] IACtHR. *Caso Habitantes de La Oroya Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 27 de noviembre de 2023. Serie C No. 511, paras. 128 and 143 (English version still not available). Additionally, this judgment refers extensively to climate change and could be considered a prelusive test for its AO.

the HR dimension of climate change. The ITLOS' AO has barely referred to the matter[26]. The ICJ's future AO is supposed to be committed to it broadly. Not only has this Court deepened its jurisprudence on HR law when it was the subject matter of the case[27], but she has also accepted this HR perspective in cases where jurisdiction was not based on an HR treaty[28]. In addition, the request of the General Assembly expressly requires the Court to frame the obligations of climate change into 'the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights' and 'the rights recognized in the Universal Declaration of Human Rights'.

A significant issue arises from this context, namely how the International Court of Justice (ICJ) would address extraterritoriality concerning both environmental law and human rights law.

Extraterritoriality has historically been perceived as a unilateral extension of state power, frequently regarded as excessive. It is more readily accepted within the realms of legislative reach and judicial scope when a reasonable connection to the extraterritorial matter is present and repudiated when it comes to enforcement powers. Universal jurisdiction remains a separate issue. Within this context, extraterritoriality seems to support and legitimize the creation of new domestic regulations connecting human rights and associated environmental responsibilities, particularly of business, abroad.

Conversely, extraterritoriality has been adopted as a mechanism by HR bodies and Courts to control and oversee the state's exercise of power outside its territory. On that note, the HR extraterritoriality does not confer upon the state the authority to expand its jurisdiction, reading that expansion as a mere factual departing point. Quite the opposite, it encompasses an international obligation incumbent upon the state to guarantee that, when exercised extraterritorially under certain circumstances, its legislative, judicial, and even enforcement powers abide by the corresponding HR obligations. In this sense, HR extraterritoriality is not at the discretion of the state but imposed on him by IL rules and IL bodies when interpreting and applying those rules on HR. The extraterritoriality of HR, when circumstances are met, remains under the control of those same courts and bodies. At the same time, HR extraterritoriality does not extend an automatic endorsement, nor a validity control, of the state right to exercise extraterritorial competences, either legislative or judicial, and less of all, enforcing powers.

The developing jurisprudence of human rights courts and bodies identifies various categories or circumstances under which extraterritorial obligations are engaged. Traditionally, *territorial control* (a state enforcing rules over a foreign territory under its very control) has been the primary factor, with *functional control* (command over the

[26] ITLOS, *supra* n. 14, para. 66 solely. However, Judges Pawlak and Infante Caffi dedicate their respective Declarations to discussing the human rights implications of climate change.

[27] See ICJ's past cases based on the Genocide Convention and the Convention on the Elimination of All Forms of Racial Discrimination.

[28] Example of this tendency are the ICJ's cases on consular assistance (*Lagrand* in 2011, *Avena and others* in 2004, *Jadhav* in 2019), where jurisdiction was based on the Vienna Convention on Consular Relations, or *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, where jurisdiction was based in unilateral declarations submitted by both states.

acting agents in foreign territory) ranking second.[29] Currently, the notion of attributing responsibility for human rights violations through the lens of *control over effects* is being explored. This concept could potentially attribute accountability for human rights violations linked to climate change within the territory of a third state.[30]

The central question is whether the International Court of Justice (ICJ) might endorse a framework for the extraterritorial application of human rights (HR) concerning climate change obligations, and if so, one based on the theory of control over the effects recently rejected by the ECHR.[31] Conversely, given that the AO of the IACtHR is likely to be adopted before the ICJ decides upon the request and considering that the former has already examined the concept of extraterritoriality through the theory of effects linking human rights violations to environmental obligations,[32] this development would likely facilitate a progressive approach in this area.

Although improbable at present, such endorsement would effectively reconceptualize the current extraterritorial reach of domestic national legislation and jurisdiction over environmental issues, from being merely a right to rule and/or adjudicate to potentially becoming a duty in the form of an 'obligation to protect' HR within the context of climate change. One must not overlook the associated legal ramifications, particularly if any state interprets this as prompting a novel form of 'humanitarian' intervention. This interpretation would be based on the impact of climate change on HR conditions in third countries, whereby state enforcement authorities would be ascribed an extraterritorial duty to protect and uphold human rights on an international scale, potentially resulting in unforeseen outcomes.

(2) Same Rules for an Asymmetric Outcome: the Common But Differentiated Responsibilities Principle

Small and developing states disproportionately bear the brunt of climate change's impacts, despite contributing minimally to the anthropogenic causes of these recent

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29 J. González Vega, '¿Colmando los espacios de no «Derecho» en el Convenio Europeo de Derechos Humanos? Su eficacia extraterritorial a la luz de la jurisprudencia', 24 *Anuario Español de Derecho Internacional* (2008), 141-175 [https://doi.org/10.15581/010.24.28343]; J. D. Janer Torrens, *Conflictos territoriales y Convenio Europeo de Derechos Humanos, (Aranzadi, Cizur Menor, 2023); E. J. Martínez Pérez, 'Más allá del tradicional enfoque del control efectivo: los renovados vínculos jurisdiccionales que justifican la aplicación extraterritorial de los tratados internacionales de derechos humanos', 46 Revista Electrónica De Estudios Internacionales, 2023 at 171–194* [https://doi.org/10.36151/reei.46.05]; S. Salinas Alcega, 'Aplicación extraterritorial de la Convención Europea de Derechos Humanos. De la jurisdicción, como objeción preliminar, a la responsabilidad', 78 *Revista de Derecho Comunitario Europeo* (2024), at 65-101 [https://doi.org/10.18042/cepc/rdce.78.03].

30 CRC/C/88/D/104/2019, *Chiara Sacchi et al. v Argentina*, Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 22 September 2021, para. 10.5.

31 ECHR, *Duarte Agostinho and Others v. Portugal and 32 Others*, dec. 9 April 2024, paras. 184-213.

32 IACtHR, Advisory Opinion OC-23/17, November 15 2017, on the environment and human rights. The extraterritoriality based on the effects is clearly set in the para. 81, although more nuanced and probably restricted in para. 93 to a territorial and functional approach to extraterritoriality. On this Interamerican approach, refer to N. Carrillo, P. Roa & F. Seazu, 'The Scope of the Extraterritorial Obligation to Respect in the Inter-American Human Rights System: An Approach Fully Consistent with the Demands of the Recognition of the Dignity of All Human Beings', 27 *SYbIL* (2023), 73-94 [https://doi.org/10.36151/SYBIL.2024.004].

effects. Furthermore, these states often lack the territorial and financial capacity necessary to mitigate such impacts. It is not coincidental that small insular states have initiated the two requests for advisory opinions to the ITLOS and the ICJ. This pattern is likewise evident in contentious cases within both domestic and international arenas, particularly in relation to human rights litigation.

International environmental law has already dealt with the specific and vulnerable situation of those states through the recognition of the principle of common but differentiated responsibilities (CBDR). It was formalized in the United Nations Framework Convention on Climate Change (UNFCCC). As a differential treatment clause, it has been included in different treaties such as the Montreal Protocol on Substances that Deplete the Ozone layer, the Kyoto Protocol, or more recently the Paris agreement. It is also recognized in international environmental customary law, being initially defined by Principle 23 of the Declaration of the United Nations Conference on the Human Environment 1972.

The complex issue of transporting the CBDR framework to the broader context of climate change arises from the repeated intersection of environmental law with human rights law. It raises the question of whether it is feasible to apply the CBDR principles not only to the scope of environmental obligations but to the human rights obligations intrinsically linked to climate change. A differential treatment clause, such as CBDR, possesses the potential to transform a uniform framework of climate change obligations into a multitude of possible compliance scenarios. It would be highly beneficial for the ICJ to deliberate on this matter as it is likely to become relevant in future contentious cases.

First, the CBDR principle must not be utilized by any state, whether small or developing, as a justification for failing to uphold human rights, particularly those rights recognized as ius cogens norms. Therefore, any derogation or suspension of these rights, as stipulated in the relevant human rights treaty provisions, should be deemed unlawful when allegedly based on the CBDR principle concerning climate change.

Second, attention should be given to the conditions under which the CBDR climate change principle could eventually be invoked in the context of the circumstances precluding wrongfulness in respect of the breach of any international legal obligation related to climate change. Some interpretations in this context should be avoided as to exempt small, developing countries from any share of responsibility based on this principle. The reduced contribution to climate change approach should not per se be considered as granting a right to invoke force majeure, distress or necessity, allowing to breach any other international obligations. As exceptions to responsibility rules, these must be interpreted stringently.

Finally, when examining compliance with international obligations, especially those encompassing negative and positive obligations on human rights, the principle of CBDR should grant greater latitude to small and developing states. Consequently, this principle would support a more flexible appraisal of these states' conduct, meticulously considering the state's margin of appreciation based on its genuine capacity for positive action, hence the broader concept of common but differentiated responsibilities 'and respective capabilities'.

In summary, applying the CBDR principle from environmental law to climate change obligations must not result in the expansion of clauses that permit the circumvention

of international human rights obligations or provide states with a justification to evade their international commitments in any other domain. Concurrently, CBDR should enable a judicious consideration of the extent of effective control by small developing states in fulfilling their international obligations on climate change, encompassing the effective safeguarding of human rights.

(C) GOING TOO FAR TOO QUICKLY? PROCEDURAL PUBLIC INTEREST ON CLIMATE CHANGE

The ICJ has been called to establish the obligations of states "to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases" along with the "legal consequences under these obligations". While the primary focus in this crusade remains a quest to define the obligations substantively, the request also brings to light some procedural matters linked to the secondary rules on responsibility on which the ICJ must elaborate according to the second part of the request. Therefore, within the confines of this short piece, we present two points connected to ius standi (1. *Owning the Obligations v. Defining the Beneficiaries*), and the standard of proof (2. *Attributing Responsibility or Liability Must Be Proven*).

(1) Owning the obligations v. Defining the Beneficiaries

This analysis will explore the ratione personae scope of obligations. An obligation may be conceptualized as a bilateral string connecting the obligor and the beneficiaries. Procedurally, this translates into the inquiry of which parties are entitled to seek protection in the event of non-compliance with the obligation. Consequently, the ICJ's interpretation of the legal nature of climate change obligations — whether they are merely reciprocal or otherwise — will significantly influence future adjudication in this area.

Following the development of the concept of obligations *erga omnes* over several decades, the Court has recognized in *Gambia v. Myanmar* (2022) a significant procedural outcome: the standing of parties not directly affected in a multilateral treaty that protects common interests through *erga omnes* obligations, whose violation is under deliberation[33].

The manner in which the International Court of Justice (ICJ) delineates the substantive obligations associated with climate change poses a formidable challenge. Initially, the Court must ascertain whether its legal framework is conventional or customary in nature, or both.[34] The Secretary-General of the United Nations has already submitted substantial legal documentation to the Court immediately following the registration of the request; additional materials are anticipated to be revealed with the input from states and International Organizations during the oral proceedings slated for December 2024. Subsequently, the Court's analysis may encompass the legal interests safeguarded as a shared interest. Furthermore, the *erga omnes* nature of obligations pertaining to climate

[33] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 7 states intervening)*, Preliminary objections, Judgment of 22 July 2022, at para 106.

[34] J. Brunnée, *supra* n. 1, at 567-572, not being conclusive on the process of transformation of treaty rules into customary in the environmental domain.

change warrants thorough examination. The language in the request unequivocally facilitates this, taking into account intentional ambiguity or vagueness, in the pursuit of clarifying the states' responsibilities to protect the climate system 'for states and for present and future generations.'

On this line of argument, it would not be difficult to accept that violation of a treaty-based climate change-related obligation could be considered in light of article 42.2.ii) ARSIWA.

> A state is entitled as an injured state to invoke the responsibility of another state if the obligation breached is owed to: … b) a group of states including that state, or the international community as a whole, and the breach of the obligation:… ii) is of such a character as radically to change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation.

Furthermore, it remains to be determined whether the Court will recognize the expanded ius standi for third states situated outside the framework of multilateral treaty arrangements, predicated upon customary *erga omnes* obligations, constituting an ultimate *actio popularis* in accordance with article 48 of ARSIWA.

> 1. Any state other than an injured state is entitled to invoke the responsibility of another state in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of states including that state, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.

Considering the current case law of the ICJ on *erga omnes* obligations, a similar approach for climate change could be more clearly reach from the human rights impact dimension, as scholars remain uncertain about the *erga omnes* nature of environmental obligations originating from principles such as the 'no harm' rule, even when acknowledging the baseline of common interest.[35]

While optimistically envisioning the broadest and most magnanimous affirmation of the shared commitment to safeguarding states, human populations, and future generations from the impacts of climate change, significant risks are apparent. The integration of these components recognition of common interest, *erga omnes* obligations, and an expanded ius standi for non-conventional obligations could transform climate change litigation into a comprehensive and unprecedented legal campaign, 'the mother of all crusades'. This framework would enable a state to initiate legal proceedings against another state on behalf of a third state, individuals, or even future generations, were the ICJ to describe the substantive obligations in such a manner. However, the Court is not, has never been, naïf.[36] Despite the current progressive case law gaining momentum,

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35 J. Brunnée, *supra* n. 1, at 566; 567-572; J. Brunnée, 'International Environmental Law and Community Interests: Procedural Aspects', in E. Benvenisti and G. Nolte (eds.), *Community Obligations in International Law* (Oxford Academic, Oxford, 2018) at 151-175.

36 In *Gambia v. Myanmar* preliminary objections judgment, the ICJ explicitly abstained from differentiating among 'injured state', 'directly injured state', or 'specially affected state', avoiding therefore to take sides for article 42 or 48 ARSIWA, in ICJ, *supra* n. 32, at para. 106.

the Court will encounter a challenging task in delineating the nature and scope of the substantive obligations.

(2) Attributing Responsibility, or Liability, Must Be Proven

Addressing the issue of the extent of ratione personae and its principal procedural implication, specifically the capacity to initiate a claim in the event of an alleged infringement, essentially unlocks Pandora's box. Upon its unsealing, a multitude of other issues emerge. Notably, the Court has been requested to adjudicate on the repercussions of potential breaches of climate-change obligations.

In a manner that may be considered somewhat obscure, the second question presented to the ICJ initiates a discourse on the legal origin for responsibility to arise concerning obligations related to climate change. The point at discussion is whether there is responsibility for wrongful act or liability for resultant damages. In accordance with the request, the ICJ is expected to articulate:

> (b) What are the legal consequences under these obligations for states where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
> (i) states, including, in particular, small island developing states, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
>
> (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

The secondary relationship may be established based on one of three scenarios: firstly, when a state fails to fulfil its climate change-related obligations (a traditional perspective); secondly, when a state, through action or inaction, inflicts "significant damage" upon the climate system or environment, irrespective of its compliance with climate change obligations (an ambitious stance); thirdly, when a state violates a climate change obligation resulting in significant damage (the most conservative position), necessitating "significant harm" for responsibility to be attributed for the breach of the obligation.[37]

Although this text does not resolve the issue at present, the broader procedural concern impacts all contexts: The ICJ must address the delicate matter of establishing a standard of proof either to substantiate a breach of climate-change obligations or to establish causation of damage within a causal chain, or both. Challenges persist regardless of the *erga omnes* nature of the obligations involved, as states that are neither directly nor specifically injured, yet claim a violation, would also need to prove one of these links, unless the Court grants a reversal of burden of proof.

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[37] From a broader perspective, the inquiry into the relationship between responsibility and harm within the realm of environmental law potentially applicable to the issues of responsibility and liability concerning climate change is addressed in T. Fajardo, *La protección del medio ambiente y el desafío climático. 50 años después de la Declaración de Estocolmo* (Dykinson, 2024), at 143-162.

Regarding the standard of proof, it is imperative to consider several elements: firstly, the attribution criteria under the principles established in ARSIWA for wrongful acts or the liability standards concerning damage causation, particularly for assigning international responsibility to the state for the acts from the private sector, which includes both corporations and individuals concerning their climate-change-related decisions taken in a private capacity. Secondly, with specific regard to climate change, the role of an individual state as a contributor to a global series of events and outcomes, and the establishment of a causality link, are of significant importance. Lastly, the classification of climate change obligations as either obligations of means or obligations of results continues to present a fundamental challenge, with violations of obligations of means being more challenging to substantiate than those of obligations of results.

Concurrently, difficulties arise to reach a nuanced equilibrium in establishing evidence to allocate the share of responsibility between the anthropogenic and natural causes of climate change, with the latter having evolved over centuries and millennia. Consequently, the scientific component in potential contentious cases, particularly in relation to causation and evidence, should not be overshadowed.[38]

Ultimately, the Court could strengthen the procedural aspect of the aforementioned CBDR principle, thus reducing the evidentiary burden for the small and developing claimant states. In that line, unintended consequences of the CBDR principle could appear when discussing appropriate reparations if states argue either as claimant or defendant CBDR as clean hands or lack thereof to be considered. In both lines, the conceptualization of CBDR (either under the form of financial assistance to developing states or differentiated rates of national determined contributions) appears not only to be a substantial rule but a procedural one.

For the AO to achieve significant influence, it is imperative for the Court to thoroughly examine these subjects while articulating the implications of climate change obligations. This is especially crucial since the international community should be aligned and not take diverging sides in this contemporary crusade, with the common future of the planet and humankind at stake. In that line, we will briefly conclude with a two tiers set of reflections after the image of a courtesan lady-in-waiting, being she the public interest litigation at the Court, serving the international society of states for the sake of humanity.

(D) GETTING TO A CLOSE: A PUBLIC-INTEREST-IN-WAITING AT THE COURT

For most readers, the Advisory Opinion of the International Court will have been made public and subjected to discussion and analysis by the time they peruse these pages. At a minimum, all written submissions from participating states and International

[38] Both ITLOS and the ICJ have already explored the need for scientific knowledge to decide on cases. There is some bibliography on the topic, such as the excellent book of K. Kulyok, *Science and Judicial Reasoning: The Legitimacy of International Environmental Adjudication* (Cambridge University Press, Cambridge, 2021). The ICJ has taken the exceptional step of organizing a meeting with some authors of the reports of the Intergovernmental Panel on Climate Change (IPCC), scheduled November 26, 2024, ahead of the oral proceedings for the advisory opinion on climate change, ICJ, Press Release No. 2024/75.

Organizations will have been disclosed, thus illuminating potential directions regarding the anticipated content of the opinion.

As an old lady-in-waiting at the Court, 'what to expect while expecting' the ICJ's AO? This question features our formidable challenge. If the Court adheres to its previous patterns, the duration of waiting time shall not be extensive. It required eighteen months for the Court to render an opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (2024), with participation from approximately sixty states and Organizations in the written and oral proceedings. In the AO on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius* (2019), the ICJ took twenty months to issue its decision, with engagement from approximately forty states. Although, in the instance, participation is more extensive and the ICJ is addressing a substantial and intricate docket, it is anticipated that the AO might be delivered by the end of 2025, or at the latest, early 2026. Meanwhile, the International Law Commission (ILC) remains actively engaged in examining the implications of sea-level rise in relation to International Law, while the COPs continue to convene, not only within the framework of the Paris Agreement but also regarding other environmental treaties such as the United Nations Convention on Biological Diversity. Concerns have already been expressed loudly regarding the potential risks and deficiencies of the forthcoming advisory opinions, including the one to be issued by the ICJ.[39]

Consequently, in drawing our reflections to a close, we present several considerations to assess the pivotal moment of 'dare or truth' for the ICJ. (1. *Does the ICJ Need to Go Beyond an Environmental Restatement?*) and the (r)evolutionary time for public interest definition (*2. Does Public Interest in International Law Progress from Here?*).

(1) Does the ICJ Need to Go Beyond an Environmental Restatement?

The relative latitude afforded to the Court when delivering any advisory opinion, unencumbered by the particular interests of involved parties, has been emphasized. This has resulted in ambitious and innovative opinions leaning towards the progressive development of international law,[40] as opposed to merely affirming extant international law in certain cases,[41] while exhibiting considerable self-restraint in others.[42] Nonetheless, the Court's liberty primarily encompasses a confident analysis concerning the articulation of law, alongside a more self-restrained discourse on the

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[39] B. Mayer, 'International advisory proceedings on climate change', 44 *Michichan Journal of International Law* (2023) 41-115.

[40] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949; ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951.

[41] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004; ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024.

[42] ICJ, *Legal Consequences for states of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996.

implications that general principles or rules, whether substantive or procedural, might entail in specific scenarios. Consequently, we expect a pragmatic approach regarding the Advisory Opinion on climate change obligations for states, the repercussions of their breaches, and the causation of damages either to other states or to individuals and future generations.[43]

The Court can readily rely on its established jurisprudence.[44] Although a specialized chamber for environmental issues was inaugurated in 1993,[45] it was dissolved in 2006 due to a lack of cases. Nevertheless, this has not hindered the Court from incorporating environmental considerations in various contentious cases and in at least one advisory opinion. Simultaneously, the ICJ is developing increasingly proactive jurisprudence concerning human rights issues. Importantly, it has rendered judgments on pecuniary reparations in both domains,[46] a practice that is rather uncommon.

The prospective AO is required to navigate the intersection of both domains within the discourse of climate change. This presents a challenge, as contradictory dynamics govern these two subsystems of international law: HR international law advocates for universal standards, whereas environmental law operates on a differential treatment principle (DBSR); environmental regulations pertain to a notion of extraterritoriality as a sovereign prerogative, while human rights extraterritoriality is considered an obligation for the state to ensure that extraterritorial activities comply with the framework of HR international law.

The Court might focus on environmental issues while adopting a less rigorous approach to HR concerns, as the ITLOS has previously done, relying on the IACtHR to address primarily the HR perspective. Such an approach may pay mere lip service to the comprehension of international law on a universal, global scale. We propose that the ICJ should not simply reiterate the law but rather engage deeply at the intersection of various branches of substantive rules, thereby genuinely addressing any issue of "fragmentation" in international law, as already debated.[47]

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43 On whether the Court needs or not to define the concept of future generations and the ramifications thereof, see P. Lawrence, 'The International Court of Justice Advisory Opinion on Climate Change and Future Generations', 8 *Chinese Journal of Environmental Law* (2024) 284-300, at 291-299.

44 We propose two general readings from Spanish scholars, aware that the topic is being extensively researched these days, although more from a singular case study perspective than a general one, as those we cite. J. Juste-Ruiz, 'The International Court of Justice and International Environmental Law', in: N. Boschiero, T. Scovazzi, C. Pitea, C. Ragni (eds), *International Courts and the Development of International Law* (T.M.C. Asser Press, The Hague, 2013), 283-411 [https://doi.org/10.1007/978-90-6704-894-1_30]; R. M. Fernández Egea, 'La protecciónmedioambiental en la jurisprudencia de la Corte Internacional de Justicia: ¿un reto irresoluble?', in S. Torrecuadrada García-Lozano (dir.), *Los nuevos retos de la Corte Inernacional de Justicia* (Wolters Kluwer, Madrid 2021), 105-134.

45 Based on Art 26 (1) of the ICJ Statute.

46 In relation to environmental obligations, ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua). Indemnisation due par la République du Nicaragua à la République du Costa Rica*, Judgment of 2 February 2018, at para. 157. On human rights, ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo). Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea*, Judgment of 19 June 2012, at para. 61.

47 Concerning the potential for fragmentation as a result of the three successive AOs, see M. A. Tigre, 'It is (Finally) Time for an Advisory Opinion on Climate Change: Challenges and Opportunities on a Trio of Initiative', 17 *Charleston Law Review* (2023), 623-725, at 704-722.

(2) Does Public Interest in International Law Advance from Here?

Although the ICJ stance on climate change remains central to the Advisory Opinion, from a wider viewpoint, the Court faces a critical juncture: is it immersing itself into the unpredictable domain of public interest, or does it adhere to the more traditional synallagmatic frameworks? Will the Court contribute to the development of an international community, or will it uphold its role as the protector of interstate society? The increased level of participation in all three AO proceedings has been remarkable. However, by excluding involvement of non-state actors and recently expanding its discretion to potentially curtail oral phase in such proceedings[48] the ICJ's approach suggests an implicit endorsement of a restricted, arguably conservative, interpretation of public interest.

The approach to PIL in the current ICJ case law concerns the procedural avenues for a third state to claim *erga omes* obligations protecting shared common values of the international community. Whether the Court assumes this very approach for a broaden standing for climate change obligations, while defining them in terms of means or result and their status as treaty or customary international law, will definitely mark the openness for future contentious proceedings in terms of *ius standi*.[49] While the ICJ will soon provide the international community with its advisory *opinion* on climate change, it is important to acknowledge that AOs have[50] and will lay the law for subsequent contentious cases that both domestic and international judicial bodies may adjudicate.

Nevertheless, the establishment of a jurisdictional basis for contentious public international law obligations related to climate change presents an ongoing challenge. The identification of a treaty provision encompassing the entirety of climate change obligations remains elusive, and the prospect of a special agreement to address cases involving 'significant harm to the climate system and other environmental components' inflicted upon states, individuals, or future generations by a third party, is improbable. The most viable mechanisms for advancing a contentious submission are likely unilateral declarations, whereas the utilization of *forum prorogatum* appears to be a less probable alternative. A thorough comprehension by the Court of the procedural dimensions of

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48 J. McIntyre, 'The ICJ Changes the Rules for Intervention', *EJIL Talk*, 11 March 2024.

49 An interesting exercise for future contentious proceedings is offered by M. Wewerinke-Singh, J. Aguon, J. Hunter, I. Algona, C. Bakker, & J. Gauci, 'Bringing climate change before the International Court of Justice: prospects for contentious cases and advisory opinions', in I. Alogna, Ch. Bakker, and J.-P. Gauci (eds.), *Climate change litigation: Global perspectives* (Brill, 2021) 393, at 395-403; E. Sobenes and F. Sindico, 'Climate Change and the International Court of Justice', in F. Sindico, K. Mackenzie, G. Medici-Colomo and L. Wegener, Research *Handbook on Climate Change Litigation* (Elgar, 2024) 264, at 277-282.

50 On that effect, see ICJ, supra n. 32, at para 106. The ICJ founded Gambia's legal *standi* in the legal relationship established among states parties under the Genocide Convention, citing the *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (I.C.J. Reports 1951, at p. 23): 'In such a convention the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type, one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.'

climate change litigation, as delineated in section C, might instigate a series of restrictive reservations to the existing unilateral declarations, as they are currently formulated.

However, the very effectivity in terms of responsibility for climate change will depend on the definition of the origin of responsibility, correlating wrongful acts and damage or opting for the first or the latter. Not only the origin, but the burden of proof concerning a broad array of questions from the standard for due diligence or prevention, the measurement of the specific contribution of a state (and the responsibility for acts of private and corporate persons), the share of anthropogenic vs. natural causes of climate change, or the consideration to be paid to material and moral damage calculation, are all key points that will not probably be dealt with by the ICJ in the coming AO, but will be on the table of prospective situations. These, although mostly related to procedural aspects, are the heart of a PIL case on climate change, briefly, for advancement in the realization of public interest in international law.

As we have outlined it in the first section, we are marching the peaceful crusades of our era, from fighting genocide to climate change, through law. International law should carry the banner, and the ICJ should set the pace, not only to defend the states but also to protect the core and purpose of their existence: human beings, whether they are current or future generations.

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Climate Change-Related Obligations under the Inter-American Human Rights System: A prospective mapping

Gastón Medici-Colombo*

Abstract: On January 9, 2023, the states of Colombia and Chile submitted an interpretative consultation to the Inter-American Court of Human Rights with the main purpose of clarifying "…the scope of State obligations… in order to respond to the climate emergency within the framework of international human rights law […]". This piece offers a prospective analysis of the approach the Court might take and, to some extent, of the scope of the climate-related human rights obligations to be determined. It does so by examining, on the one side, the request and the interpretative margins of the advisory function and, on the other, the relevant environment-related jurisprudence of the Court. As a result, the paper makes three remarks regarding the foreseeable approach, content and scope of the future opinion: a) the general climate-related obligations will be complemented by *enhanced obligations* for the protection of groups in vulnerable situations, disproportionally affected by climate change; b) the scope and functioning of the climate-related obligations will be influenced by the particular features of the right to a healthy environment recognized by the Court; and c) the Court will answer the request by applying and further developing the 'Inter-American framework of environment-related obligations' to climate change.

Keywords: Climate change human rights Inter-American Court of Human Rights climate litigation

(A) INTRODUCTION

On January 9, 2023, the states of Colombia and Chile submitted an interpretative consultation (article 64.1. of the American Convention on Human Rights (ACHR)) to the Inter-American Court of Human Rights (hereinafter the IACtHR or the Court), with the main purpose of clarifying "…the scope of State obligations… in order to respond to the climate emergency within the framework of international human rights law […]".[1] A wide range of questions were raised on, for instance, obligations of prevention and guarantee of human rights, differentiated obligations in relation to vulnerable groups and communities, procedural obligations and shared and differentiated responsibilities.

Following the rules of procedure, the Secretariat of the Court sent notice of the consultation to all member states of the Organization of American States (OAS) and relevant OAS organs, which have a legal right to submit written observations to

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1 The Republic of Colombia and the Republic of Chile, *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile*, 9 January 2023.

protect their legitimate interests.[2] Eight member states (Costa Rica, Barbados, Paraguay, Colombia, Chile, El Salvador, Brazil, and Mexico) and four OAS organs, including the Inter-American Commission on Human Rights (IACommHR), presented written submissions. Additionally, the President of the IACtHR invited *all interested parties* to also present their written observations. A record number of actors took advantage of the opportunity, including a non-OAS state (the Republic of Vanuatu), international and domestic organs and bodies, and more than 200 civil society actors. On February 22, 2024, the Court decided to hold two in-person hearings.[3] The first one took place in Bridgetown (Barbados) in April and the second in Brasilia and Manaus (Brazil) in May 2024. During these hearings, many of the aforementioned actors presented oral arguments to the Court. Now is the time for the Inter-American judges to deliberate, seek consensus and issue the long-awaited opinion the AO-32 , which is expected by mid-2025.

Will the opinion live up to expectations? Only time will tell. As I write this piece, the full scope of the climate change-related obligations to be established by the IACtHR can only be a matter of speculation. However, a prospective analysis of the approach to be taken by the IACtHR and, to some extent, of the scope of climate-related human rights obligations can be conducted by examining the request and the interpretative margins of the IACtHR's advisory function (section B), and the relevant environment-related jurisprudence of the Court (section C). Section D concludes.

(B) THE REQUEST AND THE INTER-AMERICAN COURT'S ADVISORY JURISDICTION

Between December 2022 and March 2023, three advisory opinion requests on states' climate-related obligations were submitted to international courts. In addition to the one that is the subject of this paper, in December 2022 the Commission of Small Island States (COSIS) triggered an advisory proceeding before the International Tribunal for the Law of the Sea (ITLOS),[4] and four months later the United Nations General Assembly (UNGA) followed suit taking climate change to the International Court of Justice (ICJ).[5] A simple glance at the three requests is enough to notice how different the approach taken by Colombia and Chile with their request was when compared to the other two. While COSIS and UNGA each posed two carefully thought-out questions of general nature, Chile and Colombia's request included a long list of 24 questions, not very clearly structured and covering a wide range of specific (sub)topics. There is no room in this piece to discuss the several factors influencing the drafting of the questions[6] or

2 *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*. IACtHR, Advisory Opinion OC-3/83 of September 8, 1983. Series A No 3 at 24.

3 IACtHR, *Request for an Advisory Opinion OC-32. Call to a public hearing. Order of the President of the Inter-American Court of Human Rights of February 22, 2024*.

4 COSIS, *Request for Advisory Opinion*, 12 December 2022.

5 UNGA Res. 77/276, 29 March 2023.

6 E.g., while COSIS and Chile and Colombia had wide latitude to design their questions, UNGA request was constrained by the need to reach consensus.

whether a better approach could have been taken.[7] What it is of interest here is to note, on the one hand, how vast the scope of the request posed before the IACtHR is, and, on the other, how wide the contours of the task to be conducted by the Court under its advisory function are.

Regarding the request, as mentioned, it includes more than 20 questions divided into the following six blocks: a) states' obligations derived from the duties of prevention and guarantee of human rights; b) states' obligations to preserve the right to life and survival; c) differentiated obligations of states in relation to the rights of children and new generations; d) states' obligations arising from consultation procedures and judicial proceedings; e) convention-based obligations of prevention and the protection of territorial and environmental defenders, as well as women, Indigenous Peoples, and Afro-descendant communities; and f) shared and differentiated human rights obligations and responsibilities of states. At minimum, the following specific (sub)topics can be extracted from the questions:

(i) climate change mitigation;

(ii) climate change adaptation;

(iii) climate-induced losses and damages;

(iv) procedural rights (access to information, active transparency, participation and justice) in climate matters;

(v) differentiated protection for vulnerable groups (Indigenous Peoples, Afro-descendant, peasant communities, women);

(vi) rights of the child and future generations;

(vii) environmental defenders;

(viii) just transition policies;

(ix) climate-induced migration and forced displacement;

(x) duty to cooperate;

(xi) common but differentiated responsibilities and fair share.

Regarding the IACtHR's advisory function, two aspects are of note. First, under article 64.1 ACHR, OAS states and organs may consult the Court regarding the "interpretation of [the ACHR] or of other treaties concerning the protection of human rights in the American States." That means that opinions are not limited to the interpretation of the sense, scope or correct application of the ACHR, but rather of

> any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be

[7] See, e.g., D. Bodansky, 'Advisory opinions on climate change: Some preliminary questions', 32(2) *Review of European, Comparative & International Environmental Law* (2023) 185-192, https://doi.org/10.1111/reel.12497; S. Meckievi and J. Viñuales, 'The Search for Clarity: Resort to Advisory Opinions as a Strategy for the Implementation of International Environmental Law', 33(1) *The Italian Yearbook of International Law Online* (2024) 85-109, https://doi.org/10.1163/22116133-03301005

> bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.[8]

In this sense, the Court may, in the context of its advisory function, directly interpret *human rights-connected* provisions in any other international treaty. In addition, the Court's consolidated practice of integrating its interpretations of the ACHR with relevant international norms should be highlighted. In its *Advisory Opinion OC-23/17 on the Environment and Human Rights* (hereinafter the 'AO-23/17'), the Court observed that, in application of the systematic interpretation established by the Vienna Convention on the Law of the Treaties, it must take international environmental law into consideration when defining the meaning and scope of states' obligations under the ACHR, in particular, when specifying the measures that the states must adopt.[9] This implies that the list of treaties that can potentially be brought to the IACtHR's attention, under an advisory proceeding both for a *direct* or *indirect* interpretation, is broad and non-restrictive, expressing a systemic understanding of human rights' (universal) protection.[10] In their request, Colombia and Chile referred to some treaties which will surely integrate, among others, the Court's design of the climate-related human rights obligations: the United Framework Convention on Climate Change (UNFCCC), the Paris Agreement, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the Escazú Agreement), and the Convention on the Rights of the Child. The list provided by the request directs the Court towards possibly relevant norms from which to derive and interpretate states' obligations, but in no way limit its response.

A second aspect to consider is that the IACtHR, when exercising its advisory function, is not constrained by the number or literal wording of the questions posed and can answer only some or rephrase them in order to provide better assistance in the protection of human rights to all the states and organs of the Inter-American Human Rights System (IAHRS). The quantity and the intricate nature of the questions posed by Colombia and Chile make foreseeable that the Court will exercise its discretion to rephrase and restructure the questions when answering the request. This was done by the Court in the past, for example in its AO-23/17 to generalize and expand the scope of the questions then posed by Colombia.[11]

All this hints at a wide latitude for the IACtHR when deciding how to respond to the main question posed by Colombia and Chile, that is the scope of states' obligations in order to respond to the climate emergency within the framework of international human

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8 *'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights).* IACtHR, Advisory Opinion OC-1/82 of September 24, 1982, Series A No 1 at 12 first resolutive paragraph and 21.

9 *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention.* IACtHR, Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23 at 44.

10 The *Institution of Asylum and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*. IACtHR, Advisory Opinion OC-25/18, of May 30, 2018. Series A No 25 at 15.

11 *The Environment and Human Rights…*, *supra* n. 9, at 36.

rights law, not only regarding the subtopics to be addressed, but also the normative basis to be utilized and the approach to be taken.

(C) A PROSPECTIVE MAPPING OF THE CLIMATE CHANGE-RELATED OBLIGATIONS UNDER THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

After exploring the terms of the consultation and the margins of the IACtHR's advisory function and concluding that the Court has broad discretion with respect to the content, scope, approach and normative basis of the future advisory opinion, a question emerged: where to lay the foundations of the prospective mapping? Lacking any explicit reference to climate change in the normativity of the IAHRS, the obvious choice of where to look for some guidance is the previous jurisprudence of the Court.

The IACtHR has a rich jurisprudence on environmental matters that will arguably define the approach to be taken and be the basis of the future opinion. This environmental jurisprudence can be classified in two clearly differentiated phases.[12] An early phase in which environmental protection was mainly addressed by the Court through the protection of the rights of Indigenous Peoples collective property (article 21 ACHR), dignified life (article 4 ACHR) and political participation (article 23 ACHR) . A second phase in which the IACtHR, on the one side, recognized, under article 26 ACHR, an autonomous and actionable right to a healthy environment of individual and collective nature, with an ecocentric dimension and, on the other, systematized the specific environment-related human rights obligations.[13] Climate change has been mentioned by the Court, although as a passing reference, in both its early and current environmental jurisprudence.

The following sections identify key developments of this rich environmental jurisprudence and speculate about their value and implications for the future climate-related advisory opinion. In doing so, a map on the foreseeable climate change-related obligations under the IAHRS begins to be drawn.

(1) The Interrelationship between Human Rights and Climate Change

In its AO-23/17, the Court devoted an entire section to describe the human rights-environment nexus, emphasizing the foundational idea that "an undeniable relationship between the protection of the environment and the realization of other human rights" exists.[14] This idea was established by the Court for the first time in 2009 in the case of *Kawas Fernández v. Honduras*[15] and constantly reminded in the following environmental

[12] See, e.g., M.G. Aguilera, *Environmental Human Rights: New Thinking from Latin America and the Caribbean* (Brill, Leiden, 2023).

[13] *The Environment and Human Rights…*, *supra* n. 9.

[14] *Ibid* at 47.

[15] *Case of Kawas Fernández v. Honduras. Merits, Reparations and Costs.* IACtHR, Judgment of April 3, 2009. Series C No. 196 at 148, referencing its own jurisprudence on Indigenous Peoples and that of the European Court of Human Rights.

case law. Returning to this idea, in the AO-23/17, the Court referred to its own case law on Indigenous Peoples noting the connection between a healthy environment and rights such as the collective property and dignified life ,the work of other OAS bodies, the European Court of Human Rights' (ECtHR) case law, the work of UN bodies, some basic documents of the sustainable development paradigm (Stockholm Declaration, Rio Declaration, Agenda 2030) and the Inter-American Democratic Charter.[16] On this basis, the Court reaffirmed the idea of a relationship of *interdependence* and *indivisibility* between human rights, the environment, and sustainable development and derived from this connection three key ideas: a) the existence of a right to a healthy environment as a right in itself; b) the existence of a series of states' environment-related human rights obligations; and c) the use of international environmental law for determining those obligations under the ACHR.[17]

Similarly, it is foreseeable that the Court devotes some ink in its future advisory opinion to describe and reflect on the interrelationship between human rights and climate change. Indeed, when the Court made its foundational recognition of the environment-human rights nexus back in 2009, it also referred to the "adverse effects of the climate change" on the effective enjoyment of human rights.[18] The origin of that phrasing dates back to resolutions by the UN Commission on Human Rights and the OAS General Assembly on the matter, particularly the 2008 Resolution 2429 on 'Human Rights and Climate Change in the Americas'[19]. This passing reference would be reiterated and expanded in the AO-23/17, citing the work of the Human Rights Council (HRC), which affirmed that "climate change has a wide range of implications for the effective enjoyment of human rights, including the rights to life, health, food, water, housing and self-determination" and that "environmental degradation, desertification and global climate change are exacerbating destitution and desperation, causing a negative impact on the realization of the right to food, in particular in developing countries".[20] To explore this specific relationship in the future opinion, the Court will not be short of references. It can rely on the work on the matter of several regional and international bodies, including the IACommHR;[21] the ECtHR;[22] the African Commission on Human and Peoples' Rights;[23] and UN bodies,[24] including Special Rapporteurs[25] and treaties'

16 *The Environment and Human Rights…*, *supra* n. 9 at 48-53.
17 *Ibid* at 54, 55.
18 *Case of Kawas Fernández…*, *supra* n. 15, at 148.
19 OAS AG/Res. 2429 (XXXVIII-O/08) *Human Rights and Climate Change in the Americas* (adopted 3 June 2008).
20 *The Environment and Human Rights…*, *supra* n. 9 at 47, 54.
21 IACommHR, Resolution 3/2021, *Climate Emergency: Scope of Inter-American Human Rights Obligations* (adopted 31 December 2021).
22 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECHR (2024) 53600/20, 9 April 2024.
23 African Commission on Human and Peoples' Rights, Res. 417 (LXIV) *Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change* (adopted 14 May 2019).
24 See Office of the High Commissioner for Human Rights, OHCHR and climate change (accessed 22 December 2024).
25 See, e.g., Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights,* A/78/168, 13 July 2023; Special Rapporteur on the promotion and protection of human rights in the context of climate change, *Access to information on climate change and human rights*, A/79/176, 18 July 2024.

committees,[26] among others. As it did in the AO-23/17, the IACtHR may identify a list of human rights that are particularly vulnerable to climate change, which probably overlap in great extent with those already identified when examining the environment-human rights nexus.[27]

Furthermore, considering the questions posed by Chile and Colombia and the extensive IACtHR case law on groups in vulnerable situations, it is more than probable that the Court will devote some paragraphs to refer to the particular impacts of climate change on those groups. In the AO-23/17, the Court referred to certain groups in vulnerable situations whose rights may be affected to a greater extent by environmental degradation and to which states have *enhanced obligations* based on the principles of equality and non-discrimination. That includes Indigenous Peoples; children; people living in extreme poverty; minorities; people with disabilities; communities that, essentially, depend economically or for their survival on environmental resources from the marine environment, forested areas and river basins; or run a special risk of being affected owing to their geographical location, such as coastal and small island communities.[28] It is clear that the Court was already considering climate change effects when making this list, as proven by the references to the 2009 HRC Report on the relationship between climate change and human rights[29] with respect to Indigenous Peoples, women and displaced people, and to the international climate legal regime with respect to coastal and small island communities.[30]

Those were not unique references that the Court has already made to groups in vulnerable situation affected by climate change. In its 2023 decision in *Inhabitants of La Oroya v. Peru*[31] — a case on air, soil and water pollution — the Court again made passing reference to the vulnerable situation of children and women in the context of climate change, based on the work of the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women (CEDAW).[32] The main consequence of identifying vulnerable groups and the application of the principles of equality and non-discrimination is the establishment of *enhanced obligations* that will arguably play a key role in the future climate-related opinion. In the 2023 case, for example, the Court asserted that "States should… put children's health concerns at the

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26 Committee on the Rights of the Child, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019*, CRC/C/88/D/104/2019, 8 October 2021; Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019, 22 September 2022; Committee on Economic, Social and Cultural Rights, *General comment No. 26 (2022) on land and economic, social and cultural rights*, E/C.12(GC/26, 24 January 2023.

27 *The Environment and Human Rights…*, *supra* n. 9 at 66.

28 *Ibid* at 67.

29 HRC, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, A/HRC/10/61, 15 January 2009.

30 *The Environment and Human Rights…*, *supra* n. 9 at 67.

31 *Case of the Inhabitants of La Oroya v. Peru. Preliminary Objections, Merits, Reparations and Costs.* IACtHR, Judgment of November 27, 2023. Series C No. 511.

32 *Ibid* at 140, 143, 232; Committee of the Rights of the Child, *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, CRC/C/GC/15, 17 April 2013; Committee on the Elimination of Discrimination against Women, *General recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change*, CEDAW/C/GC/37, 13 March 2018.

forefront of their climate change adaptation and mitigation strategies" and that they have "an increased duty to protect children from health risks caused by the emission of polluting gases that contribute to climate change".[33]

(2) A Right to a Stable/Safe Climate?

One of the reasons to assert that the IACtHR broke ground with its AO-23/17 is the recognition of an autonomous and actionable right to a healthy environment contained in article 26 of the ACHR. According to the Court, this right has both an individual and collective nature and includes an ecocentric dimension.[34] In *Inhabitants of La Oroya*, the Court observed that this right is comprised of a set of procedural and substantive elements. The former give rise to obligations relating to access to information, political participation and access to justice. Within the latter are the air, the water, the food, the ecosystem, *the climate*, among others.[35] After identifying these elements, the Court *derived* from the right to a healthy environment two specific rights — the 'right to breath clean air' and the 'right to clean water' — and listed a series of specific obligations connected to them.[36]

This 'derivative practice' allows one to wonder whether a specific 'right to (live in) a stable/safe climate' will be enshrined in the future opinion. Being not a stand-alone but a derived right, it does not seem to require — following the Court's reasoning — to find any new normative basis beyond that of the right to a healthy environment. In this sense, it would be a reasonable incremental — rather than a truly disruptive — development by the Court. This recognition would be aligned with the findings of the former UN Special Rapporteur on Human Rights and the Environment who expressed that the substantive elements of the right to a safe, clean, healthy and sustainable environment include a safe climate and that "States must not violate the right to a safe climate […]".[37]

As a derived right, the right to a safe/stable climate would share the main features of the right a healthy environment, in particular, its collective and intergenerational nature, as well as an ecocentric dimension.[38] This means that it would, at least in principle, protect from climate change not only individuals but communities, future generations, other components of the environment (rivers, forests, seas…) and other living organisms.

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33 *Case of the Inhabitants of La Oroya…*, *supra* n. 31 at 140, 143; based on Committee on the Rights of the Child, *Decision adopted…*, *supra* n. 26.

34 *The Environment and Human Rights…*, *supra* n. 9 at 62.; the Court established a violation of this right for the first time in *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina. Merits, Reparations and Costs.* IACtHR, Judgment of February 6, 2020. Series C No. 400, on the 'ecocentric' jurisprudence of the Court, see D.G. Montalván Zambrano, 'Antropocentrismo y ecocentrismo en la jurisprudencia de la Corte Interamericana de Derechos Humanos', 23(46) *Araucaria* (2021), 505-527, https://doi.org/10.12795/araucaria.2021.i46.25

35 *Case of the Inhabitants of La Oroya…*, *supra* n. 31 at 118.

36 *Ibid* at 120, 121.

37 Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,* A/74/161, 15 July 2019, at 43, 65; see A.O. Jegede, 'Arguing the Right to a Safe Climate under the UN Human Rights System', 9 *International Human Rights Law Review* (2020) 184-212, https://doi.org/10.1163/22131035-00902001, arguing that the 'right to a safe climate' meets the Alston's criteria for a new right to emerge.

38 *The Environment and Human Rights…*, *supra* n. 9 at 59, 62.

This would be a key finding with implications for complex aspects of the human-right based approach to climate change, such as the climate victim status, the consideration of inter-temporal risks or the order of remedies with collective effects. This was indeed expressly acknowledged by three of the seven Inter-American judges in their concurring decision in *Inhabitants of La Oroya* when affirming in reference to the provision of collective reparations that also protect future generations the relevance of the case as an "important source of standards for States regarding their obligations to ensure equitable conditions for development in the face of climate change".[39] The detailed references by these judges[40] of the *climate* rulings of the German Constitutional Court in the so-called *Neubauer case*[41] and the Colombian Supreme Court in the so-called *Future Generations case*[42] are of note in this regard.[43]

In short, the collective, inter-generational and ecocentric dimensions of the enshrined right to a healthy environment are key factors when thinking of the scope of the climate-related obligations under the IAHRS. And this is true regardless of whether or not the Court explicitly recognizes a right to a safe/stable climate. That recognition, although reasonable, is by no means necessary for the Court to apply to its full extent the right to a healthy environment to climate change and its human rights impacts, and it would arguably not change the scope or ambition of the Court's response. That said, it is worth noting that a Court's recognition of this *new* right could have political or legal effects beyond the IAHRS. On the one hand, it would arguably be a milestone for the climate movement that has been advocating for it[44] and, on the other, it could trigger normative developments in other jurisdictions with (at least for this paper) unforeseeable legal consequences.

(3) The 'Inter-American Framework on Environment-Related Obligations' and its Application to Climate Change

Irrespective of the relevance of the findings described in the previous sections regarding the *enhanced* obligations or the special features of the right to a healthy environment, the core of the mapping exercise is to be found in other key development of the environmental jurisprudence of the Court: the 'Inter-American framework on environment-related obligations'. This is a structured set of specific obligations relating to the protection of the environment, derived from the general obligations to respect and ensure human rights (article 1.1. ACHR).[45] It was the result of a systematization task conducted by the Court in its AO-23/17 that included the translation of international

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39 *Case of the Inhabitants of La Oroya…*, *supra* n. 31 at 70 (concurring opinion of the judges Ricardo C. Pérez Manrique, Eduardo Mac-Gregor Poisot and Rodrigo Mudrovitsch).

40 *Ibid* at 137, 139 (concurring opinion of the judges Ricardo C. Pérez Manrique, Eduardo Mac-Gregor Poisot and Rodrigo Mudrovitsch).

41 *1 BvR 2656/18; 1 BvR 78/20; 1 BvR 96/20; 1 BvR 288/20,* German Federal Constitutional Court, order of 24 March 2021.

42 *STC4360-2018*, Supreme Court of Colombia, order of 5 April 2018.

43 On these cases and the connection between intergenerational responsibility and climate litigation, see M. de Armenteras Cabot, 'El litigio climático ante la responsabilidad intergeneracional', 44 *Cuadernos Electrónicos de Filosofía del Derecho* (2021) 1-22 https://doi.org/10.7203/CEFD.44.19409

44 E.g., Union of Concerned Scientists, *The Human Right to a Stable Climate,* 25 September 2023.

45 *The Environment and Human Rights…*, *supra* n. 9 at 23, 35, 115.

environmental law obligations into human rights duties. In its following contentious jurisprudence, the Court applied and developed it further. The (not so bold) argument here is that the Court will follow (expressly or not) this framework when defining the scope of states' climate-related obligations in its future opinion.

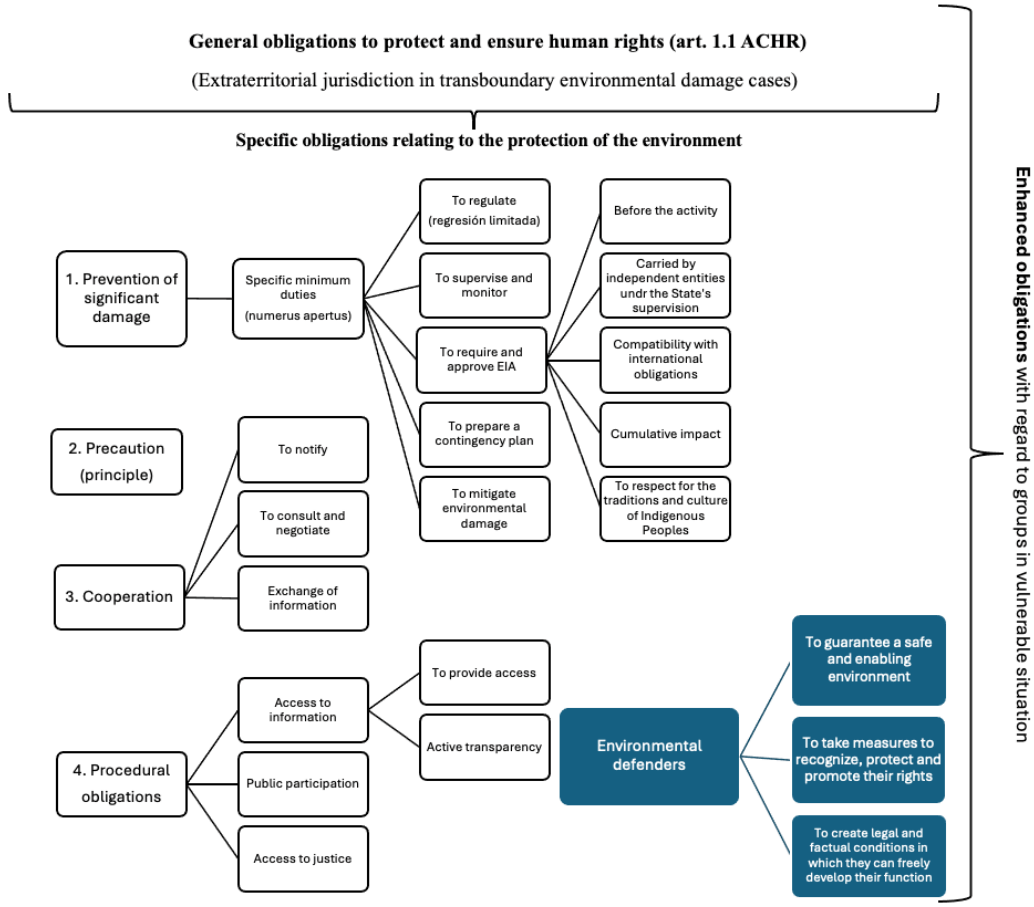

Figure 1. Inter-American framework on environment-related obligations. The author based on concurring opinion of the judges Ricardo C. Pérez Manrique, Eduardo Mac-Gregor Poisot and Rodrigo Mudrovitsch in Inhabitants of La Oroya v. Peru (2023), par. 33)

There is insufficient room here to go in detail on this framework, but some initial notes are worthy of mentioning. First, the framework includes both obligations of results (in particular, negative obligations, such as to not unlawfully pollute) and conduct (due diligence).[46] Second, it covers not only activities carried out by public agents but also private parties[47] with impacts both within and beyond national borders, according to

[46] *Ibid* at 117, 118.
[47] *Ibid* at 118.

the extraterritorial jurisdiction approach adopted by the Court.[48] Third, the intensity of the duties is defined by the level of risk.[49] Fourth, compliance with these duties should be informed by the best available science and technology.[50] Fifth, the framework applies irrespective of whatever the activity, geographical area or component of the environment affected are, and without detriment to other environment-connected obligations agreed by the states.[51] Sixth, although the framework was originally designed to answer a question regarding the environment-related obligations emerging from the right to life and personal integrity, it is clear that the Court conceives it as having general character.[52] That means that the obligations and specific duties contained in the framework apply also when considering states' compliance with other human rights in their connection with environmental protection, including the right to a healthy environment.[53] In other words, the framework also embodies, at least to a large extent, the *obligational* content of the right to a healthy environment and its derived rights, including a possible right to a safe/stable climate.

A reasonable and consistent approach for the Court, therefore, would be to answer Colombia and Chile's questions by applying and further developing this framework to climate change. In doing so, as mentioned *ut supra*, the Court will, in application of the systemic interpretation, draw on the international climate legal regime, and other international treaties, as well as the work of international courts and bodies particularly the HRC and its special procedures and treaties committees and even extended domestic practices. Of particular note in this regard are the climate rulings recently delivered by the ECtHR (especially, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*),[54] and the ITLOS' climate-related advisory opinion.[55] Providing a full catalogue of the foreseeable specific climate-related standards to be established by the IACtHR in the future opinion is beyond the aim and scope of this piece.[56] However, in a speculative exercise, it is worth mentioning at least some of its possible developments, to illustrate how they would be placed into the identified map, i.e., the framework.

For example, the Court could define that, under the *duty to regulate* of the *obligation of prevention*, a mandate of having an effective national climate legal framework exists. Having an effective climate legal framework could require the determination of intermediate and long-term ambitious and fair emissions mitigation targets, in accordance with the Paris Agreement goals and the best available science, together with clear timelines.[57] Furthermore, under the application of the *precautionary principle* (and intergenerational

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48 *Ibid* at 101.

49 *Ibid* at 142.

50 *Ibid* at 142, 172; *Case of the Inhabitants of La Oroya…*, *supra* n. 31 at 120, 121.

51 *The Environment and Human Rights…*, *supra* n. 9 at 126.

52 *Ibid* at 69,125, 243.

53 *Case of the Inhabitants of La Oroya…*, *supra* n. 31 at 120, 121; *Case of the U'wa Indigenous People and its members v. Colombia. Merits, Reparations and Costs.* IACtHR, Judgment of July 4, 2024. Series C No. 530 at 292.

54 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland…*, *supra* n. 22.

55 *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law,* ITLOS Advisory Opinion, 21 May 2024.

56 Catalogues of proposed climate-related obligations under the IAHRS can be found in the written observations submitted to the IACtHR in the opinion's proceeding, IACtHR, *Observations on the Request for an Advisory Opinion* (accessed 23 December 2024).

57 *Ibid; Verein KlimaSeniorinnen Schweiz and Others v. Switzerland…*, *supra* n. 22 at 550; *The Environment and Human Rights…*, *supra* n. 9 at 146-151; *Case of the U'wa Indigenous People…*, *supra* n. 53 at 296.

equity), the Court could ask the states to take into account inter-generational distributional costs when defining their mitigation targets and timelines.[58] Likewise, the IACtHR could observe that a failure to comply with the established emissions limits can imply, on its own, a human rights violation that needs to be avoided by instituting solid and transparent monitoring (and enforcement) mechanisms applicable to every economic sector, as part of the *duty to supervise and monitor*.[59] In addition, the Court may develop the *duty to require and approve environmental impact assessments*, clarifying that, in this context, it includes mandatory quantification and assessment of all direct and indirect emissions of projects and a consideration of their compatibility with the international and national climate commitments, thus ensuring regulatory consistency.[60]

The Court may also observe that, under the *duty to regulate* as well as *the duty to prepare contingency plans* and *to mitigate environmental damage*, states have obligations to enact and implement adaptation plans, early warning systems and compensation mechanisms for losses and damages.[61] Or it may refer to the need, in complying with the *cooperation obligation*, to participate in good faith in international negotiations connected with climate issues, which would include not only the climate regime, but other relevant fora, such as multilateral financial institutions.[62]

Finally, the Court was also asked by Chile and Colombia about the obligations relating to climate defenders and the procedural obligations of states in climate matters. With regard to the first issue, the Court may bring to the opinion its extended case law on human rights and *environmental defenders* and refer to the worrying proliferation of Strategic Lawsuits against Public Participation (SLAPPs) and the criminalization of climate protest.[63] With regard to *procedural obligations*, the Court could refer, among other things, to the need to maintain updated and accessible emissions' inventories and other relevant climate information under the *duty of active transparency*.[64] Furthermore, it could further develop the *access to justice* obligation, in accordance to the Escazú Agreement, by requiring states to guarantee particularly broad standing criteria in climate cases, especially when vulnerable groups or future generations are involved,[65] or it could address due process requirements for climate-induced migratory procedures.[66]

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58 *Case of the Inhabitants of La Oroya…*, *supra* n. 31 at 128; and 137 (concurring opinion of the judges Ricardo C. Pérez Manrique, Eduardo Mac-Gregor Poisot and Rodrigo Mudrovitsch) with reference to *1 BvR 2656/18; 1 BvR 78/20; 1 BvR 96/20; 1 BvR 288/20…*, *supra* n. 41.

59 *The Environment and Human Rights…*, *supra* n. 9 at 152-155.

60 *Ibid* at 156-170; see G. Medici-Colombo, *La litigación climática sobre proyectos. ¿Hacia un punto de inflexión en el control judicial sobre la autorización de actividades carbono-intensivas?* (Tirant lo Blanch, Valencia, 2024).

61 *The Environment and Human Rights…*, *supra* n. 9 at 171-173.

62 See, e.g., Barbados, *Written Observations on Behalf of Barbados*, 18 December 2023.

63 N. Lakhani, D. Gayle and M. Taylor, 'How criminalization is being used to silence climate activists across the world', *The Guardian*, 12 October 2023; *Case of Baraona Bray v. Chile. Preliminary Objections, Merits, Reparations and Costs.* IACtHR, Judgment of November 24, 2022. Series C No. 481 at 91, 127.

64 *The Environment and Human Rights…*, *supra* n. 9 at 221.

65 *Case of the Inhabitants of La Oroya…*, *supra* n. 31 at 155 (concurring opinion of the judges Ricardo C. Pérez Manrique, Eduardo Mac-Gregor Poisot and Rodrigo Mudrovitsch); see G. Medici-Colombo and T. Ricarte, 'The Escazú Agreement Contribution to Environmental Justice in Latin America: An Exploratory Empirical Inquiry through the Lens of Climate Litigation' 16(1) *Journal of Human Rights Practice* (2024) 160-181, https://doi.org/10.1093/jhuman/huad029

66 IACommHR, *Resolution 3/2021…*, *supra* n. 21.

(D) CONCLUSION

This paper aimed to present a mapping of the climate-related human rights obligations under the IAHRS which will be defined by the IACtHR in the upcoming AO-32. As with any prospective exercise, it integrated an analytical task with a *pinch* of intuition and speculation, which may lead the exercise to findings that may be proved wrong (soon). The broadness of the request posed by Chile and Colombia and the wide margins enjoyed by the IACtHR in the context of its advisory function further diminish the prospects of getting it right. In this scenario, appealing to the relevant previous jurisprudence of the Court is probably the safest choice in order to make a useful contribution to the topic. This is particularly the case when, as apparent from the above revisit, the Court has produced a rich environment-related jurisprudence that includes various elements with the potential to meaningfully affect and define the approach, content and scope of the future opinion.

In this sense, in section C.1, the piece observed that, given the centrality of the issue of vulnerable groups both in the request and in the Court's jurisprudence, it is more than probable that the IACtHR will complement the general climate-related obligations to be defined in its future opinion with *enhanced obligations* owed to a variety of groups particularly affected by the impacts of climate change. Furthermore, in section C.2, the enshrinement of an autonomous and actionable right to a healthy environment with an individual, collective and intergenerational nature, and that includes an ecocentric dimension was highlighted. The contention, in this regard, is that the features of this right will meaningfully influence the scope and functioning of the climate-related obligations to be determined, even if the Court opts not to refer to a 'right to a safe/stable climate' as a derived right. Finally, section C.3. presented the 'Inter-American framework of environment-related obligations' as the core of the map in which the forthcoming climate-related standards should be pinpointed. This is based on the understanding that a reasonable and consistent approach for the Court to take would be to answer Colombia and Chile's questions by applying and further developing this framework to climate change. To illustrate this point, the paper offers a few speculative examples regarding how the duties identified by the Court in its framework can be translated and developed to address the climate concerns raised by the request.

As mentioned, the Court is expected to deliver its advisory opinion in 2025, some months after this piece is published. Only then will it become clear how right or wrong it was. But, much more importantly, it will then be time to assess the IAHRS' contribution to International Law's response to one of the most pressing threats of this era, at a particularly critical time.

SYbIL | Spanish Yearbook of International Law

The UNCLOS as a legal living instrument to combat climate change and its deleterious effects: the specific obligations of State Parties according to the interpretation of ITLOS

Eduardo Jiménez Pineda*

Abstract: this contribution analyses the advisory opinion rendered by the International Tribunal for the Law of the Sea on 21 May 2024. Accordingly, the contribution summarizes the background of the advisory proceedings considering the legal nature of the Commission of Small Island States on Climate Change and International Law. This required the advisory opinion to the Tribunal about the specific obligations of the States Parties to the United Nations Convention on the Law of the Sea to prevent, reduce and control pollution of the marine environment and to protect and preserve the marine environment in relation to climate change impacts. In this sense, the contribution highlights the acknowledgement by the Tribunal of its jurisdiction to answer the request following its previous jurisprudence. Moreover, this paper studies the specific obligations on climate change of UNCLOS States Parties declared by ITLOS. According to the Tribunal and in addition to other important specific obligations, States Parties have specific due diligence obligations to take all necessary measures to prevent, reduce, and control marine pollution resulting from such emissions, taking into account the goal of limiting the temperature increase to 1.5°C above pre-industrial levels, and to ensure that anthropogenic greenhouse gas emissions under their jurisdiction or control do not cause harm to other States or their environments. In short, this paper concludes the interesting contribution made by the Tribunal making clear the specific obligations of UNCLOS States Parties on climate change, which is in line with the valuable jurisprudence of ITLOS along its nearly 30 years of existence.

Keywords: climate change litigation, specific obligations, States Parties, United Nations Convention on the Law of the Sea, International Tribunal for the Law of the Sea

(A) INTRODUCTION

Climate change is one of the primary concerns currently facing the international community. As acknowledged in the Preamble of the Paris Agreement, "climate change is a common concern of humankind," which entails crucial challenges and issues of international governance of a highly diverse nature that undoubtedly exceed the scope of the Law of the Sea and even that of International Environmental Law.[1] In this regard, various initiatives are being proposed to establish a legal strategy that, through

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1 See in this sense the following Resolutions of the United Nations General Assembly: *Resolution 76/205 of 17 December 2021 on the protection of the global climate for present and future generations*; or *Resolution 76/300 of 28 July 2022 on the human right to a clean, healthy, and sustainable environment.*

International Law, may contribute to addressing climate change and its deleterious effects.

Among these, the recent initiatives aimed at requesting advisory opinions on climate change deserve particular attention. These include, on the one hand, a request before the International Tribunal for the Law of the Sea (hereinafter ITLOS or the Tribunal) and, on the other hand, a request before the International Court of Justice (hereinafter ICJ or the Court).[2] Additionally, we may also highlight the Request for an Advisory Opinion on Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile on January 9, 2023.

Along this contribution I will focus on the firstly mentioned advisory opinion, the one requested by the Commission of Small Island States on climate change and International Law before the International Tribunal for the Law of the Sea, which is at the time being the only one given by the aforementioned international courts and tribunals. As it is known, the International Tribunal for the Law of the Sea rendered its advisory opinion on 21 May 2024 answering the request submitted by the Commission of Small Island States on climate change and International Law.[3] Nonetheless, the other advisory opinions requested before the International Court of Justice and before the Inter-American Court of Human Rights are highly interesting, too. This Agora contains significant contributions analysing the other two advisory opinions.[4]

In this regard, the relationship between the oceans and the climate is evident, close, and significantly more complex than its current reflection in international legal frameworks.[5] Oceans and seas are among the areas most affected by the adverse and negative effects of climate change such as rising sea levels and loss of biodiversity and simultaneously play a crucial role in mitigating the effects of this phenomenon due to their status as the world's largest carbon sink.[6]

Although the United Nations Convention on the Law of the Sea (UNCLOS) does not explicitly regulate climate change, it establishes a comprehensive legal regime for the seas and oceans, from which rights and obligations arise that are directly impacted by and relevant to the effects of climate change. Consequently, it is clear that climate change

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In particular, along the Preamble of the Paris Agreement it is acknowledged that 'that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.'

2 *Obligations of States in respect of Climate Change*.

3 Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 21 May 2024, ITLOS Reports 2024, to be published.

4 See in this sense the contributions by Eulalia Petit de Gabriel and by Gastón Alejandro Medici Colombo in this Agora.

5 R. J., Roland Holst, 'The Climate-Oceans Nexus: Oceans in the Climate Regime, Climate in the Oceans Regime', in P. G., Harris (ed.), *Routledge Handbook of Marine Governance and Global Environmental Change* (Routledge, New York, 2022) 28.

6 See A. Boyle, 'Protecting the Marine Environment from Climate Change', in E. Johansen *et al* (eds), *The Law of the Sea and Climate Change. Solutions and Constraints* (Cambridge University Press, Cambridge, 2022) 81-103.

poses direct challenges and raises fundamental issues for the sector of international legal frameworks governed by the Law of the Sea.

Accordingly, along the following pages of this contribution I will firstly address the background of this advisory proceedings. Secondly, I will analyse the jurisdiction of the Tribunal to render this advisory opinion. Thirdly I will reflect on the contribution of the Tribunal to the clarification of the specific obligations of the UNCLOS States Parties to combat climate change. Finally, I will make some final considerations in light of the study previously developed.

(B) THE ADVISORY OPINION'S PROCEDURAL BACKGROUND

On October 31, 2021, the first day of the 26th Conference of the Parties to the United Nations Framework Convention on Climate Change held in Glasgow,[7] the governments of Antigua and Barbuda and Tuvalu signed an Agreement for the Establishment of a Commission of Small Island States on Climate Change and International Law.[8] This agreement is open to members of the Alliance of Small Island States, with seven States having acceded to it so far: Palau, Niue, Saint Lucia, Vanuatu, Saint Vincent and the Grenadines, Saint Kitts and Nevis, and The Bahamas.

The agreement, consisting of only four articles, provides for the creation of the aforementioned Commission and, significantly, authorizes it to request advisory opinions from the International Tribunal for the Law of the Sea on any legal question within the scope of the United Nations Convention on the Law of the Sea, in accordance with Article 21 of the Tribunal's Statute and Article 138 of its Rules.[9]

Thus, the Commission aimed to follow the path initiated by the advisory opinion issued by the Tribunal in 2015 in response to the request of the Subregional Fisheries Commission.[10] In that opinion, the international judicial body determined for the first time that its full bench could exercise advisory jurisdiction on a legal question if an international treaty related to the objectives of the United Nations Convention on the Law of the Sea specifically provided for such a request.[11] This conclusion received some criticism among legal scholars, highlighting differing interpretations of the Tribunal's advisory jurisdiction.[12] Nevertheless, in this case, as will be detailed below, the Tribunal accepted its jurisdiction without extensive deliberation.

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7 United Nations Framework Convention on Climate Change, adopted on 29 May 1992, *UNTS* vol. 1771, 107-321.

8 *Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law*. See D. Freestone, R. Barnes, and P. Akhavan, 'Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (COSIS)', *International Journal of Marine and Coastal Law* (2022) 37, 166-178.

9 This provision is mentioned below.

10 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4.

11 *Ibid*, paras. 37-69, 219. See particularly paras. 58-60.

12 See among others M. Lando, 'The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission", *Leiden Journal of International Law* (2016) 441-461 ; or Y. Tanaka, 'Reflections on the Advisory Jurisdiction of ITLOS as a Full Court: The ITLOS Advisory Opinion of 2015', *The Law and Practice of International Courts and Tribunals* (2015) 318 339.

Therefore, on December 12, 2022, the Commission of Small Island States submitted a request for an advisory opinion to the International Tribunal for the Law of the Sea. In this request, the applicants invoked the following legal bases to establish the advisory jurisdiction of the Tribunal: Article 21 of its Statute, Article 138 of its Rules, and Article 2.2 of the Agreement for the establishment of the Commission. In particular, the article 2.2 establishes as follows: 'having regard to the fundamental importance of oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on Small Island States, the Commission shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea ('ITLOS') on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules.'

In light of these jurisdictional provisions, the Commission presented the following questions to the Hamburg Tribunal:

> 'What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the 'UNCLOS'), including under Part XII:
>
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
>
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?'

Four days after the submission of the request, on December 16, 2022, the Tribunal issued an order to include this request for an advisory opinion on its docket (as Case No. 31) and to notify all States Parties to the United Nations Convention on the Law of the Sea (UNCLOS) of its receipt. Furthermore, through this order, the Tribunal decided, in accordance with Article 133, paragraph 1, of its Rules, to invite certain intergovernmental international organizations, listed in an annex to the order, to provide information on the issues submitted to the Tribunal in this advisory opinion.[13] Additionally, the order invited, pursuant to Article 133, paragraph 3, of the Tribunal's Rules, the Commission and the aforementioned organizations to submit written statements on these issues, initially setting May 16, 2023, as the deadline for such submissions, which was subsequently extended to June 16, 2023.[14]

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13 Order of 16 December 2022.

14 Article 133 of the Rules of the Tribunal establishes: '1. The Registrar shall forthwith give notice of the request for an advisory opinion to all States Parties. 2. The Chamber, or its President if the Chamber is not sitting, shall identify the intergovernmental organizations which are likely to be able to furnish information on the question. The Registrar shall give notice of the request to such organizations. 3. States Parties and the organizations referred to in paragraph 2 shall be invited to present written statements on the question within a time-limit fixed by the Chamber or its President if the Chamber is not sitting. Such statements shall be communicated to States Parties and organizations which have made written statements. The Chamber, or its President if the Chamber is not sitting, may fix a further time-limit within which such States Parties and organizations may present written statements on the statements made. 4. The Chamber, or its President if the Chamber is not sitting, shall decide whether oral proceedings shall be held and, if so, fix the date for the opening of such proceedings. States Parties and the organizations referred to in paragraph 2 shall be invited to make oral statements at the proceedings.'

This advisory procedure has received significant interest, not only among scholars but also among States themselves, as evidenced by the high level of participation it has elicited. A total of 31 States Parties to UNCLOS participated in the process, including the Democratic Republic of Congo, Poland, New Zealand, Japan, Norway, Germany, Italy, China, the European Union, Mozambique, Australia, Mauritius, Indonesia, Latvia, Singapore, South Korea, Egypt, Brazil, France, Chile, Bangladesh, Nauru, Belize, Portugal, Canada, Guatemala, the United Kingdom, the Netherlands, Sierra Leone, Micronesia, and Djibouti.

Additionally, 8 intergovernmental international organizations submitted written statements pursuant to articles 138, paragraph 3, and 133, paragraph 3, of the Rules of the Tribunal, including the United Nations, the International Union for Conservation of Nature, the International Maritime Organization, the Commission of Small Island States on Climate Change and International Law, the Pacific Community, the United Nations Environment Programme, the African Union, and the International Seabed Authority.[15] Furthermore, four written submissions were presented after the deadline (from Rwanda, the Food and Agriculture Organization of the United Nations, Vietnam, and India), and 10 *amicus curiae* participated.[16]

In my view, the wording of the questions submitted by the Commission is highly appropriate due to their precision, specificity, and clear legal connection to the Convention.[17] Nevertheless, in order to respect the main object of this contribution, I will now proceed to highlight the most relevant aspects of the advisory opinion issued by the International Tribunal for the Law of the Sea on May 21, 2024, addressing firstly the jurisdictional aspects and subsequently the substantive issues.

(C) THE JURISDICTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

First of all, the advisory jurisdiction of the International Tribunal for the Law of the Sea (ITLOS) is, in principle, expressly and explicitly recognized by the Convention only for a specific chamber of the Tribunal, the Seabed Disputes Chamber (SDC), and solely with regard to matters concerning the international seabed area (Articles 191 and 159, paragraph 10, of UNCLOS).[18]

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15 All the documents concerning this advisory proceedings, included the written statements of these international organizations can be accessed here.

16 These *amicus curiae* are: United Nations Special Rapporteurs on Human Rights, & Climate Change, Toxics & Human Rights and Human Rights & the Environment, High Seas Alliance, Client Earth, Opportunity Green, Center for International Environmental Law and Greenpeace International, Advisory Committee on Protection of the Sea, World Wide Fund for Nature, Our Children's Trust and Oxfam International, Observatory for Marine and Coastal Governance, One Ocean Hub.

17 I have considered this question in a previous paper: E. Jiménez Pineda, 'Hacia una opinión consultive sobre cambio climático: a propósito de la solicitud de dictamen de la Comisión de Pequeños Estados insulares al Tribunal Internacional del Derecho del Mar', *Revista Electrónica de Estudios Internacionales (2023) 45, at 16.*

18 See M. García García-Revillo, and E. Jiménez Pineda, 'Los aspectos jurisdiccionales de la opinión consultiva sometida al Tribunal Internacional del Derecho del Mar por la Comisión Subregional de Pesca',

As such, the Tribunal itself, in plenary session, is not explicitly mentioned as having authority to address such matters or others through an advisory procedure. However, it should be noted that the Tribunal in plenary took a decisive turn on this issue through what has been described as a bold play: the introduction, *motu proprio*, of Article 138 (the final article) into its Rules. This provision expressly establishes a general advisory jurisdiction for the Tribunal in plenary, albeit subject to certain conditions or prerequisites.[19] Significantly, the legal grounds on which the Tribunal based this addition or, at the very least, this extensive modification of its advisory jurisdiction, are not explicitly stated.

The question of the jurisdiction of the ITLOS plenary was one of the fundamental points of discussion in the case concerning the *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, with arguments presented both in favour and against.[20] As is well known, the Tribunal resolved the dispute concerning its jurisdiction by deeming itself competent to render its advisory opinion on the questions submitted.

This decision was essentially based on the interpretation of Article 21 of its Statute, which considers the reference to "all matters" as authorizing it to address any request for an advisory opinion.[21] Regarding Article 138 of its Rules, the Tribunal stated that this provision does not establish advisory jurisdiction but merely sets forth the preliminary requirements that must be satisfied, namely: the existence of an international treaty related to the purposes of UNCLOS and the presentation of a question of a legal nature.[22]

In any case, it can be noted that, even in that earlier request, the potential risk was highlighted that certain States, through bilateral or multilateral agreements, might establish an international organization similar to the Subregional Fisheries Commission or this *new* Commission of Small Island States with the aim of submitting a request for an advisory opinion and thereby gaining a certain advantage over third

in J. M. Sobrino Heredia (ed), *La toma de decisiones en el ámbito marítimo: su repercusión en la cooperación internacional y en la situación de las gentes del mar (Bomarzo, Albacete, 2016) 155-166, at 157.*

19 See M. García García-Revillo, *The contentious and advisory jurisdiction of the International Tribunal for the Law of the Sea* (Brill Nijhoff, Leiden Boston, 2016) 297.

20 In a nutshell, the principal argument advanced in favour of the advisory jurisdiction was based on the phrase "all matters" employed in the final clause of Article 21 of the Tribunal's Statute. This argument emphasized that, when contrasting the terms "disputes" and "claims," the word "matters" carries a noticeably broader meaning. On the contrary, the arguments briefly presented against the advisory jurisdiction of the International Tribunal for the Law of the Sea (ITLOS) in its plenary composition were as follows: (1) the absence of a provision expressly conferring advisory jurisdiction upon the Tribunal (see China's declaration); (2) the lack of precedent in the practice of States concerning other international tribunals, whose advisory jurisdiction has always been explicitly and expressly conferred (see Spain's declaration); (3) the parallelism between Article 21 of the ITLOS Statute and Article 36(1) of the Statute of the International Court of Justice (ICJ), bearing in mind that the advisory jurisdiction of the principal judicial organ of the United Nations is grounded in Article 96 of the United Nations Charter and Article 65(1) of the ICJ Statute; and, finally, (4) the real possibility that affirming the advisory jurisdiction of the Tribunal in plenary session would enable third States, including those not party to UNCLOS, to bring matters before the Tribunal (see Australia's declaration).

21 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 21, para. 56.

22 *Ibid*, p. 22, para. 60.

States.[23] In other words, the creation of an *ad hoc* international organization with the sole and genuine purpose of enabling its member States to seek an advisory opinion from this international tribunal may be deemed problematic.

Concerning the issue of jurisdiction, the Tribunal unanimously determined that it has jurisdiction to issue the advisory opinion requested by the Commission and further decided to respond to said request.[24] To this end, the International Tribunal for the Law of the Sea invoked both Article 21 of its Statute and the Agreement establishing the requesting Commission, as well as, most notably, its prior jurisprudence in the advisory opinion issued in 2015 at the request of the Subregional Fisheries Commission, previously mentioned.

In this regard, the Tribunal noted that the majority of participants in this proceeding expressed the view that it has jurisdiction to issue the requested advisory opinion.[25] Likewise, recalling its prior jurisprudence, the Tribunal affirmed the three requirements necessary for its advisory jurisdiction to be established, namely: (a) the existence of an international agreement related to the objectives of the Convention that specifically provides for the possibility of requesting an advisory opinion from the Tribunal; (b) that the request be submitted to the Tribunal by an entity authorized by or in accordance with the agreement; and (c) that the request concerns a legal question.[26]

In this case, the Tribunal considered that the questions submitted by the Commission bear a sufficient connection to the object and purpose of the treaty establishing the Commission, thereby affirming its jurisdiction to address the requested opinion.[27]

Furthermore, the Tribunal declared that it is 'aware of the importance of the questions in the Request for the members of the Commission and that by answering the questions, the Tribunal would be assisting the Commission in the performance of its activities and contributing to the fulfilment of its mandate, including the implementation of the Convention.'[28]

Accordingly, the Tribunal highlighted that it is 'is mindful of the fact that climate change is recognized internationally as a common concern of humankind' and it is 'also conscious of the deleterious effects climate change has on the marine environment and the devastating consequences it has and will continue to have on small island States, considered to be among the most vulnerable to such impacts.'[29] As such, the Tribunal concluded that it 'deems it appropriate to render the advisory opinion requested by the Commission', upholding its jurisdiction in this case.[30]

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23 See in this sense the *Declaration of Judge Cot*, particularly p. 74, para. 9.

24 *Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 21 May 2024, ITLOS Reports 2024,* para. 441.

25 *Ibid, para. 91.*

26 *Ibid, para. 95.*

27 *Ibid, paras. 108-109.*

28 *Ibid, para. 118.*

29 *Ibid, para. 122.*

30 *Ibid, para. 121.*

(D) THE SPECIFIC OBLIGATIONS OF UNCLOS STATES PARTIES ON CLIMATE CHANGE ACCORDING TO ITLOS

Along its advisory opinion, the International Tribunal for the Law of the Sea devoted greater attention to the substantive issues than to the resolution of jurisdictional questions, which have been recently commented upon. First and foremost, the ITLOS addressed the interpretation of the Convention and the link between this treaty and other norms of International Law, declaring that the rules contained in Part XII (concerning the protection and preservation of the marine environment) and Article 237 demonstrate the openness of Part XII to legal regimes established by other treaties.[31]

Accordingly, the Tribunal held that, 'subject to article 293 of the Convention, the provisions of the Convention and external rules should, to the extent possible, be interpreted consistently.'[32] In this sense, the Tribunal affirmed that 'there is an extensive treaty regime addressing climate change that includes the UNFCCC, the Kyoto Protocol, the Paris Agreement, Annex VI to MARPOL, Annex 16 to the Chicago Convention, and the Montreal Protocol, including the Kigali Amendment' and that, 'in the present case, relevant external rules may be found, in particular, in those agreements., with respect to climate change, include the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Montreal Protocol.'[33]

Moreover, when addressing the substantive issues raised by the Commission, the Tribunal, with regard to the first issue presented, declared that anthropogenic emissions of greenhouse gases into the atmosphere constitute marine pollution within the meaning of the Convention. Furthermore, it held that the States Parties have specific obligations, pursuant to Article 194, paragraph 1, of the Convention, to take all necessary measures to prevent, reduce, and control marine pollution resulting from such emissions.[34]

In a very interesting approach, the Hamburg Tribunal affirmed that such measures must be determined objectively, taking into account, among other aspects, the best available science and the relevant international standards and rules contained in treaties on climate change, such as the United Nations Framework Convention on Climate Change and the Paris Agreement, particularly the goal of limiting the temperature increase to 1.5°C above pre-industrial levels.[35]

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31 *Ibid, para. 134.*

32 *Ibid, para. 136.*

33 *Ibid, paras. 137.*

34 *Ibid, para. 441, a, a).*

35 *Ibid*, para. 441, a, b). In particular, the Tribunal declared: 'Under article 194, paragraph 1, of the Convention, States Parties to the Convention have the specific obligations to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to endeavour to harmonize their policies in this connection. Such measures should be determined objectively, taking into account, inter alia, the best available science and relevant international rules and standards contained in climate change treaties such as the UNFCCC and the Paris Agreement, in particular the global temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal. The scope and content of necessary measures may vary in accordance with the means available to States Parties and their capabilities. The necessary measures include, in particular, those to reduce GHG emissions.'

In addition, the Tribunal expressed its view that the scope and ambition of the necessary measures may vary in accordance with the resources available to the States Parties and their capacities, and include, in particular, the reduction of greenhouse gas emissions. Furthermore, the obligation 'under article 194, paragraph 1, of the Convention to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions is one of due diligence.'[36] Such 'standard of due diligence is stringent, given the high risks of serious and irreversible harm to the marine environment from such emissions,' although 'the implementation of the obligation of due diligence may vary according to States' capabilities and available resources.'[37]

In this regard, the ITLOS stated that, pursuant to Article 194, paragraph 2, of the Convention, States Parties have a specific obligation to take all necessary measures to ensure that anthropogenic greenhouse gas emissions under their jurisdiction or control do not cause harm to other States and their environment, and that pollution resulting from such emissions under their jurisdiction or control does not extend beyond areas where they exercise sovereign rights.[38] Even though the Tribunal also concluded that this is a due diligence obligation, it considered that the standard of due diligence could be even more stringent than that established in Article 194, paragraph 1.[39]

In a nutshell, among the specific obligations declared by the Tribunal in response to the first question submitted by the Commission namely, what are the specific obligations of State Parties to UNCLOS to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change which are caused by anthropogenic greenhouse gas emissions into the atmosphere , the following can be highlighted:

- Pursuant to Articles 207 and 212 of UNCLOS, the specific obligation to adopt laws and regulations to prevent, reduce, and control marine pollution caused by greenhouse gas emissions from land-based sources and atmospheric discharges.[40]
- In accordance with Article 217, the specific obligation to ensure that ships flying their flag or registered under their jurisdiction comply with the applicable international rules and standards established by the competent international organization or through a general diplomatic conference, as well as with their own laws and regulations for the prevention, reduction, and control of marine pollution from greenhouse gas emissions originating from ships.[41]
- Pursuant to Articles 197, 200, and 201, interpreted jointly with Articles 194 and 192, the specific obligation to cooperate, directly or indirectly through competent international organizations, in a continuous, meaningful, and good-faith manner to prevent, reduce, and control marine pollution caused by anthropogenic greenhouse gas emissions.[42]

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36 *Ibid, para. 441, a, c).*
37 *Ibid.*
38 *Ibid, para. 441, a, d).*
39 *Ibid.*
40 *Ibid, para. 441, a, f).*
41 *Ibid, para. 441, a, i).*
42 *Ibid, para. 441, a, j).*

- Under Article 202, the specific obligation to assist developing States, particularly vulnerable developing States, in their efforts to address marine pollution resulting from greenhouse gas emissions.[43]

On the other hand, in response to the second question, the International Tribunal for the Law of the Sea stated that the obligation under Article 192 of the Convention includes the duty to protect and preserve the marine environment from the impacts of climate change and ocean acidification, being a due diligence obligation whose standard is stringent, 'given the high risks of serious and irreversible harm to the marine environment from climate change impacts and ocean acidification'.[44] Pursuant to Article 194, paragraph five, UNCLOS States Parties have the specific obligation to 'to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life from climate change impacts and ocean acidification'.[45]

According to ITLOS, pursuant to Articles 61 and 119 of the Convention, States Parties have a specific obligation to adopt the necessary measures to conserve living marine resources threatened by the impacts of climate change and ocean acidification, taking into account, among other factors, the best available science as well as relevant environmental and economic considerations.[46] Similarly, the obligation to seek to reach an agreement under Article 63(1) and the obligation to cooperate under Article 64(1) of the Convention require States Parties, among other things, to consult with each other in good faith with the aim of adopting the effective measures necessary to coordinate and ensure the conservation and development of shared stocks.[47]

Finally, the International Tribunal for the Law of the Sea declared that pursuant to Article 196 of the Convention-States Parties have a specific obligation to 'take appropriate measures to prevent, reduce and control pollution from the introduction of non-indigenous species due to the effects of climate change and ocean acidification which may cause significant and harmful changes to the marine environment,' which requires the application of the precautionary approach.[48]

(E) CONCLUSION

This contribution has tried to highlight both from a jurisdictional perspective and from a substantive viewpoint the most noteworthy aspects of the advisory opinion rendered by the International Tribunal for the Law of the Sea on May 21, 2024, following

43 *Ibid, para.* 441, a, k).
44 *Ibid*, para. 441, b, b) and c).
45 *Ibid, para. 441, b, d).*
46 *Ibid, para. 441, b, e).*
47 *Ibid, para. 441, b, f).* In this paragraph, the Tribunal further declared: 'The necessary measures on which consultations are required must take into account the impacts of climate change and ocean acidification on living marine resources. Under article 118 of the Convention, States Parties have the specific obligation to cooperate in taking measures necessary for the conservation of living marine resources in the high seas that are threatened by climate change impacts and ocean acidification.'
48 *Ibid*, para. 441, b, g).

the request submitted by the Commission of Small Island States on Climate Change and International Law.

Climate change is, in the words of the Paris Agreement's Preamble, a common concern of humankind. From a legal perspective, climate change has become a central issue in international and domestic law, prompting the development of treaties, regulations, and litigation aimed at mitigating its effects, adapting to its impacts, and ensuring accountability for environmental harm.

Although the advisory nature of the Tribunal's decision should not be overlooked considering that it is an advisory opinion, and as such, by definition, it is not legally binding. Nonetheless, it is a decision grounded in law, rendered by the full bench of an international judicial body specializing in the Law of the Sea. In this regard, this advisory opinion should not be undervalued, specially taking into consideration that the decision has been reached unanimously by the 21 members of the Tribunal.[49]

In my view, this advisory opinion undoubtedly means a significant contribution in clarifying the meaning and determining the scope of the specific obligations of States Parties in the matter of climate change under the United Nations Convention on the Law of the Sea (UNCLOS). These obligations include, on the one hand, the prevention, reduction, and control of marine environmental pollution in connection with the harmful effects that result from or are likely to result from climate change and, on the other hand, the protection and preservation of the marine environment from the impacts of climate change.

With respect to the jurisdictional issue, the Tribunal followed the approach it first started in 2015 when addressing the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission. In this *climate change case*, the Tribunal considered that it has jurisdiction in its plenary formation under Articles 21 of its Statute and 138 of its Rules, given the fulfilment of the conditions that, in the Tribunal's interpretation, must be satisfied and which, in its judgment, are present in this case, namely: 1) the existence of an international agreement related to the objectives of the Convention that expressly provides for the possibility of requesting an advisory opinion from the Tribunal; 2) that the request be submitted to the Tribunal by an entity authorized by or pursuant to the agreement; and 3) that the request pertain to a legal question.

In my opinion, even more interesting is the substantive approach taken by the Hamburg Tribunal to the issues raised by the Commission of Small Island States on Climate Change and International Law concerning the specific obligations of States Parties under the Convention in the context of climate change.

On top of declaring that anthropogenic greenhouse gas emissions into the atmosphere constitute marine pollution within the meaning of the Convention, the Tribunal determined a relevant set of specific obligations. Notably, it highlighted that States Parties have specific due diligence obligations to take all necessary measures to prevent, reduce, and control marine pollution resulting from such emissions and to

[49] In this sense, it can be noted that the advisory opinion received individual declarations from the Judges Jesus, Pawlak, Kulyk, Kittichaisaree, and Infante Caffi.

ensure that anthropogenic greenhouse gas emissions under their jurisdiction or control do not cause harm to other States or their environments.

Moreover, States Parties to the Convention are under a specific obligation to protect and preserve the marine environment from the impacts of climate change and ocean acidification, as well as to safeguard rare or fragile ecosystems, habitats of depleted, threatened, or endangered species, and other forms of marine life from the impacts of climate change and ocean acidification. In this regard, the Tribunal also determined that States Parties have a specific obligation to adopt appropriate measures to prevent, reduce, and control pollution arising from the introduction of non-native species due to the adverse effects of climate change and ocean acidification.

In my view, this advisory opinion constitutes a historic decision by the International Tribunal for the Law of the Sea, addressing the highly technical issues raised by the requesting Commission. It continues with the case-law line established in other highly significant decisions by this Tribunal, such as among others its judgment in the dispute concerning the delimitation of maritime boundaries between Mauritius and the Maldives in the Indian Ocean.[50] In that case, the Tribunal applied in a contentious case the ruling given by the International Court of Justice in its advisory opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965.[51]

In addition, this opinion shows the forward-looking approach the Tribunal has consistently pursued since its beginning, an approach that sometimes contrasts with that of other international judicial bodies. It is shown, for instance, in the legal nature of the entity that requested this advisory opinion — the very recent created Commission of Small Island States on Climate Change and International Law — or in the ambition and in the extent of the specific obligations affirmed along this advisory opinion.

In conclusion, I consider this advisory opinion, even in its non-binding and consultative capacity, to be another major contribution by the Hamburg Tribunal to the appropriate interpretation of the United Nations Convention on the Law of the Sea and, in brief, to the development of this crucial sector of International Law represented by the Law of the Sea.

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[50] *Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives), Judgment, ITLOS Reports 2022-2023*, to be published.

[51] *Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965, avis consultatif, C.I.J. Recueil 2019*, p. 95

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Procedural challenges: ius standi and causality

Sergio Salinas Alcegas*

Abstract: Procedural aspects present a particular challenge in the case of international climate change litigation based on human rights. The complex nature of climate change and its global character pose the risk that a broad approach to victim status will call into question the functioning of these bodies and clearly complicate the establishment of causality. This should not mean abandoning international human rights-based climate litigation as a means of reacting to climate change, but it does require a proper assessment of what this instrument can contribute to the ultimate goal of sufficiently reducing GHG emissions.

Keywords: International Climate Change Litigation, Procedural Challenges, ius standi, causality

(A) INTRODUCTION

The relevance of procedural aspects in the functioning of any dispute settlement forum is magnified in the case of international human rights protection bodies. One of the reasons for the greater importance of these procedural issues is the access that the individual has to these bodies, which, together with the large number of potential *applicants*, poses a risk of work overload that threatens their proper functioning. The importance of these procedural aspects is even greater in the case of climate disputes brought before these international human rights protection bodies. The features of climate change, and in particular its global nature, open the door to a potential universalisation of access to these bodies, thus increasing the aforementioned risk of work overload. However, when addressing the approach of these bodies to the procedural aspects of climate litigation, a summa divisio can be established according to their nature, distinguishing between the committees on the one hand and the courts on the other.

In the following, the role of two of these procedural aspects will be explored in the context of international human rights-based climate litigation: ius standi and causality. In view of their importance from a procedural perspective, both are good examples of the particularities that these procedural aspects present in climate litigation compared to what arises in other types of cases.

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This study is part of the R&D&I project PID2021-124296NB-I00 funded by MCIN/AEI/10.13039/501100011033 and by ERDF "A way of doing Europe" and the R&D&I project TED2021-130264B-I00, funded by MCIN/AEI/10.13039/ 501100011033/ and by the European Union NextGenerationEU/PRTR. It should also be understood as part of the actions that the AGUDEMA Research Group (Water, Law and Environment, Competitive Reference Group S2117 R, *BOA* 81, 27 March 2018), develops with funding from the Government of Aragon within the IUCA (University Institute of Environmental Sciences).

Moreover, they are procedural aspects that are situated at different stages of the procedure. The ius standi, as admissibility criteria of the claims or communications, is configured as a conditio sine qua non for the corresponding body to be able to rule on the merits. For its part, causality constitutes the essential element for the attribution of liability, by connecting the author of an action or omission with the damage caused as a consequence of the same. Therefore, this aspect comes into play in the proceedings once the claim has been admitted, having fulfilled the admissibility criteria, and is related to the examination of the merits.

(A) THE IUS STANDI IN CLIMATE LITIGATION BASED ON HUMAN RIGHTS

Jus standi entails the recognition of an applicant's right of access to a court, having met the conditions established for this purpose within the regulatory framework governing the functioning of the court. And as mentioned in the introduction, this element is included among the admissibility criteria that the court must analyse before entering into the merits of the case, giving rise to the inadmissibility of the claim or communication in the event that it is not fulfilled. This procedural aspect takes on special relevance in the functioning of international human rights protection bodies, and in particular in the case of the courts where, as noted above, in view of the large number of potential applicants or communicants, the implementation of filtering mechanisms is required in order to enable an adequate examination of the claims or communications that are directly related to the nature of the system[1].

(1) Different approach to the condition of victim from committees and courts

The approach of the international human rights protection bodies to this ius standi requirement is conditioned, as already mentioned, by their nature, being more restrictive in terms of compliance in the case of the courts than in that of committees. The explanation can be found in the different nature of the decisions made by each of these types of bodies, especially the legal binding nature of court judgments for the States parties in the proceedings.

However, this different approach has no obvious basis in the text of the conventions within which the various international human rights protection bodies operate. The description of these admissibility criteria in Article 34 of the ECHR is not very different from that included in Article 5 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure or in Article 1 of the Optional Protocol

[1] This logic of establishing some kind of filter to limit a potentially excessive volume of individual applications led the European Court of Human Rights (ECtHR) to take a small step backwards in recognising the individual's ability to have direct access to it. Indeed, a decade after reaching an equal footing with the States Parties, as a consequence of Protocol No 11 in 1994, an attempt was made to restrict the number of individual applications by amending Art.35(3)(b) of the European Convention on Human Rights (ECHR) by Protocol No 14 in 2004, which introduced a new admissibility criterion referring to the case where: 'the applicant has not suffered a significant disadvantage'.

to the International Covenant on Civil and Political Rights. All three cases refer to individuals, singly or collectively, claiming to be victims of a violation of a right protected in the relevant convention by a State party to the same.

This different approach is based rather on the case law of these bodies through which these admissibility criteria are interpreted and the requirements of ius standi are specified. In this study, we will focus our attention on this interpretation in relation to the possible attribution of the status of victim to an applicant or communicant; although it should be borne in mind that a complete analysis of this ius standi would require attention to other aspects, such as those relating to the interpretation of the scope of the jurisdiction of the States, in order to determine whether or not the applicant or communicant is subject to it.

The ECtHR can be mentioned as an example of the special care that is taken in the case of the courts with regard to the interpretation of the ius standi provided for in the respective human rights conventions. In this case, this interpretation refers to the provisions of Article 34 of the ECHR cited above, leading to a restrictive approach to the requirement of victim status. The ECtHR has established as a principle the need for a flexible approach to the applicant's status as a victim, taking into consideration the circumstances of the case and ruling out a rigid, mechanical and inflexible application of the provisions of the ECHR[2]. But this has not prevented it from establishing as an essential condition for assigning that status of victim to demonstrate that a sufficiently direct link exists between the applicant and the harm associated with the alleged breach of the ECHR, in such a way that the situation differentiates the applicant from other citizens, thus rejecting the possibility of actio popularis[3].

This relative ambivalence of the Court's approach to the status of victim is perceived in relation to its admission, in the context of the flexible stance referred to above, as a consequence of possible future damage[4] , even in the distant future, albeit exceptionally[5] . But once again, however, the restrictive approach appears by demanding the surpassing of a threshold in order to be able to take into account this future risk with a view to considering an applicant as a potential victim. Thus, the Strasbourg Judges require

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2 *Karner v. Austria*, judgment of 24 October 2003, Application no. 40016/98, 25 (ECLI:EC:ECHR:2003:0724JUD004001698). and *Micallef v. Malta* (GC), judgment of 15 October 2009, Application no. 17056/06, 45 (ECLI:EC:ECHR:2009:1015JUD001705606).

3 Vid. V. P. Tzevelekos, 'Standing Before the European Court of Human Rights' (2019), *Max Planck Encyclopedia of International Procedural Law* (2019), at 8. Available at: https://ssrn.com/abstract=3968200. As to the refusal to admit actio popularis the ECtHR has made clear that its function is not to review the relevant law and practice in the abstract, but to determine whether the manner in which they were applied or affected the applicant gave rise to a violation of the Convention. Vid. e.g. *Roman Zakharov v. Russia* (GC), judgment of 4 December 2015, Application no. 47143/06, 164 (ECLI:CE:ECHR:2015:1204JUD004714306).

4 Vid. e.g. *Öneryildiz v. Turkey* (GC), judgment of 30 November 2004, Application no. 48939/99, 98-101 (ECLI:EC:ECHR:2004:1130JUD004893999) or *Budayeva and others v. Russia*, judgment of 29 September 2008, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 147-160 (ECLI:EC:ECHR:2008:0320JUD001533902).

5 The Strasbourg Judge notes as a principle that the exercise of the right of individual petition cannot be used to prevent a potential violation of the ECHR, since, in theory, the ECtHR can only examine a violation ex post facto, once it has occurred. Only in very exceptional circumstances can an applicant claim to be a victim because of the risk of a future violation of the ECHR. *Berger-Krall and others v. Slovenia*, judgment of 13 October 2014, Application no. 14717/04/99, 258 (ECLI:EC:ECHR:2014:0612JUD001471704).

applicants to: 'produce reasonable and convincing evidence of the likelihood that a violation affecting them personally will occur', considering insufficient a mere suspicion or conjecture of future harm[6].

These principles established in general by the ECtHR in relation to ius standi are transposed to climate litigation. And it is precisely the differences between the position of Strasbourg Judges in these cases and that of other international bodies for the protection of human rights of a non-jurisdictional nature, i.e. committees, that highlight the above-mentioned divisions. Thus, the approach to ius standi has a more restrictive scope in the case of the courts than in the case of the committees, in an attempt to minimise the impact that a broader position in this respect could have on their workload and, by extension, on their future functioning. In the following, we will analyse this different approach of international human rights protection committees and courts to the status of victim in the case of climate litigation.

(2) Different approach to the condition of victim in international climate change litigation based on human rights

As a model or example of the position adopted in this respect by the committees, one can cite the Views of the Human Rights Committee, in relation to the communication submitted by *Daniel Billy*. This body, after confirming its jurisprudence concerning the need to demonstrate that the Member State has already impaired the exercise of the rights of the authors of the communication, or that such impairment is imminent, concludes that these individuals, as members of a population extremely vulnerable to climate change, are exposed to a risk that their rights will be impaired, which the Committee considers to be more than a theoretical possibility, and therefore declares the communication admissible[7].

This approach contrasts with that of the Court of Justice of the European Union (CJEU) and especially with that of the ECtHR. In the first case, the General Court, in its Order of 8 May 2019 in the *Armando Carvalho* case, confirmed by Judgment of the CJEU of 25 March 2021[8], concludes that the applicants have not been individually and directly affected by the legislative provisions to which the action for annulment is directed, which establish the effort to reduce GHG emissions to be made by the Member States of the European Union. In relation to the issue of interest here, the Court's rejection of the applicants' argument that: 'each applicant is affected by climate change ... idiosyncratically and is therefore distinguished from all other persons' is particularly noteworthy, qualifying it as fallacious from a logical perspective by implying that: 'every person around the world is individually concerned by this legislative package'. This leads the Luxembourg Judge to consider that the above argument is a blatant contradiction of its own case-law criterion which requires the existence of genuine distinguishing

6 Vid. e.g. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, judgment of 17 July 2014, Application no. 47848/08, 101 (ECLI:CE:ECHR:2014:0717JUD004784808).

7 Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019**, **, ***, CCPR/C/135/D/3624/2019, 18 September 2023, 7.9 and 7.10.

8 Judgment of 25 March 2021, *Armando Carvalho and others v Parliament and Council* (C-565/19 P) (ECLI:EU:C:2021:252).

features[9]. This approach of the European Union Judge to the question of the individual's direct scope of action before him leads to pessimistic predictions regarding the future of climate litigation in this forum[10].

In the case of the ECtHR, the approach to ius standi in climate litigation contrasts even more with that of the Human Rights Committee mentioned above. This contrast is evident in its judgment in the *Verein KlimaSeniorinnen* case, in which the Strasbourg Judges warned of the risk of taking too broad an approach to the status of victim, warning that this would mean opening the door to everyone, depriving the status of victim through its role as a limiting criterion, i.e. its role as a filter, as mentioned at the beginning[11].

The perception of this risk leads the ECtHR to identify two specific criteria for the recognition of victim status in these climate disputes, which sum up this restrictive approach. These criteria are as follows:

> '(a) the applicant must be subject to high intensity exposure to the adverse effects of climate change, that is, the level and severity of adverse consequences of governmental action or inaction affecting the applicant must be significant; and
>
> (b) there must be a pressing need to ensure the applicant's individual protection, owing to the absence, or inadequacy, of any reasonable measures to reduce harm'[12].

To this is added the determination of an especially high threshold for fulfilling these criteria, in view of the exclusion of actio popularis. This threshold means that, in contrast to what the Human Rights Committee stated earlier, for the Strasbourg Judge it is not enough to belong to a category of persons particularly sensitive to the effects of climate change in order to consider the applicants to have the status of victims, but rather the situation must be analysed in each case, and in this case the applicants have not demonstrated that they have fulfilled the specific criteria indicated, and therefore they are not recognised as victims[13].

This restrictive approach of the ECtHR can also be seen in the case of the applicant association in the same case, which is also denied the status of victim, although it is recognised as having the capacity to act before it[14]. But, again, this capacity to act is

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9 Order of 8 May 2019, *Armando Carvalho and others v Parliament and Council* (T-330/18), 28 (ECLI:EU:T:2019:324).

10 Beatriz Pérez de las Heras considers this path to be practically non-existent, although she adds that this conclusion is somewhat compensated for by the indirect positive effect that the CJEU can play in this regard, serving as support, via preliminary rulings, for the role of national courts in forcing governments to modify their climate policies. B., Pérez de las Heras, 'Climate litigation in the European Union: an asymmetrical instrument of climate governance', 64 *General European Law Review* (2024), 92.

11 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, judgment of 9 April 2024, Application no. 53600/20, 460 (ECLI:EC:ECHR:2024:0409JUD005360020).

12 *Ibid*., 487-488.

13 In particular, the ECtHR points out that there is nothing to show that the applicants have suffered critical health problems, the aggravation of which due to the heatwaves could not be mitigated by adaptation measures available in Switzerland or reasonable individual adaptation measures. Moreover, the ECtHR recalls that it does not recognise the status of victim in respect of a future risk other than by way of exception and the applicants have not proved the existence of such exceptional circumstances, and therefore declares the individual application inadmissible. *Ibid*., 531 et seq.

14 Recognition that is underpinned by the status of such associations, according to Strasbourg's own case law, as an accessible, and sometimes the only, effective means of defence in relation to particularly

restricted by the determination of specific conditions that try to avoid the presentation of actio popularis[15].

This restrictive approach of the ECtHR to the attribution of victim status has been the subject of criticism with respect to its jurisprudence on the right to a healthy environment, arguing that it reduces the possibilities for the ECHR system to be configured as an instrument for the protection of a public interest, such as the environment[16]. This would be transferable to climate litigation and the status of the ECtHR as a tool to make climate justice effective in the face of policy inadequacies.

In this regard, it should be noted that this position clearly results in a limitation of access to the ECtHR in defence of the right to a suitable climate, but there are a number of observations to be made with respect to the above allegations. Firstly, that in determining their position on the recognition of this right the Strasbourg Judges have had to weigh up various interests in relation to which, as has already been said, they must strike a balance. One such interest is that of ensuring the proper functioning of the system of protection itself, in particular with regard to the problem of the workload that continues to weigh it down at present, in relation to which climate cases pose the risk already noted of a virtual universalisation of access to the ECHR system.

Furthermore, this criticism of the restrictive approach of the ECtHR, with the consequent limitation of its configuration as an instrument for the defence of a public interest such as environmental protection, can be countered by another consideration that has to do with the very nature of the ECHR system. Its raison d'être is to safeguard individual and specific rights and, in accordance with the principle of subsidiarity, to support the proper functioning of national systems. Indeed, it is this objective of safeguarding individual rights that leads the ECtHR not to accept the submission of actio popularis, which in principle rules out the possibility of considering it as an instrument designed for the protection of any public interest, however legitimate it may be.

(B) CAUSALITY IN CLIMATE CHANGE LITIGATION

Causality is a fundamental element for the attribution of liability and generally consists, as noted above, in the determination of the cause-effect relationship between a given conduct and a damage or harm, which allows the attribution of liability for the commission of that damage or harm to the perpetrator of that conduct. However, causality has distinctive elements in the case of climate change, the complexity of which

complex administrative acts, which is seen as particularly valid in the case of climate change. *Ibid*., 489.

15 These conditions include that the association is legally constituted or has the capacity to act in the State in question; that it demonstrates that it pursues a specific interest, in accordance with its statutory objectives, in defending the fundamental rights of its members or other affected individuals in that country; that it is truly representative; and that it is entitled to act on behalf of its members or other individuals. In addition, the persons on whose behalf such an association acts before the ECtHR must be in a position to claim that they are subject to specific threats or adverse effects of climate change on their lives, health, well-being and quality of life. *Ibid*., 524.

16 Vid. R. Pavoni, 'Public Interest Environmental Litigation and the European Court of Human Rights: No Love at First Sight', in F. Lenzerini and A. F.Vrdoljak (eds.), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart Publishing, Oxford, 2014), at 331-359.

makes it more difficult to determine the existence of such a causal link between a specific conduct, such as the insufficient effort of a State in relation to the reduction of GHG emissions, and the harm suffered by a specific individual.

(1) Complexity of causality in International Climate Change Litigation

This complexity is embodied in the identification of several stages of this causal relationship, which can be distinguished as follows:

> that which links the increase in anthropogenic GHG emissions to the existence of climate change.
>
> that which establishes the relationship between climate change and the occurrence of extreme events (floods, droughts, rising temperatures, ...), and
>
> that which relates these extreme events to the prejudice suffered by individuals to their rights.

In principle, the determination of causality in each of these stages does not pose any difficulties from a scientific point of view, and one can refer to the successive IPCC reports, which increasingly clearly corroborate these cause-effect relationships. Moreover, the integration of each of these causal links would ultimately lead to consideration of the link between anthropogenic GHG emissions and the harm to the rights of individuals.

However, the problem arises when it comes to determining the individual responsibility of each State in relation to the harm caused to the rights of each specific person, which is known as specific causality. The reasons for the difficulty in establishing this causal link result from the fact that the harm caused to the rights of a specific person does not have a single responsible party, but rather results from a confluence of multiple conditions contributed by multiple actors. This leads to the qualification of climate change as a: 'collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible'[17].

Thus, although there has been some progress in the science of attribution, it is still not possible to determine specific causation, i.e. to demonstrate precisely that the defendant's specific emissions caused the specific injury alleged[18]. This distinguishes

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[17] T. Burman, 'A New Causal Pathway for recovery in Climate Change Litigation?', 52 *Environmental Law Reporter* (2022), at 1044. Available at: https://www.elr.info/sites/default/files/files-general/52.10038.pdf. Constituting what Richard J. Lazarus calls a *super-wicked problem* from a policy and legal point of view. What he describes as a consequence of several elements such as a very large number of sources that originate the problem or the wide variety of actors involved in it, from States themselves to small and large businesses, farmers, and individuals who consume goods, heat their homes, or drive a car, etc. Added to this are additional complicating factors such as the fact that the emission of GHG is not forbidden in and of itself, being its cumulative effect in space and in time that is problematic or the rapid diffusion of GHG emissions in the atmosphere, which leads to the fact that their effects are not related to the location of their source. R. J. Lazarus, 'Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future', 94 Cornell Law Review, No. 5 (20099, at 107. Available at: https://ssrn.com/abstract=1302623.

[18] T. Burman, 'A New Causal Pathway for recovery in Climate Change Litigation?', cit. at 1052. Along the same lines, Andre Nollkaemper acknowledges that the IPCC's findings on general causation may not solve specific causation problems, and adding that the significant progress made for climate science in the

climate litigation from environmental litigation, where the cause-effect relationship between a particular conduct of a State and the harm caused to the rights of specific persons appears much more direct and individualised. In conclusion, the significant advances made by climate science in recent years do not allow, at least at the current state of those progresses, to reach specific conclusions on whether a particular State caused specific harm or led to the violation of a right of a particular person.

The demonstration of this specific causality is presented as necessary for the purpose of determining compensation for damages, making it possible to determine the specific degree of contribution of that State to the harm caused to that individual and, therefore, its share of responsibility and, if applicable, the assumption of that compensation. However, this is not usually the aim of human rights-based climate litigation, including international human rights litigation; rather, it is litigation that is described as preventive, trying to push for specific action, to press legislators and policymakers to be more ambitious in their approaches to climate change and fill the gaps left by legislative and regulatory inaction[19].

In order to avoid this obligation to intensify their efforts to reduce GHG emissions, States resort to the *drop in the ocean* argument, putting forward that their contribution to the total of these emissions and therefore to the aggravation of climate change is small, which, taken to the extreme, would exonerate them from responsibility for the harm suffered by a private individual, which would continue to occur even if that State increased its mitigation efforts.

However, such an argument, which is ultimately not without reason as far as the final conclusion of continued harm to the rights of the individual is concerned, clearly risks exonerating all States, or at least the vast majority except the major GHG emitters, from having to undertake an intensification of their mitigation effort[20].

(2) Normative approach to causality in international climate change litigation

In any case, this argument is rejected by the international human rights protection bodies, which change their approach to causality so that they choose to focus on State behavior not so much in relation to GHG emissions as to the adoption of the necessary preventive measures to avoid the impacts of climate change affecting the rights of individuals, regardless of the State's contribution to those impacts.

This approach is the one followed by the ECtHR in its judgment in the *KlimaSeniorinnen* case, in which it ruled out the possibility of a State avoiding its responsibility by hiding behind those of others, concluding that, in cases of joint responsibility of several States,

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past few years, does not (yet) allow for specific findings that a particular State caused a particular harm. A. Nollkaemper, *Causation Puzzles In International Climate Litigation*, 17 Amsterdam Law School Research Paper (2024) at 2. Available at: file:///Users/user/Downloads/ssrn-4819496%20(2).pdf.

19 S. Maljean-Dubois, 'Climate Change Litigation', *Max Planck Encyclopedia of Procedural International Law* (2018), at 5. Available: https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3461.013.3461/law-mpeipro-e3461?rskey=3i5w6U&result=1&prd=OPIL&print. What is identified as *strategic litigation*. B. Pérez de las Heras, 'Climate litigation in the European Union: an asymmetrical instrument of climate governance', cit.

20 M. Feria-Tinta, 'Climate Change Litigation in the European Court of Human Rights: Causation, Imminence and other Key Underlying Notions', (1) 3 *Europe of Rights & Liberties/Europe des Droits & Libertés* (2021), at 60.

each of them must be held accountable according to its share of responsibility[21] . Thus, the ECtHR approaches Switzerland's responsibility in this case from the perspective of that State's compliance with its positive obligations under the ECHR in relation to climate change, considering it sufficient that the domestic authorities are found to have failed to take reasonable measures that would have had a real opportunity to change the course of events or to mitigate the damage caused[22].

And the same approach is followed by other international bodies, such as the Committee on the Rights of the Child, in the *Sacchi* case[23], or the International Tribunal for the Law of the Sea (ITLOS), in its Advisory Opinion of 2024, in which it opts for a similar solution by stating that: 'the causation between emissions from activities under the jurisdiction or control of one State and damage caused to other States and their environment, should be distinguished from the applicability of an obligation under article 194, paragraph 2, to marine pollution from anthropogenic GHG emissions'[24]..

In other words, the factual causation standard is replaced by a normative approach to causality based on international obligations to prevent climate change, in which the question is not whether that State has caused significant harm but whether it has done enough to prevent it[25]. This new approach facilitates the determination of State responsibility, which is now circumscribed to simply to prove that the State has failed to meet its obligations of conduct by not having taken all the measures that should have been taken and that makes its contribution to the prejudice of the violated rights of a specific person irrelevant[26].

The first criterion for assessing this normative causality, i.e. the sufficiency of the State's action to prevent harm to the applicant's rights, is logically compliance with its legal obligations, including those of an international nature. However, the complexity of the response to climate change and the relative ambiguity of the obligations resulting from legal texts, especially at an international level and in particular those set out in the Paris Agreement, mean that, even in strict compliance with their obligations, a State's GHG emission reduction efforts may be considered insufficient for an effective response to climate change and contribute to the harm that may be caused to the rights of potential applicants[27]. This insufficiency of legal obligations is expressly noted by ITLOS, which recalls that: 'the Paris Agreement does not require the Parties to reduce

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21 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, cit., 441.

22 *Ibid*., 444.

23 *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019*, ***, CRC/C/88/D/104/2019, 8 October 2021, par. 10.4 and 10.5.

24 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, 21 May 2024, 252. Available: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf.

25 A. Nollkaemper, *Causation Puzzles in International Climate Litigation*, cit.

26 S. Maljean-Dubois, 'Climate Change Litigation', cit.

27 This insufficiency of the mitigation effort so far is expressly reflected in the first global stocktake presented in accordance with Art. 14 of the Paris Agreement at COP 28 in 2023, which notes that the significant collective progress made is insufficient to meet the objectives of the Agreement. Decision 1/CMA.5. *Outcome of the first global stocktake*, FCCC/PA/CMA/2023/16/Add.1, 15 March 2024, 4. Available at: file:///Users/user/Downloads/cma2023_16a01_adv_.pdf.

GHG emissions to any specific level according to a mandatory timeline but leaves each Party to determine its own national contributions in this regard', and therefore concludes that it is necessary to consider: 'other factors relevant to the determination of necessary measures to prevent, reduce and control marine pollution'. Adding in this regard that 'Article 194, paragraph 1, of the Convention provides that States shall take necessary measures, using for this purpose "the best practicable means at their disposal" and "in accordance with their capabilities"'. Thus, the scope and content of necessary measures may vary depending on the means available to States and their capabilities, such as their scientific, technical, economic and financial capabilities[28].

And, in the same vein, the applicants in the *Verein KlimaSeniorinnen* case, after considering that Switzerland's contribution to the goal of limiting the temperature increase to 1.5 °C is far from fair[29] , turn to science, relying on the 5th IPCC report to conclude that, to have a 66% chance of staying within the 2°C global average temperature increase target set in the Paris Agreement, States like the respondent would need to reduce their emissions by at least 40% and possibly up to 100% by 2030 compared to 1990[30].

(C) CONCLUSIONS

The complexity of climate change poses specific challenges for the recognition of ius standi and the determination of the causal link in the case of human rights-based climate litigation. However, international rights protection bodies take a proactive approach to overcoming these procedural hurdles, opening the way for the individual to bring their own claims before these bodies.

However, this approach is conditioned by the nature of these protection bodies, being more restrictive in the case of the courts than in that of the committees. This does not prevent the hurdle represented by specific causality from being overcome, even within the framework of the proceedings before these international courts, by replacing the traditional approach based on factual causality with one that focuses on the positive obligations of States, in this case in relation to the impact of climate change on the rights of persons subject to their jurisdiction, and which is identified as a normative approach to this causal relationship.

The realisation of the difficulties encountered in international human rights-based climate litigation should not undermine the importance of climate action at the judicial level as an appropriate way to help overcome the inadequacy of policy. However, it does highlight the limits of this avenue and clarifies its true function, which is to raise awareness and open ways for States to strengthen their commitment to tackling climate change.

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[28] *Request for an Advisory Opinion...*, cit.

[29] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, cit., 304.

[30] *Ibid*., 769 et seq. And they even point to additional arguments, such as the use of objective scientific analyses of the equity of states' mitigation efforts, such as that carried out by the *Climate Action Tracker*, which in this case leads to the assertion that if all States were to follow Switzerland's approach in terms of their efforts to reduce GHG emissions, global warming would reach 3 °C, which leads to the conclusion that Switzerland's reaction to this phenomenon is insufficient.

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The ECtHR's *KlimaSeniorinnen* Judgment: A Cautious Model for Climate Litigation

Corina Heri*

Abstract: The judgment of the European Court of Human Rights in the 2024 case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* represents the first time that an international court found a human rights violation in light of States' greenhouse gas emissions policies. Responses to this judgment spanned a wide spectrum from surprised but welcoming academic reactions, to allegations of judicial overreach and calls to terminate Switzerland's membership in the European Convention on Human Rights from domestic political actors. Various of these discussions consider *KlimaSeniorinnen* to be an example of public interest litigation, understanding this term as synonymous with that of the proscribed *actio popularis*. The present contribution engages with this discussion. To do so, it first describes the style of *KlimaSeniorinnen* as a model judgment sitting somewhere between an individual judgment and an advisory opinion. It then clarifies the content of this model, noting that it is overall cautious or deferential to State decisions and other ongoing processes while also setting important parameters for rights-based litigation. Thirdly, it argues that there is an important distinction to be made between public interest cases, on the one hand, and *actio popularis* cases, on the other.

Keywords: Climate litigation European Court of Human Rights public interest litigation *KlimaSeniorinnen* victim status *actio popularis*

(A) INTRODUCTION

The *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* judgment of the European Court of Human Rights (ECtHR) has been widely discussed since it was issued in April of 2024. The applicants in the case argued that Switzerland had not taken sufficient mitigation action to protect the rights of older women from climate-aggravated heat waves. The resulting judgment represents the first time that an international court found a human rights violation in light of States' greenhouse gas emissions. Responses to this judgment spanned a wide spectrum from surprised but welcoming academic reactions,[1] to allegations of judicial overreach and calls to terminate Switzerland's membership in the European Convention on Human Rights (ECHR) from domestic politicians.[2] Various of these discussions consider *KlimaSeniorinnen* to be an example of public interest litigation, understanding this term as synonymous with that of the *actio popularis*, which is precluded under the ECHR system.

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1 G. Letsas, 'The European Court's Legitimacy After Klimaseniorinnen', *European Convention on Human Rights Law Review* (published online ahead of print 2024) [https://doi.org/10.1163/26663236-bja10111].

2 Swiss People's Party, 'Das Strassburger Urteil ist inakzeptabel die Schweiz muss aus dem Europarat austreten' (9 April 2024).

The present contribution engages with this case in three steps. First, it discusses the style of the *KlimaSeniorinnen* judgment as a model judgment, arguing that it leaves room for interpretation, which in turn invites conflicting assessments of the case's content and demands (Section B). Secondly, it clarifies the content of this model in its broad strokes, noting that the Court's approach is marked by caution or deference to State decisions and other ongoing processes while at the same time setting out the key parameters for rights-based climate litigation, opting for a science-based approach that unequivocally links human rights to the phenomenon of climate change (Section C). Thirdly, this article engages with the nature of the *KlimaSeniorinnen* judgment, and the overall idea that climate litigation represents strategic or public interest litigation, arguing that a clearer distinction is needed between abstract cases and public interest cases, especially as concerns situations stemming from systemic problems (Section D). Section E. concludes.

(B) THE STYLE OF THE *KLIMASENIORINNEN* JUDGMENT: A MODEL FOR FUTURE CASES

In many ways, the *KlimaSeniorinnen* judgment provides a model for future climate litigation, both in Strasbourg and beyond. This is clear from its content which contains extensive comparative law analysis and general considerations about climate science and the link between human rights and climate change, as discussed in the next section and its impact on discussions around climate litigation. In this regard, the Court established important general parameters, such as the fact that climate change threatens the enjoyment of human rights, that climate science is relevant for interpreting the law, and that "drop in the ocean"-type arguments about the contribution of a particular State cannot serve to excuse it from protecting human rights.[3]

Much has already been written about this judgment, and will continue to be written.[4] Likewise, in legal practice, the judgment is already proving influential: it is being applied by domestic courts[5] and referenced by dozens of States in the proceedings

[3] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, 9 April 2024, paras. 436 and 444.

[4] See for example A. Hösli and M. Rehmann, '*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*: The European Court of Human Rights' Answer to Climate Change', 14(3-4), *Climate Law* (2024) 263-284 [https://doi.org/10.1163/18786561-bja10055]; P. Minnerop and A. Haines, '*KlimaSeniorinnen v Switzerland*: the European Court of Human Rights Leads the Way on Climate Action' 387 *BMJ* (2024) 1-2 [https://doi:10.1136/bmj.q2156]; E. Erken, 'Scholarly and Empirical Considerations on Expanding Access for Non-Governmental Organisations Before the European Court of Human Rights', European Convention on Human Rights Law Review (published online ahead of print 2024) [https://doi.org/10.1163/26663236-bja10107]; J. Laffranque, 'KlimaSeniorinnen Climate Justice and Beyond', European Convention on Human Rights Law Review (published online ahead of print 2024), [https://doi.org/10.1163/26663236-bja10113]; K. Dzehtsiarou, '"*KlimaSeniorinnen* Revolution": The New Approach to Standing', European Convention on Human Rights Law Review (published online ahead of print 2024), [https://doi.org/10.1163/26663236-bja10110]; M. Zaballos Zurilla, '¿Un nuevo derecho fundamental a la protección efectiva contra el cambio climático?' 50 *Revista CESCO* (2024), 202 215 [https://doi.org/10.18239/RCDC_2024.50.3493].

[5] High Court of Justice for England and Wales, *R (Friends of the Earth Ltd, Kevin Jordan and Doug Paulley) v. Secretary of State for Environment, Road & Rural Affairs*, [2024] EWHC 2707 (Admin), 25 October 2024.

concerning the International Court of Justice's advisory opinion on climate change.[6] The fact that this ruling would serve as a model judgment was perhaps inevitable given that this was the Court's first engagement with climate change – albeit alongside two other cases[7] heard by the same formation and declared inadmissible on the same day as the *KlimaSeniorinnen* judgment was issued, as well as a handful of cases declared inadmissible beforehand, but without reasoning.[8] The Court seems to have been aware from the beginning that its first climate cases would serve a guiding function and be the subject of cross-regime dialogue. It held special procedural meetings on how to go about processing these cases,[9] and relinquished its first three climate applications directly to the Grand Chamber for clarification. At the same time, and unlike climate-related proceedings pending before other international courts, this is a contentious case based on an individual application against one specific State, and not an advisory proceeding. That entails certain limitations: advisory opinions entail clarification of legal obligations, and not their application to a concrete set of facts. Conversely, advisory opinions are generally non-binding, whereas the *KlimaSeniorinnen* judgment is binding on Switzerland under Article 46(1) ECHR.

The present contribution understands this judgment as sitting – sometimes uncomfortably – between the function of an individual application and an advisory opinion. Broaching a topic as multi-layered as climate change for the first time was certainly not easy for the Court, both in terms of the complexity and political nature of certain questions involved, such as the request to attribute a "fair share" of emissions to Switzerland,[10] and in terms of the potential for backlash from States.

This tension – between deciding an individual contentious case against one specific State, and setting out general standards that could also apply in future cases, all without exceeding the Court's role or legitimacy – means that some parts of the judgment are opaque, leaving room for conflicting interpretations. For example, opinions differ on who the victim was in the case,[11] whether the case recognizes new rights,[12] and what Switzerland is required to do to comply.[13] Most of these arguments are not made in bad faith, and they draw on (elements of) the judgment's text. Some of these issues will be clarified by follow-up applications, with the next two cases on the docket being the *Müllner*

6 ICJ, *Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change*, UNGA Res. 77/276, 29 March 2023. See e.g. the verbatim statements of the proceedings published by the ICJ.

7 ECtHR, *Carême v. France*, no. 7189/21, Decision [GC] of 9 April 2024; ECtHR, *Duarte Agostinho and Others v Portugal and 32 Member States*, no. 39371/20, Decision [GC] of 9 April 2024.

8 ECtHR, *Plan B. Earth and Others v. the United Kingdom*, no. 35057/22, Decision of 1 December 2022; ECtHR, *Humane Being and Others v. the United Kingdom*, no. 36959/22, Decision of 1 December 2022; ECtHR, *Instituto Metabody v. Spain*, no. 32068/23, Decision of 5 October 2023.

9 ECtHR, Press release, 'Status of climate applications before the European Court', ECHR 046 (2023) (9 February 2023).

10 ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, 9 April 2024, paras. 78, 82, 303-304, 320.

11 G. Letsas, 'The European Court's Legitimacy After Klimaseniorinnen', *European Convention on Human Rights Law Review* (published online ahead of print 2024) [https://doi.org/10.1163/26663236-bja10111].

12 ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, 9 April 2024, Partly Concurring Partly Dissenting Opinion of Judge Eicke.

13 Swiss Federal Council, Press release of the Swiss Federal Executive (28 August 2024); Joint press release by the KlimaSeniorinnen association and Greenpeace (9 October 2024).

v. Austria[14] and *Greenpeace Nordic and others v. Norway*.[15] These cases not only provide the Court with an opportunity to refine the existing standards in the *KlimaSeniorinnen* judgment, but also invite it to engage with additional questions (including protections related to disability, Indigeneity, and youth, as well as the sufficiency of mitigation measures under the EU climate regime, to which Switzerland as a non-EU State was not bound). At the same time, these tensions open the judgment up to criticism where it is interpreted as being excessively broad or distant from the text of the ECHR, with these arguments verging on the territory of bad faith where they are used opportunistically for political advantage.[16] To counter these positions, the following section argues that, read holistically and contextually, the *KlimaSeniorinnen* judgment is in fact a cautious model for future climate cases.

(C) THE CONTENT OF THE *KLIMASENIORINNEN* MODEL: CAUTION AND SUBSIDIARITY

Reading the *KlimaSeniorinnen* as a whole, and especially the conclusions reached by the Court, it is clear that the Grand Chamber was led by its regard for the primary role of domestic decision-makers in setting out mitigation policy and taking the relevant measures.[17] In addition to a procedural (Article 6 ECHR) violation, it found a violation of Article 8 ECHR, the right to respect for private and family life, but in its *regulatory* aspect. This means that Switzerland has a positive obligation to regulate its emissions in a coherent and detailed way, as well as an obligation to subject climate cases to serious judicial review, but not an ECHR-based obligation to adhere to a certain timeline or reach specific reductions targets. In essence, this judgment calls for better (i.e. more detailed) domestic regulation, and more substantive engagement by domestic courts. It does not, however, replace domestic mitigation targets or dictate the measures to be taken domestically.

To get to this conclusion, the Court had to examine the admissibility requirements under the ECHR. In particular, this case hinged on the issue of whether the applicants (four individual older women, and the association that represented them) had victim status and standing to bring a case to the Court. Victim status and standing are two different, if interrelated, issues under Art. 34 ECHR. Victim status relates to the quality of being affected in one's rights, while standing relates to the limitation of the right of individual application to persons, nongovernmental organisations or groups of individuals. The two are interlinked, with the standing rule occasionally allowing representative standing (e.g. for deceased victims) and serving particularly to exclude individual applications by governmental entities.[18]

In *KlimaSeniorinnen*, the Court found that the victim status requirement had to be revised for climate cases. It had to be particularly stringent to avoid *actio popularis* cases,

14 ECtHR, *Müllner v. Austria*, no. 18859/21, communicated on 1 July 2024.
15 ECtHR, *Greenpeace Nordic and Others v. Norway*, no. 34068/21, communicated on 16 December 2021.
16 Charlotte E. Blattner, 'Separation of Powers and KlimaSeniorinnen', *Verfassungsblog* (30 April 2024).
17 ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, 9 April 2024, paras. 413, 541.
18 *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, ECHR (2014); *Forcadell i Lluis and Others v. Spain* (dec.) no. 75147/17, 7 May 2019. In all see V.P. Tzevelekos, 'Standing: European Court of Human Rights (ECtHR)' in: H. Ruiz Fabri (ed.), *The Max Planck Encyclopedia of International Law* (Oxford 2019).

and therefore had to require both a high level of climate-related risk and "a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm" (i.e. adaptation measures).[19] As will be argued below, the fear of *actio popularis* here is subject to one's understanding of that term given that it seems to be the scale of climate-related risks, and the number and breadth of potential climate-related applications, that drove the Court's considerations in this regard.

For present purposes, this article emphasizes that the particularly high threshold for individual victim status which the individual applicants were not found to have met, leading to the inadmissibility of their part of the case is one aspect of the Court's cautious approach to climate cases. Although is complemented by allowing representative standing of climate associations subject to certain criteria (lawful local establishment, dedication to climate and human rights, being genuinely qualified and representative to represent victims), it is not yet clear how broadly this test will be interpreted. For example, the KlimaSeniorinnen association was, according to its statutes, set up to pursue a climate case, so it is not yet clear if associations with broader mandates will meet this requirement.[20] In any case, it appears that going forward it will be more difficult to bring climate-related applications than other kinds of cases under Article 34.

The caution exercised by the Court in *KlimaSeniorinnen* is on particular display in two particular additional regards: first, as concerns the content of the regulatory obligation at stake, and secondly as concerns reparations. In terms of the State's regulatory obligation, the Court found that states had a narrowed margin of appreciation as concerns setting of climate-related aims and objectives (e.g. global temperature goals), but a wide margin of appreciation in the choice of means to pursue those aims and objectives.[21] To understand if a State had overstepped that margin of appreciation, the Court announced a set of criteria.

According to these criteria, the Court will cumulatively examine five aspects of States' mitigation policies,. In doing so, it examines (a) whether the relevant authorities have adopted general measures (i.e. legislation) specifying a timeline for achieving carbon neutrality and a quantification of future GHG emissions (e.g. a carbon budget), in line with overarching national and/or global mitigation commitments (e.g. the country's NDC). It will also examine whether a State has adopted (b) adequate intermediate targets and pathways and (c) duly complied with its own targets; as well as (d) diligently updating these targets based on the best available (scientific) evidence; and (e) acted in good time, appropriately and consistently.[22] Applying these criteria to Swiss climate law and policy, the Court found "critical lacunae", especially a failure to quantify remaining emissions through, for example, a carbon budget.[23] In other words, the State had not regulated its own emissions in a concrete, planned-out way. This was the core of the Article 8 ECHR violation found in *KlimaSeniorinnen* aligning closely with the Court's

[19] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, 9 April 2024, para. 487.
[20] Statutes of the KlimaSeniorinnen association, p. 1.
[21] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, 9 April 2024, para. 440.
[22] *Ibid.*, para. 550.
[23] *Ibid.*, para. 557.

overall environmental case-law, which equally emphasizes regulatory obligations.[24] This is in many ways a hands-off obligation, with the Court leaving the concrete regulation and its implementation to States, underscoring the Court's cautious and subsidiary approach.

Another aspect that bears mentioning in this regard concerns the remedial or reparatory aspects of the case. The applicants had sought an order of general measures under Article 46 ECHR setting clear targets, specifically an indication the State was to take "all suitable measures to allow it to achieve a level of annual emissions compatible with its target of attaining a minimum reduction of 40% in GHG emissions by 2030, and carbon neutrality by 2050."[25] The Court refused to grant such an order, leaving it to the State to implement the judgment. Citing the bindingness of the judgment, the State's differentiated margin of appreciation, and the complexity of the issues involved, the Court held that it was "unable to be detailed or prescriptive".[26] It considered that Switzerland, with implementation guidance from the Committee of Ministers, was "better placed than the Court to assess the specific measures to be taken."[27] Switzerland later argued that no additional measures were needed given recent regulatory changes,[28] with its action plan pending before the Committee of Ministers at the time of writing.

Initial judicial analyses of this judgment have considered it a measured judgment that places constrained demands on States. More specifically, in a recent adaptation case before the High Court of Justice for England and Wales in the United Kingdom (UK), a judge considered that "the significance of the judgment for the UK's climate change framework should not be overstated" given that the UK did not face the same regulatory lacunae as Switzerland.[29] Although the UK's actual compliance will only be clear if and when it is decided on by the ECtHR itself, this analysis reflects the measured ambition of the guidance issued by *KlimaSeniorinnen*. Simultaneously, however, the judgment's content cannot be ignored or understood selectively. In this regard, in his analysis, the same High Court of Justice judge rejected the government's argument that certain parts of *KlimaSeniorinnen* should be considered a (perhaps persuasive, but non-binding) *obiter dictum*. In doing so, he argued that the (common-law) concept of *obiter dicta* could not be imposed on the case-law of the ECtHR, whose judges may come from legal traditions that do not use this concept. This point is an interesting one. Certainly, it is problematic to disregard any part of the Court's judgment, which is binding in full. It is important to read this guidance as a whole, and not to distort the Court's findings. At the same time, many of the general principles set out here require further concretization before they can be applied in practice. Some, like the Court's references to intergenerational equity, may have been more about providing context or noting an overarching public interest to be balanced than creating actual legal obligations. This is discussed in the following section.

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24 ECtHR, *Di Sarno and Others v. Italy*, no. 30765/08, 10 January 2012, para. 106; ECtHR, *Tătar*, no. 67021/01, 27 January 2009, para. 88; ECtHR, *Cuenca Zarzoso v. Spain*, no. 23383/12, 16 January 2018, para. 51.

25 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, 9 April 2024, para. 654.

26 *Ibid.*, para. 657.

27 *Ibid.*

28 Press release of the Swiss Federal Executive, 28 August 2024.

29 High Court of Justice for England and Wales, *R (Friends of the Earth Ltd, Kevin Jordan and Doug Paulley) v. Secretary of State for Environment, Road & Rural Affairs*, [2024] EWHC 2707 (Admin), 25 October 2024, para. 98.

Before moving on to this third aspect of the discussion, it should be made clear that although *KlimaSeniorinnen* represents a useful model for one type of climate case, specifically a mitigation case against high-emitting developed States, it is certainly not a comprehensive model, and it is very much shaped by the European political context from which it comes. There are many aspects of climate injustice and climate-related human rights impacts that are not covered by this judgment. For example, it notably does not recognize a right to a healthy environment, which is still absent from the text of the ECHR although it has been recognized by all other regional human rights systems around the world.[30] In short, crucial aspects of climate justice like extraterritorial human rights obligations, concrete and equitable reductions obligations, tailored environmental rights and a differentiated approach to climate impacts according to vulnerabilities of different groups are missing from this judgment. These omissions are explained by the institutional and political context within which the Court delivered this ruling, which is accordingly an important part of understanding this judgment and its usefulness for follow-up cases, especially in other systems.

(D) THE NATURE OF THE JUDGMENT: *ACTIO POPULARIS* OR PUBLIC INTEREST LITIGATION?

As noted above, many aspects of *KlimaSeniorinnen* will need to be clarified through the Court's interpretation in future climate cases. E.g.: Can *any* applicants meet the new, particularly high victim status threshold? What kinds of legal persons meet the representative standing criteria? Have States who do have clear but unambitious mitigation plans violated the ECHR? Does adherence to the EU's climate regime fulfil ECHR obligations? And what does the ECtHR require in adaptation cases, including in terms of effective preparedness for climate-aggravated disasters such as for example the 2024 floods in Valencia?[31] In this latter regard it is relevant to note that, in past cases, although not ones linked explicitly to climate change, the Court found violations of Article 2 ECHR in the context of floods and mudslides given regulatory and preparatory failures, including "omissions in implementation of the land-planning and emergency relief policies".[32]

These questions will require answers that are difficult to achieve at present based purely on the text of the *KlimaSeniorinnen* judgment. However, it is important to avoid the impression that this text is entirely ambiguous. In fact, when read as a whole its text provides answers to many questions that are currently being debated, including in political fora, with negative implications for the Court's legitimacy.[33] In particular, it has been variously argued that *KlimaSeniorinnen* represents an *actio popularis* or that, if

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30 C. Heri, 'Slouching towards Strasbourg? Recognizing the Right to a Healthy Environment at the Council of Europe', *GNHRE blog*, 27 May 2024.

31 F. Otto, 'Why did so many die in Spain? Because Europe still hasn't accepted the realities of extreme weather', *The Guardian*, (4 November 2024).

32 *Budayeva and Others v. Russia*, no. 15339/02, 11673/02, 15343/02…, 20 March 2008, para. 158.

33 Swiss National Council, Declaration (12 June 2024), preceded by Swiss Council of States, Declaration (6 June 2024); Swiss Council of States, Motion 24.3485, 'The ECtHR should remember its core task' (25 September 2024).

it does not, then this is only because the applicant association was granted standing to represent future generations.[34] The present contribution considers that these arguments do not represent the text of the judgment, read as a coherent whole. In other words, there is a danger of reading individual paragraphs of the ruling in isolation or ignoring the Court's elaborate buildup to its discussion of victim status and standing.

The Swiss domestic reaction to this judgment and specifically the Parliamentary reaction in the form of several motions and two official statements, which informed but did not define the official reaction of the Federal government accused the Court of overreach.[35] The two statements, which bear the title "effective human rights protection by international courts instead of judicial activism", accuse the Court of exceeding the limits of its "living instrument" approach to interpretation and contest its legitimacy.[36] In September 2024, the upper house of Swiss Parliament also passed a motion seeking the negotiation of an additional protocol to the ECHR, arguing that the Court had lost track of the meaning of Article 34 ECHR and had introduced a vehicle for abstract public interest litigation.[37] This motion is still pending approval by the lower house, but its existence and approval by at least one house of the Swiss Parliament shows the power of the *actio popularis* argument.

It is argued here that this position is difficult to reconcile with the text of the judgment, read comprehensively. There are two core points to this argument. First, an *actio popularis*, understood here as an abstract complaint which does not affect the complainant in his or her own rights, is different in nature from a complaint about a systemic problem that affects or threatens to affect many. And secondly, there is no indication in the judgment that the KlimaSeniorinnen association did not represent affected people.

In this latter regard, some have understood the fact that the Court denied victim status to the four individual applicants in the case as meaning that the association did not in fact represent climate victims, and that the case had accordingly been brought in the abstract. This brings George Letsas, for example, to ask: "[i]f there was a violation of Article 8 ECHR, as the Court accepted, then who is the victim?"[38] To answer this question, Letsas has made an intriguing argument about the possibility that the association was representing not older women, but future generations. He argues that it was "simply an oversight" that the Court did not explicitly make this connection.[39] However, this argument is difficult to square with the Court's own finding, elsewhere in the judgment, that "the legal obligations arising for States under the Convention extend

34 G. Letsas, 'The European Court's Legitimacy After Klimaseniorinnen', *European Convention on Human Rights Law Review* (published online ahead of print 2024) [https://doi.org/10.1163/26663236-bja10111].

35 See the sources cited in the next two footnotes.

36 Swiss National Council, Declaration (12 June 2024), preceded by Swiss Council of States, Declaration (6 June 2024); Swiss Council of States, Motion 24.3485, 'The ECtHR should remember its core task' (25 September 2024).

37 Swiss Council of States, Motion 24.3485, 'The ECtHR should remember its core task' (25 September 2024).

38 G. Letsas, 'The European Court's Legitimacy After Klimaseniorinnen', *European Convention on Human Rights Law Review* (published online ahead of print 2024) [https://doi.org/10.1163/26663236-bja10111], 5.

39 *Ibid*., 10.

to those individuals currently alive who, at a given time, fall within the jurisdiction of a given Contracting Party".[40]

There is, I would argue, a simpler and more textual solution to this conundrum. That is to recognize that while the individual applicants may not have met the particularly high victim status test set out especially for individuals bringing climate cases, this does not mean that they or other members of the association were unaffected. In other words, while they did not meet the "special" climate victim test, they may have very well met the Court's usual victim status requirement as per its general case-law, which appears to be implicit within the requirements for representative standing by climate associations. Notably, the Court found that its "findings undoubtedly suggest that the applicants belong to a group which is particularly susceptible to the effects of climate change".[41] It also "accepted that heatwaves affected the applicants' quality of life".[42]

This argument indicates two things. First, that cases stemming from a systemic problem such as climate change, which poses a universal if differential risk to all human beings are not necessarily *actiones populares* as long as they concern affected persons. In other words, cases that pursue a result conceived as being in the 'public interest' are not necessarily abstract, because individual and public interests understood here as general political interests are not necessarily mutually exclusive, especially where the protection of human rights is concerned. Secondly, and relatedly, that the label of public interest litigation must be understood more broadly than the term '*actio popularis*', because public interest cases need not be abstract (and therefore inadmissible).

(E) CONCLUSION

The present article has engaged with the 2024 *KlimaSeniorinnen* judgment of the European Court of Human Rights as a model, albeit a cautious one, for future climate litigation. Given the novelty of climate-related engagement for the ECtHR, and the need to clarify general principles and obligations, in some sense the judgment sits between an advisory opinion and an individual case. This explains the vagueness of certain of the Court's findings. In addition, *KlimaSeniorinnen* is far from a perfect model for all global climate cases: there are many aspects of climate injustice and climate-related human rights impacts that are not covered by this judgment, and it notably does not recognize a right to a healthy environment, which is absent from the text of the ECHR but has been recognized by all other regional human rights systems around the world. However, the judgment provides a valuable and measured judicial engagement with the human rights impacts of climate change, setting the stage for follow-up engagement by both the ECtHR and domestic courts some of which is already taking place. Engaging in depth with the judgment as a whole, it becomes clear that the allegations made against its and the Court's legitimacy on the domestic plane, including particularly the allegation that it allows an *actio popularis*, can be countered. In particular, it is neither clear that the case did not represent current victims of climate change nor that it was brought solely in the public interest.

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40 ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, 9 April 2024, para. 420.
41 *Ibid*., para. 531.
42 *Ibid*., para. 533.

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Judicial review of climate plans. A growing consensus

Pau de Vilchez Moragues*

(A) INTRODUCTION

Climate litigation is an expression that often conveys the picture of concerned citizens challenging their governments' policies regarding the climate crisis. However, in reality, climate litigation covers a much more complex set of legal actions, interests, plaintiffs and defendants. And this has been so since it started, in the 1990s in the United States.[1] Since then and until the second decade of the 2000s, climate litigation was mainly concentrated in the US, while outside of the American continent it could be found mainly in Australia.[2] The diversity of claims include both anti and pro-climate litigation, with complaints initiated by citizens, NGOs, the public administration (from all levels of government) and corporations against those same actors, although the majority of claims concern the public administration (from all levels of government) and private corporations. Indeed, legal challenges have involved permitting and licensing of Greenhouse Gas (GHG) emitting activities and infrastructures, the regulation of those activities and products (or lack thereof), the damages caused by climate change, or even greenwashing, among many other matters.

Today, climate litigation has become one of the hot topics of both international and environmental law, especially due to its increasing rate of success in challenging governments' policies and plans regarding climate change. However, it was not always so and, indeed, most of the history of climate litigation, especially in that specific manifestation, is a history of failure, at least until 2015. That year, the District Court of the Hague delivered its judgment in the Urgenda case and everything changed[3].

Until then, courts had been extremely deferential to the climate plans of the Administration. In the United States, for instance, "the courts acknowledge[d] the importance of the climate change issue and the need for attention to it. But they have proven reluctant to second-guess agency decisionmakers".[4] The doctrine of the separation

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The research for this article has been conducted within the research project PID2019-108253RB-C32, funded by the Spanish Ministry of Science and Innovation.

1 D. Markell and J.B. Ruhl, 'An Empirical Assessment of Climate Change In The Courts: A New Jurisprudence Or Business As Usual?', 64 *Florida Law Review*. 15-86 (2012).

2 According to the Climate Change Litigation Databases of the Sabin Centre for Climate Change, there had been 530 complaints filed in the US up to 2014 (included), whereas in the resto of the world there had been 144, of which 81 had been filed in Astralia. https://climatecasechart.com

3 *Urgenda Foundation et al. v. The State of the Netherlands (Ministry of Infrastructure and the Environment), The Hague District Court, Judgment, C/09/456689 HA ZA 13-1396, 24 June 2015.*

4 *Supra in n.1 at p. 45.*

of powers has long accompanied the courts of many jurisdictions which consistently considered, until 2015, that it was not for judges to assess the legality of their governments' climate policies. A clear example of that can be found in a 2008 decision by the Federal Court in Toronto which dismissed the complaint brought by Friends of the Earth regarding the State's non-compliance with the Kyoto Protocol Implementation Act. The Canadian court dismissed the claim because it considered that it was a non-justiciable issue that belonged to the legislative sphere, adding that even if it were justiciable the court would not be able to craft a meaningful remedy as any mandatory order would be "devoid of meaningful content and the nature of any response to it so legally intangible that the exercise would be meaningless in practical terms."[5] Nevertheless, the Court left an open door when it considered that "[w]hile the failure of the Minister to prepare a Climate Change Plan may well be justiciable, an evaluation of its content is not".[6]

However, something changed in 2015, with the District Court of the Hague decision in the Urgenda case, and, since then, there has been an increasing number of judges and tribunals around the globe who have come to consider that, from a legal point of view, the margin of discretion of the executive or the legislature when it comes to climate change issues is necessarily constrained by the need to protect essential legally protected rights, and thus a minimum duty of care is required from the authorities.

The Dutch courts, be it at the lower (District Court) or Higher (Supreme Court) level already set the tone for many cases to come in other countries: Courts are not to tell the Administration what precise measures ought to be taken, but in the face of dangerous and irreversible climate change they can definitely establish a threshold within which the State is to exercise its leeway, defining the policies and measures it considers most apt. In the words of The Hague's District Court:

> this discretionary power is not unlimited. (…) the question remains what is fitting and effective in the given circumstances. The starting point must be that in its decision-making process the State carefully considers the various interests. (…) Therefore, the court arrives at the opinion that from the viewpoint of efficient measures available the State has limited options: mitigation is vital for preventing dangerous climate change.[7]

The Supreme Court of the Netherlands put it very clearly:

> the Dutch constitutional system of decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound. (…) The limits referred to in above include those for the State arising from the ECHR.[8]

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5 *Friends of the Earth v. Canada*, 2008 FC1183, [2009]3 F.C.R. 201, §47. It is nevertheless interesting to note that the Court hel that The claimant's subsequent appeals were dismissed by the Federal Court of Appeals, in 2009, and the Supreme Court, in 2010.

6 *Ibid. at §34.*

7 Supra in n.3, at §§4.62-4.75.

8 *The State of the Netherlands v. Urgenda Foundation, The Supreme Court of the Netherlands, Case number 19/00135, 20 December 2019 [ECLI:NL:HR:2019:2007], §§8.3.2-8.33.*

In this paper, we will endeavour to analyse how courts around the world have identified this minimum threshold and, especially, what it entails for the margin of discretion of the State when devising its climate plans. And we will do it by distinguishing what aspect of those plans is being reviewed as well as the reasons that make those plans reviewable by the judiciary. Concerning the former, we can distinguish mainly between claims and decisions that question the targets set in domestic climate plans, on the one side, and claims and decision that address the policies defined in those plans to reach the aforementioned targets. As regards the latter, the main distinction can be drawn between those decisions that question the authorities' climate plans based on procedural reasons and those who focus instead on substantive ones.

Last, it should be borne in mind that although we will generally refer to different cases to illustrate the different legal grounds of the legal review, climate litigation is characterised by its complexity, both from a factual and legal perspective,[9] and several of these grounds can be often found in the same case.

(B) THE OBJECT OF THE REVIEW

We have already mentioned that climate litigation is a rich and diverse category that includes instances of litigation that range from a corporation challenging a particular legal provision directed at reducing polluting activities to an NGO arguing that the administration should actually adopt such provisions, individuals suing polluting corporations for damages, public authorities demanding companies to pay for adaptation and loss an damage, corporations challenging the allocation of emissions permits by the authorities, NGOs filing lawsuits against companies for greenwashing or even an administration suing another administration from the same country for not doing enough or for doing too much on global warming, usually arguing about the distribution of competences among the different levels of government. And the typology of cases keeps growing as the climate crisis worsens and the energy transition develops, for instance giving raise to conflicts between different public interests, like human rights and climate action, in what has already been called "just transition ligitation".[10]

In this article we will focus on litigation challenging climate plans adopted by public authorities, understood in a broad way as the planning documents and regulations that set the main targets, actions and priorities regarding climate action. And this for two main reasons. On the one hand, such cases have experienced an explosion in the last ten years, particularly as a consequence of the success of the Urgenda case. Moreover, such an explosion has been accompanied and even fuelled by an increasing number of decisions in which the Courts of several countries have joined their Dutch colleagues in finding that governments' plans on climate are, indeed, reviewable. On the other hand, we focus on this kind of cases because they concern the documents with legal value that

9 de Vilchez Moragues, P., *Climate in Court. Defining State Obligations on Global Warming Through Domestic Climate Litigation (Edward Elgar, Cheltenham, 2022); de Vilchez Moragues, P., 'Climate litigation, taking stock of an increasingly complex trend of legal actions', E-Publica 9 (3) (2022), pp. 186-190.*

10 Savaresi, A., Setzer, J., Bookman, S. *et al., Conceptualizing just transition litigation, Nature Sustainability* 7, 1379–1384 (2024). https://doi.org/10.1038/s41893-024-01439-y.

define the goals, milestones, strategy and measures that are to be taken and reached by a given country, therefore strongly conditioning the performance and expected results of that country in the fight against global warming. As a matter of fact, such plans may include additional elements that are increasingly considered relevant to adequately conduct the energy transition, such as justice and equity or the necessary intertwining of climate action with other sectors of government and the economy.

When challenging climate plans before the courts, there are two main elements that usually constitute the core of the legal challenge. First, there are several cases in which the plaintiffs focus on the targets set by the State. By climate targets we generally refer to the GHG emissions reductions that a given State ought to achieve by a given year as compared to a previous, baseline, year. This is usually defined as a percentage of emissions that is below that baseline year. For instance, in the Netherlands, the plaintiff Urgenda Foundation requested the Court to order the State to set an emissions' reduction goal of 25% to 40% below the GHG emissions levels of 1990.

Secondly, there are other instances in which the claimants challenge, instead of or in addition to the emissions reduction targets, the actual policies and measures devised by the State to achieve those targets or at least to respond to the climate emergency.

The legal grounds that would justify the legal review of those targets and measures as well as the specific object of the requested review will be examined in the following section.

(C) THE LEGAL BASIS OF THE REVIEW

When examining the wide diversity of legal challenges brought before the courts against climate plans, we can identify a seemingly diverse set of grounds underpinning those challenges, which can be broadly organized in two main groups: climate plans are being challenged for substantive as well as for procedural reasons. By substantive, we refer to the content of the plans, while by procedural we point to the way those plans have been laid out and adopted. In this section, we will dive into those broad groups and analyse how they have manifested in different climate cases around the world.

1. Substantive reasons for the legal challenge of climate plans

There might be different reasons to challenge a climate plan from a substantive perspective and, as we will see, these can be illustrated by recent climate cases and decisions.

(a) The plans are non-existent

The first instance of challenges to climate plans involve those that challenge precisely the absence of such plans and demand their adoption by the authorities. If climate change is a complex phenomenon that demands incremental action across sectors while there is a clear indication by science of the need to reach net zero emissions in the next thirty years, it is clear that planning is indispensable to an ordered and successful transition that leaves no one behind.

One example of this kind of litigation can be found in the case *Salamanca Mancera v. Minambiente*, also known as *Future Generations v. Colombia*. The plaintiffs, a group of children and youth, filed a constitutional protection claim ("acción de tutela") in which they affirmed that the actions and inactions of the State paved the way to the destruction of the Amazon, thus fuelling climate change and therefore endangering their lives and future, as well as violating their constitutional right to a healthy environment. After a first dismissal by a lower court, the Supreme Court of Colombia found in favour of the plaintiffs and ordered the national, regional and local authorities to establish, in a four to five months' timeframe, strategic plans, with the participation of the Claimants and all relevant actors, to halt deforestation and bring the deforestation rate of the Colombian Amazon to 0%.[11]

Another instance of a challenge of a lack of planning can be found in *Navahine v. Hawai'i*. In that case, a group of youth, counseled by the organisations Earthjustice and Our Children's Trust, complained that the absence of a Transport plan in Hawai'i negatively affected their right to a clean and healthful environment and violated the public trust doctrine, since the transportation sector is a net contributor to the GHG emissions of Hawai'i, an archipielago that is particulary vulnerable to climate change. During the proceedings before the Court, the plaintiffs and the defendants reached a settlement agreement in which the latter recognised the constitutional right to a healthy and clean environment of the plaintiffs, that this right was threatened by climate change, and that the State of Hawai'i has a public trust obligation to protect the environment for present and future generations and therefore agreed to reduce GHG emissions of the transportation sector, both intra and inter-island (including sea and air-bound) and to develop and implement a plan directed at such an aim, which will include both transformative changes of the transportation system as well as specific emissions' reduction targets for 2030, 2035 and 2040, until net zero is achieved at 2045 at the latest.[12] As per the settlement agreement, the Court will retain continuing jurisdiction to enforce the Parties' obligations until the end of 2045.

(b) The plans are not adequate to tackle climate change

A second reason why a plan may be challenged lies in its inadequacy to prevent, reduce or respond to the threats posed by global warming. The most notorious example of such a case is *Urgenda v. the Netherlands*, in which a Dutch foundation claimed before the courts that the emissions reduction target set by The Netherlands for the year 2020 was not consistent with the level of emissions that science deemed necessary to have a fair chance to limit global warming to a safe level. The State of The Netherlands had set a target of 17% (in the context of the 20% reduction set at the EU level), and Urgenda alleged that the IPCC had established that to limit global warming to a safe level it was necessary that the emission of GHG into the atmosphere be reduced between 25% and 40% by 2020. The Court, after examining all the evidence concluded that, indeed, the target set by the

[11] *Salamanca Mancera et al. v. Presidencia de la República de Colombia et al.*, Corte Suprema de Justicia de Colombia, N° 110012203 000 2018 00319 01, 5 April 2018.

[12] *Navahine F. et al. v. Hawai'i Department of Transportation et al., Circuit Court of the First Circuit, CIVIL NO. 1CCV-22-0000631 (Environmental Court), 20 June 2024.*

Netherlands was impermissibly below the minimum threshold of 25% and ordered the State to conform to such a level. The separation of powers and the margin of discretion of the Government did not prevent the Court from ordering a certain reduction effort but limited its capacity to go beyond the minimum level identified by science.[13]

The inadequacy of the climate goals was also at the core of *Neubauer v. Germany*, a case brought by a group of youth before the German Constitutional Court. The plaintiffs argued that the 55% reduction of GHG emissions in Germany by 2030 was not in accordance with the country's commitments at the international level (i.e. the Paris Agreement) to hold global temperatures well below 2°C and therefore violated their rights to life as a consequence of deteriorating climate change. The Constitutional Court, while recognising that "[t]he question of whether sufficient measures have been taken to fulfil duties of protection arising from fundamental rights can only be reviewed by the Federal Constitutional Court to a limited extent", it nevertheless declared that the existence of a margin of appreciation of the legislator "does not mean that the question as to the effectiveness of state protective measures is beyond the scope of review by the Federal Constitutional Court where a duty of protection does exist. The Federal Constitutional Court will find a violation of a duty of protection if no precautionary measures whatsoever have been taken, or if the adopted provisions and measures prove to be manifestly unsuitable or completely inadequate for achieving the required protection goal, or if the provisions and measures fall significantly short of the protection goal.[14]

In relation to the matter under review, the Court found that although the uncertainties surrounding the calculation of the carbon budget made it impossible to consider that a potential breach of that budget following the official emissions reduction of 55% by 2030 could be considered unconstitutional, the dimension of the dangers involved and especially the fact that most of the burden in GHG emissions reduction should be borne by the generation living from 2030 onwards could be considered unconstitutional.[15] The Constitutional Court affirmed that the duty to protect life included in the Constitution also covers the risks derived from climate change and the constitutional obligation to protect nature, as a foundation of life, for future generations also extended to the climate system. According to the Court, the main consequence that derives from that interpretation is that the safeguarding of fundamental rights prohibited the State from disproportionately burdening future generations with the actions and efforts needed to keep global warming at a safe level (1.5°C), and therefore, the target of reducing GHG emissions by 55% by 2030 as compared to 1990 levels was inadmissibly low.[16]

A third instance of this kind of challenge can be found in Spain. In 2021, Greenpeace Spain, Ecologistas en Acción and Intermón-Oxfam filed a claim before the Supreme Court alleging that the emissions reduction target of 23% by 2030 set in the National Integrated Plan on Energy and Climate (PNIEC) 2021-2030 was largely insufficient regarding the international commitments to which Spain was part (mainly, the Paris Agreement) as well as the findings of the Intergovernmental Pannel on Climate Change (IPCC), which

[13] *Urgenda Foundation et al. v. The State of the Netherlands (Ministry of Infrastructure and the Environment), The Hague District Court, Judgment, C/09/456689 HA ZA 13-1396, 24 June 2015, §§4.84-4.86.*

[14] *Neubauer et al. v. Germany, BVerfG, Order of the First Senate of24 March 2021 – I BvR 2656/18, §152.*

[15] *Ibid*., at §142.

[16] *Ibid*. at §§206, 229, 231, 236-248.

required, according to the plaintiffs, that the GHG reductions attain at least 55% by 2030 as per 1990 levels. However, the Supreme Court of Spain diverged from its colleagues from The Netherlands and Germany and concluded, forfeiting any human rights consideration or assessment, that since the Paris Agreement awarded a considerable leeway to States when defining their National Determined Contributions (NDCs), "without imposing on them any qualitative or quantitative content regarding the measures to be adopted", and since the 23% target does not violate the effort sharing decision of the European Union, the Court was not allowed to intervene without violating the principle of the separation of powers, since the decision could not be considered arbitrary in any way.[17]

Before turning to next section, it is wort highlighting that what is considered safe may evolve over time, both regarding the temperature threshold within which warming should be limited as well as the GHG concentration in the atmosphere that would correspond to such a level of warming and the reductions in GHG emissions needed to respect that level of GHG concentration, which is often conceptually formulated as the "carbon budget". And this can even happen during the judicial proceedings of a given case. For instance, whereas in the Urgenda case the "safe" temperature target underlying the claim of the plaintiffs was 2ºC, as supported by the majority of scientific reports of the time, which pointed out at a significant increase in climate-derived threats from a global temperature beyond that threshold, both the Court of Appeals[18] and the Supreme Court highlighted that the scientific consensus had moved towards a lower threshold of security since the start of the proceedings, that now pointed to the need to make all possible efforts to limit global warming to 1.5ºC.[19] A view that was included in the Paris Agreement.

(c) The plans are not adequate to achieve the targets set by the State

Beyond setting the specific targets to be achieved at a certain date regarding GHG emissions or other key elements of the Administration's response to the climate crisis , States need to define strategies to actually attain those targets. The mismatch between the two has also been the object of climate litigation in recent years.

An illustrative case of this approach is provided by *KlimaSeniorinnen v. Switzerland*, especially in the proceedings before the European Court of Human Rights (ECtHR). In a long judicial iter, that brought them before three domestic courts and, ultimately, at Strasbourg, a group of elderly women challenged the climate plans of the Swiss state. Altough the complaint has many aspects, which include, among others, the definition of the targets themselves, similarly as to the cases presented in the previous section, there is one aspect of especial interest here that regards the adequacy of the domestic climate strategies to achieve those targets.

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17 *Greenpeace et al. v. Spain*, Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección Quinta, Sentencia núm. 1079/2023, 24 July 2023, pp. 70-74.

18 *The State of the Netherlands v. Urgenda Foundation, The Hague Court of Appeal, Case number C/09/456689/ HA ZA 13-1396, 09 October 2018 [ECLI:NL:GHDHA:2018:2610], §50, §73.*

19 *The State of the Netherlands v. Urgenda Foundation, The Supreme Court of the Netherlands, Case number 19/00135, 20 December 2019 [ECLI:NL:HR:2019:2007], §§7.2.8-7.2.9.*

Despite the claim being rejected by all internal courts, including the Federal Supreme Court,[20] the European Court of Human Rights positively considered many of the claimants' assertions and petitions. In particular, the Court recalled that while the Swiss State had adopted a net zero target by 2050, the plans and regulations defined at the domestic level would not allow to achieve that target. This conclusion derived both from existing legislation (CO_2 Act), that was deemed insufficient even by an assessment of the Swiss Federal Council, regarding the 2020 targets, as well as from the absence of a carbon budget that would allow to identify exactly the amount of GHG that could be emitted per sector to achieve the 2050 target.[21]

Another example of a policy that is challenged for not being aligned with the overall targets set by the State can be found in *Commune de Grande-Synthe v. France*. In this case, a French municipality (Grande-Synthe) filed a claim before the *Conseil d'État* against the (tacit) refusal of the French Government to correct what the municipality deemed an insufficient trajectory of emissions reduction if the nationally determined decarbonisation goals were to be respected. The Government alleged that it was already reducing the country's emissions, which were lower than other countries. However, after examining both the French and European legislation, as well as the international legal framework on climate change, and the scientific data produced by French institutions, the Council found that, indeed, although France was reducing its GHG emissions it was doing so at a lower pace than required to achieve the legally set decarbonisation target for 2030 ("sur la base des seules mesures déjà en vigueur, les objectifs de diminution des émissions de gaz à effet de serre fixés pour 2030 ne pourraient pas être atteints")22. As a consequence, the Conseil d'État annulled the Government's refusal and ordered the Prime Minister to

> take all appropriate measures to curb the curve of greenhouse gas emissions produced on national territory in order to ensure its compatibility with the greenhouse gas emission reduction targets set out in Article L. 100-4 of the Energy Code and in Annex I of Regulation (EU) 2018/842 of 30 May 2018 before 31 March 2022.[23]

(d) The targets have not been achieved

Domestic authorities may have set specific targets regarding climate change and even adopted strategies to achieve them, but may nonetheless have failed to do so. Thus, a fourth reason that may compel claimants to bring a complaint against domestic climate plans before the courts is the non-achievement of the targets set by the domestic authorities themselves.

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[20] *Verein KlimaSeniorinnen Schweiz et al. v. Federal Department of the Environment, Transport, Energy and Communications (DETEC), Federal Supreme Court [of Switzerland], Public Law Division I, Judgment 1C_37/2019 of 5 May 2020, Appeal against the judgment of the Federal Administrative Court, Section 1, of 27 November 2018 (A-2992/2017).*

[21] *Verein Klimaseniorinnen Schweiz and Others v. Switzerland, European Court of Human Rights, Grand Chamber, Application no. 53600/20, judgment of 9 April 2024, §§558, 565, 573.*

[22] "Based on existing measures alone, the 2030 greenhouse gas emission reduction targets will not be met." *Commune de Grande-Synthe v. France, Conseil d'État, n. 427301, Decision of 1 July 2021, §6.*

[23] *Ibid., Article 2.*

France offers again an example of this type of claim. In 2021, the Administrative Court of Paris issued two decisions in the cases filed by Notre Affaire à Tous, Oxfam France, Greenpeace France and the Fondation pour la Nature et l'Homme. Basically, those NGOs claimed that the French government was responsible of causing a "préjudice écologique" ("ecological damage") as a consequence of its insufficient climate action. One important element in their pleading involved the fact that France was actually not complying with the pluriannual carbon budgets it had itself set into law. Recognising the ecological damage deriving from climate change, the Court concluded that the State had in fact not respected the carbon budget for the period 2015-2018 and therefore ordered the Government to take all necessary measures ("toutes les mésures utiles") in order to repair the ecological damage and to prevent the aggravation of that damage at a level that is proportionate to the observed excess in emissions.[24]

It is particularly remarkable that the Administrative Court considers that the breach of the pluriannual target included in the carbon budget is legally relevant in itself, independent of the likelihood of achieving emissions targets set at a later stage, since the excess in emissions that has already happened has indeed contributed to exacerbate global warming and the ecological damage and will continue to do so for a long time, given the long life nature of several GHG.[25]

Another instance of this type or argument can be found in *KlimaSeniorinnen v. Switzerland*. As aforementioned, the ECtHR found in that case that the Swiss Government had not developed a framework that would allow Switzerland to comply with their emissions reduction targets for 2030 and 2050, and that led the Court to find a violation of Article 8 of the European Convention on Human Rights (ECHR), the right to private and family life. The court found that Article 8 encompasses the right to effective protection by the State from the serious adverse effects of climate change,26 which obliges the State to "devise, develop and implement the relevant legislative and administrative framework" to adequately respond to climate change, and it interestingly found that the non-respect of the domestic targets by the Swiss authorities indicated the "insufficiency of authorities' past action to take the necessary measures to address climate change", therefore reinforcing the plaintiffs' claims.27

(e) The plans have not been complied with

Besides non-compliance with specific targets, a last trigger of the legal review of climate plans regards whether those plans have been followed and acted upon. Here, we can turn to the Supreme Court of Brazil, which in 2022 issued a relevant decision in *PSB v. Brazil* regarding the so called "Climate Fund". This fund had been created by law in 2009 and, according to the Court, is "the main federal instrument aimed at funding the fight against climate change and the fulfilment of greenhouse gas emission reduction

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24 *Notre Affaire à Tous et al. v. France, Tribunal Administratif de Paris, N°s 1904967, 1904968, 1904972, 1904976/4-1, 14 October 2021.*

25 *Notre Affaire à Tous et al. v. France, Tribunal Administratif de Paris, N°s 1904967, 1904968, 1904972, 1904976/4-1, 3 February 2021, p. 34.*

26 Supra n. 20, in §544.

27 Ibid. at §559.

targets".[28] Then President Jair Bolsonaro and his government were not allocating the resources needed for the Fund to operate and the Supreme Court undisputably found that, in the midst of a climate emergency that endangered constitutionally protected human rights,

> the aversion to the subject repeatedly expressed by the Federal Government, the history of dismantling collegiate bodies that are part of the Public Administration and the failure to allocate resources for environmental protection also corroborate the need for this Federal Supreme Court to comply with the applicants' request for a determination that the Executive has the duty and not the free choice to operate the Climate Fund and allocate its resources for its purposes.[29]

It is worth recalling that the Supreme Court of Brazil construed this limited margin of discretion of the State in climate issues also based on the understanding that the Paris Agreement and other international environmental treaties are to be considered "a species of the human rights treaties genre" which gives them supra-legal status. From this, the Court unambiguously concludes that "there is no legally valid option to simply omit to combat climate change".[30]

2. Procedural reasons for the legal challenge of climate plans

When we analyse the reasons behind the increasing number of claims filed against climate plans, we can find, beside the substantive elements raised above, several claims which question different procedural aspects related to the plans. Those claims touch upon either the way the plans have been adopted, the superficiality or lack of detail of such plans, or, last, the difficulties faced by the plaintiffs to challenge those plans before a court. Which, in short, refers to the three main procedural environmental rights enshrined in both domestic and international law (like the Aarhus Convention of 1998 or the Escazú Agreement adopted twenty years later)[31]: public participation in decision-making, access to information and access to justice in environmental matters.

(a) Challenging the adoption process of climate plans

Neubauer v. Germany is a good example of that type of claims which consider that the *iter* followed to develop and adopt the domestic plans intended to tackle the climate

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[28] *PSB et al. v. Brazil* (Fundo Clima), Supremo Tribunal Federal [S.T.F.] [Supreme Federal Tribunal], Arguiçao de Descumprimento de Preceito Fundamental [ADPF] 708, Relator: Min. Roberto Barroso, 04.07.2022, 194, D.J.e, 28 September 2022, §19

[29] *Ibid.* §27.

[30] *Ibid.* §17.

[31] Aarhus Convention on Access to Information and Public Participation in Decision-making and Access to Justice in Environmental Matter, 25 June 1998, 2161 UNTS 447 ('Aarhus Convention'); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Adopted in Escazú on 4 March 2018, entry into force 22 April 2021 ('Escazú Agreement'). On the Escazú Agreement and its relevance for climate litigation, see Medici, G., Ricarte, T., 'The Escazú Agreement Contribution to Environmental Justice in Latin America: An Exploratory Empirical Inquiry through the Lens of Climate Litigation', *Journal of Human Rights Practice*, Volume 16, Issue 1, February 2024, Pages 160–181, https://doi.org/10.1093/jhuman/huad029.

emergency were not adequate. In its decision of 2021, the German Constitutional Court recognised the distinct dangers posed by climate change, not the least the serious threats upon fundamental rights, but it also highlighted the challenges derived from the measures needed to prevent the earth from reaching dangerous temperature levels as well as to prevent the damage probably deriving from those temperatures. That is, the mitigation and adaptation measures needed to both reduce our GHG emissions to net zero by the half of the century and to protect the population, human and natural systems from the heat levels that are already locked in the climate system. Those measures, although necessary, clear and available, are not easy to take by governments, since they involve deep and rapid systemic transitions without precedent in terms of scale. In the words of the IPCC, "limiting warming to 1.5°C is possible within the laws of chemistry and physics but would require unprecedented transitions in all aspects of society".[32]

According to the German Constitutional Court, if sufficient measures were not adopted before 2030, "the constitutional obligation to take climate action (…) would require [after that year] the acceptance of considerable restrictions on freedom, which would hardly be deemed reasonable from today's perspective".[33] Given the relevance of the matter, the Court found that the intervention of the legislature was crucial and the devising of the plans could not be left alone to the executive power. Moreover, this intervention needs to be a qualitative one, not merely an approval of the Executive's prior decisions, and this because

> the special importance of the interests protected under Art. 20a GG and their tensions with any conflicting interests must be reconciled in a democratically accountable manner, and legislation provides the appropriate framework to do this ([...]). The legislative process gives the required legitimacy to the necessary balancing of interests. The parliamentary process with its inherently public function and the essentially public nature of the deliberations ensures through its transparency and the involvement of parliamentary opposition that decisions are also discussed in the broader public, thereby creating the conditions by which the legislative process is made accountable to the citizenry.[34]

In the aforementioned case of *Greenpeace et al. v. Spain,* claimants also contested the participation process regarding the drawing up of the Integrated National Plan of Energy and Climate. In particular, the claimants alleged that although they took an active part during the participation process and the strategic environmental assessment conducted prior to the adoption of the plan, their proposals and allegations were neither included nor considered in the Plan, and they received no response whatsoever as to the reasons for them being discarded.[35]

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32 IPCC, 2018: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. et al. (eds.)].

33 *Supra* in 14, at §246.

34 *Ibid*., §213.

35 Greenpeace España et al., *Recurso Contencioso-Administrativo Contra El Plan Nacional Integrado de Energía y Clima 2021-2030*, 28 May 2021, pp. 10-12.

(b) Challenging the lack of detail

Information is a key element to enable a meaningful participation process, and some climate cases have dealt with this kind of shortcoming. A relevant example of that kind of legal flaw can be found in *Friends of the Irish Environment v. Ireland,* in which an environmental NGO challenged the validity of the Irish National Climate Plan adopted in 2017. This Plan had been adopted following the Climate Action and Low Carbon Development Act 2015, which establishes on Article 4 the obligation to adopt such a plan not later than 18 months after the passing of the Act and every five years from then on. According to Friends of the Irish Environment (FIE), the Plan was legally flawed for two main reasons. On the one side, it included an increase in GHG emissions in the early years of its adoption, which would then progressively fall until reaching net zero by 2050. FIE argued that climate change was a serious threat the size of which depended not only on reaching net zero emissions at a given time but also, and especially, on the amount of GHG that would have been emitted until then. In short, it is not a question of volume of emissions at a given time, but rather of concentration of those emissions over time. Since the Plan included an increase in those emissions, the claimants contended that the plan infringed upon their fundamental rights. On the other side, FIE considered that the Plan also violated the provisions of the Climate Action Act. In particular, the claimants considered that the National Climate Plan did not respect section 4.2 of the Act, which establishes, among other things, that the Plan shall specify the manner in which the objectives will be achieved as well as the policy measures needed to reduce GHG emissions in a manner that is consistent with those objectives.

In 2020, the Supreme Court of Ireland concluded, as regards the first claim, that FIE did not have standing regarding the alleged violation of fundamental rights, since it did not actually enjoy those personal rights (e.g. the right to life).[36] However, on the second claim the Court found in favour of the plaintiffs. Following a detailed assessment of the 2015 Climate Change Act and the content of the 2017 Climate Plan, the Supreme Court found that the latter lacked enough level of detail so as to satisfy the requirements of the former and this circumstance not only fell short of what was legally required by the act itself but also deprived the public of the information needed to form a constructive opinion of the Plan. In the words of the Court,

> [w]hat the public thinks of any plan and what the public might do about it if they do not like a plan is a matter for the public to consider. But the 2015 Act requires that the public have sufficient information from the Plan to enable them to reach such conclusions as they wish. On that basis, it seems to me that the level of specificity required of a compliant plan is that it is sufficient to allow a reasonable and interested member of the public to know how the government of the day intends to meet the NTO so as, in turn, to allow such members of the public as may be interested to act in whatever way, political or otherwise, that they consider appropriate in the light of that policy.[37]

[36] *Friends of the Irish Environment v. the Government of Ireland, Supreme Court, Appeal No: 205/19, Judgment of 31 July 2020. §§7.2, 7.4, 7.18-7.22.*

[37] *Ibid*. §6.38.

And, according to the Court,

> the Plan falls a long way short of the sort of specificity which the statute requires. I do not consider that the reasonable and interested observer would know, in any sufficient detail, how it really is intended, under current government policy, to achieve the NTO by 2050 on the basis of the information contained in the Plan.[38]

It is also relevant to recall here that the Supreme Court rejected the Government's assertion that, reviewing the Plan, the Court would be impermissibly dealing with questions of policy, since the issues under review had been turned into law "by virtue of the enactment of the 2015 Act".[39]

(c) Access to justice

The last of the procedural reasons behind some of the recent climate cases involves the lack of appropriate access of claimants to the justice system in order to challenge climate related plans and policies. A very recent example is provided by *KlimaSeniorinnen v. Switzerland*, particularly the ECtHR's judgment of April 2024. As we have highlighted above, the plaintiffs had challenged various aspects of the Swiss climate strategy, which was deemed insufficient to reach the targets set forth by the Swiss authorities, let alone to limit global warming to a safe level. In addition to those different substantive reasons, the claimants also argued that they had been denied access to a court and therefore relied both on Article 6 and Article 13 of the ECHR in their claim before the ECtHR.

Similarly to other substantive arguments, the Court also made a clear stance in favour of procedural rights. Thus, the Court stresses that complex decision making must involve serious investigation and studies and the public "must have access to the conclusions of the relevant studies".[40] Similarly, the ECtHR further recalls that the "individuals concerned must have an opportunity to protect their interests in the environmental decision-making process, which implies that they must be able to participate effectively in relevant proceedings and to have their relevant arguments examined".[41] But it is to the third dimension of procedural rights that we turn our attention here, and the Court is consistent with the prior findings.

The Court recalls that the claimants addressed their concerns first to the Swiss administrative bodies and only following a rejection from those authorities to substantively engage with their claims they turned to the courts. Both the Federal Administrative Court and the Federal Supreme Court rejected the plaintiffs' claims without delving on their merits, and this, given the substantive danger associated with climate change constituted an impermissible violation of their right to access the courts, as set forth in Article 6.1 of the ECHR.

As the Court recalls, "the right of access to a court includes not only the right to institute proceedings but also the right to obtain a determination of the dispute by

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38 *Ibid*. §6.46.
39 *Ibid*. at §9.1.
40 *Supra* in 21, at §539 (c) and (d).
41 *Ibid*. at §539 (e)

a court. This flows from the fact that the right of access to a court must be "practical and effective", not theoretical or illusory".[42] The rejection of the plaintiffs' claims by the domestic courts without assessing their merits is therefore considered by the Court to affect the rights of those plaintiffs and therefore allows them to file a complaint before the ECtHR without being considered an impermissible *actio popularis*.[43] Moreover, since the claims were filed both by several elderly women as well as by an organization (KlimaSeniorinnen) counting thousands of elderly women, including the ones bringing the claim, the fact that the domestic courts avoided the assessment of the standing capacity of the organization itself is considered by the ECtHR an additional prove of Switzerland's violation of Article 6.1:

> The Court further notes that the domestic courts did not address the issue of the standing of the applicant association, an issue which warranted a separate assessment irrespective of the domestic courts' position as regards the individual applicants' complaints. The domestic courts did not engage seriously or at all with the action brought by the applicant association.[44]

Last, but certainly not least, it seems particularly to the point to close this section with a final reference to the ECtHR's decision in *KlimaSeniorinnen*. Because, after having examined all the particular circumstances surrounding the lack of access to justice in this particular case, the Court made a more general pronouncement on the role of the judiciary regarding climate disputes, and held it "essential to emphasise the key role which domestic courts have played and will play in climate-change litigation", stressing that "it falls primarily to national authorities, including the courts, to ensure that Convention obligations are observed".[45]

(D) A PEEK INTO THE (NEAR) FUTURE

Given the relentless and dangerous increase in GHG emissions, only temporarily halted during the peak of the Covid crisis in 2020,[46] as well as the steady increase in climate related phenomena causing damages around the world,[47] it is to be expected that climate complaints will continue to be filed before courts of justice around the

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42 *Ibid*. at §629.
43 *Ibid*. at §§630-634.
44 *Ibid*. at §636.
45 *Ibid. at §639.*
46 There was a reduction in GHG emissions of around 7% in 2020, but this was but a blink. Emissions in 2023 broke the record of emissions of 2022, and they are poised to establish a new record in 2024. *Global Carbon Project: Coronavirus causes 'record fall' in fossil-fuel emissions in 2020*, CarbonBrief, 11 December 2020 (https://www.carbonbrief.org/global-carbon-project-coronavirus-causes-record-fall-in-fossil-fuel-emissions-in-2020/), last accessed on 18 December 2024; *Greenhouse gas concentrations surge again to new record in 2023*, World Meterological Organization, 28 October 2024 (https://public.wmo.int/news/media-centre/greenhouse-gas-concentrations-surge-again-new-record-2023), last accessed on 18 December 2024; *Fossil fuel CO2 emissions increase again in 2024*, Global Carbon Project, 13 November 2024 (https://globalcarbonbudget.org/fossil-fuel-co2-emissions-increase-again-in-2024/), last accessed on 18 December 2024.
47 *Climate change made Hurricane Helene and other 2024 disasters more damaging, scientists find, Yale Climate Connections, 9 October 2024* (https://yaleclimateconnections.org/2024/10/climate-change-made-hurricane-helene-and-other-2024-disasters-more-damaging-scientists-find/), last accessed 18 December 2024.

world. In this section we will sketch the specificities of some of the new approaches to climate plans-related litigation, which may help to introduce novel visions on the matter and, therefore, bring some additional complexity to an already rich phenomenon. In particular, we will first focus on the introduction of equity when devising climate plans in order to strike a fairer balance of the interests involved, in what is usually called "just transition"; secondly, we will refer to the probable increase in adaptation cases, involving the need to introduce preventative approaches and measures in climate plans regarding expected or probable climate-related threats; and, last, we will also briefly refer to climate litigation before a court that has so far remained quite hermetic to the recent surge in judicial review decisions regarding climate plans: the Court of Justice of the European Union.

(1) Just transition

As governments develop and implement plans and policies to tackle climate change it is becoming increasingly clear that those plans and policies are not neutral, and they generate benefits and burdens that are distributed among society. This distribution is sometimes particularly detrimental to some sectors of society while others ripe its benefits, therefore generating equity concerns. Just transition litigation is a novel concept that encompasses the claims brought before courts to specifically challenge that unequal burden.

However, just as energy transition plans can produce unexpected unequal results and harm the rights and interests of some sectors of society, just transition litigation might result in the paralysis or at least slow down an already insufficient energy transition that is indispensable to tackle climate change, the consequences of which will, in turn, be extremely harmful and unequal. Therefore, while such cases are still incipient, there are already some voices, like Savaresi and Setzer, advocating for a detailed monitoring and assessment of just transition litigation in order to better understand their motivations, diverse justice claims involved and results.[48] Such an analysis, the authors contend, would in addition provide a better understanding of how to integrate the interests and concerns of sectors of society that are usually misrepresented in the decision-making process, therefore better legitimising those processes and their outcomes, ensuring a more just transition and helping to overcome at least part of the opposition that those measures and policies might create.

Savaresi and Setzer identify three main dimensions of justice that are related to the energy transition and which can appear either alone or simultaneously in a given context: distributive justice (who benefits and who is burdened by the plan), procedural justice (how decisions are taken and plans made), and recognition justice (how the interests of marginalised communities or sectors of society are included in those plans).

Ultimately, the key question that needs to be addressed is "how can we rapidly and urgently decarbonize while maintaining distributive, procedural and recognition justice?".[49]

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[48] Savaresi, A., Setzer, J., Bookman, S. et al. 'Conceptualizing just transition litigation'. *Nature Sustainability* 7, 1379–1384 (2024), https://doi.org/10.1038/s41893-024-01439-y.

[49] *Ibid.*

(2) Adaptation

There have traditionally been two sorts of responses to climate change: mitigation and adaptation. While the former tries to slow, stop or reduce the concentration of GHG in the atmosphere, in order to prevent global temperatures from rising to dangerous levels, the latter focuses instead on the measures that need to be taken to protect us from the impacts of climate change that are already happening or will most probably happen given the current or foreseeable concentration of GHG. One seeks to prevent dangerous climate change, the other seeks to prevent the impacts of that climate change.

Most lawsuits challenging climate plans have so far related to mitigation. This is easy to understand: the dangers of global warming multiply as the temperature increases, causing more devastation and damage; the costs of addressing climate change become higher as the temperature rises; the possibility of actually limiting global warming to a safer level diminishes as temperatures go up; and last, but not least, while we can deploy measures to adapt to some climate change impacts, the more the temperature increases, the harder it is to protect the population from both sudden and slow onsetting events. To put it bluntly, there's no adapting to a certain level of warming.

Nevertheless, extreme events are already occurring and causing harm around the globe. Moreover, even if we were to stop warming at 1.5°C, there are a cascade of impacts that would derive from such an increase in temperature.[50] And it is necessary to adopt measures that would prevent those impacts from harming the population. Governments have been slow in deploying appropriate mitigation policies, but they have been even slower in drafting adequate adaptation plans.[51] Therefore, it is to be expected that, alongside mitigation-related climate litigation we will see an increase in adaptation cases.

Already in 2015, in Pakistan, a lawsuit was filed by Ashgar Leghari, challenging the lack of implementation of the country's climate strategy, regarding adaptation and resilience to the warming climate. The High Court of Lahore found in favour of the applicant and convened a commission of representatives of different ministries tasked with overseeing the actual implementation of the plan. The commission worked for three years, under the supervision of the judge, until the Court was satisfied that a significant part of the plan had been implemented, and then the Court created a Standing Committee to act as a link between itself and the executive and to assist the Government in the further implementation of the plan.

More recently, there have been some interesting cases regarding adaptation. For instance, the ECtHR recalled in *KlimaSeniorinnen v. Switzerland* that "effective protection of the rights of individuals from serious adverse effects on their life, health, well-being and quality of life requires that the above-noted mitigation measures be supplemented

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50 *Supra* in 32.

51 Since 2014, the United Nations Environment Programme (UNEP) annually publishes the "Adaptation Gap Report". The first sentence of the 2024 Report reads: "As climate impacts intensify, adaptation action continues to fall behind needs." United Nations Environment Programme (2024). *Adaptation Gap Report 2024: Come hell and high water – As fires and floods hit the poor hardest, it is time for the world to step up adaptation actions*. Nairobi. https://doi.org/10.59117/20.500.11822/46497.

by adaptation measures aimed at alleviating the most severe or imminent consequences of climate change."[52]

In 2023, Friends of the Earth brought a legal claim against the United Kingdom's third National Adaptation Programme (NAP3) that somehow bridges different points analysed in this paper: procedural rights, adaptation and just transition. The NGO, together with a disability rights activist and a campaigner trying to save his house, challenge NAP3 for a set of reasons: first, they consider that the plan is not specific enough, and instead of defining clear objectives only states broad goals; secondly, there is allegedly no information on the risks; thirdly, the plan does not consider its unequal impacts; and, last, there is a violation of several fundamental rights, like the right to life or to private and family life, as set in the ECHR.[53] The High Court of England and Wales delivered its judgment in October 2024, and although it dismissed the plaintiffs' claims, it nevertheless delivered a relevant statement on the relevance of adaptation, especially in regard to the aforementioned decision of the ECtHR in *KlimaSeniorinnen.* The Court stated that the European Court

> appears to indicate that the positive obligation imposed by Articles 2 and 8 extends to adopting and effectively implementing "adaptation measures aimed at alleviating the most severe or imminent consequences of climate change, taking into account any relevant particular needs for protection".[54]

Nevertheless, the Hight Court also considered that the lack of a specific goal on adaptation established at the international level, similar to the targets set in the Paris Agreement, necessarily conferred a larger margin of discretion to the authorities regarding adaptation. In the Court's own words,

> (a) the narrow margin of appreciation in relation to the mitigation aims was justified by reference to the internationally agreed objective of carbon neutrality by 2050 and the impact of one State's default on other States;
>
> (b) neither of these features applies in the field of adaptation; and
>
> (c) accordingly, in the field of adaptation, States are to be accorded a wide margin of appreciation in setting the relevant objectives and a wider margin still in setting out the proposals and policies for meeting them (by analogy with the margin accorded to the State in setting the means for achieving the mitigation objectives).[55]

All this notwithstanding, the position of courts is likely to evolve as the climate crisis looms on, just as it has evolved regarding mitigation cases. According to the last report on the global trends of climate litigation by Setzer and Higham, 64 climate adaptation cases have been filed since 2015, eight of them in 2023.[56] It certainly isn't the most

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52 *Supra* in 21, at §552.

53 *R (Friends of the Earth Ltd et al.) v Secretary of State for Environment, Rood & Rural Affairs, complaint, 17 October 2023.*

54 R(Friends of the Earth Ltd et al.) v Secretary of State for Environment, Rood & Rural Affairs, High Court of Justice, King's Bench Division, Administrative Court, [2024] EWHC 2707 (Admin), judgment 25 October 2024, at §102.

55 *Ibid*. at §105.

56 Setzer, J., and Higham, C., (2024), *Global Trends in Climate Change Litigation: 2024 Snapshot*. London: Grantham Research Institute on Climate Change and the Environment, London School of Economics

numerous group of cases, but as the impacts of the current level of warming increase and become more apparent and destructive, it certainly is to be expected that more victims and NGOs will turn to courts to protect and upheld the right of those affected, or potentially affected, by the lack of adequate adaptation plans and measures.

(3) Court of Justice of the European Union

One last area that may be worth exploring in the near future regards lawsuits challenging climate plans at the EU level. This has been an area with, so far, extremely limited results and scope, with most cases regarding the emissions trading system (ETS) of the European Union and the allowances of GHG emissions allocated to a certain country or company.[57] The most notorious climate case that has not to do with the ETS is probably *Ferrão Carvalho*, in which families from several EU and non-EU countries filed in 2018 a claim before the Court of Justice of the European Union (CJEU) regarding the then 40% GHG emissions reduction target for 2030 (which has since then been augmented to 55%)[58]. The CJEU basically dismissed the claim for lack of standing of the plaintiffs, arguing that they were not particularly and individually affected by the legislative measures under challenge, beyond the fact of being potentially affected by climate change.[59]

Although this interpretation of standing constitutes a considerable legal hurdle for other climate related complaints, there have recently been some cases that try to challenge climate plans in the EU framework. We will refer here to two of them which have not yet been decided at the time of writing this lines.

The first one is a claim brought by Climate Action Network (CAN) Europe and Global Legal Action Network (GLAN) against the EU Commission regarding the 2030 GHG emissions reduction targets.[60] This may be reminiscent of *Ferrão Carvalho,* and the plaintiffs develop their case in a different way so as to avoid stumbling upon the same obstacles. Thus, CAN Europe and GLAN do not directly challenge the target itself, but rather the so-called annual emissions allocations (AEAs) made by the Commission to the member states within the framework of the overarching climate targets. The plaintiffs argue that the EU Commission failed to assess different elements during the definition process of the AEAs and therefore they should be remade. Among those elements that were not assessed, they refer to the global emissions reductions required to hold

and Political Science, pp, 4 and 34.

57 There are at least 38 such cases, out of a total of 71 climate cases at the EU level, according to the database of the Sabin Centre for Climate Change Law (https://climatecasechart.com), last accessed on 20 December 2024.

58 Regulation (EU) 2021/119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

59 *Armando Carvalho and Others v European Parliament and Council of the European Union, Case C 565/19 P ECLI:EU:C:2021.* For an assessment of the challenges involving climate litigation before the CJEU see, inter alia, Campins Erritja, M., 'La difícil construcción de una política climática de la Unión Europea a través de la jurisprudencia del Tribunal de Justicia de la UE', in Peñalver i Cabré, A., *Litigación Climática. El Papel de la Ciudadanía y los Jueces*, Universitat de Barcelona, 2024, pp. 239-258.

60 *Global Legal Action Network and CAN-Europe v EU Commission*, General Court of the EU, 27/08/2024.

the global mean temperature to 1.5°C; what constitutes a fair share of the emissions reductions; what domestic reductions are feasible at the EU level; or the impact of climate change upon fundamental rights, as recognised in the Charter of Fundamental Rights of the European Union. It must be noted that the plaintiffs do not directly challenge the AEAs before the Court, but rather the refusal of the EU Commission of their request for internal review of those AEAs.[61] The hearings before the General Court of the EU are expected to take place in 2025 and a final decision in 2026.

A second claim or, rather, a second series of claims have been brought simultaneously by different environmental organisations before the EU Commission against the National Climate and Energy Plans (NCEPs) of their respective countries, namely France, Germany, Ireland, Italy, and Sweden. The plaintiffs claim, among other things, that the NCEPs of those country are inadequate to achieve the climate targets set by the EU for 2030, lack proper public participation and are unequitable. The plaintiffs expect the EU Commission to launch a formal infringement procedure that may ultimately lead to a review of the plans.

(E) CONCLUSION

Climate litigation is a manyfold phenomenon, diverse in its actors as well as in its claims and legal arguments. In this article we have tried to present a clear picture of a specific modality of climate litigation: that brought by individuals and nongovernmental organisations against the climate plans of a given country or region. The case law shows that an increasing number of courts in different jurisdictions are finding that the authorities have acted unlawfully regarding climate plans, either because no such plans exist, or because they are inadequate to deal with the climate crisis or maybe even because they are not complied with. Ultimately, what arises from many of those cases is that most jurisdictions no longer consider climate change as a no-go area. On the contrary, courts are becoming increasingly aware of the importance of devising and implementing adequate climate plans in order to respond to climate change and, ultimately, to uphold the law. Since the climate crisis is far from being resolved and recourse to the courts of justice is likely to, at least, continue in the coming years, we have also presented, in the last section of the article, some possible avenues for the next generation of climate lawsuits against climate plans, dealing with adaptation, the fairness of the energy transition and the possible emergence of less mobilised courts in the recent history of climate litigation, like the CJEU.

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SYbIL | Spanish Yearbook of International Law

Climate change litigation through the prism of private international law

Eduardo Álvarez-Armas*

INTRODUCTION

Climate change litigation is a very broad legal phenomenon, with various sub-species, most of which largely arise from a single socio-political concern: the understanding, notably within civil society, that not enough is being done to tackle what the United Nations has come to call the "climate crisis".[1] Over the last three decades, political and diplomatic initiatives have unfolded to try to contain or at least manage climate change and its ramifications, due to the threats they pose to life on the planet. However, as these efforts are perceived to be unsatisfactory, and climate change is perceived to lie at the heart of modern global challenges, the phenomenon of climate change litigation is gaining momentum, notably since the 2015 decision in the famous Dutch case "Urgenda".[2] Interestingly, despite this recent attention, Climate change litigation has possibly existed, with relative discretion, for around three decades too: if one dives into the databases held by the Grantham Research Institute on Climate Change and the Environment and the Sabin Center for Climate Change Law,[3] it is possible to find, for instance, Australian cases going back to the 1990s.[4]

The significant attention this kind of litigation has gained recently has brought along scepticism about its capacity to yield the outcomes it purports to obtain, i.e. redress for climate-change-related damage and/or facilitation of climate-change mitigation and adaptation.[5] However, at the very least its political significance, i.e. its potential to spark

* Assistant professor of law Universidad Pontificia Comillas (Madrid, Spain) and Université catholique de Louvain (Belgium). This article reprises and develops elements already published in E. Álvarez-Armas, "Le contentieux international privé en matière de changement climatique à l'épreuve de l'article 17 du règlement Rome II : enjeux et perspectives" (2020) 3 RDIA 109; and E. Álvarez-Armas, "Goal 13", in R. Michaels, V. Ruiz Abou-Nigm & H. Van Loon (eds), *The Private Side of Transforming the World – UN Sustainable Development Goals 2030 and the Role of Private International Law* (Intersentia 2021) 409. DISCLAIMER: E. Álvarez-Armas provides pro-bono advice to an NGO in a climate litigation case.

1 See <http://un.org/en/un75/climate-crisis-race-we-can-win> accessed 30 May 2024.

2 For a description and timeline: <https://www.urgenda.nl/en/themas/climate-case/climate-case-explained/> accessed 23 September 2024.

3 https://climate-laws.org/cclow/litigation_cases and http://climatecasechart.com/ respectively.

4 *Greenpeace Australia Ltd. v. Redbank Power Co. 1994* ("*Challenge to state council decision granting development consent for a power station*") as referenced in <https://climatecasechart.com/non-us-case/greenpeace-australia-ltd-v-redbank-power-co/> accessed 23 September 2024.

5 "*Mitigation*" is an "*anthropogenic intervention to reduce the sources or enhance the sinks of greenhouse gases*"; and "*Adaptation to climate change refers to adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities*" (IPCC, *Glossary of*

public debate on global warming, and possibly push forward the above-referred political and diplomatic initiatives, is not to be neglected.[6]

From this standpoint, the following pages intend to sketch the core characteristics, and some selected issues, of one of the above-mentioned sub-species within climate change litigation, which may be labelled as "private international climate change litigation": private party *versus* private party cross-border climate litigation. This is to be understood as litigation: i) amongst private parties only; ii) of a private-law (generally, tort-law) nature; iii) conducted on the basis of private-international-law foundations; iii) over damage threatened or caused by climate-change-derived phenomena.

A first section will contextualize private international climate change litigation (hereinafter "PICCL") within the broader panorama of climate change litigation (I), before presenting some illustrations of the phenomenon (II). Thereafter, a classic structure will be followed: the basics of the international jurisdiction dimension of PICCL will be addressed firstly (III), subsequently proceeding to the presentation of its basic choice-of-law elements (IV). Finally, a series of more advanced considerations will be delivered (V). These will provide a more detailed account of selected issues and challenges surrounding PICCL as a form of litigation.

(A) CONTEXT

The phenomenon of climate change litigation in general began to have a certain prominence after 2005 in the United States, where several waves of (unsuccessful) litigation against private parties (irrespective of whether initiated by public or private subjects) followed one another.[7] The "turn of the tide" came on the 24th June 2015 with the above-referred historic judgment rendered by the District Court of The Hague (The Netherlands) in the so-called "*Urgenda climate case*", where the Urgenda foundation[8] successfully conducted litigation against the Government of the Netherlands for its lack

Terms used in the IPCC Third Assessment Report, 2001, 379 and 365 respectively; <https://archive.ipcc.ch/pdf/glossary/tar-ipcc-terms-en.pdf> accessed 30 May 2024).

6 M Lehmann and F Eichel, "Globaler Klimawandel und Internationales Privatrecht Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden" (2019) 83(1) Rabels Zeitschrift für ausländisches und internationales Privatrecht 77, at 82. These authors contend that climate change lawsuits often serve less to provide effective legal protection than to attract public attention to the problem of global warming. Cf Shi-Ling Hsu, 'A realistic evaluation of climate change litigation through the lens of a hypothetical judgment lawsuit' (2008) 79 *University of Colorado Law Review* 701, 717: "*By targeting deep-pocketed private entities that actually emit greenhouse gases* […], *a civil litigation strategy, if successful, skips over the potentially cumbersome, time consuming, and politically perilous route of pursuing legislation and regulation*."

7 G Ganguly, J Setzer & V Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2008) 38/4 *Oxford Journal of Legal Studies* 841, 846ff.

8 In its own words, "*The Dutch Urgenda Foundation aims for a fast transition towards a sustainable society, with a focus on the transition towards a circular economy using only renewable energy*. […] *Urgenda views climate change as one of the biggest challenges of our times and looks for solutions to ensure that the earth will continue to be a safe place to live for future generations*." <https://www.urgenda.nl/en/home-en/> Reportedly, it is "*a citizens' platform which develops plans and measures to prevent climate change [which] also represent*[ed] *886 individuals in this case*." <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196> accessed 30 May 2024.

of efforts to combat climate change.[9] In its landmark ruling, which was upheld on the 20th December 2019 by the Dutch Supreme Court,[10] the District Court established that "*the State must take more action to reduce the greenhouse gas emissions in the Netherlands. The State also has to ensure that the Dutch emissions in the year 2020 will be at least 25% lower than those in 1990.*"[11]

Since 2015 there has been a proper "Big Bang" of cases around the globe which have been labelled as "climate litigation". Beyond those which have been inspired or given further momentum by the Urgenda decision (i.e. actions by NGOs and other public-interest representatives around the world against public bodies for lack of action in respect of dealing with climate-change), there is a rich typology of legal means displayed and actors involved (including, for instance, corporation versus corporation for "greenwashing" as unfair competition).[12] One therefore finds a wide variety of litigation forms: individuals versus public bodies; public bodies against corporations; corporations against public bodies; etc…

Although it may be quite graphic to refer to "public" versus "private" climate litigation within this context, depending on whether the defendant is a public entity or a private person,[13] it may be more appropriate to further refine the typology and differentiate along two axes of coordinates: domestic versus international litigation, and public versus private litigation, further restricting the latter to situations where both claimant and defendant are private parties, and the relevant cause of action bears a private-law nature. Admittedly, it may be difficult to draw clear-cut distinctions (notably as climate change is, by definition, an 'international'/global phenomenon), but differences in legal and non-legal stakes along both axes justify the classification effort. The presence of a public entity on either side of the legal relationship will frequently bring various complexities into the picture: potential international law immunities and doctrines such as the 'act of state' when litigation targets a public defendant, or else questions as to whether the lawsuit is grounded on public prerogatives/State authority when litigation is brought by a public plaintiff, for instance. Moreover, (domestic) political and (international) diplomatic dynamics differ widely depending on the public or private nature of the parties involved.

From this standpoint, focusing specifically on those cases featuring cross-border elements where civil society/individuals turn against corporations, PICCL is to be characterized (as announced) by confronting one or several private-party claimants (as opposed to public bodies) and one or several private-party defendants (as opposed to public entities), the latter generally being amongst the so-called "Carbon Majors".

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9 See footnote 2.

10 <http://www.urgenda.nl/en/climate-case/> accessed on 23 September 2024.

11 An English version of the 2015 judgment rendered by the District Court of The Hague can be found under the following permanent link: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196> The quotation is taken from the summary provided in the same webpage; accessed 23 September 2024.

12 See, for instance, <https://climatecasechart.com/non-us-case/iberdrola-and-others-vs-repsol/> accessed 23 September 2024.

13 The Sabin Center sub-divides its "Global Climate Litigation Database" into "*Suits against governments*", "*Suits against corporations, individuals*" and "*Advisory opinions*" <https://climatecasechart.com/non-us-climate-change-litigation/> accessed 23 September 2024.

Carbon Majors are a group of 90 corporations, which, following scientific evidence, are responsible for "*63 % of cumulative worldwide emissions of industrial CO2 and methane between 1751 and 2010*".[14] Moreover, as indicated, PICCL will frequently respond to the features of what, under comparative methodologies, could be labelled as tort law (or non-contractual obligations under EU terminology). This is so, irrespective of whether internally these cases would be considered to rely on pure tort law or to arise from the "law of nuisance" (which in certain systems is a part of property law/rights in rem). Overall, PICCL aims to provide compensation for damage suffered, and/or where available, at the introduction of injunctive relief. As it does so at the international level, it is sustained and framed by private-international-law elements.

(B) SAMPLE CASES

As a relatively recent variety within climate change litigation, and possibly also due to the costs and practical difficulties that it entails for plaintiffs, PICCL illustrations are still scarce in the above-referred databases. The Grantham Research Institute and Sabin Center databases show approximately five cases[15] that could respond to the features identified above as characterizing PICCL.[16] Three of them have been selected for presentation hereinafter, as they illustrate three potential approaches that this kind of litigation may pursue.

In *Milieudefensie v Shell* 2019,[17] seven Dutch NGOs (and, initially, over 17,000 individuals) brought Royal Dutch Shell before the District Court of The Hague (The Netherlands), on the basis of both EU and Dutch rules of private international law (Royal Dutch Shell had at the time its registered office in the United Kingdom and its principal place of business in the Netherlands). The claimants sought to obtain the transposition of the legal reasoning of the *Urgenda* case to private subjects (corporations). Specifically, they sought to obtain, inter alia, an order that Shell limits "the joint volume of all CO_2 emissions associated with its business activities and fossil fuel products in such a way that the joint volume of those emissions is reduced by (net) 45% by 2030 compared to 2010 levels."[18] They sustained their claim on Dutch tort law, under which Shell would

14 R Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854 2010' (2014) 122 *Climatic Change* 229. For updated data <https://climateaccountability.org/carbon-majors/> accessed 23 September 2024.

15 Other than the three cases presented hereafter, *Asmania et al. v. Holcim* <https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/> combines compensatory and injunctive approaches, and *Friends of the Earth (Les amis de la terre) et al v Total* <https://www.climate-laws.org/geographies/france/litigation_cases/friends-of-the-earth-et-al-v-total> is based on the French *Loi sur le devoir de vigilance* (both accessed 24 September 2024).

16 <https://climate-laws.org/cclow/litigation_cases> and <http://climatecasechart.com/ > both accessed 30 May 2024. Beyond the cases mentioned, some further five or six cases, located in non-EU jurisdictions such as Argentina and Australia, could potentially be classified as PICCL, but their files do not contain enough information to ascertain whether that is indeed the case.

17 <https://en.milieudefensie.nl/climate-case-shell/climate-case-against-shell> (not to be confused with the 2008 *Milieudefensie v Shell* "common" environmental litigation <https://en.milieudefensie.nl/shell-in-nigeria>) both accessed 24 September 2024.

18 Page 205 of the unofficial translation of the court summons, which can be found under the "summons" link at <http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/> accessed 24 September 2024.

have "a duty of care towards the claimants to contribute to preventing [climate-change-derived] danger and to act in line with … Paris climate target[s]."[19] Their position was further argued, amongst other grounds, on a claim to indirect horizontal effect of Articles 2 ("right to life") and 8 ("Right to respect for private and family life, home and correspondence") of the European Convention of Human Rights.[20] On 26 May 2021, the trial level decision was issued. The District Court of The Hague

> Order[ed] [Shell], both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts […] to limit or cause to be limited the aggregate annual volume of all CO_2 emissions into the atmosphere […] due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels.[21]

Although the decision was welcomed as a "turning point" (since "[f]or the first time in history"[22] a court had ruled in the referred sense against a corporation within the climate change litigation context), civil society's joy did not last very long: Shell announced an appeal,[23] and in a decision rendered on the 12th November 2024 the Court of Appeal of The Hague overturned the trial decision.[24] At the time of writing it is not known whether the matter will proceed to the Supreme Court.

In *Lliuya v. RWE*, the plaintiff, Mr. Saúl Lliuya, lives in Huaraz, a city in Perú situated on the Andes mountains, precisely at the feet of a glacier that global warming is melting, increasing the water volume of a lake (Palcacocha) that will eventually overflow and flood Mr. Lliuya´s property.[25] Backed-up by German NGO Germanwatch, he has sued German electricity-provider RWE in order to avoid damage to his property. He contends, on the basis of scientific data/evidence, that, as RWE has contributed to 0.47% of all GHG emissions since the beginning of the industrial era,[26] it is liable to contribute to 0.47% of the costs of the preventative measures (building/construction works) required to prevent his property from being flooded.[27] The plaintiff´s approach to his case is undoubtably creative: by focusing on the claimant's aspiration to protect his own property from future damage, the case circumvents several difficulties typically encountered in environmental litigation (*locus standi* in respect of diffuse interests and "visibility" of latent damages). Notwithstanding this

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19 ibid paras 38–39.

20 ibid paras 40, 50–55.

21 Point 5.3 of the Court-issued English translation of the District Court Judgment <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf > accessed 24 September 2024.

22 Statements of Milieudefensie representatives <https://en.milieudefensie.nl/news/historic-victory-judge-forces-shell-to-drastically-reduce-co2-emissions> accessed 24 September 2024.

23 Shell announced its appeal back in 2021 https://www.shell.nl/media/persberichten/media-releases-2021/reactie-shell-op-uitspraak-klimaatzaak.html#english; Milidefensie´s "Statement of defence on appeal" is available in the Sabin Center database <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20221018_8918_na.pdf> both accessed 24 September 2024.

24 The English translation of the decision can be found in <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2024/20241112_8918_judgment.pdf> accessed 6 December 2024.

25 <https://rwe.climatecase.org/en/background#palcacocha> accessed 24 September 2024.

26 Lliuya v. RWE, Statement of claim, point 8.2, p. 19; accessed 24 September 2024 <https://www.germanwatch.org/sites/germanwatch.org/files/announcement/20822.pdf>

27 Ibid, p. 2 (idea adapted from the petitum) accessed 24 September 2024.

focus on private rights and interests, the case, if successful, will indirectly produce climate-beneficial results. The case is still ongoing, and that is so despite not succeeding at trial level before the District Court in Essen (Germany) due to issues of causality (even if scientific evidence was offered to the court in the statement of claim). An appeal is currently pending before the Higher Regional Court in Hamm, which has, in principle, accepted the causal link, and opened the evidentiary phase.[28] After a long hiatus, due to the fact that the Higher Regional Court wanted to take evidence *in situ* in Peru, and the COVID pandemic hindered this possibility,[29] a "Court appointed expert deliver[ed a] report on the 1st question of proof" in august 2023.[30] As of September 2024, "[b]*oth parties to the proceedings have submitted their responses to the expert opinion on the flood risk to the court*" and they are waiting for the Hamm Higher Regional Court to set a the date for the hearing.[31]

While *Milieudefensie* resorts to a tort-law approach and originally led to the obtention of an order to curb down emissions (unaccompanied with any request as to compensation) and *Lliuya* resorts to a rights-in-rem approach in order to obtain compensation for "protective" purposes, *Falys v. Total Energies* combines certain elements from both approaches.[32] Hugues Falys has been a farmer for around 30 years in Lessines, Belgium, and during this time he has suffered the effects of climate change; specifically, the impact of several extreme weather events (amongst which heatwaves and droughts), resulting in "*significant losses, extra workload, constant stress and immense worry for the years to come*".[33] Supported by three organisations Ligue des droits humains, FIAN Belgium and Greenpeace he has filed a lawsuit with the Commercial Court of Hainau, Tournai division (Belgium) against French petrol multinational TotalEnergies. On the basis of a tort-law reasoning, Mr. Falys is demanding compensation for the damage he has suffered as well as an order to "*the company to move away from fossil fuels in order to prevent future damage*".[34] The lawsuit was filed in March 2024 and is, as of December 2024, pending at trial level.

Having briefly sketched the approaches that PICCL may take, let us analyse the specific rules that sustain the international jurisdiction and choice-of-law dimensions of PICCL in the European Union.

(C) EU RULES ON INTERNATIONAL JURISDICTION OF COURTS

EU rules on international jurisdiction relevant to private international climate change litigation are thought to be the "gold standard"[35] of rules of international jurisdiction

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28 <https://www.germanwatch.org/en/15999> accessed 24 September 2024 ("*The decision by the Higher Regional Court Hamm to enter into the evidentiary stage is a historic breakthrough: it is the first time that a court has recognised that "a private company is in principal* [sic] *responsible for its share in causing climate damages in other countries* ").

29 < https://rwe.climatecase.org/en/legal#timeline > accessed 24 September 2024.

30 < https://rwe.climatecase.org/en/legal#timeline > accessed 24 September 2024.

31 "Current status of the lawsuit" in <https://rwe.climatecase.org/en> accessed 24 September 2024.

32 < https://www.thefarmercase.be/en/ > accessed 24 September 2024.

33 < https://www.thefarmercase.be/en/the-court-case/> accessed 24 September 2024.

34 Ibid.

35 E. Álvarez-Armas has not coined the referred expression (with which he strongly agrees) but cannot recall in which conference he heard it used, or who the author was. E. Álvarez-Armas apologizes to the author of the expression for this memory lapse.

over human-rights-related torts (a broader category, in which PICCL belongs). This is largely due to two core reasons: firstly, the relevant rules on international jurisdiction are generally available for any potential plaintiff anywhere in the world, irrespective of their nationality, domicile, habitual residence, place of harm, or any other possible characteristic, as long as the defendant is domiciled in a Member State of the European Union.[36] Secondly, legal mechanisms, such as the Anglo-Saxon doctrine of *forum non conveniens*, that would restrict the resort to existing and available grounds of jurisdiction on the basis of expediency or convenience of having cases tried elsewhere in the world are not acceptable within the EU system of international jurisdiction.[37]

These two considerations entail that, generally, provided that the relevant GHG emitter is domiciled in the EU, access to justice is unrestrictedly available for any potential climate-change-related tort victim anywhere in the world. The relevant grounds of jurisdiction are to be found in the so-called Brussels I bis Regulation,[38] specifically in Article 4, the general rule of the system, conferring jurisdiction to the courts of the country of the domicile of the defendant; and Article 7(2), a special rule of jurisdiction on "*matters relating to tort, delict or quasi-delict*", conferring jurisdiction to the courts of the place where the "*harmful event occurred or may occur*". The latter provision is to be interpreted according to the *Mines de Potasse* ruling,[39] which reflects the so-called "ubiquity principle": in a nutshell, in cases of complex non-contractual obligations (i.e. when an action/omission in country A gives rises to a damaging result in country B), the plaintiff may freely choose to submit their claim in the place where the event giving rise to damage occurred or may occur, or else in the place where the damage occured or may occur.

Overall, the referred elements yield three different jurisdictional possibilities: suing EU-domiciled GHG emitters in their country of domicile (Article 4); suing EU-domiciled GHG emitters in the EU location where victims suffer damage (Article 7(2), first option per *Mines de Potasse*); or suing EU-domiciled GHG emitters in the EU location of the event giving rise to damage (Article 7(2), second option per *Mines de Potasse*). Irrespective of the nature of the action under the applicable (domestic private) law (i.e. irrespective of the underlying pure-tort or rights-in-rem approach), the relevant heads of jurisdiction will always be Articles 4 and/or 7(2): per the Čez[40] case-law of the CJEU, the rule of exclusive jurisdiction in Article 24 is not relevant for cases where the very substance of a right in rem is not in question and, typically, climate litigation will not delve into those themes.

The openness of the EU system and its various positive aspects, as just described, in terms of facilitating access to justice do not mean, however, that the system does not feature limitations, both structural and practical.

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36 CJEU, case C-412/98, *Group Josi Reinsurance Company SA*, ECLI:EU:C:2000:399

37 CJEU, case C-281/02, Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others, ECLI:EU:C:2005:120

38 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L351/1

39 Case 21-76 *Handelskwekerij G.J. Bier B.V. & the Reinwater Foundation v. Mines de Potasse d'Alsace S.A.*, ECLI:EU:C:1976:166.

40 Case C-343/04 *Čez*, ECLI:EU:C:2006:330

Structurally, a first extremely prominent limitation should immediately become clear from the description provided so far: the relevant rules confer jurisdiction over EU-domiciled GHG emitters but cannot be used to assert jurisdiction over non-EU-domiciled GHG emitters whose activities have an impact on the territory of the EU. In other words, the way that the Brussels I bis system is currently configurated entails the need to resort to domestic rules on international jurisdiction vis-à-vis third-country defendants, if available at all. This configuration has historically been an issue when trying to bring a third-country subsidiary to court alongside an EU parent company, for instance in respect of conventional environmental torts and/or human-right-related torts. At first sight, these scenarios are unlikely to take place in climate litigation, as per its typical structure, climate litigation targets parent companies only. Still, even when focusing on parent companies alone, trying to bring to court a non-EU-domiciled Carbon Major is currently outside the scope of the Brussels I bis Regulation, and therefore not a given, as it is fully dependent on domestic rules of international jurisdiction. Thus, the geographical restriction on the application of the Regulation's rules[41] may not be a problem in those Member States where domestic rules based on the crystallization of damage exist,[42] but it is a very significant shortcoming where there is a lack of jurisdictional criteria based on the impact of the tort/the materialisation of the result. Significantly, several EU countries have rules based only on the place of action or do not have domestic rules on jurisdiction over torts at all.[43]

Beyond this, there are practical limitations that may arise from the very application of current provisions or their interaction with other rules. Amongst these, two examples deserve to be mentioned.

Firstly, there is a relative risk of fragmentation of jurisdiction in cases where the latter would be based on the notion of the place of action/event giving rise to the damage. An Example of this can be easily drawn by analogy from the choice-of-law aspects of the Lliuya case: when trying to identify the place of acting for choice-of-law purposes, the claimant mentions in his statement of claim that (only) "*two thirds of* [RWE's] *greenhouse gas emissions occur within Germany*",[44] which is likely related to the fact that RWE has premises in other countries.[45] On a purely technical level, this should have likely determined the impossibility to apply German law alone to the full extent of the controversy, and the need to apply on a distributive basis the law(s) of the (various) place(s) where the remaining third of GHG emissions originates (It would seem, however, that the point was not raised in order not to further complexify an already technically complex legal situation). If one was to transpose these ideas to the realm of jurisdiction, the fact that RWE has got emitting structures both in Germany and other countries should lead to a kind of "reverse mosaic"

41 Articles 4 and 6(1).

42 European Commission, *Green paper on the review of council regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2009] COM(2009) 175 final, 3ff.

43 A Nuyts and K Szychowska, *Study on residual jurisdiction (Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations) – General report*, JLS/C4/2005/07-30-CE, Université libre de Bruxelles (2007) 32-33.

44 <https://www.germanwatch.org/sites/germanwatch.org/files/announcement/20822.pdf> p. 21; accessed 1 November 2024.

45 <https://www.rwe.com/en/the-group/countries-and-locations/?locationType=ob515186-8541-45fa-8de3-50a449c731cc> accessed 1 November 2024.

scenario,[46] where jurisdiction could not have been asserted at a single place on the basis of Article 7(2). However, this fragmentation risk at the level of jurisdiction is merely potential, on two accounts: firstly, choosing to assert jurisdiction at the domicile of the EU-domiciled defendant will likely allow averting the issue and, secondly, *Milieudefensie 2019* opened the door to interpreting that the place of action is the place where the decision-making process took place.[47]

Secondly, the lack, within Brussels I bis, of a ground of international jurisdiction allowing the cumulation of related actions may be a practical obstacle to NGO-driven climate change litigation, environmental litigation, and business and human rights litigation more generally. Bringing this kind of claim to court requires having the capacity to face significant expenses, even when a party litigates within their own jurisdiction. The costs associated with conducting proceedings outside of one's own jurisdiction may entail a very significant hindrance in accessing justice in certain cases, even within the European Union. Thus, costs may be more easily dealt with if potential plaintiffs can concentrate their resources by building a joint case out of their related actions. Against this reality, however, Brussels I bis approaches the topic of related claims from a totally different perspective. Article 30 Brussels I bis establishes that when "*related actions*" (i.e. actions "*so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*") are "*pending in the courts of different Member States, any court other than the court first seised may stay its proceedings*". *The article moreover establishes that "[w]here the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.*" As it may be seen, Article 30 is a provision that only facilitates the coordination of pending proceedings on related actions. There is no provision in the Regulation that would "create" jurisdiction as such on the basis of connexions between claims, as it is the case in the domestic procedural law of certain countries, with respect to internal/territorial jurisdiction. *De lege lata*, the only existing possibilities for plaintiffs to cumulate their claims would be to try to build a joint case, if possible at all, before the courts of the domicile of the GHG emitter, on the basis of Article 4 Brussels I bis, or else, potentially, before the courts of the place where the event giving rise to the damage occurred, on the basis of Article 7(2). It would not be possible, however, to cumulate related actions by various victims at any given place where damage occurred or would have occurred for a given specific victim (Article 7(2), first option per *Mines de potasse*, as described above). *De lege ferenda*, the possibility of drafting a rule that would create jurisdiction in the sense described should be explored. This is so even when in such endeavor careful consideration would need to be given to factors that may determine the appropriateness and logic of allowing the cumulation, such as the nature of the actions to be cumulated compensatory, injunctive, etc and the influence of various concerns: proximity, proper administration of justice, easy access to evidence,

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46 The Mosaic theory is featured in the CJEU's decision in *Shevill* (CJEU, case C-68/93, Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA, ECLI:EU:C:1995:61)

47 See footnote 17 (The court's reasoning refers to choice of law, but may be transposed to jurisdiction *mutatis mutandis, even if the trial decision has been overturned*).

etc. Allowing the cumulation of actions aiming at injunctive relief would not be the same as allowing the cumulation of actions aiming at compensation.

Having sketched the basic features of the EU jurisdiction system and some of its limitations, let us explore the basic traits of the choice-of-law dimension of PICCL.

(D) EU RULES ON CHOICE OF LAW

Putting aside any consideration that may potentially arise from the existence, within the EU legal order, of the corporate sustainability due diligence directive,[48] the following lines present the core traits of the EU framework on choice of law in climate-related matters. The law governing liability for and/or injunctive relief over climate-change-related damage occurred or that may occur is determined by EU courts (save in Danemark) by resorting to the so-called Rome II Regulation.[49] The regulation contains in Article 7 a specific choice-of-law rule on "Environmental damage" (A). However, it also contains a further provision, Article 17, on "Rules of safety and conduct" which, allegedly, should play a role in private international environmental litigation generally, and PICCL specifically (B). The interaction between these two articles is complex: as will be explained, Article 17 may potentially undermine the effectiveness of Article 7 and the environmental policies that it is meant to embody.

(1) Article 7 Rome II, on the law applicable to "environmental damage"

Article 7 of the Rome II Regulation reads as follows:

> "*The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred*"

The provision offers victims of environmental damage (both environmental damage in the strictest sense and environmental damage "lato sensu"; damage sustained by persons or property as a result of environmental damage) the choice between two potentially applicable laws to govern the liability arising from environmental damage:[50] the law of the place where the damage materializes (the general rule of the Rome II regulation, found in Article 4(1)) and the law of the place where the "causal" event giving rise to the damage occurred. This entails a strategic privilege justified by the *favor laesi* principle ("*discriminating in favour of the person sustaining the damage*") and by the principles of environmental law of the EU, according to recital 25. The underlying assumption is

[48] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, O.J. L, 2024/1760, 5.7.2024.

[49] Regulation (EC) 864/2007, of the European Parliament and of the Council, of 11 July 2007, on the law applicable to non-contractual obligations (Rome II), O.J. L 199, 31.7.2007, p. 40.

[50] According to Articles 2.3.b and 15.b of the Regulation, damage "*that is likely to occur*" *and* "*measures […] to prevent […] injury*" *are also covered.*

that victims will use the choice offered to maximize the reparation to be paid by the polluter, by choosing the legal system that will lead to a more substantial economic compensation. This is (allegedly) meant to produce an enhanced deterrent effect upon potential polluters, thus amounting to an increase in the level of environmental protection in force in the international scene:[51] "*the point is not only to respect the victim's legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection*".[52]

(2) Article 17 Rome II, on "Rules of safety and conduct"

As announced, Article 7 may potentially encounter difficulties in respect of fulfilling its environmentally protective functions due to its potential interaction with Article 17. The latter reads:

> "*In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability*."

According to Recital 34, the latter provision is to be approached from the following coordinates:

> "*In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country. The term 'rules of safety and conduct' should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident*".

Article 17 is one of the Regulation´s general provisions, and, consequently, is meant to intervene in any situation concerning non-contractual obligations (not only climate litigation or environmental torts) where "*rules of safety and conduct*" happen to be involved. As explained by the European Commission in the Explanatory memorandum to the Rome II proposal, at the root of Article 17 lies the understanding that a tortfeasor needs to respect the rules of safety and conduct in force in the country where they deploy their activities "*irrespective of the law applicable to the civil consequences of his action*", and, therefore, "*these rules must also be taken into consideration when ascertaining liability*".[53]

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[51] See Article 7, recital 24, and recital 25 Rome II Regulation, and the Explanatory Memorandum to the Commission´s Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM(2003) 427 final, 19-20. L Enneking ('The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law' (2008) 2 *European Review of Private Law* 283, 289-291) describes explicitly the law and economics reasoning underlying the rule, which is not explicitly addressed in the above-referred documents, but it very clearly transpires from them.

[52] Explanatory Memorandum, op cit, 19.

[53] Ibid, 25: "[…] *Taking account of foreign law is not the same thing as applying it: the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact, for example when assessing the seriousness of the fault or the author's good or bad faith for the purposes of the measure of damages*".

Thus, judges may solely apply the legal order designated by the choice-of-law rule, but "*must*" take into account the other law as an element of fact. In other words, according to the European Commission, within the framework of international disputes on non-contractual obligations, rules on safety and conduct do not intervene as legal elements; they are not applied as legal rules, but they are taken into account as factual elements, as data.[54]

The above-announced potential to interfere with Article 7 may crystallize, whenever the applicable tort law is fault-based,[55] as follows: on the basis of Article 17, certain authors argue that the public (administrative) law provisions[56] that regulate environmentally damaging activities (like emitting GHGs) in the state where the action takes place should nuance or discard liability altogether even when the applicable law chosen by the victim is the *lex loci damni*.[57] This conclusion, reportedly,[58] should extend to situations where an administrative permit/authorisation allows the activity in the state where the action takes place, as could allegedly be the case of the European emission allowances under the European emission Trading Scheme (hereinafter EETS).[59]

A series of arguments run against this stance, however. They may be summarized as follows:[60] firstly, the legal nature of the EETS is uncertain, and it is thus difficult to determine whether it creates "permits"/"authorizations";[61] secondly, strictly speaking, a permit"/"authorization" is not a "rule" of safety and conduct; thirdly, "permits"/"authorizations" have varying legal significance within different legal orders (it cannot be presumed that the permit/authorization would necessarily have protective

54 As explained by A Dickinson (*The Rome II Regulation: the law applicable to non-contractual obligations* (OUP 2008) 640-41), "[t]*hey provide part of the context within which the conduct of the person liable must be judged, and their significance will vary according to the nature of that conduct and the other surrounding circumstances, as well as the content of legal rules underlying the non-contractual obligation in question. If liability under the applicable law is strict, the conduct of the person liable may not fall to be assessed at all*".

55 Ibid.

56 The term "*rules of safety and conduct*" is not confined to the realm of administrative-law provisions. However, the bulk of this kind of category are indeed administrative-law rules (M Vinaixa, *La responsabilidad civil por contaminación transfronteriza derivada de residuos*, (Universidad de Santiago de Compostela 2005) 427).

57 See, amongst others, S C Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56(1) *The American Journal of Comparative Law* 173, 212 215; M Lehmann and F Eichel, op cit.

58 M Lehmann and F Eichel, op cit, 98.

59 The scheme is built on the basis of multiple legal texts and amendments, but it ultimately stems out of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32.

60 For detailed explanations of these points, see E. Álvarez-Armas, "Le contentieux international privé en matière de changement climatique à l'épreuve de l'article 17 du règlement Rome II : enjeux et perspectives" (2020) 3 RDIA 109; and E. Álvarez-Armas & O. Boskovic, "Climate change litigation: Jurisdiction and Applicable law" in A. Frąckowiak-Adamska & G. Rühl (eds), *Private international law and global crises* (Edward Elgar 2025 - upcoming).

61 It is not completely clear whether the operation of the EETS actually amounts to creating permits or authorizations under administrative law. There is an academic controversy as to the legal nature of the "allowances" created by Directive 2003/87/EC, for there are strong terminological divergences in its various linguistic versions (C Cheneviere, *Le système d'échange de quotas d'émission de gaz à effet de serre – Protéger le climat, préserver le marché intérieur* (Bruylant 2018) 200).

effects for the GHG emitter under the relevant private law);[62] fourthly, precedents to Article 17 ultimately plead for a pro-victim not pro-polluter interpretation thereto.[63]

Ultimately, even if these considerations were discarded, a simple *effet utile* reasoning leads to understanding that preserving the effectiveness of Article 7 requires blocking Article 17, not only in climate cases, but in environmental tort cases, generally. The panorama described clashes against the environmentally protective objectives of Article 7 in the following sense: even the simple qualification of liability (reduction of the quantum of the compensation), not to say its exclusion, is against the economic rationale described above. Critically, within this context, Article 7 Rome II should be considered a *lex specialis* vis-à-vis Article 17. Thus, if it was deemed that trying to "*strike a reasonable balance*" between GHG emitters and victims, as a general policy, amounted to being incompatible with favouring climate and environmental victims, as a special policy (as sustained by the *favor laesi* principle and the principles of EU environmental law), then the latter should prevail. As a consequence, interpretations that do not favour the victims, and even more so, interpretations that disfavour the victims need to be discarded. Therefore, either through mere coherent interpretation or else through amendment, access to the benefits of Article 17 needs to be blocked for GHG emitters, and arguably for all potential polluters.[64]

(E) ADVANCED CONSIDERATIONS

Previous pages have sketched the core features of the EU rules on international jurisdiction of courts and on applicable law relevant for compensatory and/or injunctive actions over cross-border climate-change-related damage. Upcoming pages will present some more advanced considerations on certain specific issues, to better understand the contribution that EU private international law makes to PICCL, using as a point of departure certain priorly presented elements.

(1) On the complex nature of climate change phenomena and the notion of "environmental damage" under Rome II

Climate change and its related phenomena are complex from a scientific perspective, and this may entail difficulties regarding how legal systems may apprehend them. Specifically, climate change is per essence a global phenomenon that knows no geographic limitation, to which multiple emitters contribute, and that may potentially impact a very significant number of victims, anywhere in the world. This global and unrestricted nature should

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62 Different national substantive laws may confer different effects to authorization/permits, which may vary from no effect at all under private law (thus allowing victims to resort to all sorts of actions under private law) to a full shielding from liability, ranging through various intermediate possibilities.

63 As acknowledged in the Explanatory Memorandum to the Rome II proposal (op cit, 25) the provision is directly inspired by Article 7 of the Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, and Article 9 of the Convention of 2 October 1973 on the Law Applicable to Products Liability. See the explanations on these precedents provided in the work referenced supra note 59.

64 Also in favour of the exclusion of Article 17 in environmental matters: O Boskovic 'L'efficacité du droit international privé en matière environmentale' in O Boskovic (dir), *L'eficcacité du droit de l'environnement* (Dalloz T&C 2010) 53, 62.

not make us lose sight, however, of the fact that inasmuch as an individual victim may identify individual damage that they have suffered as a consequence of climate-change-related phenomena their situation may be "translated" into private law, and they would be *prima facie* entitled to use private law tools (where available) to bring to justice a Carbon Major of their choosing on the basis of the best available science.[65] Any witty lawyer will understand, nevertheless, that difficulties do not stop here: after establishing jurisdiction, PICCL may face significant difficulties to proceed further, coming notably from the realm of substantive tort law. Notably, establishing causal links between action (greenhouse gas emission) and result (climate-related damage) may prove to be challenging.[66] Specifically, the traceability of "*non-degradable, anthropogenic*" surpluses of greenhouse gases to any specific emitter is complicated at least by two factors: on the one hand, *"the greenhouse effect also takes place without human intervention and is subject to natural fluctuations that vary in space and time"*; on the other hand, anthropogenic greenhouse gases emissions are absorbed by so-called (natural) *"CO2 sinks" (such as land surface or water)*".[67] Moreover, reportedly, establishing a causal link/chain in respect of material or financial damage attributable to global warming is further complexified by the fact that the specific material or financial damage suffered by a person is preceded by impacts on two "environmental goods": first, changes in the atmosphere (greenhouse gases not "absorbed" by water or soil intensify the natural greenhouse effect, leading to increases in the mean temperature on Earth); second, changes in the environment that result from the latter, as for instance, rising sea levels, severe droughts or the melting of glaciers. Therefore, overall,

> "*the damage suffered by the plaintiff is not directly and monocausally attributable to an act of the defendant, but is mediated through general global warming. This distinguishes it from actions for directly caused environmental disasters […]. At the level of national law, this leads to challenges in proving causality and in selecting the liable debtor […]*".[68]

But not only. These comparative-tort-law difficulties may also be accompanied by private-international-law ones. The scientific and structural complexities described above could potentially be used by defendants to try to contest the characterization of climate-change-derived damage as "environmental damage" caused by a tortfeasor to a victim under the Rome II Regulation. However, according to Recital 24:

> *'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource*

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65 See notably footnote 14: the percentages of GHG emissions attributed to each Carbon Major in the Heede report served as the basis of the lawsuit in Lliuya.

66 It is worth noting that defendants may feel tempted to use the causal link "upstream" as an excuse to try to contest the assertion of jurisdiction. This comes within the tendency to try to transform the jurisdiction stage of proceedings into a mini-trial, which has been proscribed, for instance, by the UK Supreme Court (See, *inter alia*, *Vedanta Resources PLC and another (Apellants) v Lungowe and others (respondents)* [2019] UKSC 20, at 9). In this sense, it is worth recalling that even authors who may take pro-defendant stances are against this practice, and say that only a "*prima facie*" causal link may be required: establishing causality is part of the substance of the case, after jurisdiction is asserted (See, for instance, F Giansetto, "Changement climatique - Le droit international privé à l'épreuve des nouveaux contentieux en matière de responsabilité climatique" (2018/2) *Journal du droit international* 505, 519.

67 The entirety of the remainder of the paragraph is a translation/paraphrasis of M Lehmann & F Eichel, op cit, 79-80.

68 Ibid.

> *for the benefit of another natural resource or the public, or impairment of the variability among living organisms.*

Moreover, Article 7 establishes that, beyond "*environmental damage*" as described in recital 24 (i.e. *stricto sensu* environmental damage, ecological damage, damage to nature as such) it also covers "*damage sustained by persons or property as a result of such damage*" (i.e. *lato sensu* environmental damage). From this standpoint, it seems clear that climate-related damages in the cases referred in the "samples cases" section above are indeed environmental damages for the purposes of Rome II, inasmuch as anthropogenic GHG emission constitute an "*adverse change in a natural resource, such as* […] *air*, [inter alia]" and the damages "*sustained*" by the relevant victims are "*a result*" thereto.

Notwithstanding this very clear conclusion, contesting the characterization of climate-related damage as environmental damage would only be interesting for Carbon Majors in two specific senses. Firstly, in cases where victims chose the application of the law of the place where the event giving rise to the damage occurred (as in Lliuya, where the law of Germany was chosen) and defendants wanted to try to avoid this. Should a court (mistakenly) decide that a PICCL case is not a case of "environmental damage" and that Article 7 does not apply, the general rule of the Rome II regulation, Article 4(1), would come into play, leading to the application of the law of the place of damage (result). Secondly, in cases where victims chose the application of the law of the place of damage (result) and defendants wanted to try to avoid this and obtain the application of the law of the place where the event giving rise to the damage occurred. In these instances, beyond misleading the court into deciding that Article 7 does not apply, the defendant would need to persuade the court that the climate tort is manifestly more closely connected with the country where they acted, i.e. resort to Article 4(3), the "escape clause". However, the escape clause is exceptional in nature and requires proof that the case is "manifestly" more closely connected with a State other than the one designated by article 4(1). This seems impossible in cases like Lliuya where connecting factors with equal weighting and significance are equally distributed between the two relevant countries in the case (Germany and Peru).

All in all, the understanding that climate-related damage is indeed "environmental damage" covered by Article 7 Rome II is supported by academia[69] and by the District Court of The Hague in *Milieudefensie 2019*.[70]

(2) On Article 30 Brussels I bis and the mandatory respect for plaintiff's choice of forum

It was referred above that NGOs will not necessarily have it easy to try to cumulate climate-cases against a given same Carbon Major. The opposite, however, is also true (and should so

[69] See amongst others O. Boskovic, « La localisation du dommage en matière d'atteinte à l'environnement », 2022 Int'l Bus. L.J. 697 (2022) 697; Y. Nishitani, Localization of Damage in Private International Law and Challenges of Climate Change Litigation, 2022 Int'l Bus. L.J. 697 (2022) 707 ; E-M Kieninger, 'Conflicts of jurisdiction and the applicable law in domestic courts' proceedings', in: Wolfgang Kahl & Marc-Philippe Weller (eds.), *Climate Change Litigation. A Handbook* (München 2021) 119.

[70] Milieudefensie 2019, op. cit., point 4.3.2.

remain): NGOs cannot and should not be forced to cumulate different proceedings against a single given Carbon Major by the latter, notably to the detriment of their jurisdictional choices. In other words, the above-referred Article 30 Brussels I bis on "related actions" cannot be used to try to short-circuit a plaintiff's choice of a forum whenever they start litigation against a given Carbon Major and there was another "related" climate lawsuit pending in a different Member State against the same defendant but by a different claimant.

Let us illustrate this point through an example: CarbonMajor1 is a corporation with its domicile in Spain, and NGO1 and NGO2, both established in the Netherlands, submit a lawsuit to Dutch courts on the basis of Article 7(2) Brussels I bis, since their climate-related damage materializes in the Netherlands. In their law suit they request injunctive relief (i.e. that CarbonMajor1 be ordered to curb down its GHG emissions in accordance with the best available science to a level that will contribute to not surpassing 1.5 degrees Celsius of increase in global average temperature) and monetary compensation (i.e. recovery of damages to then invest them in reforestation, for instance, or other carbon offset projects), both under Dutch law (including International and European law as embedded in the Dutch legal order). When NGO1 and NGO2 submit their lawsuit, NGO3, established in Spain, had already started climate-change litigation in Spain against CarbonMajor1, also on an injunctive and on a compensatory basis (both under Spanish law, including International and European law as embedded in the Spanish legal order). In this scenario, CarbonMajor1 could not use Article 30 Brussels I bis to contest the jurisdictional choice by NGO1 and NGO2 and force a cumulation of proceedings in Spain. Firstly, because Article 30 does not impose an obligation on any court to stay proceedings or decline jurisdiction (the latter possibility being moreover dependent on whether "*court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof*"); obligations of such nature would only exist in situations leading to *lis pendens* (which is not the case). But secondly, and more significantly, because the purpose of Article 30 is "*to avoid the risk of irreconcilable judgments resulting from separate proceedings*" and there is no true risk of irreconcilable judgments: i) CarbonMajor1 may be ordered to pay damages to NG1 and NG2 but not NG3; or viceversa; or to all or to none of the claimants; none of those possibilities entail any sort of contradiction, as the Dutch decision will depend on the subjective situation of NGO1 and NGO2 and the applicable Dutch private law, while the Spanish decision will depend on the subjective situation of NGO3 and the applicable Spanish private law. ii) CarbonMajor1 may be ordered to curb down its emissions by the Dutch decision and not by the Spanish one or viceversa; or by both or by none; and, again, none of those possibilities entails any sort of contradiction, as each decision will depend on the application of a different legal order. If both decisions order a curbing down of GHG emissions but by different percentage, by respecting the most restrictive percentage CarbonMajor1 will be also respecting the most lenient one (i.e. if you comply with an order to curb down by 50% you are simultaneously also complying with an order to curb down by 30%).

(3) On the appropriateness of the ground of jurisdiction of the place where the damage occurs

As mentioned above when Article 30 Brussels I bis was first presented, *de lege lata* there would be no possibility to cumulate related actions by various victims at any given

place where damage occurred for a given specific victim, should this be necessary. This idea leads to introducing a point that may be controversial: certain authors question the appropriateness of the ground of jurisdiction of the place where the damage occurred, notably as regards actions aiming at the reduction of greenhouse gas emissions.[71] They consider that proximity concerns recommend that the action be tried by a court close to greenhouse gas emitter's headquarters, as the relevant court may potentially issue orders that are aimed at the modification of the general policy of the whole company. Against this stance, proximity concerns alone (but potentially and significantly in cumulation with the points on costs raised when Article 30 was presented), also sustain that the case be heard by a court that is close to the materialization of the damage, to facilitate obtaining evidence (equally relevant in cases on injunctive relief). In this respect, one of the key elements in *Mines de Potasse* in relation to proximity and proper administration of justice as regards the jurisdiction of the court of the place where the damage occurred is the ease with which evidence can be obtained, which is indisputable. As an illustration of the importance of this point, and of the difficulties that may ensue if a "remote" court hears a case, in Lluiya the Court of Appeal of Ham (Germany) was forced to seek permission from Ecuadorian authorities to travel physically to the Andes in order to examine and obtain evidence of the claimant's precise situation, thus delaying the procedure significantly.[72]

Moreover, critically, the court of the place of damage is not necessarily unable to issue injunctive relief, if necessary. The "*sic utere tuo ut alienum non laedas*" principle, that constraints States under public international law in such a way that "*no State has the right to use or permit the use of its territory in such a manner as to cause injury* […] *in or to the territory of another or the properties or persons therein* […]"[73] should be construed as framing the understanding and the exercise of international jurisdiction by courts in these matters. Specifically, this obligation on States should be interpreted as not rendering inappropriate or inadequate the assertion of jurisdiction over actions aiming at the reduction of greenhouse gas emissions (and the potential subsequence issuance of an order) by the courts of the place of damage. In other words, an assumption of jurisdiction with a view to potentially issuing an order would not entail an inappropriate assertion of sovereign authority by one State over the territory of another (especially within the EU) because, ultimately, the State of the place of action does not have "*the right to use or permit the use of its territory in such a manner as to cause injury*".

Overall, calling into question the appropriateness of the ground of jurisdiction of the place where the damage arises entails calling into question *Mines de Potasse* and the effet utile of Article 7(2) that the referred case preserves. Sovereignty and proximity concerns do not suffice to do so (they were already factored into the CJEU's decision back in 1976, the latter very explicitly). Nevertheless, one further aspect deserves to be analysed: foreseeability, which also runs transversally through concerns on the appropriateness of the application of the law of the place where the damage occurs.

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71 O. Boskovic (with whom I have respectful and amicable disagreements) in E. Álvarez-Armas & O. Boskovic, op. cit.

72 https://theconversation.com/a-peruvian-farmer-is-trying-to-hold-energy-giant-rwe-responsible-for-climate-change-the-inside-story-of-his-groundbreaking-court-case-218408 <accessed 10 December 2024>

73 Trail Smelter award (United States of America v Canada (Award) (1941) 3 RIAA 1905) para. 1965

(4) On the appropriateness of the application of the law of the place where the damage occurs, and on foreseeability, generally

There is a further concern underpinning the referred contestation to the suitability of the place of materialization of damage as a ground of jurisdiction: its potential lack of foreseeability. Such lack of foreseeability would arise from climate change's above-mentioned global and geographically unlimited nature (a phenomenon to which multiple emitters contribute and that may potentially impact a very significant number of victims, anywhere in the world). This concern is extended by certain authors to its suitability as a connecting factor in choice-of-law: reportedly, the referred absence of foreseeability of the place of materialization of damage would disqualify the latter as a connecting factor, for it would render the applicable law equally unforeseeable. This is taken as far as questioning the adequacy of the legislative policy behind Article 7 Rome II in PICCL, for, allegedly, the fact that damage may arise anywhere in the world may lead to the application of the law of any potential place of damage anywhere, which would run against the "*legitimate expectation of companies*".[74] These considerations would be taken even one step further as regards injunctive relief for the curbing down of GHG emissions: the law of the place of damage would allegedly be even less adequate to issue orders aiming at the modification of the general policy of the relevant corporation, since that would raise concerns in terms of proximity.[75] Similar considerations are presented by other authors when analysing the above-referred issues on permits/authorizations: as the emitter "[…] *could not foresee the effects of his actions in other countries, he should be able to rely on the permissibility of his activities at the place of action […].* "[76] Therefore, they advocate, within the framework of Art. 17 Rome II, for an extension of the effects that the permit/authorization would have in the country of the event giving rise to damage, thus allegedly protecting the emitter.[77]

These arguments can be countered on several accounts:[78]

Firstly, regarding the assertion of jurisdiction specifically: the CJEU already had "*atmospheric pollution*"[79] and its geographically unrestricted nature in mind when it decided *Mines de potasse*. Hence, other than considering sovereignty and proximity (as mentioned), the CJEU also factored foreseeability into the solution provided in the decision. This, therefore, makes *Mines de Potasse* a perfect precedent to the above-referred climate cases that needs to stand. The ensuing conclusion, that in matters of climate-related damage the courts of each EU Member State could potentially have jurisdiction over the same Carbon Major inasmuch as damage is suffered within their jurisdiction, is further comforted by *Shevill*[80] and *eDate*:[81] while it is true that those decisions deal with "mosaic" situations,

74 Y. Nishitani, op. cit., 707.
75 O. Boskovic (with whom I have respectful and amicable disagreements) in E. Álvarez-Armas & O. Boskovic, op.cit.
76 M Lehmann and F Eichel, op cit, 100-101.
77 As mentioned above, these positions presume that the permit/authorization would necessarily have protective effects under private law for the GHG emitter, which is not necessarily the case.
78 For further arguments, see E. Álvarez-Armas, "Le contentieux … », op.cit., 136-138.
79 *Mines de Potasse*, op. cit., paragraph 13.
80 See footnote 46.
81 CJEU, joined cases C-509/09 and C-161/10, *eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited, ECLI:EU:C:2011:685.*

it is equally true that the potential geographically unrestricted reach of the underlying defamatory acts, and the ensuing lack of jurisdictional foreseeability, did not put into question the solutions enshrined therein. Since such jurisdictional results are deemed to be acceptable in terms of foreseeability in defamation cases, they ought to be acceptable in PICCL too.

Secondly, neither the assertion of jurisdiction nor the identification of the applicable law on the basis of the place of materialization of damage are to be approached from the standpoint of the potential geographically unrestricted scope of the impact of the tortfeasor's activities. Instead, they need to be approached from two interlinked standpoints: i) for each victim, their damage is not global or diffuse, but identifiable, specific and geographically limited; and ii) save where collective redress is available, each individual victim brings an action in respect of their own individual damage. Consequently, jurisdiction and applicable law need to be framed within the individual procedural relationship built between victim and tortfeasor, as parties to the proceedings (i.e. independently from the damage suffered by other potential victims).

Thirdly, if a lack of foreseeability remains for the defendant within the referred framing, then it stems from the very nature of their activities and the way in which they carry them out, which they control and may thus potentially change. Reportedly, certain Carbon Majors have known about the impact of their activities since the early 1970's[82] and *Mines de Potasse* dates back to 1976. Hence, at the very least in terms of jurisdiction, but also in terms of choice of law, it has been foreseeable for Carbon Majors for almost 50 years now that, as their activities have a wider impact than the country where they are established, they could be taken to court elsewhere and see a foreign legal system applied to their liability. They could have even tried to avoid liability by changing their behaviour over the last 5 decades.

Finally, and critically, the above-referred academic opinions do not consider that foreseeability (in all environmental torts, not only in climate-related ones) is a two-way street that concerns victims as well: if defendants are supposed to lack sufficient foreseeability as to where damage may arise, victims are "weak parties" that have no foreseeability at all as to the fact that a damage may arise to begin with. Defendants, however, by being engaged in industrial activities, have at least the understanding that should anything go wrong with respect to their business, they are exposed to lawsuits.

(F) CONCLUSIONS

This "private" and "international" penchant to climate change litigation is a relatively new category within "business and human rights", transnational environmental litigation, and, more specifically, (broader) climate change litigation. Consequently, it is very likely that significant developments are still to come. These pages have presented the basic features (advantages and limitations) of EU rules on international jurisdiction and choice of law on liability for and/or injunctive relief over climate-change-related

[82] C Bonneuil, P-L Choquet & B Franta, "Early warnings and emerging accountability: Total's responses to global warming, 1971 2021", 71 (4) Global Environmental Change 2021.

damage, before providing some more advanced considerations. The latter have amounted to demonstrating that: i) despite complexities, climate-related damage fits into Rome II's notion of "environmental damage"; ii) despite potential contestation, a plaintiff's choice of forum needs to be mandatorily respected; iii) despite clear contestation, the place where the damage occurs is an appropriate ground of jurisdiction and an appropriate connecting factor for choice of law. Finally, these pages have countered some transversal concerns about foreseeability for the greenhouse gas emitter of the potential assertion of jurisdiction over and of the law applicable to liability for climate-related damage. This has been done on the basis of various arguments, including the fact that foreseeability is bilateral, and if defendants are supposed to lack sufficient foreseeability as to where damage may arise, victims are "weak parties" that have no foreseeability at all.

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International Climate Litigation against Companies: Issues of Applicable Law

Ana Crespo Hernández*

Abstract: In the context of climate litigation, actions have been filed both against States, for their inaction in combating climate change, and against companies, to compel them to reduce their greenhouse gas emissions. The latter fall within the scope of private law and may raise issues of private international law when the situation involves any element of internationality. In EU Member states, the applicable law in such cases is determined using Art. 7 of the Rome II Regulation, which governs environmental damage and includes damage caused by climate change. The application of Art. 7, which enshrines the rule of ubiquity, raises the issue of locating the place of the event giving rise to the damage and the damage itself. The place of acting of the tortfeasor may be understood as the location where the emissions are generated. As an additional alternative, the event could also be placed where an insufficient corporate policy to mitigate climate change is adopted. The damage in these cases occurs globally, and this, together with the cause-effect rupture between action and harm, raises doubts about whether the law of damage is an appropriate solution. Completing the system, Art. 17 of the Rome II Regulation allows consideration of the rules of safety and conduct of the country where the liable party acted. This provision helps protect the legitimate expectations of operators who have adjusted their emissions to a license, but it may also undermine the victim's right to choose the applicable law.

Keywords: International climate litigation, conflict of laws, Art. 7 Rome II Regulation, place of the event giving rise to the damage; place of the damage; rules of safety and conduct.

(A) INTERNATIONAL CLIMATE CHANGE CLAIMS AND PRIVATE LAW

Climate change is one of today's major public concerns. Many, like the British naturalist David Attenborough, believe that we are facing "a man-made disaster of global scale" which, if we do not act, could lead to the "collapse of our civilisations and the extinction of much of the natural world".[1] The data is alarming, as measurements taken since the period 1850-1900 show that international action is not producing the desired results.[2] The "ideal" limit of 1.5 degrees Celsius of temperature increase foreseen in the Paris Agreement[3] has already been exceeded on several occasions, albeit temporarily, and

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1 Remarks by David Attenborough at the opening ceremony of COP24 United Nations Climate Change Conference (Poland 2018): *Transcript of People's Seat Address by Sir David Attenborough at COP24*, https://unfccc.int/documents/185211

2 The Intergovernmental Panel on Climate Change (IPCC) has been warning about global warming and its consequences since 2018. See IPCC, *Climate change 2023. Synthesis Report.* [Core Writing Team, H. Lee and J. Romero (eds.)], (IPCC, Geneva, 2023), esp. at 4-6 [doi: 10.59327/IPCC/AR6-9789291691647].

3 Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016), 3156 *UNTS* 79. This Agreement aims to limit global warming to below two degrees compared to pre-industrial levels, but preferably no more than 1.5 degrees.

we are increasingly facing phenomena resulting from global warming, such as extreme storms, droughts or floods, which cause severe damage to people and their property.[4]

The worsening of the situation has been attributed both to states, for their omissions in implementing regulations, and to companies that emit greenhouse gases (GHG), which are the main driver of climate change. In this context, individuals and communities have been trying for years to reverse the situation through a wave of "international climate actions" against states and corporations.[5] The "vertical" actions against the inactivity of states in combating climate change have led to such relevant and well-known decisions as that of the Dutch Supreme Court in the *Urgenda* case[6], or the ECHR judgment in the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland.*[7] Alongside these, individuals, NGOs, and associations defending collective interests are filing an increasing number of "horizontal climate actions"[8] against the companies responsible for CO_2 emissions, particularly those listed by the *Carbon Major* database[9] as the world's largest emitters. These actions are based on private law and generally rely on tort law[10], although they often also invoke the Paris Agreement and human rights regulations, particularly the ECHR. The claims are intricately linked to the public debate on global warming, more so than to their actual ability to mitigate climate change or to redress the damage caused by it.[11]

Lawsuits against companies can be grouped into two categories: climate protection actions and climate liability actions.[12] In protection actions, the aim is for the company to reduce its emissions and thus minimize its impact on climate change. A notable example is the *Milieudefensie* case, filed before Dutch courts, which sought to have Royal Dutch Shell (RDS) ordered to progressively reduce its emissions. The claim was based on Dutch tort law and the group's inaction in achieving the Paris Agreement targets. The Hague District Court Judgment of 26 May 2021 sets an important precedent by ordering RDS to reduce its CO_2 emissions by 45% by 2030, compared to 2019 levels, through the

4 On the consequences of climate change in Europe and the world: https://climate.ec.europa.eu/climate-change/consequences-climate-change_en

5 A list of cases, created and updated by Sabin Center for Climate Change Law can be found at https://climatecasechart.com/, site providing two databases of climate change litigation: US Climate Change Litigation and Global Climate Change Litigation.

6 Judgment of Dutch Supreme Court of 20 December 2019, *Urgenda*, case 19/00135, ECLI:NL:HR:2019:2007. The Court ordered the Dutch State to reduce its greenhouse gas emissions by 25% compared to 1990 by 2020.

7 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, 53600/20, ECHR (9 of April 2024). This judgment recognizes the right of individuals to effective protection by the State against the adverse effects of climate change on their lives, based on Art. 8 ECHR.

8 M.P. Weller/M. Tran differentiate between vertical and horizontal actions ("Climate Litigation against companies", *Climate Action* (2022) 1-17, at 2-3 [doi:10.1007/s44168-022-00013-6]).

9 https://carbonmajors.org/index.html. Currently, 122 companies are considered responsible for 72% of global CO_2 emissions from fossil fuels and cement.

10 M.P. Weller/M. Tran, *supra* n. 8, at 3.

11 E. Álvarez-Armas, "Le contentieux international privé en matière de changement climatique à l'épreuve de l'article 17 du règlement Rome II: enjeux et perspectives", 3 *Revue de Droit international d'Assas* (2020) 109-138, at 109

12 S.H. Braun, S. Isenburg, J. Kress, "Transformation through harmonization. The potential of a climate liability Directive to strengthen climate protection", 5 *Themis Annual Journal* (2023) 138 155, at 148.

group's corporate policies.[13] On the other hand, liability actions focus on preventing or compensating for damages suffered by individuals as a result of climate change. A model for this is the lawsuit filed by Peruvian farmer Saúl Lliuya against the German energy company RWE, which is still pending before the Higher Regional Court of Hamm. The plaintiff is seeking the German electricity giant's financial participation in the cost of constructing a dam to protect his home in Peru from a potential overflow of Lake Palcacocha because of glacial melt.[14]

Climate actions against corporations may present an element of internationality, either because the victim suffers the damage in a place different from where the company operates, or because claims are directed against a transnational corporate group operating in multiple states. In this context, the purpose of the following pages are some brief reflections on the difficulties raised by determining the applicable law in these cases. The analysis is based on actions brought before the courts of the European Union. Therefore, the basis of the study will be the rules of the Regulation on the law applicable to non-contractual obligations (Rome II)[15]. The first issue they raise is to what extent global warming or climate damage can be considered an "environmental damage" within the meaning of Art. 7 of the Regulation. Next, the rule of ubiquity established in the provision will be dealt with, specifying how the place of the event and of the damage can be understood in these cases. Finally, some ideas will be added on the effect that the "rules of safety and conduct" provided for in Art. 17 Rome II may have in these cases, particularly when the responsible company has a permit for CO2 emissions.

(B) DAMAGE INCLUDED IN AND EXCLUDED FROM ART. 7 ROME II REGULATION

Art. 7 Rome II Regulation establishes a rule for "environmental damage", which acts as an exception to Art. 4 and in the absence of an unlikely choice of law by the parties

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13 Judgment of The Hague District Court of 26 May 2021, *Milieudefensie et al. v. Royal Dutch Shell*, C/09/571932/HA ZA 19-379, ECLI:NL:RBDHA:2021:5337. The judgment has been appealed, although it is enforceable from the moment it was delivered. The lawsuit was filed in April 2019 before the Dutch courts by the environmental group Milieudefensie, along with other NGOs, and more than 17,000 citizens. The claim was directed against Royal Dutch Shell, the parent company of the Shell group, incorporated under the laws of England and Wales and headquartered in The Hague. The plaintiffs argued that Shell's contribution to climate change violated its duty of care under Book 6, section 162 of the Dutch Civil Code, as well as human rights obligations, particularly Articles 2 and 8 ECHR.

14 Https://rwe.climatecase.org/en. RWE is being claimed to cover 0.47% of the cost of construction, as the company is responsible for the emission of this percentage of global greenhouse gases, according to the *Carbon Majors Database Report of 2017* (https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf). Initially, the claim was dismissed by the Judgment of the Essen Regional Court of 15 December 2016, as. 2 O 285/15, ECLI:DE:LGE:2016:1215.2O285.15.00 (unofficial English translation: https://rwe.climatecase.org/sites/default/files/2022-10/28.11.2016%20Plaintiff%20Written%20submission.pdf). The Court found that a linear causal link between emissions and the consequences of climate change could not be established. After the judgment was appealed, the Oberlandesgericht allowed the case to proceed to the evidentiary phase. A prompt decision is expected after the court visited Huaraz to gather evidence and the expert report was submitted to the Court.

15 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/40

(Art. 14). The application of Art. 7 obviously requires that the case falls within the material scope of the Rome II Regulation. This shall apply to "non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to (...) administrative matters or to the liability of the state for acts and omissions in the exercise of state authority (*acta iure imperii*)" (Art. 1). This rule means the exclusion of climate litigation against states. Actions brought by individuals or NGOs against public authorities for their inaction in combating climate change do not fall within private law, as the state's role as guarantor of environmental protection is carried out in the field of public law. The implementation or non-implementation of the necessary measures to reduce emissions and GHG cannot be considered a management activity, but rather part of the policies adopted in the exercise of the state public power.

Art. 7 provides for the law applicable "to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage". This provision, therefore, applies to two categories of damage traditionally distinguished by doctrine:[16] environmental damage *stricto sensu* or "pure" ecological damage, caused to the environment as such, and private damage to persons or property as a result of the former, also known as "collateral" damage.[17] Environmental damage is defined in recital 24 as an "adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource of the public, or impairment of the variability among living organisms".

In the light of the above, the question is whether the changes that CO_2 emissions produce in the atmosphere can be considered as environmental damage. Climate change can be seen, rather than as a damage in itself, as something that might cause damage, so it could be debated whether climate actions involve the environmental damage required by Art. 7 Rome II.[18] In our opinion, the answer should be affirmative. There is an environmental damage whether measures are claimed to combat global warming itself (climate protection actions), and whether the claim focuses on damage to people or property as a consequence of climate change (climate liability actions) even if there is not a previous ecological damage to a natural resource different from the atmosphere. Regarding the first type of actions, we consider the statement of the District Court of The Hague in the *Milieudefensie* case to be correct, which understands that "the parties were right to take as a starting point that climate change, whether dangerous or otherwise, due to CO_2 emissions constitutes environmental damage in the sense of Article 7 Rome II".[19] The Court views environmental damage not as the actual pollution, but as global warming itself caused by anthropogenic CO_2 emissions.[20] As for actions claiming individual damages as a consequence of climate change (climate liability

16 E. Álvarez-Armas, «La aplicabilidad especial del Derecho Medioambiental Europeo, su interacción con la norma de conflicto europea en materia de daños al medio ambiente: apuntes preliminares», 13 *AEDIPR* (2013) 381-421, at 386.

17 A.L. Calvo Caravaca/J. Carrascosa González, *Las obligaciones extracontractuales en Derecho internacional privado. El Reglamento "Roma II"* (Comares, Granada, 2008), at 162.

18 On this controversy: M. Lehmann/F. Eichel, "Globaler Klimawandel and Internationales Privatrecht", 83 *RabelsZ* (2019-1) 77-110, at 94.

19 Judgment of The Hague District Court of 26 May 2021, section 4.3.2.

20 M.P. Weller/M. Tran, *supra* n. 8, at 6

actions), the majority opinion consider it sufficient that the damage to the person or property results from the interference of some natural resource.[21] It is enough that an environmental pathway is affected, without the need for a prior detrimental change in a natural resource.[22] Therefore, in our view, global warming can be considered as ecological damage. It should be noted that the 2004 Directive on Environmental liability,[23] which serves as a guide to interpret recital 24,[24] allows to understand that individual damage derived from an alteration of the atmosphere is included, since the atmosphere is a "natural habitat" within the meaning of art. 2 (1) of the Directive.[25] Along these lines, the statement of claim in the *Saul Lliuya* case assumes that the adverse change is the increase of greenhouse gases in the atmosphere itself, without prejudice to the fact that this, in turn, contributes to changes in natural resources and may produce material damage.[26]

Although most climate litigation deals, in whole or in part, with future damage, this does not preclude the application of the Rome II Regulation. Its Art. 2 (3) (b) clarifies that "damage shall include damage that is likely to occur", so the rules of the Regulation also apply if the action is of a preventive nature, or if the claimant's claim is associated with potential future damage resulting from climate change. Whether the action seeks compensation or the persons applying for an injunction aim to prevent the damage, the applicable law is determined in accordance with Art. 7 Rome II.[27]

(C) THE LAW APPLICABLE TO CLIMATE ACTION

(1) The rule of ubiquity

Art. 7 of the Rome II Regulation indicates that "The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4 (1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred". This provision establishes the so-called "rule of ubiquity" and grants the

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21 D. Iglesias Márquez, "Climate litigation against *carbon majors* in home states: insights from a business and human rights perspective", 37 *REEI* (2019) 1-37, at 25.

22 M. Lehmann/F. Eichel, *supra* n. 18, at 94.

23 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143/56.

24 J. Von Hein, "Article 7. Environmental damage", in G.P. Calliess/M. Renner (Eds.), *Rome Regulations: commentary* (3rd ed., Wolters Kluwer, 2020) 462, at. 467.

25 M. Lehmann/F. Eichel, *supra* n. 18, at. 94.

26 "The emission attributable to the respondent are already causing an "adverse change" through the increase of greenhouse gas concentrations in the atmosphere. Additionally they contribute to a change in the aggregate state of the glacial ice above Lake Palcacocha, which in turn leads to the change in the lake's water level and the resulting hazard. An environmental damage in the meaning of Art. 7 Rome II is given; furthermore (impending) material damages exist due to that damage" (Unofficial English translation of the statement of claim filed in November 2015: https://rwe.climatecase.org/sites/default/files/2022-10/23.11.2015%20Plaintiff%20Claim.pdf)

27 M. Bogdan/M. Heller, "Article 7", in U. Magnus/P. Mankowski (eds.), *European Commentaries on Private International Law. Volume 3 Rome II Regulation – Commentary* (Dr. Otto Schmidt, Köln, 2019) 287, at 290; Th. Kadner Graziano, "The law applicable to Cross-border damage to the environment: A commentary on article 7 of the Rome Regulation", 9 *Yearbook of Private International Law* (2007) 71-86, at 76.

victim more favorable treatment than that generally provided by Art. 4 Rome II, which focuses on the law of the damage.[28] The victim's right of choice is justified, according to recital 25, by the principles of protection of nature set out in Art. 191 TFEU: "a high level of Protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage". In this way, the rule is not so much an expression of sympathy towards the weaker party, as an economic choice aimed at making polluters internalize the cost of the negative environmental impact of their activities, thus making the polluter pays principle effective.[29] The rule serves to pressure companies to implement environmental standards comparable to those of the EU in their transnational activities, contributing to the reduction of GHGs and the achievement of European emission control targets.[30]

In international climate litigation, Art. 7 Rome II has been used both by requesting the application of the law of the event giving rise to the damage and the law of the damage. In the *Milieudefensie* case, the plaintiff opts for Dutch law as the law of the place of the event, just as in the *Saul Lliuya* case, where the plaintiff requests the application of German law, since RWE operates in Germany.[31] However, the Belgian law of the place of damage has been chosen in the lawsuit filed by the Belgian farmer *Hugues Falys* against Total in March 2024 before the Belgian courts.[32]

The main challenge in applying Art. 7 of the Rome II Regulation to international climate litigation lies in determining the meaning of "country in which the damage occurs" and "country in which the event giving rise to the damage occurred". In climate actions, the complex chain of events and consequences makes it difficult to determine such places, as both the cause of global warming and its effects are global in nature. The process starts with the emission of greenhouse gases, mainly product of industrial

[28] According to Art. 4 (1): "unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur". This rule applies only when the person claimed liable and the person sustaining damage do not have their habitual residence in the same state: in this case, Art.4 (2) leads to the law of their common habitual residence. Both connections are subject to the escape clause of Art. 4 (3) of the Regulation.

[29] J. Von Hein, *supra* n. 24, at 464.

[30] D. Iglesias Márquez, *supra* n. 21, at 27.

[31] The complaint states that this is a typical distance tort, where the place of the event is Germany, where RWE emits, and the damage is suffered in Peru, where the plaintiff's property is located and at risk of being flooded as a consequence of glacial melting. The Judgment of the Regional Court of Essen of 15 December 2016 bases its dismissal on German law, without the question of applicable law being raised again throughout the proceedings.

[32] https://www.thefarmercase.be/ and https://climatecasechart.com/non-us-case/hugues-falys-fian-greenpeace-ligue-des-droits-humains-v-totalenergies-the-farmer-case/. In this case, the plaintiff claims that the French energy company Total should be ordered to adopt an appropriate climate transition plan, and to phase out GHG emissions and oil and gas production. The farmer alleges in his non-contractual claim that the extreme weather events of recent years (such as droughts and violent storms) have caused him direct economic losses, forcing him to limit his crops and livestock.

activity.[33] The gases accumulate in the atmosphere and their non-degradable excess is absorbed by natural resources, such as the earth's surface or water, as well as by the atmosphere. As a result, weather patterns gradually change, and global temperatures progressively increase. As global warming intensifies, extreme weather events, deadly heat waves, droughts, floods, and other occurrences that harm people's health or property become more frequent. In this chain, as it may be noticed, there is no single emitter responsible for the gases, and the damage occurs globally. Moreover, harm to individuals' health or property is not a direct consequence of emissions but comes after two environmental assets have been previously affected: first, the atmosphere, and then the earth's surface, as a result of drought, rising sea levels or melting glaciers or poles, for instance.[34]

(2) Determination of the place of the event giving rise to the damage

In the complex process of climate change, several options are possible when determining the location of the generating event. Firstly, the cause of the damage could be thought of as greenhouse gas emissions, located at the site of the emitting installation.[35] A second possibility is to understand the place of the event as the location where the company adopts its corporate policy on emissions, when it has not reduced these in the appropriate proportion to curb climate change. Both approaches have been put forward in the *Milieudefensie* case: for the plaintiff, the triggering event was the corporate policy determined by RDS in the Netherlands for the Shell group, but the corporation considered the actual CO_2 emissions as the event giving rise to the damage.[36]

On the one hand, GHG emissions may perfectly well be considered the source of the damage. In this case, choosing the law of the causal act implies a fragmentation of the law applicable, as a company or corporate group could emit greenhouse gases from different countries. When there are multiple locations of the event, the starting point is that the law of the place where each event occurs should apply to the liability arising from each of them, without the escape clause being invoked under Art. 7 Rome II.[37] Thus, in the *Milieudefensie* case, the defendant argued that choosing the law of the event led to the applicability of a large number of legal systems, as RDS's emissions were carried out in different countries around the world.[38] The same idea could have been invoked in

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33 https://climate.ec.europa.eu/climate-change/causes-climate-change_en. A minority of GHG are produced naturally, e.g., following volcanic eruptions, or fluctuations in solar radiation or the earth's orbit.

34 M. Lehmann/F. Eichel, *supra* n. 18, at 79.

35 J. Von Hein considers that omissions should be placed where the source of danger is located, e.g., where the plant emitting the toxic gases is situated (*supra* n. 24, at 472)

36 Judgment of The Hague District Court of 26 May 2021, section 4.3.2.

37 J. von Hein, *supra* n. 24, at 472. When several tortfeasors act in different countries, claims against each of them must be based on the law of the place where their action actually took place; but the answer might change if a single defendant is claimed to be responsible for several events in different countries (e.g. in several factories operated by the same company). In this case, M. Bogdan/M. Hellner have suggested that "it might be reasonable to apply to the whole damage" the law of the place where an event occurs that is "manifestly the principal cause of the damage". These authors acknowledge, however, that it is doubtful whether Art. 7 Rome II allows such a solution (*supra* n. 27, at 295-296).

38 Judgment of The Hague District Court of 26 May 2021, section 4.3.2. and 4.3.5. As the Court indicates, "it is not in dispute that the CO_2 Emissions for which Milieudefensie at al. hold RDS liable occur all over the

Saul Lliuya as well: in this case, German law is being applied as claimed by the plaintiff as *lex loci actus*, but the statement of claim pointed out that two thirds of RWE's GHG emissions were produced in Germany, so a distributive application of the laws of the countries from which the remaining emissions originate could have been envisaged.[39]

On the other hand, it is also reasonable to consider the location of the event as the place where the corporate policy responsible for the damage is adopted. This possibility has long been suggested in environmental matters, as an additional alternative to the law of the place where the polluting act takes place.[40] The idea has been admitted in the *Milieudefensie* judgment, even though RDS indicated that corporate policy is a preparatory act that falls outside Art. 7 Rome II. It is traditionally required that the event giving rise to the damage directly causes the damage, excluding preparatory acts when determining the place of the event.[41] However, based on the distinctive elements of environmental damage and the principle of nature protection, the District Court of The Hague considered that the adoption of the Shell group's corporate policy is an independent cause of the damage that may contribute to environmental damage.[42] The Court's response seems to us to be correct. The company's policy is itself responsible for contributing to climate change. This solution also allows a single law to comprehensively determine the obligations of the entire corporate group and is suitable from the perspective of foreseeability: a company may expect to be subject to the law of the country where it adopts its emissions-related policy.

(3) Determination of the place of damage

When the victim does not base his claim on the law of the event, then according to Article 7, "the law determined pursuant to Article 4 (1)" applies, that is, the law of the place where the damage occurs. Within the framework of Article 4(1) of the Rome

world and contribute to the climate change in the Netherlands and the Wadden region".

39 E. Álvarez-Armas, "Le contentieux international privé...", *supra* n. 11, at 114-115. According to this author, probably this question was not raised in order to avoid further complicating an already complex legal situation.

40 L. Carballo Piñeiro, "Litigación internacional y daños al medio ambiente", 1 *Revista Ítalo-Español de Derecho Procesal* (2018), 65-88, at 85. Taking into account the place of decisión-making is also suggested by C. Otero García-Castrillón, "El Derecho Internacional Privado de la Unión Europea en la determinación de la responsabilidad civil por daños al medio ambiente", *Anuario Hispano Luso Americano de Derecho* internacional (2013) 367-400, at 391-392, and N. Magallón Elósegui, "El Reglamento Roma II y la ley aplicable a la responsabilidad civil derivada de actos contrarias a derechos humanos realizados por empresas en sus actividades transfronterizas", 22 *AEDIPR (2022) 203-235, at 224*

41 J. Von Hein, *supra* n. 24, at 472 regarding the applicable law. On international jurisdiction, see M. Virgós Soriano/F.J. Garcimartín Alférez, *Derecho Procesal Civil Internacional. Litigación Internacional* (2nd ed., Civitas, Madrid, 2007), at 191, and A.L. Calvo Caravaca/J. Carrascosa González, "Ilícitos a distancia y daños patrimoniales directos: Del caso *Minas de Potasa de Alsacia* (1976) al caso *Volkswagen* (2020)", in J. Ataz López/J.A.A Cobacho Gómez (Coords.), *Cuestiones clásicas y actuales del Derecho de daños: Estudios en homenaje al profesor Dr. Roca Guillamón* (Aranzadi, Cizur Menor, 2021) 987, at 1005.

42 Judgment of The Hague District Court of 26 May 2021, section 4.3.3 and 4.3.6. The Court quotes J. Von Hein, who, regarding the chain of acts, considers that a generous approach fits the principle of environmental protection: "One has to concede that extending the victim's right to choose the law of each place of acting would considerably undermine legal predictability. On the other hand, such a generous approach would fit the favor naturae underlying Article 7" (*supra* n. 24, at 473).

II Regulation, this is considered "irrespective of the country or countries in which the indirect consequences of that event occur", so that "the law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively" (recital 17). The place of damage is, therefore, where a specific personal injury or damage to property is sustained. Material damage is located where the property or asset is injured. Damage to an intangible good may be considered to occur at the place where the right is infringed: if the damage concerns the interest in enjoying an atmosphere unaffected by global warming, it is suffered where it should be enjoyed or where health is adversely affected[43].

In the context of international climate litigation, the application of the law of damage is not always the best solution. On the one hand, damages are suffered globally, insofar as climate change is a global problem. The combined CO_2 emissions of individual states contribute globally to rising temperatures, which in turn cause adverse phenomena and damage everywhere in the world. This implies that Art. 4 (1) might lead to a wide variety of applicable laws[44] under the mosaic theory.[45]

On the other hand, and this seems more serious to us, the law of damage may lead to inadequate results from the perspective of predictability. We are not exactly thinking of operators not being able to foresee where the consequences of their actions will occur. In today's world it could rather be argued that companies should be aware that their CO_2 emissions might cause damage anywhere in the world.[46] The point is that individual damages are decoupled from the place of action[47] so that the law of damage is potentially that of any country in the world. Damages cannot be immediately and monocausally attributed to an action of the defendant but are the result of general global warming; consequently, there is not a direct link between the action and the place of the damage. This not only complicates the establishment of the causal link and the person liable, but also calls into question the results to which the rules of private international law lead.[48] In the *Saul Lliuya* case, for example, if the law of damage had been chosen, Peruvian law would have been applied to assess actions carried out by the defendant primarily in Europe, which, only when combined with the actions of many other companies around the world, explain the risk of the Palcacocha glacier lake overflowing. In this

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43 A direct damage to an intangible good, such as the interest in enjoying a healthy environment, occurs where the right is injured, i.e., where the healthy environment was enjoyed, or where health is damaged: L. García Álvarez/D. Iglesias Márquez, "La regla de la ubicuidad y la responsabilidad ambiental corporativa", in M.C. Marullo/F.J. Zamora Cabot (Coord.), *Empresas y Derechos Humanos. Temas actuales* (Editoriale Scientifica, Italy, 2018) 115, at 149.

44 H. van Loon, "Strategic Climate Litigation in the Dutch Courts: a source of inspiration for NGO`s elsewhere?", 66 *Auc Iuridica* (2020) 69-84, at 80, [doi:10.14712/23366478.2020.32]

45 When interpretating the law of damage under Art. 7, the solutions established for Art. 4.1 Rome II apply. That includes the mosaic theory: J. Von Hein, *supra* n. 24, at 472.

46 It has been a few years since Th. Kadner Graziano, *supra* n. 27, at 73 considered that "in a period in which we are becoming increasingly aware of the effects of global warming, foreseeability is no longer an issue in environmental damage claims".

47 M. Lehmann/ F. Eichel, *supra* n. 18, at 90, on international jurisdiction.

48 *Ibid*., at 80

context, it has to be assessed whether it is appropriate to apply a law that is not always directly related to the defendant's actions. Especially in view of the material results it may lead to. Through a flexible interpretation of causality, the law of the place where damage occurred could make companies that limit their actions and the scope of their activity to European territory liable for damage in third countries[49]. The law of harm also might require the cessation of an activity that national law has authorized after properly weighing all its implications.

Art. 7 of the Rome II Regulation does not establish exceptions based on the lack of foreseeability. The rule apparently assumes that despite the distance, predictability is always present.[50] It has already been pointed out that the provision is not subject to the escape clause, so the application of the law where the damage occurs cannot be excluded under it on the ground that it is not foreseeable for the tortfeasor.[51]

(D) RULES OF SAFETY AND CONDUCT

The system is completed by Art. 17 of the Rome II Regulation. In order to mitigate some of the negative effects of the law of the damage and to contribute to a climate of foreseeability for the defendant, this allows for the consideration of administrative rules of safety and conduct of the country where the responsible party operates. The provision is highly controversial and raises a multitude of issues in the field of climate actions. In particular, the question arises as to whether Art. 17 can justify an exemption or limitation of liability for an operator who has complied with safety or behavioral rules or had a license for their actions, when the law of damage is applicable and sets stricter standards.

The scope of Art. 17 of the Rome II Regulation is limited by the wording of the provision itself. The rules of safety and conduct shall be taken into account "as a matter of fact" and "in so far is appropriate". That is, these rules are not applied, but taken into account, and they are considered factual, not legal elements. Their role is to provide part of the context in which the liability must be judged, but they are not the only element.[52] The provision, therefore, is not a rule of applicable law,[53] so it should not frustrate the application of the governing law of liability, which should always be the key in resolving the case. Accordingly, Art. 17 should not undermine the application of Art. 7 in climate litigation: although the former provision was conceived by the drafters of the Regulation as an instrument to help the tortfeasor, the victim should not be forgotten, nor the *favor naturae* principle that inspires the regulation of environmental damage. Thus, it has been pointed out that Art. 17 cannot be interpreted in a way that contradicts the spirit of

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49 *Ibid*., at 96-97.

50 S.C. Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity", 56 *Am. J. Comp. Law* (2008), at 38. The electronic version available at https://ssrn.com/abstract=1031803 is used, and the page numbering corresponds to that version.

51 J. Von Hein, *supra* n. 24, at. 472.

52 A. Dickinson, *The Rome II Regulation. The law applicable to non-contractual obligations* (Oxford University Press, 2008), at 640

53 *Ibid*., at 640

art. 7 and the polluter pays principle.[54] On the other hand, it also seems fair to consider the operator's confidence that their conduct is lawful if it complies with the rules of conduct of the country of operation, especially if it conforms to an authorization granted after weighing both the environmental impacts of the emissions and the benefits of the activity for the common good.[55]

Reconciling the interest at stake is not easy; hence, quite different doctrinal solutions have been proposed. On the one hand, in order to avoid compromising the victim's freedom of choice under Art. 7 Rome II, it has been suggested to close the possible use of Art. 17 in favour of the polluter and adopt a conservative position on the role of authorizations and foreign public law.[56] A second proposal seeks an interpretation that balances the interplay of Art. 17 and 7 based on the principle of foreseeability. On this basis, the polluter should not take refuge in Art. 17 if he has been aware of the impact of his action in the country of potential damage; but he could invoke the legality of his action when he could not foresee the effects of his action in other states.[57] This approach may be appropriate in the context of neighboring relations, where the perpetrator may or may not have foreseen whether their actions would cause damage in another state. However, in climate litigation, the harmful effects of emissions on global temperature are known to materialize globally, thus predictability exists.

On the other hand, the EU emissions trading system (EU ETS), articulated around Directive 2003/87,[58] deserves additional consideration. It regulates the greenhouse gas emission rights of companies in the EU Member States through an allocation and trading system. A limited number of emission allowances are put into circulation by the system, which can be bought and sold by participants. The emission limits authorized by the system clearly imply an increase of CO2 in the atmosphere, which will contribute to climate change. However, it is assumed that when issuing the authorizations, the various economic and environmental interests have been adequately weighed. With this in mind, the system does not make much sense if the exercise of rights leads to actions for damages.[59] Based on the idea that Art. 17 Rome II is not well adapted to the peculiarities of the ETS, it has recently been proposed to consider that Directive 2003/87 contains an implicit unilateral conflict rule that allows ETS allowances to circulate throughout the EU, including the possible exemption from civil liability in force in the State issuing the allowance.[60]

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54 S.C. Symeonides, *supra* n. 50, at 41-42.

55 Following M. Lehmann/F. Eichel, in climate change claims, it is presumed that the applicant relied on the state granting the authorization to have comprehensively assessed the environmental effects of the emissions and the benefits of the activity for the common good, *supra* n. 18, at 100.

56 E. Álvarez-Armas, "Le contentieux international privé...", *supra n. 11, at 130-131.*

57 M. Lehmann/F. Eichel, *supra* n. 18, at 100. M. Bogdan/M. Hellner, *supra* n. 27, at 297 consider likewise that it would not be appropriate to exonerate the company from liability for the consequences of its activities when it knew or ought to have known that they are inadequate.

58 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275/32.

59 M. Lehmann/F. Eichel, *supra* n. 18, at 103-104.

60 M. Pasqua, "Authorisations to Emit Greenhouse Gases A Conflict-of-Laws Perspective", 3 *The Italian Review of International and Comparative Law* (2023) 409-429

The Hague District Court in *Milieudefensie* case has based its decision on the idea that Art. 17 RRII extends to permits[61] and has accorded compensatory effect to RDS emissions certificate trading included in the EU ETS. According to the Court, these authorizations were granted after adequately weighting all interests at stake, so that RDS does not have an additional reduction obligation in relation to emissions within the ETS. However, the compensatory effect of the ETS does not reach the large number of RDS emissions which the Court considers not to be covered by the system.[62] On the other hand, the Court does not grant compensatory effect to the operating permits for oil and gas extraction. Consequently, these permits do not diminish RDS's obligation to reduce emissions, as the Court does not consider it evident that CO2 emissions played a significant role in the granting of these licenses.[63]

(E) FINAL ASSESSMENT

International climate litigation does not appear to be a passing trend; rather, it is expected to continue growing in importance. Many of the actions are still pending before the Courts, so we will have to wait for future judgments to assess how the various issues raised are resolved in practice. From the perspective of private international law, the rule of Art. 7 is adequate to determine the law applicable to international climate actions, although only the practice of the courts will allow us to assess the problems posed by its interaction with Art. 17. However, a mere conflict rule does not eliminate the inherent difficulties of climate litigation at the national law level. Article 7 Rome II is of little use if the applicable substantive law does not allow for the establishment of the causal link or the overcoming of the independent legal personality of subsidiaries.[64] The situation could improve with the new Directive on Due Diligence[65], which could help create uniform standards and make it easier to hold companies liable for non-compliance with their climate obligations. In this context, let us hope that the measures adopted, as well as the climate actions may help prevent a future that appears both bleak and too warm

61 The Judgment of The Hague District Court of 26 May 2021 uses the rules of safety and conduct to assess the defendant's compliance with the unwritten duty of care provided for in the Book 6, section 162 of Dutch Civil Code (section 4.4.2 and 4.4.44)

62 The Hague District Court Judgment of 26 May 2021, section 4.4.45-4.4.47. The ETS only covers the Shell group's activities in the European Union, and concerns Scope 1 allowances (direct emissions by the company from sources it owns or controls) (section 4.4.45).

63 The Hague District Court Judgment of 26 May 2021, Section 4.4.48

64 D. Iglesias Márquez, *supra* n., at 26: The effective application of conflict-of-law rules requires the presence of substantive rules that make it possible to determine that the damages caused by transnational corporate activities are the result of the activities of parent companies and other entities that exercise control over subsidiaries operating in third States.

65 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L 1760

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*What we talk about when we talk about…*Corporate Sustainability Due Diligence (CSDD) and Climate Change Litigation

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Abstract: Climate change represents one of the most pressing challenges of our time, with especially profound impacts on vulnerable communities and a tendency to intensify social, economic, and environmental inequalities. In this context, the concept of climate justice has emerged as a critical framework for addressing the impacts of climate change through a human rights lens. Initially developed within corporate law, the principle of due diligence has evolved into international human rights standards, serving as a valuable tool for holding companies and states accountable for their environmental and social impacts. Consequently, climate due diligence emerges as an essential tool in the ongoing fight against climate change.

Keywords: Corporate Sustainability Due Diligence Climate Change Litigation Climate Due Diligence

(A) SOME INITIAL PREMISES

As previously noted in another work in this issue,[1] climate litigation is not a recent phenomenon. However, the *Urgenda* case[2] marked a significant shift in trends. Over the past decade, climate litigation has evolved into a steadily growing reality, as evidenced by the data.[3]

Recently, the *KlimaSeniorinnen*[4] case marked a new turning point for two primary reasons. Firstly, it is the the first time the European Court of Human Rights (ECHR) has ruled on the responsibility of states for their inaction in combating climate change. Although the cases of *Carême v. France*[5] and *Duarte Agostinho and Others v. Portugal and*

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1 E. Álvarez-Armas, "Climate change litigation: overview of jurisdiction and applicable law", 20 *SYbIL* (2024).

2 L. Chiussi, L., A. M Tanzi, "Urgenda: un precedente mundial en el litigio climático," in F.J. Zamora Cabot, L. Sales Pallarés, M.ª Ch. Marullo (dirs.), *La lucha en clave judicial frente al cambio climático (Aranzadi, Navarra, 2022); N. Rodríguez García, "Responsabilidad del Estado y cambio climático: el caso Urgenda c. Países Bajos", 7(2) Revista Catalana de Dret Ambiental (2016) 1-38 [doi:* http://dx.doi.org/10.17345/1703]; Vilchez Moragues, P., "Broadening the scope: The Urgenda case, the Oslo principles and the role of national courts in advancing environmental protection concerning climate change", 20 *SYbIL (2016) 71-92 [*doi: http://dx.doi.org/10.17103/sybil.20.06]; A-S. Tabau, Ch. Cournil, "Nouvelles perspectives pour la justice climatique (Cour du District de La Haye, 24 juin 2015, Fondation Urgenda contre Pays-Bas)", 4 *Revue juridique de l'environnement (2015) 672-693 [doi:* http://dx.doi.org/10.3406/rjenv.2015.6759].

3 Data from the Grantham Research Institute on Climate Change and the Environment or the Sabin Center for Climate Change Law (respectively https://climate-laws.org/cclow/litigation_cases and http://climatecasechart.com/) to see the increase in climate litigation cases over the past decade.

4 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (GC)*, ECHR (2024), no. 53600/20, judgment (Grand Chamber) of 9 April 2024 [https://hudoc.echr.coe.int/eng/?i=001-233206].

5 *Case of Carême v. France (GC)*, ECHR (2024), no. 7189/21, judgment (Grand Chamber) of 9 April 2024, [https://hudoc.echr.coe.int/?i=001-233174].

32 Other States,[6] which were consolidated with this ruling, were dismissed on procedural grounds, the decision in *KlimaSeniorinnen* is likely to spur further litigation against European states for similar inaction attributed to Switzerland.

Secondly, this turning point is underpinned by the legal context which the European Union operates, particularly following the adoption of the Corporate Sustainability Due Diligence Directive (CSDDD). The Directive establishes a new framework that will compel both companies and states to expand their responsibilities, inevitably leading to an increase in climate litigation once it comes into force, as it raises the standards regarding the obligations and responsibilities.

To understand the relationship between these two arguments, the first section will review the due diligence regulations. This analysis will allow us to examine cases such as *KlimaSeniorinnen* through the lens of due diligence, enabling a clearer understanding of what *climate due diligence* entails.

(B) DUE DILIGENCE AND HUMAN RIGHTS

In order to gain an accurate understanding of the scope and meaning of due diligence, it is first necessary to appreciate the nuances of its nature. The concept of due diligence was introduced by the *Securities Act of 1933*[7] and served as a measure of prudence required of every businessman. Intermediaries utilized it as protective measure against investors in instances where the information pertaining to share purchases was found to be erroneous. By demonstrating that they had conducted due diligence on the affected company and communicated the findings to investors, intermediaries could avoid liability for any misinformation.

The concept of due diligence was gradually institutionalized, and its application was extended beyond the field of securities to other areas of corporate practice.

Consequently, due diligence is defined as the process through which the potential positive and negative consequence of a decision can be evaluated. This process *contributes to informed decision-making by optimizing the quality and quantity of information available to decision-makers*.[8] In the context of commercial law, the term 'due diligence' is used to describe the investigative process that is undertaken with a view to informing decision-making. This process entails a systematic analysis of the risks, costs and benefits associated with a transaction, with a view to objectively evaluating the cost of operations. Consequently, the practice of due diligence in the context of corporate transactions is a common procedural practice that is aimed at mitigating the risks associated with such financial transactions. The conventional purpose of due diligence has been to function

6 *Duarte Agostinho and Others v. Portugal and 32 Others* (dec.) [GC] 39371/20, Decision 9.4.2024 [GC] [https://hudoc.echr.coe.int/eng/?i=002-14303]

7 United States Code: Securities Act of 1933, 15 U.S.C. §§ 77a-77mm (1934) [https://www.govinfo.gov/content/pkg/COMPS-1884/pdf/COMPS-1884.pdf].

8 R. E. Hoskisson, M. A. Hitt, R. D. Ireland, J.S. Harrison, *Competing for Advantage* (Second Edition, Thomson/South-Western, 2008), at 252.

as a process for the prevention of risk in significant securities and financial transactions, as well as in the design of operational activities.[9]

This commercial concept was subsequently integrated with an *international law concept of due diligence*, which was proposed as a criterion for measuring the responsibility or commitment of states in response to claims from an individual or group. In accordance with the *Guiding Principles on Business and Human Rights*, due diligence has been defined as "…[s]uch a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case".[10]

From this perspective of human rights due diligence, the support provided by the emergence of the *Guiding Principles*[11] was fundamental, as they defined the concept based on the negative or adverse impacts on human rights that business practices entailed: "…[h]uman rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size, and similar factors) to meet its responsibility to respect human rights".[12]

The impetus of the *Guiding Principles* resulted in the integration of the concept into regulatory frameworks and guidelines of organizations such as the European Union and the OECD, as well as in major transnational companies. Furthermore, it facilitated the formulation of regulatory frameworks for corporate conduct in the realm of human rights, including the establishment National Action Plans on business and human rights and the development and enhancement of National Contact Points. Nevertheless, the most significant outcome was the impetus they provided for the enactment of national legislation requiring due diligence in the field of human rights.[13]

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9 O. Martin-Ortega, "La diligencia debida de las empresas en materia de Derechos Humanos: un nuevo estándar para una nueva responsabilidad", in F.J. Zamora Cabot, J. García Cívico, L. Sales Pallarés, (eds.), *La responsabilidad de las multinacionales por violaciones de derechos humanos (Ed. Universidad de Alcalá, Madrid, 2013), at 167-192.*

10 OHCHR, *The Corporate Responsibility to Respect Human Rights: An interpretative Guide* (Nueva York y Ginebra, 2012), at 6.

11 OHCHR, *Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework* (Nueva York y Ginebra, 2011). The Guiding Principles on Business and Human Rights are the global standard for preventing and addressing the risk of adverse impacts on human rights involving business activity, and they provide the internationally accepted framework for enhancing standards and practices with regard to business and human rights. They were developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Human Rights Council unanimously endorsed the Guiding Principles in its Resolution GA A/HRC/RES/17/4.

12 OHCHR, *The Corporate…*, supra n.10, at 6.

13 C. Márquez Carrasco, "El reto de la diligencia debida en materia de derechos humanos en el 10 aniversario de los Principios Rectores de las Naciones Unidas sobre empresas y derechos humanos: orígenes, evolución de instrumentos y valoración de cara a la próxima década", in C. Márquez Carrasco, *El 10 aniversario de los principios rectores de las Naciones Unidas sobre empresas y derechos humanos, retos de la debida diligencia en materia de derechos humanos y medio ambiente y derechos de los pueblos indígenas (Aranzadi, 2022), at 21-70.*

The efforts of numerous forums and actors have successfully established a link between businesses and human rights, ensuring that business practices respect internationally recognized standards and principles on environmental protection and the protection of vulnerable groups, particularly in sectors or activities where risks have a greater social and environmental impact.[14] Furthermore, these obligations have been extended not only to the companies' own operations but also to their supply chains.[15] The Organization for Economic Co-operation and Development (OECD) has defined this due diligence process in relation to supply chains, stating that due diligence is a process that encompasses the entire supply chain and applies to all business relationships, including those that extend beyond contractual, "first-tier," or immediate relationships.[16]

This is not simply a matter of chance, as the reduction of social and environmental impacts in relation to supply chains has become a central issue in supranational and national legislative proposals on business and human rights.[17] This obligation of the company to respect human rights and protect the environment in a broad sense will necessitate the implementation of human rights processes that facilitate the identification, prevention, and mitigation of the risks and impacts that its operations or business relationships may have on human rights[18]. Furthermore, the company is obliged to implement robust internal procedures to rectify any adverse consequences that it has caused or contributed to causing. In accordance with *Guiding Principle 17* business enterprises are required to carry out human rights due diligence in order to "…identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence: (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships; (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations; (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve".[19]

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14 M.E. Hernández Peribáñez, *Diligencia Debida y Derechos Humanos, acceso a mecanismos de reparación judicial (COLEX, 2022).*

15 European Commission, Directorate-General for Justice and Consumers, F. Torres-Cortés, C. Salinier, H. Deringer, C. Bright, *et al.*, *Study on due diligence requirements through the supply chain: final report* (Publications Office, 2020) at 39 [https://data.europa.eu/doi/10.2838/39830].

16 OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing, Paris, 2023) [doi: https://doi.org/10.1787/81f92357-en].

17 J. Nolan, "Business and human rights: The challenge of putting principles into practice and regulating global supply chains", 42(1) *Alternative Law Journal* (2017) [doi: 10.1177/1037969X1769478 3].

18 In the same vein, the pioneering *LOI n.° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n.° 0074 du 28/03/2017, stated "…[m]esures de vigilance raisonnable propres à identifier les risques et à prévenir les atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l'environnement, résultant des activités de la société et de celles des sociétés qu'elle contrôle…"; N. Magallón Elósegui, La ley aplicable a la responsabilidad civil extracontractual de empresas por abusos de los derechos humanos (Aranzadi, Navarra, 2023), at 26.*

19 OHCHR, *The Corporate Responsibility…*, *supra* n.10, at 31.

Consequently, it is incumbent upon each company to undertake this task, adapting its measures in accordance with factors such as size, sector and location. It is incumbent upon them to evaluate and measure the actual and potential impacts of their activities throughout the supply chains; to monitor the results of these evaluations; to communicate the findings both internally and externally, and to inform their decision-making regarding negative consequences.

Furthermore, as the objective is to enable a company to demonstrate that it respects human rights throughout all its operations and over time, it is necessary to implement permanent processes, rather than a one-time exercise. Consequently, human rights due diligence must be a continuous and ongoing process for companies. In practice, this represents the most significant challenge companies face, as they must incorporate a new, permanent process for which they have no prior experience in the sector.

(1) How to Initiate Change: From Due Diligence to Climate Due Diligence

In order to comprehend the manner in which climate due diligence is evolving into a distinct dimension of the due diligence obligations pertaining to human rights for both states and corporations, it is essential to examine the evolution in the understanding and practice of due diligence by the principal actors. While states remain responsible for ensuring climate protection by providing tools to make environmental information accessible and enabling civil society participation in environmental policies,[20] they have also permitted the involvement of new actors.

It was previously assumed that the state was the sole guarantor of fundamental rights and environmental protection. Nevertheless, this is no longer the case. The involvement of new actors, such as companies and, indirectly, individuals, has resulted in a shift in the conceptualization of norms and the manner in which they are demanded. Following the adoption of internal legislation on human rights by several states,[21] the European Union put forth the proposal of establishing regulations that would set due diligence obligations regarding human rights and the environment for companies in a polyhedric mode[22].

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[20] *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)*, UN, Treaty Series, vol. 2161, at 447.

[21] In addition to the aforementioned LOI n° 2017-399 du 27 mars 2017 *relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, other European countries have enacted similar internal regulations, such as the Netherlands, (*Child Labour Due Diligence Act*), Germany (*Act on Corporate Due Diligence Obligations in Supply Chains* of 16 july 2021 (*Lieferkettensorgfaltspflichtengesetz – LkSG*)), Norway (Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act), and many others are in the process of enacting or studying similar initiatives. All of these can be followed at https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/.

[22] Although the CSDDD Directive has been the most relevant regulation for us as it is the latest adopted, the European Union has been regulating in this direction for some time, as evidenced by: Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011; Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, 15.11.2014; Regulation (EU) 2017/821 of

Furthermore, the private sector has come recognize that competing in a globalized economy entails a certain degree of obligations. These entities are responsible for a considerable proportion of global greenhouse gas emissions,[23] which have an adverse impact on millions of individuals as a result of their activities in the context of climate change. The emergence of new models of responsible consumers has led to a greater demand for transparency, thereby elevating the importance of due diligence and environmental risk management in supply chains[24]. For businesses, due diligence has become a strategic objective to attract this new consumer.

As companies learn to incorporate sustainable practices into their business models with the dual objective of reducing their environmental impact and increasing profitability, we will have identified a balance that is currently only anticipated. The primary challenge in achieving this objective is the mechanism that allows for strict control by governments and supranational institutions to verify the effectiveness of the measures implemented by these companies to minimize negative impacts, as well as instance of non-compliance. A further significant challenge is the necessary for an independent national supervisory authority to assess the compliance and progress of the plans developed by companies. In the absence of the capacity to sanction those whose strategies fail to meet the required standards, it is unlikely that any tangible results will be achieved. The establishment of obligations for companies would lack sufficient substance and be ineffective if it were not subject to specialized control. Such control would assist companies in their due diligence efforts, specify the requirements for enhanced due diligence, if necessary, maintain a register, supervise due diligence

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the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130, 19.5.2017, which obliges community companies to ensure in their supply chain that they import only tin, tungsten, tantalum, and gold from responsible and conflict-free sources and to establish more specific mechanisms to carry out due diligence; Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019, on sustainability-related disclosures in the financial services; Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, PE/20/2020/INIT, OJ L 198, 22/06/2020; Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, 9.6.2023; Regulation (EU) 2023/2631 of the European Parliament and of the Council of 22 November 2023 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds, OJ L, 2023/2631, 30.11.2023; Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020,PE/78/2023/REV/1, OJ L, 2024/1252, 3.5.2024.

[23] The Carbon Majors database tracks historical cumulative emissions from 1854 to 2022 of 122 industrial producers, whose share of CO□ accounts for 72% of global CO□ emissions from fossil fuels and cement since 1751. More than 70% of these global CO□ emissions have historically been attributed to 78 corporations. In its latest report from April 2024, it focused on carbon dioxide (CO□) emissions from 2016 to 2022, the years following the signing of the Paris Agreement. The study concludes that 57 corporations are responsible for emitting 80% of the emissions. It also highlights that most fossil fuel companies ignored the Paris Agreement and produced more fossil fuels in the seven years following the adoption of the treaty than in the seven years prior (https://carbonmajors.org/briefing/The-Carbon-Majors-Database-26913).

[24] D. Surya, "Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?", 36(2) *Leiden Journal of International Law* (2023) 389-414 [doi:10.1017/S0922156522000802].

statements and plans, make recommendations, advise state bodies and companies, articulate mechanisms for conciliation, mediation and arbitration, establish a claims procedure, and finally, a sanctioning regime that defines infractions and penalties.[25]

Having ensured that companies incorporate human rights due diligence into their business activities, the next logical step is to turn our attention to *climate due diligence*. Discussions surrounding climate due diligence encompass the evaluation and minimization of CO□ emissions alongside the incorporation of climate change adaptation measures within business operations. As the primary contributors to emissions,[26] companies are well-positioned to play a pivotal role in combating climate change by reducing their impact. As highlighted in the 2022 UNEP Report[27], the experience of the 2020 coronavirus (COVID-19) crisis regarding the reduction of emissions indicates that significant emissions reduction will only be achievable by 2030 if countries integrate decarbonization into their economic recovery plans. In any case, the instruments currently in place to reduce greenhouse gas emissions, especially those designed for companies, have been demonstrated to be ineffective or insufficient to achieve this goal. It is imperative that new legal instruments capable of exerting pressure on other states, as well as their respective corporations, are established. An increase in due diligence obligations represents the optimal instrument.

The phenomenon of climate change represents an unprecedented threat to human rights. The UNGPs' stipulation that the most severe adverse human rights impacts should be accorded priority status means that climate change should be identified as an area of particular concern for corporate sustainability due diligence with unambiguous clarity. In accordance with the UNGPs' stipulation that human rights risks should be prioritized according to their severity, it is imperative that the CSDD provides a detailed account of this unprecedented human rights risk, clearly identifying it as a paramount concern in corporate due diligence processes. In light of the imminent irremediability of climate-related risks in the event of climate tipping points being surpassed, coupled with the limited timeframe available to avert such risks, it is imperative that there is no ambiguity in the legal framework as to the necessity for companies to consider climate-related risks in their due diligence processes. It is imperative that companies are explicitly instructed to do so with the utmost urgency.

Furthermore, the proposal of a European Green Deal[28] and the objective to become climate neutral by 2050, with the goal of making Europe the first climate-neutral continent in the world, provides additional justification for considering the mandatory submission of the entire industry to climate due diligence. Climate due diligence entails direct and effective engagement with the primary actors responsible for environmental externalities and climate change: corporations. As previously noted, this approach has

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25 C. Fernández Liesa, "Obligaciones del Estado y de la empresa en materia de debida diligencia", in M.C. Marullo, L. Sales Pallarés, F.J. Zamora Cabot, *Empresas transnacionales, derechos humanos y cadenas de valores: nuevos desafíos, (COLEX, 2023), at 232.*

26 Briefing Carbon Majors databases, *supra* n 23.

27 UNEP, *Emissions Gap Report (EGR) 2022: The Closing Window* (https://www.unep.org/resources/emissions-gap-report-2022).

28 European Green Deal: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/story-von-der-leyen-commission/european-green-deal_en?prefLang=es.

been adopted by some European states. However, companies may find some appeal in having a mandatory legal due diligence regime. On the one hand, this could promote harmonization and level the playing field, at least throughout the EU territory. On the other hand, it could provide greater legal certainty regarding the standards that will be required of companies, in a common and more harmonious path towards sustainability.

It is imperative that companies comprehend the potential risks and the concomitant investment opportunities. Such risks may be classified as either physical or transition risks. Physical risks encompass the impact of extreme weather events on infrastructure, while transition risks pertain to the potential consequences of a shift towards a more sustainable economic model.[29] It is incumbent upon companies to assess their greenhouse gas emissions and carbon footprints along their supply chains, as well as to develop plans to reduce emissions in accordance with the goals set out in the Paris Agreement. Subsequently, an examination of governance strategies and processes should be conducted to ensure that climate-related risks and opportunities are adequately addressed at all levels. Finally, an assessment of reputational risks and the adequacy of insurance coverage should be undertaken.

It is imperative that the state maintains its role in guaranteeing the efficacy of corporate measures, facilitating external control mechanisms, and imposing penalties when necessary. Concurrently, the state must establish incentives for companies to invest in renewable energy and/or more sustainable infrastructure.

It is beyond question that certain industrial sectors and/or activities give rise to considerably greater environmental impacts in connection with climate change. However, a new phenomenon has emerged: investors are requesting that large corporations implement more comprehensive and effective processes to assess the risks and opportunities associated with the transition to a low-carbon economy. In addition, major UK pension funds are urging the senior management of companies such as *BP Plc* and *Shell* to adopt a more rigorous and effective approach to addressing the issue of carbon emissions.[30]

It seems inevitable that due diligence will become an essential component of responsible investments and business *best practices* associated with the transition to a low-carbon economy. This is particularly likely if companies recognize that implementing sustainable practices could also confer economic and reputational benefits. Consequently, organizations that adopt more sustainable practices will be able to attract a greater number of customers and enhance their profitability.

Although the subject of emissions has been the primary focus of this discussion, it is important to understand climate due diligence in a broader context. Such an approach will facilitate the identification of the impact of corporate activities on the human rights of vulnerable communities. To illustrate, a company engaged in natural resource extraction must evaluate the extent to which its activities contribute to deforestation

[29] E.g. a transition risks could be the possibility of regulatory changes at the state or supranational level or market changes affecting operations.

[30] Reuters, *UK pension funds target BP and Shell directors over climate goals-FT* (March 12, 2023) [https://www.reuters.com/world/uk/uk-pension-funds-threaten-vote-against-bp-shell-directors-over-climate-targets-2023-03-12/].

and, consequently, to climate change. This evaluation must also consider the impact of these activities on the rights of indigenous communities and their relationship with the affected territory. Furthermore, effective climate due diligence should encompass the provision of efficacious recourse for those adversely impacted by its consequences, such as pecuniary compensation or environmental remediation. This would reinforce the capacity of victims to pursue legal redress. The European Union's Corporate Due Diligence Directive provides a promising exemplar for integrating due diligence with climate objectives.

(2) Directive on Corporate Sustainability Due Diligence: Reasons for a Change For the Better?

The CSDDD establishes a transparent and comprehensive framework of obligations for companies in relation to climate risks. To achieve the objectives, set out in the Paris Agreement, it is imperative that they develop a detailed plan to reduce their greenhouse gas emissions. This plan must include short, medium and long-term targets for decarbonization. Furthermore, they are obliged to evaluate the climatic impact of their operations, including their supply chains.

Such assessments must encompass climate risks, necessitating the identification of both direct emissions (arising from the company's own operations) and indirect emissions (emanating from supply chains). To the extent that European companies are responsible for the climate and human rights impacts of their suppliers in third countries, they will be obliged to require suppliers to comply with environmental and climate standards, implementing audits and controls throughout their supply chains.

The directive requires companies to publish comprehensive reports on the risks identified, the measures taken, and the climate performance achieved. This obligation serves to enhance accountability and facilitate the monitoring of corporate performance.

The primary challenges that the EU will face in ensuring the CSDDD's material applicability are twofold: firstly, to build the technical and financial capacity of small and medium-sized enterprises (SMEs), which are likely to encounter significant difficulties in meeting the requirements of the CSDDD; and secondly, to provide adequate support to these enterprises to enable them to comply with the CSDDD. As they become integrated into a supply chain, they will be required to adopt a standard that is markedly different from their usual practice, which will be challenging for many of them to learn and internalize. In addition to the challenge of acquiring the necessary skills, there will be the monitoring of compliance itself. Many suppliers are in countries with either no domestic regulations or very weak ones, which will present a significant challenge.

In any case, the action taken by the Directive is of great consequence in terms of aligning business activities with global sustainability objectives. The CSDDD not only establishes clear obligations for companies but also serves to reinforce the interconnection between climate justice, human rights and corporate responsibility. Nevertheless, the success of the Directive will depend on its effective implementation, collaboration across sectors and political commitment to address climate and social challenges in a comprehensive and equitable manner.

It is not yet possible to reach a conclusion regarding the CSDDD. It is sufficient to note that the Article 22 stipulates that Member States must ensure that companies adopt and implement a climate change mitigation transition plan. This is to guarantee that their business model and strategy are compatible with the transition to a sustainable economy and with the limitation of global warming to 1.5°C and the goal of achieving climate neutrality.

Moreover, Articles 24(1) and 25(1) stipulate that each Member State shall designate an authority or authorities to monitor compliance with the obligations set forth in this Directive. These monitoring authorities must be vested with the requisite powers and resources to fulfil their duties, including the authority to require companies to provide information and to conduct investigations pertaining to compliance with the obligations outlined in this Directive.

If we recall our initial remarks about criticizing Switzerland's inaction and noting that member states have not yet aligned themselves with the objectives in question, it would seem contradictory to suggest that the body responsible for monitoring company compliance with European legislation relating to climate change mitigation could potentially infringe these very objectives.

It is thus of the utmost importance that the States fulfil the obligations set out for them. In the event of non-compliance, it is essential that additional measures are implemented to guarantee the fulfilment of these obligations, particularly when there is a high probability of non-compliance. At this juncture, it is evident that there is a dichotomy between the conviction that climate due diligence will curb climate change and the doubt as to whether it will be effective.

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Agora

First ordinary conference of the AEPDIRI network of early-career researchers

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First Ordinary Conference of the AEPDIRI Network of Early-Career Researchers

Nuria Arenas Hidalgo*

The present Ágora compiles the most highly-rated papers presented during the First Ordinary Conference of the AEPDIRI Network of Early-Career Researchers, held at the University of Murcia on September 6, 2024.

Established in 2022 by initiative of the AEPDIRI Board, the *"AEPDIRI Network of Early-Career Researchers"* is an informal tool aimed primarily at proposing and supporting initiatives specifically designed for the benefit of junior researchers within the Association. It also serves as a guide on matters related to their teaching and research training. Furthermore, the network was created with the purpose of connecting those in the process of completing their doctoral theses, or in the period immediately following the attainment of their doctoral degree.

The Network is directed by a Coordinating Committee whose primary function is to act as a bridge between the AEPDIRI leadership and junior researchers, with the goal of encouraging their participation in the activities proposed by the Association while also empowering them to organize their own activities. Currently, the Committee is composed of the following junior researchers: Dr. Ignacio Álvarez Arcá, Assistant Professor of Public International Law and International Relations at the University of Málaga; Dr. Carlos Gil Gandía, Assistant Professor of Public International Law and International Relations at the University of Las Palmas de Gran Canaria; Dr. Josep Gunnar Horrach Armo, Permanent Lecturer in Private International Law at the University of the Balearic Islands; Dr. Carmen Martínez San Millán, Assistant Professor of Public International Law and International Relations at the University of Valladolid; Dr. Ana Sánchez Cobaleda, Assistant Professor of Public International Law and International Relations at the University of Barcelona; and two members of the AEPDIRI Board, Dr. Nuria Arenas Hidalgo, Senior Lecturer of Public International Law and International Relations at the University of Huelva, and Dr. Eduardo Jiménez Pineda, Senior Lecturer of Public International Law and International Relations at the University of Córdoba.

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The Network has already launched a series of "virtual coffee meetings" as informal spaces where members can share their concerns and challenges related to their research. Additionally, the Network organized its First Ordinary Conference, specifically directed at this group, which is planned to take place biennially. This conference was held at the University of Murcia on September 6, 2024, serving as a space for dialogue and collaborative work between senior and junior researchers something that had not existed within the Association until that point.

The conference included participation by prominent legal scholars from the disciplines comprising AEPDIRI (Public International Law, Private International Law, and International Relations), such as Professor Dr. Esperanza Orihuela Calatayud, Chair of Public International Law and International Relations at the University of Murcia, who delivered the keynote address titled *"The Use of the International Court of Justice by Non-Injured States: Lights and Shadows"*. Subsequently, four working panels were established, each featuring presentations of various papers selected by a scientific committee. These papers were then discussed with commentators such as Dr. María José Cervell Hortal, Chair of Public International Law and International Relations at the University of Murcia; Dr. Juan Jorge Piernas López, Senior Lecturer of Public International Law and International Relations at the University of Murcia; Dr. María Ángeles Sánchez Jiménez, Senior Lecturer of Public International Law and International Relations at the University of Murcia; and Dr. Alberto Priego Moreno, Associate Professor of Public International Law and International Relations at Comillas Pontifical University.

The most highly-rated papers by the Scientific Committee have been selected for publication in this edition of the Ágora of SYBIL. This initiative opens one of the most prominent and internationally recognized journals of the Association to the work of the new generation of researchers. The relevance of this initiative is evident from the topics addressed, which include pressing challenges within our disciplines: *"Pioneering Legal Advances: The European Convention on Human Rights' Latest Efforts against Online Hate"*, *"Displacement and Climate Change in the Renewed European Framework on Migration and Asylum: Insights from the Practice in Spain and Italy"*, *"The Application of Collective Agreements in Cross-Border Employment Contracts"*, *"The Corporate Sustainability Due Diligence Directive: Displaced Workers and Emerging Challenges in Respecting Human Rights"*, and *"Change and World Order in Classical Realism: Understanding the Revisionist Challenge"*.

The choice of topics and the high quality of these works demonstrate the excellent training of AEPDIRI's junior members and the need to give them greater visibility a goal furthered by their publication in this journal.

AEPDIRI is clearly committed to fostering the Network's activities and the intergenerational dialogue it promotes. Through these collaborative workspaces, our Association creates a more dynamic and balanced ecosystem conducive to the scientific progress of our disciplines, in which the new generations play a prominent role.

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Pioneering legal advances: the European Convention on Human Rights' latest efforts against online hate

Francisco Placín Vergillo*

Abstract: This article examines the most recent criteria and determinations in the jurisprudence of the European Court of Human Rights (ECtHR) regarding the interpretation of the European Convention on Human Rights (ECHR) for the effective prevention and prosecution of online hate speech by national authorities. In a digital landscape marked by the rise of expressions that foster intolerance, the ECtHR has reinforced its position on the balance between freedom of expression (Article 10 ECHR) and the effective protection of the right to respect for private and family life (Article 8 ECHR). This analysis delves into several cases before the Court that establish precize standards on the prevention and sanction of online hate speech. Furthermore, it highlights a new line of jurisprudence under development concerning the complexities and difficulties related to online hate speech in implementing the ECtHR's resolutions. The article concludes by emphasizing the relevance of these interpretations for strengthening the fight against online hate speech, underlining the central role of the ECtHR as a guarantor of the principles of the ECHR in a constantly evolving digital environment.

Keywords: Hate speech online freedom of expression Internet

(A) ANALYSIS OF THE RESEARCH OBJECT

Online hate speech has become a socio-legal phenomenon that, on occasion, constitutes the starting point for the emergence and development of social conflicts, even posing a real risk to the protection of democratic systems and human rights.[1] This is because it generates an atmosphere of intolerance that can lead to serious human rights violations, especially against the most vulnerable and oppressed groups in society.

The United Nations has pointed out that incitement to violence against specific communities or individuals based on their identity can contribute to the facilitation or preparation for the commission of atrocity crimes and is simultaneously a warning sign and an indicator of the risk of such crimes being committed.[2]

* PhD Candidate in International Law, University of Seville, fraverpla@alum.us.es. This article presents novel approaches, explores innovative legal perspectives, and revisits its research object. It constitutes an expanded and updated version of a previous study published in IUS ET SCIENTIA.

1 European Economic and Social Committee Opinion JOIN(2023) 51 final, OJ 2024 C/2024/4669, 2.2. And Commission Joint Communication JOIN(2023) 51 final, OJ 2023, at.15

2 United Nations, *Plan de Acción para Líderes y Actores Religiosos. Para la prevención de la incitación a la violencia que podría dar lugar a crímenes atroces* (United Nations Office on Genocide Prevention and the Responsibility to Protect, 2017).

It has been demonstrated that hate speech, even when propagated by the media, plays a fundamental role in the commission of genocides such as the Rwandan genocide, which resulted in over 800,000 deaths in less than five months. [3]

While one might think that online hate speech does not have the same force or direct effect in reality, it has also been a fundamental tool used to commit atrocities, taking advantage of the fact that platforms do not always have efficient content filtering or review systems. An example of this occurred in Kenya, where numerous expressions of hate were spread on social networks during an election, provoking harassment and social violence that resulted in over 1,000 deaths and 600,000 displaced persons.[4]

However, despite the above, it must be acknowledged that there is currently no definition of hate speech accepted by the entire international community. Nevertheless, the United Nations, in the Rabat Plan of Action, defines it as "any kind of communication, whether oral or written or also behavior that attacks or uses pejorative or discriminatory language referring to a person or group based on who they are, in other words, based on their religion, ethnicity, nationality, race, color, ancestry, gender, or other forms of identity".[5]

At the European regional level, the territorial scope of this research, the Council of Europe defined hate speech in its Recommendation No. 20 of the Committee of Ministers on Hate Speech of 1997 as: "[...] all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism and other forms of hatred based on intolerance, including intolerance expressed in the form of aggressive negationism and ethnocentrism, discrimination and hostility against minorities, immigrants and persons born of immigration."[6]

Therefore, given the absence of new international instruments that directly address the new socio-legal phenomena of the digital age, this research aims to determine whether, by resorting to the interpretation of the ECHR,[7] at least at the regional level, international treatment of online hate speech can be achieved by each of the Council of Europe states, as the ECtHR jurisprudence seems to indicate, aimed at its prevention and prosecution, at least regionally.

The methodology used is based on the HUDOC database, where the research was focused on all ECtHR resolutions concerning Article 10 ECHR, which enshrines the right to the free exercise of freedom of expression, and on hate speech in the last ten years until December 3, 2024, focusing on those cases where online hate speech was the issue, regardless of whether or not there was a human rights violation.

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3 M. Chiara Marullo, 'El rol de la plataforma Facebook en la difusión de la campaña de odio contra la etnia musulmana rohingya en Myanmar', in Z. Combalía, M. P. Diago, and A. González-Varas (eds), *Libertad de expresión y discurso de odio por motivos religiosos (Licregdi, Zaragoza, 2019) 119, at 127.*

4 I. Gagliardone et al., *Countering Online Hate Speech* (UNESCO SERIES ON INTERNET FREEDOM, France, 2015), at.34.

5 United Nations, *La Estrategia y Plan de Acción de las Naciones Unidas para la lucha contra el discurso de odio* (United Nations Office on Genocide Prevention and the Responsibility to Protect, 2019).

6 Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech" (adopted 30 October 1997).

7 European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953).

(B) THE EUROPEAN CONVENTION ON HUMAN RIGHTS: RECENT ADVANCES ON ONLINE HATE SPEECH

Firstly, it must be stated that the ECtHR's interpretation of the research object is based on the protection of two rights enshrined in the ECHR.

Thus, when faced with a case of online hate speech, the ECtHR is obliged to verify whether national authorities have achieved a fair balance between the two rights enshrined in the ECHR that are involved: the right to exercise freedom of expression (Article 10) and the right to respect for private and family life (Article 8).[8]

This is because these are not absolute rights, so under certain circumstances and requirements, both can be limited by national authorities, see in this sense the provisions of the second paragraph of both. [9]

The verification of this fair balance is the basis on which the ECtHR develops criteria to be considered by national authorities to determine what measures should be applied to guarantee (or violate) the effective protection of both rights enshrined in the ECHR, as well as under what circumstances one right may require greater protection than the other.

The ECtHR has repeatedly stated that these criteria are not exhaustive,[10] which is evident in recent jurisprudence on the prevention and prosecution of online hate speech. Through this, it is verified that the ECtHR is developing specific treatment for each of the elements that are emerging and being incorporated into this phenomenon, giving rise to detailed jurisprudence on online hate speech.

Therefore, the ECtHR has focused, through its jurisprudence, on determining the particularities and specifications required for the treatment of online hate speech, such as the analysis of the language and stylistic resources of a social network (Application *Savva Terentyev v. Russia)*,[11] the amplifying effect of the network (Applic. *Cicad v. Switzerland*),[12] the feeling of anonymity (Applic. *Verlagsgesellschaft mbH v. Austria*),[13] among others.

In this sense, we will focus on analyzing the most recent advances of the ECtHR in the interpretation of the ECHR to guarantee the effective protection of both rights in the face of online hate speech, specifically regarding measures to block access to websites and the responsibility of users for the dissemination and attitude towards it.

(1) Blocking measures

With regard to measures to block access to websites by national authorities, the ECtHR has been involved for years in determining when they are justified under the ECHR. These require a thorough analysis, as they are designed to influence the accessibility of

8 *Medzlis Islamske Zajednice Brcko and others v. Bosnia and Herzegovina*, ECtHR (2017), No.17224/11, 77.
9 J.A. Carrillo Salcedo, *El Convenio Europeo de Derechos Humanos* (Tecnos, España, 2004), at 30-32.
10 *Medzlis Islamske Zajednice Brcko and others v. Bosnia and Herzegovina*, ECtHR (2017), No.17224/11, 88.
11 *Savva Terentyev v. Russia*, ECtHR 2018, No.10692/09.
12 *Cicad v. Switzerland*, ECtHR 2016, No.17676/09.
13 *Standard Verlagsgesellschaft mbH v. Austria*, ECtHR 2021, No.39378/15.

the internet for users and, consequently, compromize the State's responsibility for the possible violation of the right to the free exercise of their freedom of expression.[14]

In the Applic. *Taganrog Lro and others v. Russia*, of June 22, 2022, the ECtHR stated that the declaration of the international website of Jehovah's Witnesses as extremist could not be made in a general manner, so that blocking measures should only be directed at extremist content and not the entire website. This prevented users of the website from accessing, receiving, and disseminating information, even affecting their right to freedom of religion, as it was verified that the website contained content on various topics.[15] In fact, this situation was aggravated by the fact that it was a website that disseminated religious content adapted for people with specific needs.[16]

Therefore, it should be noted that it is established jurisprudence of the ECtHR that the decision to declare an entire website "extremist" for the purpose of total blocking constitutes an extreme measure that deliberately ignores the distinction between licit and illicit information that a website may contain, constituting in itself a violation of the ECHR.[17]

This does not mean that the ECtHR has stated that a total blocking measure of a certain website can never be applied, but that there should be a separate and distinct justification for this, with respect to the underlying justification directed solely to the blocking of illicit content, and with reference to the criteria established in accordance with Article 10 ECHR, otherwise this would constitute an arbitrary interference by national authorities on the users and owners of the website. [18]

This is significant because the ECtHR establishes that to carry out the total blocking of a website, it is not enough to determine the necessity of it on each of the illicit contents contained therein, but to carry out a thorough analysis and justification of the reasons why it must be blocked completely. This represents a real step forward in that the ECtHR determines the possibility of carrying out a total blocking of a website, which until then had been considered in a very succinct manner.

(2) Responsibilities

Another issue analyzed in various cases by the ECtHR is the determination of responsibility for online hate speech, from its creation to its dissemination.

In this sense, we must highlight, due to its current relevance and importance, the Applic. *Muhkin v. Russia*, of December 14, 2021, through which the ECtHR stated that journalists, editors-in-chief, publishers, and media owners may have duties and responsibilities regarding the hate and violence expressed in their media, even if they are not personally associated with such statements if they assist the authors in their dissemination.[19]

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14 *Ahmet Yildirim v. Turkey*, ECtHR 2012, No.3111/10, 48-54.
15 *Taganrog Lro ad others v. Russia*, ECtHR 2022, No.32401/10, 224.
16 *Taganrog Lro ad others v. Russia*, ECtHR 2022, No.32401/10, 225.
17 *Taganrog Lro ad others v. Russia*, ECtHR 2022, No.32401/10, 230-231.
18 *Taganrog Lro ad others v. Russia*, ECtHR 2022, No.32401/10, 231.
19 *Mukhin v. Russia*, ECtHR 2021, No.3642/10, 124.

This represents an advance in the determination of the responsibility of the subjects involved in the dissemination and manifestation of hateful expressions in different media, since until now, the element of intentionality had been a subjective and defining element for the ECtHR to respond for the consequences of hate speech.[20] This shows that the ECtHR is in an evolutionary process of its jurisprudence regarding the treatment of online hate speech.

An example of the ECtHR's jurisprudential evolution in this matter is the treatment of the individual responsibility of the user for online hate speech when this user is a political figure, highlighting in this regard the recent Applic. *Sanchez v. France*, of May 15, 2023, whose case revolves around the responsibility of the claimant, specifically a council member, with respect to online hate speech expressed in one of his publications by other users through comments on the same.

Firstly, it is particularly important to note, regardless of the claimant's status as a public representative and the relationship of this to his responsibility, that the ECtHR considered and analyzed the Terms of Service of the network where the hateful expressions were made, in order to determine the degree of responsibility of the originating user. [21] This is revealing in that, for the first time, the ECtHR not only takes into account the national and international regulations applicable to the case for its pronouncement, but also incorporates the Terms of Service of a social network to analyze the diligence of the user in it.

This case stands out because with it, the ECtHR takes a very important step in the prosecution and prevention of online hate speech, as it has become fundamental to understanding the responsibility that politicians may have in the dissemination and constitution of hate speech on social networks. In the Applic. *Delfi AS v. Estonia*, of June 16, 2015, the ECtHR indicated that the responsibilities and obligations of large internet portals managed professionally and exploited for commercial purposes, excluding from its examination internet forums where comments from third parties may be disseminated. However, from this judgment, the ECtHR expresses that social network for political purposes, where even the account holder is not a simple individual, but a political representative who uses their networks for such purposes, cannot have the same consideration, and therefore the same responsibilities, as the social network of any individual. [22]

Although the case under analysis is the responsibility of the politician in relation to hateful comments made in his publication against social minorities, the ECtHR notes that there is no consensus in the Council of Europe, for the moment, to attribute responsibility for acts committed by third parties, although these may arise depending on the moderation or purification techniques applied by the "producer" users of content who use their social networks for non-commercial purposes.[23] Even so, it analyzes this term in depth through the analysis of national regulations, which is very interesting for the treatment of online hate speech by the Court.

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[20] *Sürek v. Turkey (No.1),* ECtHR 1999, No.26682/95, 62.

[21] *Sanchez v. France*, ECtHR 2023, No.45581/15, 81.

[22] *Sanchez v. France*, ECtHR 2023, No.45581/15, 179-180. And Delfi AS v. Estonia, ECtHR 2015, No.64569/09, 115-116.

[23] *Sanchez v. France*, ECtHR 2023, No.45581/15, 182.

The ECtHR observes that, although the holder of a Facebook account used for non-commercial purposes does not have absolute control over the administration of comments or automatic filtering, it was required in the case of a very popular account of a producer user to have a diligent attitude and a series of considerable resources available.[24]

Thus, the ECtHR points out that producer users cannot be exempted from all responsibility, as this could facilitate or encourage hate speech, so that professional entities that create social networks and make them available to other users have certain obligations, there must be a distribution of responsibilities among the actors involved, allowing, if necessary, the degree of responsibility and the way it is attributed to be adjusted according to the objective situation of each one.[25]

In this sense, the ECtHR determines that the duties and obligations of a politician according to the above are accentuated, as he holds a certain degree of notoriety and representativeness, having a greater capacity to influence users.[26]

Therefore, and in relation to the individual responsibility of the user who created the publication where the hateful comments were made, the ECtHR points out that although this user did not have automatic filtering tools or other mechanisms that must be established by the social network itself, he allowed public access to the wall of his Facebook account. This allows us to understand that he authorized comments to be published on it, and that taking into account the political and social circumstances in which said publication was framed, serious consequences were expected, a risk that, as a politician, he should have foreseen, which was accentuated as he was an expert in online communication strategy.[27]

Furthermore, the ECtHR recalls that hate speech is not always manifested by the individual through precize and clear expressions, but sometimes takes other forms such as implicit statements that, even if expressed cautiously or hypothetically, are equally hateful.[28] And with this, the Court points out that the impact of hateful and racist speech becomes more harmful in an electoral context where there are tensions in the population.[29] In this sense, it recalls that political speeches linked to immigration should not advocate for racial discrimination or humiliating and degrading attitudes, as this can trigger a complex social climate and undermine confidence in democratic institutions.[30]

On the other hand, with reference to the principle of proportionality that this Court has echoed so much, the ECtHR recalls that not all politicians have the same responsibility with respect to their words, but an analysis should be carried out on the degree of responsibility that can be attributed to them, since the notoriety and representativeness of all politicians are not the same. With this, it expresses that a local politician has fewer duties, and therefore a smaller burden, than a national figure,

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24 *Sanchez v. France*, ECtHR 2023, No.45581/15, 185.
25 Ídem.
26 *Sanchez v. France*, ECtHR 2023, No.45581/15, 187.
27 *Sanchez v. France*, ECtHR 2023, No.45581/15, 191-193.
28 *Smajić v. Bosnia and Herzegovina*, ECtHR 2018, No.48657/16. And *Sanchez v. France*, ECtHR 2023, No.45581/15, 157.
29 *Sanchez v. France*, ECtHR 2023, No.45581/15, 178.
30 Ídem.

since these must be graduated according to the weight and scope attributable to their words and the resources, they have at their disposal to prevent the constitution and dissemination of hate speech to intervene effectively on social media platforms.[31]

In this context, the ECtHR also establishes, as one of the elements to be considered for the prosecution of online hate speech, the attitude of the producer user towards the publication of hateful comments in his main publication, since he was also allowing the creation of a kind of permanent dialogue that represented a coherent set and not mere monologues, but these responded to and complemented each other.[32]

In fact, the individual warned the other users about the hateful nature that the comments made could have, without deleting them or showing his rejection of them, alluding to the terms of service of the network. without having stopped to determine if those that remained on his wall contained the content that these comments had, even pointing out that the claimant was aware of the legal consequences that were falling on some of the users who had made said comments.[33]

Furthermore, the ECtHR expresses that it is relevant to analyze that the claimant had declared before the national authorities that the comments on his publication were too numerous and that he could not read them regularly, which was contradicted by the Government itself and not denied by the claimant later. For this reason, the ECtHR expresses that the state of responsibility due to the difficulties caused by potentially excessive traffic on a politician's account and the resources necessary to guarantee its effective control, is not an issue addressed in the case it is hearing.[34]

And this shows that this case represents a great challenge for the ECtHR with regard to the prevention and prosecution of online hate speech, as it would be interesting to see how the Court analyzes the responsibility of a producer user and his due diligence in the presence of a large number of comments and interactions on a main publication.

However, in the face of the lack of consensus in the Council of Europe on the responsibilities that producer users may have, a new, more exhaustive jurisprudential and conceptual treatment in the matter seems to be emerging in the face of the growth of online hate speech by political representatives on the continent.

(C) THE INFLUENCE OF THE INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AS CONCLUSION

It should be noted that the above analysis has revealing connotations for the normative development of the prevention and prosecution of online hate speech by Council of Europe States.

The impact of the Convention is equivalent, in a generic sense, to the capacity of the ECtHR's jurisprudence to transform and harmonize national rules on fundamental

31 *Sanchez v. France*, ECtHR 2023, No.45581/15, 201. And *Mesić v. Croatia*, ECtHR 2022, No.19362/18, 104.
32 *Sanchez v. France*, ECtHR 2023, No.45581/15, 201. And *Mesić v. Croatia, ECtHR 2022, No.19362/18, 104.*
33 *Sanchez v. France, ECtHR 2023, No.45581/15, 196.*
34 *Sanchez v. France, ECtHR 2023, No.45581/15, 200.*

rights and related legal regulations.[35] This is because the ECtHR's jurisprudence plays a leading role as it is endowed with authority and the capacity to impose its interpretative decisions, with the Committee of Ministers responsible for supervising the execution of judgments, as well as the Secretary General and the Parliamentary Assembly.[36] However, this does not mean that the execution of ECtHR judgments is without reservations and complex procedures.

The force of ECtHR judgments in national legal systems has been demonstrated even in its own jurisprudence, highlighting the current Applic. *Nepomnyashchiy c. Russia*, of May 30, 2023, where the ECtHR established that line of jurisprudence that achieves true effective protection of human rights enshrined in the ECHR against online hate speech.

In this case, which concerned a case of online hate speech, the ECtHR has stated that it is important for the State to positively incorporate the protection that the national legal system must provide against any existing discrimination, not leaving this protection in an indeterminate legal concept.[37] This is of particular interest in relation to the aforementioned ECtHR jurisprudence, its effects, and its execution.

To this, the ECtHR adds that it is not enough to positively incorporate the protection of the rights of vulnerable groups, but the State must guarantee that the legal mechanisms for the protection of socially stigmatized persons are effective and efficient, so that the State must even ensure that the normative regulation for the protection of these groups is subsequently put into practice.[38]

In fact, numerous national legislative reforms have been driven by ECtHR judgments, as this is imposed by the international obligation to respect and guarantee conventional rights, which confirms the link between the national legislator and the fundamental rights of the ECHR.[39]

In this way, the relevance of the ECtHR's jurisprudence is observed, not only for the action and/or activity of national authorities, but also for the development of rules that guarantee the protection of human rights enshrined in the ECHR, which shows transcendental effects on national legal systems.

In this sense, we can conclude that the ECHR is a truly useful tool for the prevention and prosecution of new socio-legal phenomena capable of violating the rights enshrined in it.

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35 J. García Roca and H. Nogueira Alcalá, 'El impacto de las sentencias europeas e interamericanas: valor precedente e interpretación vinculante', in J. García Roca and E. Carmona Cuenca (eds), *¿Hacia una globalización de los derechos? El impacto de las sentencias del Tribunal Europeo y de la Corte Interamericana* (Thomson Reuters Aranzadi, Madrid, 2017) 71, at 74.

36 R. Niño Estébanez, *Fuerza obligatoria y ejecución de las sentencias del Tribunal Europeo de Derechos Humanos en España: el procedimiento de revisión* (Tirant lo Blanch, Valencia, 2019), at.53 and 56-57.

37 *Nepomnyashchiy and others c. Rusia*, ECtHR 2023, Nos.39954/09 and 3465/17, 78.

38 *Nepomnyashchiy and others c. Rusia*, ECtHR 2023, Nos.39954/09 and 3465/17, 78-79.

39 J. García Roca and H. Nogueira Alcalá, 'El impacto de las sentencias europeas e interamericanas: valor precedente e interpretación vinculante', in J. García Roca and E. Carmona Cuenca (eds), *¿Hacia una globalización de los derechos? El impacto de las sentencias del Tribunal Europeo y de la Corte Interamericana* (Thomson Reuters Aranzadi, Madrid, 2017) 71, at 83.

Through its interpretation, the ECtHR manages to establish truly pioneering guidelines and criteria for the protection of human rights in the digital age. And not only with respect to the particularities to be taken into account for the treatment of online hate speech by national authorities, but also, recently, on the analysis of the personalized responsibility of each of the users involved in the constitution and dissemination of the same, as well as the way in which national authorities must adopt measures to block websites, as an option to curb it without violating the human rights of users not involved in the hate speech that occurred.

This is revealing in that the ECtHR, analyzing cases of online hate speech, is progressively concerned, as it deals with cases in a more detailed manner, that States and national authorities provide a guaranteeing and effective response to new socio-legal phenomena capable of violating human rights, such as online hate speech.

Thus, the ECtHR shows that, despite the emergence of challenges capable of violating human rights enshrined in the ECHR, States continue to be obliged to guarantee the protection of the rights contemplated in this international instrument, which is applicable to them, acquiring a timeless character and proclaiming it capable of adapting to the new legal challenges of the 21st century.

Therefore, the foregoing deserves special attention, taking into account the effects that the ECtHR's jurisprudence acquires for national authorities and the normative reforms of the States Parties through the various enforcement mechanisms of the Council of Europe, for the prevention and prosecution of online hate speech at the regional level.

SYbIL | Spanish Yearbook of International Law

Displacement and climate change in the *renewed* European framework on migration and asylum: Insights from the practice in Spain and Italy

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Abstract: This article aims to provide a first approximation whether the European Union recognizes the group of persons who flee their homes due to the effects of climate change, through its immigration and asylum policy, recently modified by the New Pact. Notwithstanding the importance of the European legal framework in this regard, the case of Spain and Italy as the two Member States currently facing most of the migratory pressure requires looking at how they address in their domestic law the phenomenon of climate displacement.

Keywords: Climate change Displacement New Pact environmental degradation humanitarian reasons

(A) INTRODUCTION

The current state of climate on Earth points to worsening environmental factors that enhance the devastating effects of climate change, that international community will have to face unknown scenarios.[1] According to the World Meteorological Organization (WMO), from January to September 2024, the global mean surface air temperature was 1.54°C above the pre-industrial average due to the emission of increasing levels of greenhouse gases.[2] Furthermore, it is expected that 2024 will set to be first to breach 1.5°C global warming limit as established in the international legal framework on climate change.[3]

Despite the increase in global average temperature, its effects are unevenly distributed in different regions of the world, being mostly in the global south due to the temperature variation. This is the case on the African continent, whose regions

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1 See UN News, 'Hottest July ever signals 'era of global boiling has arrived' says UN chief', published on 27 July 2023, accessed 21 November 2024.

2 J. Kennedy *et. al.*, *State of the Climate: Update for COP 29* (WMO, Geneva, Switzerland, 2024) 1-12, at 2 [Permalink: https://library.wmo.int/idurl/4/69075].

3 See Climate Copernicus EU, Monthly Climate Bulletin, 'The year 2024 set to end up as the warmest on record', published on 7 November 2024, accessed 21 November 2024. See Art. 2(1)(a), Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) *UNTS 3156*.

have experienced higher temperatures than the global average.[4] The Sahel region is a paradoxical case in the sense that their countries emit hardly any greenhouse gases that fuel the climate crisis, but their population are extremely vulnerable to its effects through the environmental degradation of their habitats, and by acting as a multiplier of the drivers of displacement. [5] Unable to adapt to the new challenges that emerge as a result of slow or sudden onset degradation events, the population will be forced to migrate, internally and externally.[6]

This second pattern of human mobility is expected to be directed to European Union (EU) affecting mainly southern European countries such as Spain and Italy.[7] According to the data provided by the International Organization for Migrations (IOM), in 2023, a total of 292,985 migrants and refugees were registered arriving through the three Mediterranean routes and the Western African Atlantic route to Europe.[8] In 2024, until October, 157,319 arrivals were registered, being Spain and Italy the two main Member States (MS) that endured the burden of migratory pressure.[9]

Notwithstanding that the doctrine has stated that the European framework on migration and asylum doesn´t recognize *prima facie* the environmental or climate factor as an element to grant international protection[10], the adoption last May 2024 of the New Pact requires us to take a closer look at the new legislative package to see if there have been any changes in this regard.

This paper is divided in two sections. The first part briefly addresses the European immigration and asylum policy, focusing on the New Pact with the aim of offering a first observation on the inclusion of the climate factor in its new normative framework. The second section highlights the practice in Spain and Italy in relation to their national immigration law with the goal of studying the interpretation that they provide for

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4 See C.H. Trisos *et. al.*, '2022: Africa', In H.O. Pörtner *et. al.*, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, Cambridge, UK and NY, USA, 2022) 1285-1455, at 1324-1325 [doi:10.1017/9781009325844.011].

5 See J. Tomalka *et al.*, *Climate Risk Profile: Sahel* (Potsdam Institute for Climate Impact Research (PIK) and the United Nations High Commissioner for Refugees (UNHCR) under the Predictive Analytics project in support of the United Nations Integrated Strategy for the Sahel (UNISS), Potsdam, Germany, 2021) 1-20, at 9 [https://publications.pik-potsdam.de/pubman/item/item_26168].

6 See IDMC, *2024 Global Report on Internal Displacement* (IDMC), Norwegian Refugee Council (NRC), Geneva, Switzerland, 2024) 1-69, at 24-34 [https://www.internal-displacement.org/global-report/grid2024/]. See UNHCR, *No escape: On the frontlines of climate change, conflict and forced displacement* (United Nations High Commissioner for Refugees (UNHCR), Geneva, Switzerland, 2024), 1-60, at 15-18 [https://www.unhcr.org/media/no-escape-frontlines-climate-change-conflict-and-forced-displacement].

7 O. Puig Cepero, *et. al.*, *Climate change, development and security in the Central Sahel* (CASCADES, Research Paper, Brussels, Belgium, 2021) 1-97, at 40-41.

8 See IOM, *DTM Europe — Mixed Migration Flows to Europe, Yearly Regional Report (January-December 2023)*, (IOM, Vienna, Austria, April 2024), 1-15, at 6-7.

9 See Ministerio del Interior, *Informe quincenal, Inmigración irregular 2024, datos acumulados del 1 enero al 30 noviembre* (Ministry of Interior, Government of Spain, Madrid, Spain, 2024), 1-10, at 2; See Frontex, *FRAN and JORA data as of October 2024* (Frontex, Warsav, Poland, 2024).

10 Among others, see J. Verdú Baeza, 'Refugiados climáticos, ¿refugiados sin derechos?', in A. Del Valle Gálvez (dir.), L. Calvo Mariscal and R. El Houdaïgui (coord.) *Inmigración y derechos humanos en las fronteras exteriores del sur de Europa* (Dykinson, Madrid, 2021) 125-136; G. Fernández Arribas, 'Cambio climático, inestabilidad y desplazamientos en el Sahel. Desafíos y respuesta por parte de la Unión Europea', 75 No.1 *Revista Española de Derecho Internacional (REDI)* (2023), 49-74 [doi.org/10.36151/REDI.75.1.2].

persons who arrive due to environment degradation because of the effects of climate change.

(B) THE EUROPEAN LEGAL FRAMEWORK ON MIGRATION AND ASYLUM: AN AREA OF HIGH VOLATILITY

The regulatory regime governing migration and asylum in the EU is the result of a long process of legislative evolution and continuous negotiation within the Union with the different MS. Through the Single European Act of 1986, the aim of creating an area without internal borders controls and guaranteeing the free movement of persons was introduced into the Treaties, which would call into question hypothetical rules in the area of external borders control.[11] Through the Treaty of Amsterdam of 1997, the path of "communitisation" of borders, visas, asylum and migration matters opens by gradual creation of an area of freedom, security and justice (AFSJ) although "communitisation" on migration and asylum would not be comprehensive.[12] Finally, the Treaty of Lisbon in 2007 achieves the total "communitisation" of the institutional framework on border control, asylum and migration, saving the figure of co-decision and making it possible to refer to a "common" policy, though the persistence of MS in relation to their national sovereignty is still resent.[13]

Nevertheless, immigration and asylum policy is a highly volatile issue and susceptible to changes depending on migratory pressures affecting Europe's external borders. This causes a scenario of deadlock due to the different perceptions that exist between MS, leading to situations in which the Common European Asylum System has been overwhelmed, as happened in the 2015 refugee crisis. This was a turning point in the origin and development of what has been called the "security approach" to migration and asylum.[14]

Asylum, immigration and external borders are autonomous and different but complementary areas.[15] The connections are relevant regarding the status of the individual, but also to the objectives to achieve in the framework of the AFSJ, and the interconnection between the internal and external dimension in those matters. Now, we will briefly address the latter two aspects by adding the climate factor to assess the state of the European policy´s consideration of this issue.

(1) The immigration and asylum policy in times of climate emergency

It is worth mentioning that the EU, when designing its diverse policies, must strive to comply with a series of principles imposed on it by primary law. In this sense, article 21(3)

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11 D.J. Liñán Nogueras, 'El Espacio de Libertad, Seguridad y Justicia', in A. Mangas Martín y D.J. Liñán Nogueras, *Instituciones y Derecho de la Unión Europea* (Tecnos, Madrid, 10ª ed., 2020), 90-95.

12 See S. Peers, 'The EU Institutions and the Title IV', in S. Peers and P. Rogers (ed.), *EU Immigration and Asylum Law. Text and Commentary* (Martinus Nijhoff Publishers, Leiden, 2006) 47-79.

13 Art. 79(5) and (4) TFEU.

14 A. DelValle Gálvez, 'Refugee Crisis and Migrations at the Gates of Europe: Deterritoriality, Extraterritoriality and Externalization of Border Controls', 7 *Paix et Sécurité Internationales* (2019) 117-160 [doi.org/10.25267/Paix_secur_int.2019.i7.04].

15 V. Faggiani, *La protección internacional de los migrantes en la UE: Estándares de tutela, límites y perspectivas de reforma del derecho de asilo* (Aranzadi, Navarra, 2023), at 43.

of the Treaty on European Union (TEU) linked to article 7 of the Treaty on the Functioning of the European Union (TFEU)[16], establishes consistency as a guiding principle that should lead and develop EU´s external action and its different policies. Thus, there are a series of principles that shall guide the Union´s external action with the principle of consistency occupying a predominant position in the formulation of migration policy (both internal and external) and affecting others such as the environment and climate change.[17]

On this basis, article 11 TFEU highlights the inclusion of environmental protection in each of the Union's policies and activities, on which the different European institutions are called upon to act, as is the case of the European Council in article 15 TEU. The issue of climate displacement covers areas such as migration, international protection and environment-climate change.

The immigration and asylum policy rests in the AFSJ, established in the TEU[18] and developed in the Title V of the TFEU[19]. The inclusion of the AFSJ in the Title I of the TEU indicates that it must be considered as a *target value* in the sense that the AFSJ is a coherent result of the process of European integration whose content shall be developed taking into account the concerns and demands of modern societies.[20] As it is already mentioned, European migration policy has a dual dimension — internal and external — and a series of principles must be guaranteed, such as the principle of consistency.

Having said that, climate change is not only a great environmental issue but also a phenomenon with internal and external dynamics that require strong coordination between its legislation and policies. The Union has developed a dense network of strong environmental legislation internally, whose components have also attempted to be externalized in several ways.[21] The EU is considered to be a leader on international environmental affairs and they have launched the Climate Diplomacy as a commitment to shaping the global climate agenda.[22]

The term "climate emergency" first appeared in an EU´s document in 2019 as a consequence of the approval at the European Parliament (EP) of the Resolution[23] that urged to the European institutions and MS to urgently take actions to "fight and contain this threat" through legislation in this area but extensively to all other policies in order to achieve coherence between them. As a result, some MS followed the EP´s guidelines and "climate emergency" was declared in their national parliaments.[24]

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16 Art. 21(3) TEU and 7 TFEU states that "The Union shall ensure consistency between its policies and activities".

17 P. García Andrade, *La acción exterior de la Unión Europea en materia migratoria*, (Tirant Lo Blanch, Valencia, 2014), at 57-60.

18 See Art. 3(1) TEU.

19 See Art 78 and 79 TFEU.

20 Liñán Nogueras *supra* n. 11, at 90-91.

21 S. Keukeleire and T. Delreux, *The Foreign Policy of the European Union,* (Bloomsbury Academic, London, 3ª ed., 2022), at 256-257.

22 See T. Fajardo Del Castillo, *La Diplomacia del Clima de la Unión Europea: La acción exterior sobre cambio climático y el Pacto Verde Mundial* (Reus, Madrid, 2021), at 27-49, 73-86.

23 EP Resolution of 28 November 2019, OJ 2021 C 232/06.

24 See Climate Emergency Declaration, 'Climate emergency declarations in 2,364 jurisdictions and local governments cover 1 billion citizens', accessed 3 December 2024.

From 2019 onwards, the presence of climate change (directly or indirectly mentioned) in EU´s documents and statements has been increased exponentially proving the EU´s commitment to face climate hazard from a holistic approach as a priority[25]. However, does the EU's faithfulness to achieve climate goals extend to immigration and asylum policy?

(2) The great forgotten in the Pact on Migration and Asylum

European Commission´s Vice-President Margaritas Schinas described the Pact as a "house of three floors" with its respective layers. Thus, the first floor concerns the external dimension whose target is to robust the external borders' management. The second floor attend to intensify the cooperation with third countries, especially in the area of returns and readmissions. Lastly, the third floor is focused on the shared responsibilities aspects by MS.[26]

The Pact emerged in September 2020 through a Communication from the Commission.[27] In its content, it foresaw the issue of climate change. Notwithstanding that the Commission mentions only four times the term climate change in the Communication on the New Pact, it correctly identifies the axes on which this phenomenon has an impact, emphasizing that it must be considered in the content of the new legislative package. Thus, the Commission states that different policies that have an effect on migration such as environment and climate policy should not be dealt in isolation.[28]

Unfortunately, the importance granted to climate change by the EC would be deflated during the Pact negotiation phase until it faded away in its approval. The inclusion of a Proposal of Crisis and Force Majeure Regulation is quite enlightening in this regard.[29] Although there was no mention to climate change, its consideration as an element to bear in mind to grant a kind of international or national protection was discussed by the Committee of the EP in charge of its procedure.[30] Nevertheless, the final text of the Crisis and Force Majeure Regulation only includes a vague mention to natural disasters.[31]

We have said that the combination of these three dimensions pursues a change of paradigm in the Common European Asylum System, undermined since the refugee crisis in 2015-2016. Notwithstanding that the Pact seems to address the weak points that

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25 See Fajardo Del Castillo *supra* n. 22, at 51-71.

26 See EC Press Corner, 'Speech by Vice-President Schinas on the New Pact on Migration and Asylum', published on 23 September 2020, accessed 3 December 2024.

27 See *New Pact on Migration and Asylum* (Communication from the EC to the EP, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2020) 609 final, Brussels, Belgium, 23.9.2020) 1-29 [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609].

28 See *New Pact on Migration and Asylum* (Communication from the EC...) *supra* n. 27, at 1, 17-20. See Commission Staff Working Document, 1-107, at 23-24 [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52020SC0207].

29 See A. H., Neidhardt, *The Crisis and Force Majeure Regulation: Towards future-proof crisis management and responses?* (Policy Study, Foundation for European Progressive Studies, Friedrich-Ebert-Stiftung and European Policy Centre, Brussels, Belgium, 2024) 1-40 [https://feps-europe.eu/publication/the-crisis-and-force-majeure-regulation-towards-future-proof-crisis-management-and-responses/].

30 See Legislative Observatory: Crisis and force majeure Regulation, 2020/0277(COD) [https://oeil.secure.europarl.europa.eu/oeil/en/procedure-file?reference=2020/0277(COD)].

31 Regulation (EU) 2024/1359. Council Regulation 2021/1147, OJ 2024 L 1359.

collapsed the regular application of the European policy on migration and asylum, it fails in the task to project the migratory phenomenon as structural.

It appears that the Pact understands migration from a point-in-time crisis management approach, taking migration governance as an isolated agenda away from other forms of administration including Europe´s environment, social or external policies. This perception triggers the absence of response to long-term future displacement of persons exacerbated by climate change.[32]

Having noted the Pact´s lack of foresight on the issue climate-change induced human mobility, let us turn our attention to the practice in this regard to the Southern European MS most affected by migratory pressure: Spain and Italy.

(C) THE PHENOMENON OF CLIMATE DISPLACEMENT IN SOUTHERN EUROPEAN COUNTRIES: THE CASE OF SPAIN AND ITALY

It is argued that the more the European migratory legislative package is the more the problems related to it grow. In this sense, the normative turns into a blurred sphere with several sources whose scope constitutes an impassable terrain. As a result, this perception gets the impression that the regulatory bases are not appropriate to address the situation realistically.[33] Similarly, the climate and environmental factor as an element to be weighed in migration issues is a source of dissent and scepticism in European immigration and asylum policy. Surprisingly, this is not the case in the national policy of some MS with Italy and Spain as two paradigmatic examples. This is representative because we refer to Southern MS with external borders that face a notable migratory pressure.

(1) The evolution of Spanish case law on protection by humanitarian reasons: A path opens up for the climate factor?

Protection for humanitarian reasons is, alongside international protection and subsidiary protection[34], one of the figures provided for in Spanish law within the legal system of territorial protection for those individuals who meet the requirements established by law. Notwithstanding the distinctions between these types of protection, the figure of humanitarian reasons has suffered a misinterpretation due to its vague drafting. However, because of the practice of the courts, this figure has been endowed with a content in which environmental and climatic reasons could be included as grounds for protection.

Since the entry into force of the Law 12/2009, on the one hand, the regime of protection for humanitarian reasons has been replaced by the figure of subsidiary protection,

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32 See T. Fajardo del Castillo, 'La Política Migratoria de la Unión Europea ante el Cambio Climático. ¿Aún sin respuestas?', in G. Fernández Arribas (dir.) *Cambio climático y desplazamientos: El Sahel como caso de estudio* (Aranzadi, Navarra, 2023) 67-93.

33 See A. Remiro Brotóns, 'Presentación' in A. Remiro Brotóns, C. Martínez Capdevila (edit.) *Movimientos migratorios y derecho. Anuario de la Facultad de Derecho de la UAM 7 (2003)* (Universidad Autónoma de Madrid, Boletín Oficial del Estado, Madrid, 2004) 13-22, at 16.

34 See Art. 13.4 (referring to Art. 13 of the Spanish Constitution). See also Art. 3 and 4 of Law 12/2009, 30 October 2009 (BOE no. 263, 31 October 2009).

which is considered to be its heir according to the jurisprudence of the Supreme Court (*Tribunal Supremo*).[35] On the other hand, Articles 37(b) and 46(3) of the aforementioned law provided the possibility of authorising a stay in Spain for humanitarian reasons in accordance with the Organic Law 4/2000.[36] This reference leads us to Article 125 of the Royal Decree 557/2011 which provides for "temporary residence authorisation for reasons of international protection".[37] At present, the grounds on which a residence permit may be granted on humanitarian grounds are not listed in *numerus clausus* or *numerus apertus*, the only requirement being that the grounds must be different from those listed for subsidiary protection.

It is worth mentioning that humanitarian reasons can be granted on the basis of the specific circumstances of the asylum seeker, but also in connection with the situation in the country of origin.[38] Moreover, such a concession may be granted directly by the courts even if the Administration has not ruled on the concurrence of humanitarian reasons.[39] Two other important aspects are that the margin of discretion to grant authorisations for humanitarian reasons cannot amount to arbitrariness, and that the granting of these authorisations must be based on humanitarian grounds in accordance with the spirit of this figure.[40]

The permanence in Spain by humanitarian reasons as a third level of international protection, is aimed at those, whose exceptional personal or family circumstances, would cause serious detriment if they were to leave Spain.[41] At this point, the element of special vulnerability acquires substantial importance because its consideration will be differential in the procedure for obtaining protection for humanitarian reasons. Thus, the Supreme Court has distinguished two regimes depending on whether the request for protection for humanitarian reasons is requested by an individual in a situation of special vulnerability or not. The first regime, the 'general' regime, covers any person seeking international protection and who must invoke grounds other than those identified in the subsidiary protection status.[42]

As for the 'special' regime, the Supreme Court qualifies it as a more specific and restricted subjective scope, as it applies exclusively to applicants or beneficiaries of international protection in a situation of vulnerability. Under this regime, the main application for international protection is required, but a specific subsidiary application for a temporary residence permit for humanitarian reasons is not required.[43]

This is relevant since it opens a way, within the special regime, for those individuals who are in a situation of special vulnerability and whose scope is not taxed, giving rise to the consideration that climate displacement may be covered by this figure. The

35 STS 2675/2016, 28 February 2017 (with link to *CENDOJ*), 1-6.
36 Art. 37(b) an 46(3) of Law 12/2009 Art. 46(3). The current legislation on foreigners refers to Organic Law 4/2000, 11 January 2000 (BOE no. 10, 12 January 2000).
37 See Art. 125 of Royal Decree 557/2011, 20 April 2011 (BOE no. 103, 30 April 2011).
38 STS 875/2012, 18 October 2012 (with link to *CENDOJ*), 1-13.
39 STS 2476/2011, 24 February 2012 (with link to *CENDOJ*), 1-9.
40 STS 374/2016, 26 July 2016 (with link to *CENDOJ*), 1-6. STS 3083/2014, 9 December 2016 (with link to *CENDOJ*), 1-6.
41 SAN 289/2020, 12 November 2021 (with link to *CENDOJ*), 1-6, at 4.
42 STS 1067/2024, 17 June 2024 (with link to *CENDOJ*), 1-12, at 10.
43 STS 1067/2024 17 June 2024... *ibid* at 10-11.

Supreme Court establishes that the analysis of the social conflict and the way in which it affects the person immersed in it becomes relevant. It shall also assess whether there are grounds or circumstances that would be incompatible with the enjoyment of the person's fundamental rights if they were to return to their country.[44]

In conclusion, it is early to assess whether this differentiation of protection regimes can be considered as an avenue for those applications that are based on environmental degradation, taking into account the personal circumstances of the individual concerned and the situation in their place of origin.

(2) The presence of the environmental element in the Italian Legal Order: The figure of the residence permit for *calamitous events*

The Italian perspective combines the contribution of the normative body with that of case law by the courts. In relation to the second aspect, there is a lot of Italian jurisprudence pointing out that vulnerability (regarding humanitarian protection) needs to be interpreted broadly to encompass, *inter alia*, the asylum seeker's exposure to natural disasters, as well as the general environmental and climatic conditions of the country of origin, if these are such as to jeopardize the core of basic human rights of the individual.[45] Given the extent of this issue, we are going to concentrate on the first element, i.e. the legal body following the aim of this paper.

The Italian Constitution establishes the right to asylum specifying that the conditions for granting asylum shall be determined by law.[46] Notwithstanding that a law developing the content of asylum has never been adopted, the guarantee of this right involves the possibility of recognising the two main forms of international protection for asylum seekers: refugee status and subsidiary protection status.[47] Apart from these two figures, there is a third one, the aforementioned complementary protection: humanitarian protection[48]. According to the Legislative Decree 286/1998, this protection was granted to those individuals in presence of serious cases, in particular of humanitarian nature or resulting from constitutional or international obligations of the Italian State. In addition to humanitarian protection, there is the possibility of establishing specific extraordinary reception and temporary protection measures for significant humanitarian needs in the event of conflicts, natural disasters or other particularly serious events in countries outside the European Union[49], though there is no information available about it.[50]

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44 STS 1067/2024 17 June 2024… *ibid* at 11-12.

45 See C. Scissa 'The climate changes, should EU migration law change as well? Insights from Italy', 14 No. 1 *European Journal of Legal Studies* (2022) 6-23, at 18 [doi:10.2924/EJLS.2022.011].

46 Art. 10(3) Italian Constitution.

47 Art. 2(1)(e) and 2(1) of the Legislative Decree 251/2007, 19 November 2007 (GU Serie Generale no. 3, 4 January 2008).

48 Art. 5(6) of the Legislative Decree 286/1998, 25 July 1998 (GU Serie Generale no. 191, 18 August 1998).

49 Art. 20 Legislative Decree 286/1998.

50 See C. Scissa, 'La protezione per calamità: una breve ricostruzione dal 1996 ad oggi', 1 *Forum di Quaderni Costituzionali* (2021) 136-147, at 140-141 [https://www.forumcostituzionale.it/wordpress/wp-content/uploads/2021/01/09-Scissa-FQC-1-21.pdf].

In 2018, the Law Decree 113/2018 introduced a new provision that offered protection to asylum seekers whose country of origin was in a situation of contingent and exceptional calamity that did not allow for a safe return[51]. It is worth mentioning that the requirement that the calamity should be contingent and exceptional meant that slow-onset events were excluded from its scope of application, allowing only sudden and singular events, such as earthquakes or floods.[52] Afterwards, Law Decree 130/2020 opened the scope for the issuance of residence permits in the context of a "serious" calamity.[53] This amendment intended to allow for a broader interpretation of the concept based on the degree of severity rather than on its progression over time. Additionally, the provision improves the length of the protection because the initial six-month permit can be renewed for as long as the conditions of environmental insecurity in the country of origin persist. Thus, "a broad range of environmental causes of migration are expressly protected under Article 20 and 20 bis, respectively, through temporary protection and protection against serious calamity".[54] In this sense, that regulation not only to complied with human rights norms and their obligations according to international law, but also to ensure a functioning asylum system prepared for foreseeable future inflows.

Unfortunately, in 2023, the Law Decree 20/2023 amended and restricted the scope of residence permit applicable to situations of calamity established in the Law Decree 130/2020 as the main consequence in this regard.[55] Moreover, the new content of Article 20 bis is even narrower than the original wording in the Law Decree 113/2018 due to the fact that not only the "contingent and exceptional" calamity reappeared, but the residence permit shall not turn into a permanent permit in cases of significant humanitarian needs such as events of environmental or climate disruptions (floods, droughts, landslides…).[56]

Despite the above, it should be taken into consideration that Italian legal order is equipped with more than one legal basis due to their constitutional and legislative framework fit for offering a complementary protection to climate displacements in a vulnerable or distress situation. In this respect, there is a "limited capacity of *pro tempore* policy makers of altering in a substantive way the width of the protection afforded by international and constitutional legal obligations".[57]

To conclude, the current figure of the residence permit for calamitous events as established in the Law Decree 20/2023 is not adequate to grant protection to climate displacements.[58] Despite of this step backwards in the above-mentioned legal figure, case law of the court suggests a trend towards extending the protective framework provided to individuals granted international protection to those who flee their homes due to climate change.

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51 Art. 20 bis of Law Decree 133/2018, 4 October 2018 (GU Serie Generale no. 231, 4 October 2018).

52 Scissa, 'The climate changes…' *supra* n. 45, at 18-19.

53 Law Decree 130/2020, 21 October 2020 (GU Serie Generale no. 261, 21 October 2020).

54 Scissa, 'The climate changes…' *supra* n. 45, at 20.

55 Law Decree 20/2023, 10 March 2023 (GU Serie Generale no. 59, 10 March 2023).

56 See A. Stevanato, 'Il paradosso della contemporaneità. La protezione giuridica del migrante ambientale nei più recenti sviluppi normativi', *Accademia Diritto e Migrazioni* (ADiM BLOG, Analisi & Opinioni, Aprile 2024) 1-8.

57 See M. Di Filippo, 'La protezione dei migranti ambientali nel dialogo tra diritto internazionale e ordinamento italiano', 17, *Diritti Umani e Diritto Internazionale* (2023) 313-335, at 334 [dx.doi.org/10.12829/108061].

58 *Ibid*, at 333.

(D) CONCLUSIONS

Having briefly analysed the trend of the European legal framework on migration and asylum in relation to the climate factor and the recent practice in Spain and Italy on this issue, we can conclude with the following reflections:

The EU has only addressed this issue in an indirect manner, insofar as climate displacement is one of the side effects of climate change. The European institutions have identified a triple nexus in which climate change, migration and security are correlated and linked. On the basis of the above, these elements are present in their respective policies such as migration, development cooperation and environmental protection.

The notion of security jeopardises principles such as consistency between the external dimension of migration and other policies, as well as the internal and external dimension of migration and asylum policy.

The practice of Spain and Italy in relation to the consideration of the environmental and climatic element as a factor to be assessed in the evaluation of applications for international protection (more established in Italy and taking its first steps in Spain) should, at least, be considered as a bridge in the process of integration policies in the European Union. Does the practice in this direction by two of the southern European MS with the greatest migratory pressure show a common interest whose harmonisation is in line with pre-existing national policies in this regard? In our view, the EU should take a closer look at the MS facing migratory flows over the years in order to establish a coherent migratory and asylum policy in line with the new drivers of displacement, such as slow onset and sudden onset disasters.

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The Application of Collective Agreements in Cross-border Employment Contracts

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Abstract: Applying collective bargaining agreements in cross-border employment contracts is controversial for two main reasons: first, the employment contract may sometimes fall within the scope of a collective agreement that does not belong to the employment contract law, so alternatives should be assessed to ensure its more favourable working conditions; secondly, the application of a collective agreement which does not belong to the contract law may then impact how the applicable law is determined. Equality plans must be referenced as they raise specific problems in cross-border employment contracts.

Keywords: cross-border employment contracts collective agreements equality plans collective autonomy party autonomy.

(A) APPROACH: DIVERSITY AND UNCERTAIN NATURE OF COLLECTIVE AGREEMENTS

States usually recognise the possibility for workers and company representatives to agree on terms and conditions of employment in collective agreements, developing and specifying the provisions of generally applicable national labour rules. However, the regulation of collective bargaining and conversely the nature of the agreements that result from it vary significantly[1]. In some countries, collective agreements are more or less explicitly regarded as legal rules[2] whereas in other countries they are given a purely contractual force[3]. This issue may be of no practical relevance in employment contracts

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1 See U. Liukkunen, 'The Role of Collective Bargaining in Labour Law Regimes: A Global Approach', U. Liukkunen (ed.), *Collective Bargaining in Labour Law Regimes: A Global Perspective* (Springer, Switzerland, 2019), at. 1-64.

2 Art. 37.1 of the Spanish Constitution and Arts. 3 and 85 of the Worker's Charter do not expressly attribute legal nature to collective agreements, but their binding force (effectiveness beyond the negotiating parties, binding thirds) and their integration into the system of sources of Labour Law. In its jurisprudence, the Constitutional Court has oscillated between the normative thesis and the contractual thesis since it has attributed legal nature to them on several occasions, but it has also used arguments typical of the contractual thesis. Collective agreements are considered as hybrid instruments, between law and contracts. Regulatory effectiveness is attributed to them because their effects are equivalent to those of the law: direct and immediate application to all relationships included in its scope of application; binding on the parties of the employment contract, who cannot agree on conditions less favourable or contrary to those established in the collective agreement; unavailability for the worker; and application of state coercive instruments to enforce what was agreed. Cf. J. Lahera Forteza, *Manual de negociación colectiva* (Tecnos, Madrid, 2022), at. 28-32; A. Martín Valverde, J. García Murcia, *Derecho del trabajo*, 32nd ed. (Tecnos, Madrid, 2023), at. 371, 375, 376.

3 In some states, the predominant model is one in which the private nature of the agreement is assumed to prevail, but even in these cases collective agreements also present qualities inherent to the law. For

with no international elements because the application of the collective agreement in which the contract is included may be assured. However, the nature of the collective agreement must be determined in cross-border employment contracts because this is an issue with obvious consequences: when collective agreements are rules they must be applied by the reference of the labour conflict rule (Article 8 Rome I Regulation) to the legal system to which they belong[4], whereas the application of collective agreements considered only as agreements between the parties would not be determined by the reference of a conflict rule[5].

Each legal system determines which matters may be regulated by collective agreements and to what effect. The content of collective agreements goes beyond the scope of the law that applies by the reference of the labour conflict rule, which only covers the content of the individual employment contract, i.e. employment and working conditions. In addition, national legislators determine the effect that collective agreements may have in relation to generally applicable labour rules, i.e. when they may introduce detrimental or favourable provisions for the employees.

On this basis, this paper will focus on provisions laying down terms and conditions of employment contained in collective agreements with legal effectiveness. First, a distinction will be made between situations when the application of these provisions must be ensured because the collective agreement belongs to the contract governing law and situations when the collective agreement does not belong to the governing law. The latter situations are problematic as the application of the generally more protective conditions contained in the collective agreement is in principle not granted, even though the employment contract falls within the scope of application of the collective agreement. Therefore, we must consider whether there are technically feasible alternatives to justify the application of collective agreements in these situations.

Then we will analyse the impact of applying a collective agreement which is not part of the legal system that, in principle, governs the contract over the determination of the applicable law. This can be substantiated by two different means: if it is considered as an indicator of the existence of a closer connection with a state other than that where

example, in Italy and Sweden, collective agreements are considered as private contracts and there is a lack of universally applicable collective agreements but, although they are not formally included among the sources of law, they hold primacy in regulating industrial relations and employment. Cf. A. Iossa, *Collective Autonomy in the European Union: Theoretical, Comparative and Cross-border Perspectives on the Legal Regulation of Collective Bargaining*, Doctoral Thesis (monograph), Lund University, 2017, at. 190-208. In Spain, both models coexist. Extra-statutory collective agreements are also allowed, in which the rules on collective bargaining need not necessarily be followed during negotiations and which only bind the signatory parties.

4 See F. Jault-Seseke, 'La détermination des accords collectifs applicables aux relations de travail internationales', *Le droit international privé, esprit et méthodes:* Mélanges Paul Lagarde (Dalloz, Paris, 2005), at. 457-458. Collective agreements belonging to a specific legal system are those negotiated under the collective bargaining rules of that legal system, which gives them binding force and legal effectiveness.

5 If the agreements are not incorporated into the employment contract, the effectiveness of these collective agreements in international employment contracts is controversial. It could be seen as a superposition of contracts: employer and worker are parties to the employment contract and to the 'collective contract'. As contracts, it may be necessary to assess the applicable law to these collective agreements. It is worth considering that their application is mandatory within the margin granted to the material autonomy of the parties to the employment contract.

the employee habitually performs the work or, eventually, other than that where the engaging establishment is located (Article 8.4 Rome I); or if it is considered as an indicator of a tacit choice of law (Articles 3 and 8.1 Rome I).

Finally, problems raised by equality plans in cross-border employment contracts will be mentioned. As will be seen, both gender equality plans and the new LGTBI equality plans raise specific application problems because the existence of employment contracts with international elements has not been considered in their regulation. Therefore, alternatives must be considered to ensure the favourable working conditions contained in these plans are applied to international workers.

(B) CROSS-BORDER APPLICATION OF COLLECTIVE AGREEMENTS

(1) Collective agreements that belong to the employment contract governing law

Application of collective agreements which belong to the employment contract law must be ensured. If there is a choice of law in the contract, both the collective agreements of the objective law and those of the chosen law could be applied, provided that the employment contract meets the scope of application of the respective collective agreements.

If there is a choice of law, there is no one employment contract governing law, but an 'employment contract regime' resulting from a combination of the objective law and the chosen law, which requires a comparison between these laws. It is up to the objective law to set the minimum level of protection with the simply mandatory rules not to be discarded by the parties to the contract of that law. These rules can be found in the collective agreements of the objective law in whose scope the employment contract is included.

The chosen law applies in two areas: in matters governed by simply mandatory rules in the objective law, the chosen law only applies if it is more favourable to the employee; whereas, in the area reserved for material party autonomy in the objective law, the chosen law fully applies. If the contract is included in a collective agreement of the chosen law, the provisions of that agreement may raise the protection of the objective law and may also apply in the area reserved for material autonomy[6].

For example, there may be cases when the minimum protection of the objective law is fixed by the provisions of a sectoral collective agreement of the habitual state of work, which would apply as simply mandatory rules. Application of the company's collective agreement will not be problematic if the law of the state where the employer is established is chosen, provided these provisions raise the minimum protection of the objective law[7].

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6 The *Report on the Convention on the Law Applicable to Contractual Obligations* (M. Giuliano and P. Lagarde, at. 23) only states that when the law of the state whose legal system governs the contract obliges the employer of this country to respect collective agreements, the worker cannot be deprived of the protection of said collective agreements by choosing the law of another state in the individual employment contract. Accordingly, non-disposable rules of collective agreements belonging to the objective law establish the minimum level of protection that cannot be lowered by the chosen law.

7 Rules that establish the priority of application of certain collective agreements in the event of concurrence should not be applied when it comes to collective agreements belonging to different legal systems. Art.

If the worker is posted to provide services temporarily in a member state, the working conditions of the host state included in the "hard core" of Directive 96/71/EC[8] may apply provided they are favourable for the worker in comparison with those of the law of the contract. These conditions may be those laid down in generally applicable collective agreements of the host state (Article 3.8)[9]. Directive 96/71/EC does not require collective agreements to be of a legal nature, rather collective agreements of general application, which is not exactly the same[10]. However, application of collective agreements with no legal effectiveness would be consistent with the mechanics of the Directive. Application of host member state terms and conditions of employment does not result from a conflict rule reference. On the contrary, the employment contract law is not altered during the temporary posting, and only certain provisions of the host state law apply. The application of certain conditions of the host state contained in collective agreements without legal effectiveness is therefore not problematic from the point of view of the conflict of laws technique[11].

(2) Collective agreements not belonging to the employment contract governing law

Problematic situations are when the contract falls within the scope of application of a collective agreement which does not belong to the objective or to the chosen law. In principle, the collective agreement is not applicable as it does not belong to the 'law of the contract' so application of the generally more favourable employment and working conditions of that collective agreement is not granted.

84(2) of the Spanish Workers' Statute establishes the priority of company collective agreements but this rule would not serve for the company's collective agreement of the chosen law to be applied with priority over a sector collective agreement of the objective law because Art. 8 Rome I establishes the conditions under which the rules of each legal system apply: as any other rule of the chosen law, its collective agreements can only apply when they increase protection.

8 Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (*OJ* L 18, 21 January 1997), amended by Directive 2018/957 (*OJ* L 173, 9 July 2018).

9 Problems of application of host state collective agreements have been highlighted in successive cases before the Court of Justice of the EU, even before Directive 96/71/EC came into force. The CJEU ruled on the territorial application of host state collective agreements to workers temporarily posted to its territory, establishing that only generally applicable collective agreements could be applied, i.e. those which must be respected by all undertakings belonging to a given sector or profession falling within their territorial scope of application. Problems arose because in some cases there was no universally applicable collective agreement system in host member states and the collective agreements that were intended to apply only applied to one or more undertakings.

10 Art. 3(8) Directive 96/71/EC was modified by Directive (EU) 2018/957 to allow host member states to require the application of the working conditions set out in collective agreements, regardless of whether those member states have a universally applicable collective agreement system or not. Currently, both general applicable collective agreements in a strict sense and other collective agreements of a more limited scope of application are included. They should be collective agreements that apply to all similar companies in the geographical area, profession or sector in question or that have been concluded by the most representative social partners and are applied throughout national territory. In any case, application of company collective agreements of the host state is only granted by the Directive when the employer is a temporary work agency.

11 However, this presents a problematic fit with the generally held position on the qualification of the "hard core" conditions as internationally mandatory rules of the host state. A provision contained in a collective agreement without legal effectiveness obviously cannot be applied as an internationally mandatory rule because this provision is not a rule.

This can happen in different situations: for example, if the work is habitually performed in one state and the employer is established in another state, the provisions of the company's collective agreement do not apply; similarly, even though the work has been habitually performed in one state, if the law governing the contract is that of another state which is closer (Article 8.4 Rome I), the collective agreements of the habitual State of work do not apply. In these situations, application of the collective agreement could depend on the employer's will.

In contrast to this orthodox perspective, some authors have argued the appropriateness of applying collective agreements in which the employment contract is included, even if they are not part of the employment contract law[12]. Parties to collective bargaining autonomy of the will would be recognised as having the function of raising the minimum protection of the contract law. Application of the collective agreement would be justified because it would be necessary to guarantee respect for what has been agreed by the parties to collective bargaining, as well as the protection due to workers.

It could be argued that foreign collective agreements can always be taken into account, provided that the law governing the contract allows it, as a matter of substantive law. The rules of the employment contract law which state the obligation to apply the collective agreements in which the contract is included can be invoked in this sense, even though there will be no express reference to cross-border employment contracts or to the application of collective agreements which do not belong to that law[13]. In any case, the collective agreement would only apply within the margin available for collective bargaining in the employment contract governing law. If the collective agreement contains provisions on matters not available for collective bargaining, these could not apply.

It must therefore be determined whether a collective agreement that does not belong to the contract governing law can be applied to the employee's detriment. This would be possible because in the employment contract law collective agreements may be allowed to introduce lower conditions than those provided in the general regulations in some matters. A parallel could be drawn with the party autonomy in Article 8 Rome I. Thus, the applicable legal system under the connecting points of Article 8 Rome I would set the minimum level of protection against the conflictual and material autonomy of the parties to the contract, and also against the autonomy of the parties to the collective bargaining.

Another alternative would be application of the collective agreement provisions as internationally mandatory rules (Article 9 Rome I)[14]. It could be argued that only

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12 Cf. Á. Espiniella, *La relación laboral internacional* (Tirant lo Blanch, Valencia, 2022), at. 88. The solution could depend on the type of collective agreement and the type of collective agreement provision in question: F. Jault-Seseke, *supra* n. 4, at. 468-473.

13 If there is a choice of law, once the contractual regime resulting from the combination of the objective law and the chosen law has been determined, the possibility of applying a collective agreement belonging to a third legal system must be considered. It can be argued that, in matters governed by the objective law, the collective agreement may be applied if the objective system allows collective agreements to regulate those matters. The same would happen with the chosen law.

14 See: A.L Calvo Caravaca, J. Carrascosa González, 'Contrato internacional de trabajo', in A.L Calvo Caravaca, J. Carrascosa Gonzalez (dirs.), *Tratado de Derecho internacional privado* (tomo III), 2ª ed. (Tirant lo Blanch, Valencia, 2022), at. 3578; L. Carballo Piñeiro, *International Maritime Labour Law* (Springer, United

certain provisions of a collective agreement of the state of the forum or the state of work performance could be applied in this way, provided that these provisions can be considered essential for safeguarding the public interests of that state. However, as these are matters made available to collective bargaining by the national legislator, the concurrence of public policy interests would be excluded.

(C) IMPACT ON DETERMINING THE APPLICABLE LAW

(1) Indication of greater proximity of the exception clause

If some of the terms and conditions of employment have been determined by applying a collective agreement which does not belong to the contract governing law, then this circumstance may impact how applicable law is determined. Application of the collective agreement may contribute to the fact that the contract governing law is corrected and that the 'new' applicable law is that of the state to which the collective agreement belongs.

In the *Schlecker* case[15], the Court of Justice of the European Union (CJEU) set out the circumstances to be considered when assessing the existence of a closer connection with a state other than where the habitual place of work or the engaging establishment is located (Article 8.4 Rome I). In addition to the state of affiliation to Social Security and the state of payment of taxes on income from the worker's activity, 'all the circumstances of the case, such as the parameters relating to salary determination and other working conditions' must be considered[16]. Thus, the fixation of wages and other working conditions by the rules of a particular legal system including its collective agreements is one of the circumstances that must be assessed as an indication of proximity to determine the existence of a closer connection with another state, overriding the presumptions of the habitual state of work or the engaging establishment.

(2) Indication of a tacit choice of law

Following the CJEU, application of a collective agreement which is not part of the contract governing law must in principle be considered as an indication of the proximity of the exception clause. However, such a solution may be too simple and potentially detrimental to workers.

When applying the exception clause, consideration should be given only to elements of sufficient value to reveal the existence of greater conflictual proximity to another legal system and circumstances determined exclusively by the employer's will should be excluded. Otherwise, this would facilitate an indirect determination of the applicable law by the employer. Indeed, application of the collective agreement reveals a link

Kingdom, 2015), at. 254; O. Deinert, *International Labour Law under the Rome Conventions* (Beck/Hart/Nomos, Germany, 2017), at. 195-197; F. Jault-Seseke, *supra* n.4, at. 472; U. Liukkunen, *The Role of Mandatory Rules in International Labour Law: A Comparative Study in the Conflict of Laws* (Talentum, Helsinki, 2004), at. 121, 132.

15 Judgment of the Court, 12 September 2013, C-64/12, ECLI:EU:C:2013:551.

16 As stated in the Advocate General's Conclusions, the judge can examine by which collective agreement or what national scale the salary and other working conditions were determined.

between the contract and the legal system to which it belongs, but if it cannot be regarded as binding for the employer since there are no conflict law rules which lay down an express obligation to apply the collective agreement, the most appropriate approach would be for it to be taken as an indication of a tacit choice of the legal system to which the collective agreement belongs. Its consideration as an indication of a tacit choice is protective for employees because the choice can only favour them and the minimum level of protection of the objectively applicable law is granted. In addition, it must be borne in mind that application of the collective agreement may have created an expectation for the worker that the legal system to which the collective agreement belongs is the one that governs the contract.

When the employment contract contains an express mention of the collective agreement requires specific analysis. How it is introduced into the contract must be examined to determine the relevance of that mention: while in some cases the mention may be considered as an indication of a tacit choice of law, in other cases it may be an incorporation by reference, which excludes the parties' intention to choose the law to which the collective agreement belongs. It can be argued that whenever a mention of a collective agreement with legal effectiveness exists, it must be considered to reveal a tacit choice of the legal system to which the collective agreement belongs. However, the contract can mention the application of a collective agreement that does not belong to the legal system governing the contract, the parties could be aware of this, and the mention could only intend to clarify that the agreement will apply. In this case, the reference can be considered as an incorporation by reference of the collective agreement which would avoid having to resort to doubtful criteria to justify its application[17].

(D) CROSS-BORDER APPLICATION OF EQUALITY PLANS

Specific problems in applying equality plans for women and the new LGTBI equality plans arise from how the obligation to negotiate them has been established. LO 3/2007[18] and Law 4/2023[19] only establish that all companies with more than fifty employees, whether Spanish or foreign companies, should negotiate them[20], and the obligation to negotiate the plan is not coordinated with the possibilities for the negotiated plan to be applied.

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17 If a specific provision of the collective agreement is reproduced in the employment contract, it can be considered a clause resulting from the material autonomy of the parties incorporated by reference and the mention would not be considered an indication of a tacit choice. *Cf.* A.L Calvo Caravaca, J. Carrascosa González, *supra* n. 14, at. 3579.

18 Organic Law 3/2007 for the effective equality of women and men (*BOE* no. 71, 23 March 2007). According to Art. 45.2, companies with more than fifty workers must negotiate and apply an equality plan containing measures aimed at avoiding any type of employment discrimination between women and men. However, the plan can also be negotiated and applied in other cases. Equality plans between women and men have been developed by Royal Decree 901/2020 (*BOE* no. 272, 14 October 2020).

19 Law 4/2023 for the real and effective equality of trans people and the guarantee of the rights of LGTBI people (*BOE* no. 51, 1 March 2023). According to Art. 15.1, companies with more than fifty workers must have a set of measures and resources planned to achieve real and effective equality for LGTBI workers, including an action protocol to address harassment or violence against LGTBI people. The content and scope of these measures have been developed by Royal Decree 1026/2024 (*BOE* no. 244, 9 October 2024).

20 LO 3/2007 applies to all companies located or acting in Spanish territory (Art. 2) while Law 4/2023 applies to all those that reside, are located or act in Spanish territory (Art. 2), in both cases regardless of their

Thus, all Spanish companies with more than fifty employees would have to negotiate both equality plans and, in principle, it does not matter that some of the employees and even the whole workforce may work in other countries. In this case, although there would be an obligation to negotiate the plans, they would probably not belong to the employment contract law so application of the plan's employment and working conditions would not be granted[21]. The same arguments raised for collective agreements not part of the law governing the contract to be applied could be invoked to justify the application of the plans[22].

As for foreign companies, *a priori* the obligation to negotiate the plans would reach all those 'acting' or located in Spain, so those with employees working in Spain and with branches (workplaces) in Spain would be included. It seems clear that the number of workers should be adapted so that not all company workers are taken into account, but only contracts with enough links to Spain[23].

It would be more reasonable for the obligation to negotiate the plan to exist whenever the Spanish or foreign company has at least fifty employees working in Spain[24], in which case Spanish law would foreseeably be applicable and the negotiated plan could be applied[25]. In any case, adaptation of the calculation is not compatible with the literal wording of the rules and an adaptation based on the criterion of work performance in Spain does not exclude application problems either. Identification of the habitual state of work of each worker would be required when negotiating the plan, as when determining international jurisdiction and applicable law. If Spain is the habitual state of work of at least fifty employees, there would be an obligation to negotiate the plan. Employees who do not habitually work in any state would not count. Changes in the habitual state of work would be problematic because, if the number of employees working in Spain were to fall below fifty at any time, the obligation to negotiate the plan would disappear and it could be sustained that the obligation to apply a plan already negotiated would also disappear. In addition, although work is habitually performed in Spain, the law of another state may be applicable as the exception clause applies. These contracts would in principle count for the obligation to negotiate the plan, but the negotiated plan would not apply to them, so it might be more appropriate for them to be excluded from the calculation.

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nationality, domicile or residence.

21 Some equality plan measures must be applied by reference to the Spanish legal system by Art. 8 Rome I but the application of some measures, for example, those that aim to prevent discrimination in hiring, will not be the result of the reference in Art. 8 RIR as these are matters unrelated to employment contract law.

22 This can be sustained only if equality plans share the legal effectiveness of collective agreements, which can be deduced but is not expressly established.

23 However, according to Art. 3 RD 201/2020 and Art. 3 RD 1026/2024, to calculate the number of workers that gives rise to the obligation to negotiate an equality plan, the company's total workforce should be considered, regardless of the number of its work centres or the form of labour contracts.

24 See A. Selma Penalva, 'El plan de igualdad en la empresa internacional', *Revista Justicia & Trabajo* (2022), no. 1, at. 35-42.

25 Although for foreign companies it would be reasonable for the obligation to negotiate the plan to exist if the company has a branch in Spain, the calculation should, in any case, exclude workers providing services in other States because otherwise, the law governing these contracts would most likely not be Spanish law. Cf. Á. Espiniella, *supra* n. 12., at. 216.

(E) CONCLUSIONS

The first difficulty in applying collective agreements derives from the diversity that characterises them from a comparative law perspective: the nature of the collective agreements in which the contract is included must be examined to determine whether they are rules or equivalent to rules in the legal system that has ruled their negotiation.

If it is a legally effective collective agreement, it will be applied by the conflict rule reference to the legal system to which the collective agreement belongs. Application of collective agreements of the objective law and the chosen law must be granted as long as their scope of application is met.

It is worth considering that a collective agreement not belonging to the employment contract law could be applied within the margin granted to the parties to the collective bargaining autonomy of the will in this law. In any case, application of the foreign collective agreement must be admissible in this legal system.

The regulation of equality plans highlights the persistent problematic lack of attention to cross-border collective labour relations and specifically to the international dimension of collective bargaining. So far, the specificity of labour law sources in cross-border employment contracts has not been considered in labour law and conflict of laws rules. This is a traditional and well-known problem which, as can be seen, remains unaddressed in recent regulations.

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The EU Corporate Sustainability Due Diligence Directive: Migrant Workers and Emerging Challenges in Respecting Human Rights

Luiz Henrique Garbellini Filho*

Abstract: The EU Corporate Sustainability Due Diligence Directive (CSDDD) represents a significant advancement in regulating mandatory human rights due diligence (mHRDD). However, its potential to promote mHRDD processes that fully respect the rights of migrant workers, particularly those facing intersectional discrimination in lower tiers of the value chain, remains uncertain. This paper critically analyzes the CSDDD through an intersectional lens, with a focus on its personal scope, material scope, and approach to non-discrimination. It identifies key shortcomings in these areas and underscores the need for a more expansive, holistic and comprehensive regulatory framework in the transposition of CSDDD.

Keywords: EU Corporate Sustainability Due Diligence Directive (CSDDD) Mandatory Human Rights Due Diligence (mHRDD) Intersectional Discrimination Migrant Workers.

(A) INTRODUCTION

The business and human rights (BHR) framework can be understood as a system of polycentric governance.[1] This framework includes a coexistence of actors and regulatory instruments that reflect its complexity.[2] It facilitates adaptation to diverse regulatory contexts, while also being open to paradigmatic shifts. Scholars have identified a growing trend in the adoption of binding instruments that establish specific obligations and mandatory standards for private actors regarding mandatory human rights due diligence (mHRDD).[3] The traditional model, based on soft law instruments and voluntary business initiatives, is undergoing significant transformations. At the same time, a hybrid model that combines voluntary elements with legal obligations is gaining strength. The European Union (EU) and its Member States have played a key role in this process.[4] In the European sphere, several national and EU binding instruments regulating mHRDD have already been adopted. The most recent milestone towards mandatory requirements

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1 S. Deva, 'Business and human rights: alternative approaches to transnational regulation', 17 *Annual Review of Law and Social Science* (2021) 139-158, at 142 [doi: 10.1146/annurev-lawsocsci-113020-074527].

2 C. Rodríguez-Garavito, 'Business and Human Rights: Beyond the End of the Beginning', in C. Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press, Cambridge, 2017) 11, at 12-13.

3 S. Joseph and J. Kyriakakis, 'From soft law to hard law in business and human rights and the challenge of corporate power', 36 *Leiden Journal of International Law* (2023) 335 361 [doi: 10.1017/S0922156522000826].

4 S. Bijlmakers, *Corporate Social Responsibility, Human Rights and the Law* (Routledge, London, 2018), at 135-163.

has been the adoption of the EU Corporate Sustainability Due Diligence Directive[5] (CSDDD) by the European Parliament and Council on 13 June 2024. The CSDDD sets ambitious aims, including to "comprehensively cover human rights" (Recital 32 CSDDD). While the Directive represents a remarkable development in the BHR framework, its ability to fully achieve the intended goals through its legal provisions remains uncertain.

The HRDD obligations established in the CSDDD framework significantly extend to the production processes of in-scope companies.[6] This approach has the potential to promote mHRDD as an important mechanism for managing the risks of business-related human rights abuses, particularly in those production processes where such violations are more prevalent. Scholars have noted that these processes often share two key characteristics: concentration at the lower tiers of the value chains and adverse incorporation of individuals in vulnerable situations.[7] Given that human rights abuses are not neutral with respect to migratory status, these corporate activities frequently involve migrant workers, whether in formal or informal employment.[8] While these individuals should not be understood as intrinsically or ontologically vulnerable, many experience intersectional discrimination, which exposes them to harmful labor practices involving severe human rights violations. These practices may include, among others, labor exploitation and indecent work promoted by phenomena such as human trafficking[9] and contemporary forms of slavery.[10]

From this basis, the paper analyzes some CSDDD legal provisions that are directly or indirectly applicable to the respect of the rights of migrant workers exposed to intersectional discrimination in productive activities, particularly those taking place at the lower tiers of the value chain. For this purpose, the paper is structured in three main parts. First, it examines the mHRDD approach within the CSDDD framework. Second, it adopts intersectionality as a theoretical and methodological framework for analyzing CSDDD legal provisions. Finally, it focuses on three critical aspects that jeopardize the CSDDD potential in addressing business-related human rights abuses. The first aspect relates to its personal scope; the second, to its material scope; and the third, to its approach to addressing discrimination. After the analysis, it calls for a more expansive, holistic and comprehensive approach in the transposition of CSDDD.

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5 European Parliament and Council Directive 2024/1760, OJ 2024 L1/58.

6 The CSDDD outlines that in-scope companies' HRDD processes extend to subsidiaries and business partners throughout the "chain of activities" (Articles 7 to 15 CSDDD). Buhmann and Feld describe this as "cascading due diligence", see K. Buhmann and L. Feld, 'Shifting boundaries: a transnational legal perspective on the EU Corporate Sustainability Due Diligence Directive', 15 *Transnational Legal Theory* (2024) 1–27, at 13 [doi: 10.1080/20414005.2024.2426961].

7 N. Phillips, 'Informality, global production networks and the dynamics of 'adverse incorporation'', 11 *Global Networks* (2011) 380–397 [doi: 10.1111/j.1471-0374.2011.00331.x].

8 J.M. Diller, 'Protecting the vulnerable: migration, work and human rights due diligence', in K.A. Elliot (ed), *Handbook on Globalisation and Labour Standards* (Edward Elgar Publishing, Massachusetts, 2022) 84, at 89-90.

9 L.H. Garbellini Filho, 'La lucha contra la trata de seres humanos en la cadena de valor: construyendo vías hacia nuevos marcos normativos sobre diligencia debida empresarial', 2 *Revista Española de Empresas y Derechos Humanos (2024), 129-174, at 138-141 [doi: 10.69592/3020-1004-N2-ENERO-2024-ART6].*

10 J. Nolan and G. Bott, 'Global supply chains and human rights: spotlight on forced labour and modern slavery practices', 24 *Australian Journal of Human Rights* (2018) 44-69, at 48-49 [doi: 10.1111/j.1471-0374.2011.00331.x].

(B) THE CSDDD AND ITS MHRDD REGULATORY MODEL

The CSDDD represents the first supranational and cross-sectoral binding instrument regulating mHRDD as a *process* that in-scope companies must implement to meet respect for human rights throughout their production activities. The Directive establishes a framework that not only details a set of specific measures that companies must adopt but also mandatory minimum standards that must be followed to ensure respect for human rights and environment.[11] It assigns various responsibilities to EU Member States, including implementing accompanying measures (Article 20 CSDDD) and supervising compliance by creating national supervisory authorities (Article 24 CSDDD). At the same time, EU institutions are entrusted with measures such as issuing guidelines to support effective implementation (Article 19 CSDDD) and establishing a European Network of Supervisory Authorities (Article 28 CSDDD). To be transposed into national laws by July 2026, the Directive is anticipated to play an important role in complementing existing sectorial EU instruments and promoting regulatory harmonization among Member States.[12] Except for the mHRDD provisions concerning the identification, prevention, and cessation of adverse impacts, Member States have the flexibility to exceed the CSDDD requirements by imposing stricter obligations or expanding its scope (Article 4 CSDDD).

The adoption of CSDDD suggests a significant advancement in the EU's commitment to sustainability and addressing the adverse impacts of business activities on human rights and environmental matters. One of its main contributions lies in the adoption of an mHRDD model that must be observed by in-scope companies. To develop this model, the CSDDD, though not entirely, draws from the approach adopted by the OECD's Guidelines for Multinational Enterprises[13] and the United Nations Guiding Principles on Business and Human Rights[14] (UNGPs). The UNGPs was developed under John Ruggie's leadership and endorsed by the UN Human Rights Council in June 2011.[15] According to the UNGPs, HRDD is conceived as an ongoing management process that all companies must carry out to identify, prevent, mitigate, and account (actual and potential) adverse human rights impacts. The interpretive guidance adopted by the UN indicates that this process must be undertaken to meet a company's responsibility to respect human rights.[16] While the concept, as originally formulated in the UNGPs, allows for various interpretations and adaptations, many scholars agree on the need for mHRDD regulations to align with these principles, thereby consolidating their relevance as one of the major international normative references.[17]

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11 I. Pietropaoli, J. Elliot and S.G. Aguinaga, *Towards New Human Rights and Environment Due Diligence Laws: Reflections on Changes in Corporate Practice* (British Institute of International and Comparative Law, London, 2024), at 8-10.

12 Buhmann and Feld, *supra* n. 6, at 2.

13 OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, (OECD Publishing, Paris, 2011/2023)

14 OHCHR HR/PUB/11/04, 16 June 2011.

15 HRC Res. 17/4, 06 July 2011.

16 OHCHR HR/PUB/12/02, 21 September 2012.

17 Pietropaoli, Elliot and Aguinaga, *supra*. n. 11, at 14 and G. Holly and M. Dicalou, *Transposition of the Corporate Sustainability Due Diligence Directive: a practical guide for national human rights institutions* (Danish Institute for Human Rights, Copenhagen, 2024), at 10.

The CSDDD adopts a model centered on a wide range of measures: i) integrating due diligence into corporate policies and risk management; ii) identifying and assessing actual and potential adverse impacts; iii) preventing and eliminating such impacts; iv) providing remediation; v) meaningfully engaging with stakeholders; vi) establishing a notification mechanism; vii) monitoring the effectiveness of due diligence measures; and viii) publicly communicating (Articles 7 to 16 CSDDD). The Directive adopts a risk-based approach to human rights and environmental matters[18], requiring companies to identify and manage adverse impacts arising from their activities, including those of subsidiaries and business partners within the "chains of activities". In terms of responsibility, it establishes "obligations of means" instead of "obligations of results"[19], meaning that companies must take appropriate measures to achieve the due diligence objectives in line with human rights respect. Finally, the Directive provides for enforcement mechanisms, including administrative enforcement, and civil liability (articles 27 and 29 CSDDD).

(C) INTERSECTIONALITY AS A FRAMEWORK FOR LEGAL CRITIQUE AND PRAXIS

To develop the analysis of CSDDD relevant legal provisions in this paper, it is crucial to establish intersectionality as a theoretical-methodological framework. The intersectional framework emerged in the 1980s, proposing that categories such as gender, race, and class can interrelate to produce hierarchies that place certain subjects at an advantage or disadvantage positions in various spheres of society. At the same time, this framework also sought to establish forms of resistance and transformation of reality.[20] The term "intersectionality" was first popularized by Black feminist legal scholar Kimberlé Williams Crenshaw, who used it to analyze judicial responses to discrimination cases experienced by Black women in the United States labor market.[21] With the growing sophistication of the field, intersectionality has evolved into a complex and diverse body of social theory and critical praxis. Beyond being conceived as a complex theoretical field about oppression, discrimination, or identity[22], it has become a transformative tool oriented toward action and political resistance.[23] Specifically, in the field of law, it has been recognized as a key tool for institutionalizing social justice[24] and as an essential mechanism for the feminist legal project.[25] Although the law may be "neutral"

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18 P. Narayanan, *Decolonising Corporate Sustainability Due Diligence Directive (CSDDD)* (Global North Dominance Watch, Bangkok, 2024), at 4.

19 Pietropaoli, Elliot and Aguinaga, *supra*. n. 11, at 8.

20 A. Denis, 'Review essay: Intersectional analysis: A contribution of feminism to sociology', 23 *International Sociology* (2008) 677-694, at 679 [doi: 10.1177/0268580908094468].

21 K.W. Crenshaw, 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', 1 *University of Chicago Legal Forum* (1989) 139-167.

22 S. Cho, K. W. Crenshaw and L. McCall, 'Toward a field of intersectionality studies: Theory, applications, and praxis', 38 *Signs: Journal of women in culture and society* (2013) 785-810, at 788-789 [doi: 10.1086/669608].

23 P. H. Collins and S. Bilge, *Interseccionalidade* (Boitempo, São Paulo, 2020), at 52-69.

24 E. Holzleithner, 'Law and social justice: intersectional dimensions', in K. Davis and H. Lutz (eds), *The Routledge international handbook of intersectionality studies* (Routledge, New York, 2023) 251, at 262.

25 J. Conaghan, 'Intersectionality and the Feminist Project in Law', in E. Grabham *et al*. (eds), *Intersectionality and Beyond Law, Power and the Politics of Location* (Routledge, London, 2009), 21, at 40.

to intersectionality, it can offer an important framework for its development and for addressing complex forms of subjugation and oppression.[26]

Despite the plurality of perspectives that make up intersectional feminisms, two key contributions are useful for this study. The first is intersectionality's ability to offer a comprehensive model of analysis that encompasses different social levels (micro, meso, and macro). It allows exploring the multi-level nature of the intertwining of categories from a multi-level and interactive approach.[27] The holistic reading provides a systemic and interconnected approach to understanding the composition of "intersectional vulnerability".[28] In this way, law and state political decisions, as well as production dynamics adopted by companies whether large corporations or small businesses can contribute to generating risks of human rights violations. For instance, migrants may be exposed to such violations due to normative models with weak protections for migrant workers.[29] Moreover, they can be affected by anti-migrant policies that restrict and/or securitize migration flows[30] and increase the risks of human trafficking and exploitation[31], or even by immigration policies that restrict certain groups of immigrants to particular categories of jobs.[32] In turn, economic actors can take advantage of the situational disadvantages of migrants to incorporate them adversely into their value chains[33], particularly those in irregular situations or employed as low-skilled temporary workers.

The second contribution lies in intersectionality's ability to overcome unitary and multiple approaches to discrimination. This analytical framework allows for more complex readings, considering not only the interaction of two or more indicators of inequality but also their complex, contingent, and variable interconnections in specific contexts.[34] The migratory status indicator interacts with other indicators (such as gender, race, age, disability, etc.) and they are mutually constituted in everyday life.[35] This interaction leads to specific forms of inclusion and exclusion, as well as advantages and disadvantages, with direct impacts on the guarantee or denial of human rights. At the

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26 S. Atrey, *Intersectional discrimination* (Oxford University Press, Oxford, 2019), at. 212-214.

27 G. Winker and N. Degele, 'Intersectionality as multi-level analysis: Dealing with social inequality' 18 *European Journal of Women's Studies* (2011) 51-66, at 52 [doi: 10.1177/1350506810386084].

28 D. Mendola and A. Pera, 'Vulnerability of refugees: Some reflections on definitions and measurement practices', 60 *International Migration* (2022) 108-121, at 116 [doi: 10.1111/imig.12942].

29 L. Palumbo, *Taking Vulnerabilities to Labour Exploitation Seriously: A Critical Analysis of Legal and Policy Approaches and Instruments in Europe* (Springer, Cham, 2024), at 75-113.

30 K. Jaskulowski, 'The securitisation of migration: Its limits and consequences', 40 *International Political Science Review* (2019), 710-720 [doi: 10.1177/0192512118799755].

31 K.E. Bravo, 'Business and Human Rights A Call for Labor Liberalization' in J. Martin and K.E. Bravo (eds), *The business and human rights landscape moving forward, looking back* (Cambridge University Press, New York, 2016) 574, at 579-580 and 583.

32 L. McDowell, 'Thinking through work: complex inequalities, constructions of difference and trans-national migrants', 32 *Progress in Human Geography* (2008) 491-507, at 497 and 501 [doi: 10.1177/0309132507088116].

33 F. Bagnardi, G. D'Onofrio and L. Greco, 'The state in chains: public policies against adverse incorporation in Southern Italian production networks', 19 *Globalizations* (2020) 34 58, at 51 [doi: 10.1080/14747731.2020.1849908].

34 A.M. Hancock, 'Intersectionality as a normative and empirical paradigm', 3 *Politics & Gender* (2007) 248-254, at 251 [doi: 10.1017/S1743923X07000062].

35 H.J. Bürkner, 'Intersectionality: How gender studies might inspire the analysis of social inequality among migrants', 18 *Population, space and place* (2012) 181-195, at 191-192 [doi: 10.1002/psp.664].

same time, companies can play a central role in adopting policies and practices that can either reproduce or mitigate these dynamics.

(D) THE CSDDD'S PERSONAL SCOPE

The CSDDD personal scope covers both European and non-European companies that meet certain requirements (Article 2 CSDDD). Its implementation model follows a five-year phase-in approach, aiming to reach the final configuration by July 2029 (Article 37 CSDDD). While the gradual approach may seem reasonable from the perspective of allowing companies to adapt themselves to new regulatory obligations, it suggests a lack of urgency in addressing business-related human rights violations. For European companies, the Directive will apply to those with more than 1,000 employees and an annual turnover of more than 450 million euros. In the case of third-country companies with activities in the EU, the criterion of the number of employees is not relevant; only the aforementioned annual turnover is considered. Micro-companies and SMEs are excluded from the proposed provisions. On the other hand, these can be indirectly affected by mHRDD processes when they are commercially linked to in-scope companies.[36]

The CSDDD incorporates a clear extraterritorial dimension.[37] In-scope companies are required to address the adverse impacts of their operations, regardless of the territory where they occur. While some scholars have expressed caution regarding the extraterritorial application of law[38], this approach remains particularly significant for three main reasons. First, large companies often outsource and fragment their production in jurisdictions distinct from the location of their parent companies' headquarters.[39] Second, they operate within international production structures marked by asymmetries of market, social, and political power.[40] They exert significant influence over production practices and the conditions of price and supply, which often negatively impacts the labor conditions of individuals in vulnerable situations including migrant workers.[41] Third, their value chains often extend to countries with weak regulatory frameworks or insufficient enforcement of human rights, exacerbating abusive practices and perpetuating corporate impunity.[42] Despite the fragmentation and

36 Pietropaoli, Elliot and Aguinaga, *supra*. n. 11, at 9.

37 N. Bueno *et al*., 'The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise' *Business and Human Rights Journal* (2024) 1 7, at 5-6 [doi:10.1017/bhj.2024.10].

38 C.O. Lichuma, '(Laws) made in the 'first world': A TWAIL critique of the use of domestic legislation to extraterritorially regulate global value chains' 81 *ZaöRV* (2021) 497-532, at 518-521 [doi: 10.17104/0044-2348-2021-2-497].

39 G. Magnani, A. Zucchella and R. Strange, 'The dynamics of outsourcing relationships in global value chains: Perspectives from MNEs and their suppliers', 103 *Journal of Business Research* (2019) 581-595, at 582-583 [doi: 10.1016/j.jbusres.2018.01.012].

40 N. Phillips, 'Power and inequality in the global political economy', 93 *International Affairs* (2017) 429 444, at 433 [doi: 10.1093/ia/iix019].

41 J. Nolan, 'Regulating human rights in the textile sector: smoke and mirrors', in A. Marx *et al*. (eds), *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar Publishing, Cheltenham, 2022) 291, at 307.

42 I. Bantekas, 'Business and Human Rights Foundations and Linkages', in I. Bantekas and M.A. Stein (eds), *Cambridge Companion To Business & Human Rights Law* (Cambridge University Press, Cambridge, 2021) 1, at 10.

outsourcing in value chains, an intersectional approach allows for identifying the links connecting large companies to human rights violations occurring outside their primary territories of operation. By including these companies within the scope, the CSDDD seeks to counteract such effects, positioning companies as agents of change toward more responsible practices.

However, the CSDDD personal scope reveals some limitations. Firstly, the criterion adopted to determine which companies are included in the personal scope does not fully align with the UNGPs, which establish that all companies, regardless of size and sector, must carry out HRDD processes (Guiding Principle 14 UNGPs). Although it seems reasonable that the turnover of a company is considered, this parameter could have been used as a basis to determine the proportionality of the mHRDD measures to be implemented, and not as a criterion for inclusion in personal scope. Similarly, the exclusion of companies that do not meet a specific employee threshold constitutes a critical limitation. From an intersectional approach, it is essential to consider how the activities of all companies (and not only the large ones) can interact with the structural factors that perpetuate rights violations — for instance, the exploitation of migrant labor.

Moreover, the CSDDD accounting model does not include the workers most exposed to adverse incorporation in the lower tiers of the so-called "chain of activities". This model seems to assume that the risk of human rights violations in "chain of activities" is directly linked to the number of direct employees of the in-scope companies, rather than the total number of workers who, although not directly hired, contribute along the "chain of activities" to the final product or service. It is true that the CSDDD introduces some advances in counting the number of workers, such as considering part-time workers as full-time equivalents and including workers from temporary work agencies and non-standard forms of employment, in accordance with the jurisprudence of the Court of Justice of the European Union (CJEU) (Article 2, 4, CSDDD). Although including labor modalities with greater insecurity for workers could represent a progress in respect for migrant workers' rights[43], the model does not adequately estimate the total number of workers throughout the entire "chain of activities". Incorporating an intersectional perspective would involve a more comprehensive accounting for all workers involved in the parent company's value chain.

(E) THE CSDDD'S MATERIAL SCOPE: RESPECT FOR HUMAN RIGHTS

The CSDDD establishes that companies must detect, assess, prevent, mitigate, eliminate, and remedy "adverse impacts"[44] (Article 5, 1, CSDDD). To identify the adverse impacts on human rights during mHRDD processes, the text employs a listing technique, which includes rights, prohibitions, and international instruments. The CSDDD opts to refer these elements to an annex divided into two parts. Part I

[43] According to the ILO, the migrant population is more likely to be overrepresented in atypical and temporary forms of employment, see ILO, *El empleo atípico en el mundo: Retos y perspectivas. Presentación resumida del informe* (Ginebra, 2016), at 7 and 9.

[44] "Adverse impact" means an adverse environmental impact or adverse human rights impact (Article 3, 1, d, CSDDD).

is subdivided into two sections: "rights and prohibitions included in international human rights instruments" (Section 1) and "instruments on human rights and fundamental freedoms" (Section 2). Part II focuses on "prohibitions and obligations included in environmental instruments." While the CSDDD also contemplates that adverse impacts may arise from violations of rights not listed in the annex, it imposes a series of very restrictive conditions for companies to be required to consider these unlisted rights (Article 3, 1, c, ii, CSDDD).

Although resorting to the listing technique may seem useful to guide companies in the development of specific policies, the annex model adopted by CSDDD has substantial weaknesses. Compared to international frameworks, the Directive adopts a limited approach regarding material scope. The UNGPs, for example, state that (i) all human rights violations that may be impacted by a company must be considered, and (ii) companies must promote a comprehensive respect for human rights (Guiding Principle 12 UNGPs). This implies that the HRDD obligations should not be limited to an artificial selection of rights that does not reflect the entire body of existing rights and international instruments.

Nonetheless, the listing technique limits the interdependent, comprehensive, and indivisible approach to human rights. The CSDDD suggest reducing human rights to a catalog of isolated rights and instruments, losing the conception of rights as an interconnected whole. Moreover, it is an insufficient list. Key treaties are excluded, such as those from the UN and the Council of Europe, as well as ILO conventions that are crucial for the protection of human rights in specific contexts, such as migrant labor. For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[45] is not included under the UN framework. Under the Council of Europe, the European Convention on the Legal Status of Migrant Workers[46] is missing. Under the ILO, treaties related to migrant workers, such as Conventions No. 97[47] and 143[48], are absent. The lack of integration of these instruments hampers the creation of a regulatory framework within the CSDDD that addresses the specific needs of migrant workers from a human rights perspective.[49]

From an intersectional perspective, many migrants are often exposed to a *continuum* of exploitation and violence, which can begin in the early stages of their migratory processes and continue even after they reach their final destination.[50] In contexts

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45 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted on 18 December 1990, entered into force on 1 July 2003) 2220 UNTS 3.

46 European Convention on the Legal Status of Migrant Workers (adopted on 24 November 1977, entered into force on 1 May 1983) ETS No.93.

47 Migration for Employment Convention (Revised) (No. 97) (adopted on 1 July 1949, entered into force on 22 January 1952) 120 UNTS 70.

48 Migrant Workers (Supplementary Provisions) Convention (No. 143) (adopted on 24 June 1975, entered into force on 9 December 1978) 1120 UNTS 323.

49 This perspective "can be distinguished from other approaches to progressive change on the basis that it involves the explicit identification of rights holders and duty bearers", see R. McDermott, P. Gibbons and S. McGrath, 'Protection of Displaced Persons and the Rights-Based Approach', in P. Adey *et al*. *The Handbook of Displacement* (Palgrave Macmillan, Cham, 2020) 109, at 117.

50 I. A. Domínguez and E.J. Barbuzano, 'The Continuum of Violence and Interstices in the Journeys and Bodies of Women on the Move From West Africa', *Violence Against Women* (2024) 1-27 [doi: 10.1177/10778012241263107].

of forced mobility resulting from armed conflict and/or climate change, the risks of human rights violations tend to be amplified even further. Migrant workers who have integrated forced migration flows may come from countries with problematic socio-political and economic conditions, as well as face barriers such as strict border controls and intersectional discrimination based on gender, ethnicity, and migratory status, which further exacerbates their exposure to human rights violation risks. For this reason, respect for rights must be comprehensive, considering the interconnectivity of the various forms of abuse that can be experienced by migrant workers. Instead of adopting a holistic approach that considers how business activities interconnectedly impact people's rights, including those of migrants, the CSDDD model tends to reduce addressing adverse impacts on human rights to a fragmented exercise, where rights are examined in isolation[51], oversimplifying the complex nature of human rights violations.

(F) THE CSDDD'S APPROACH TO NON-DISCRIMINATION

The CSDDD, in its Annex Part I, Section I, establishes that one of the prohibitions in-scope companies must observe is the prohibition of unequal treatment in employment. The CSDDD specifies the prohibition of "discrimination on grounds of national extraction or social origin, race, colour, sex, religion, political opinion" (Article 14(b), Annex Part I, Section 1, CSDDD). This provision suggests being appropriate, as access, remuneration, and working conditions can vary within the same labor environment. Moreover, parent companies can perpetuate these inequalities through their production practices, which induce actors in the "chain of activities" to engage in discriminatory practices. However, this provision exhibits certain shortcomings. From an intersectional perspective, it is essential to consider a broader range of inequality indicators and recognize how these intersect and interrelate, creating specific forms of discrimination and human rights violations. One criticism lies in the use of the conjunction "or" instead of "and" in the list of discrimination grounds, which suggests a unitary model of discrimination. Although the CSDDD mentions seven indicators, it does not explicitly state that these factors can intersect. Furthermore, the list is both limited and closed. To better align with an intersectional approach, the inclusion of language such as "any other condition" would have allowed for the list to account for other possible factors of discrimination and their intersections. Additionally, migratory status itself is not explicitly recognized as a factor of discrimination. Other indicators of inequality that may intersect with migratory status, such as age, disability, sexual orientation, and gender identity, are also absent. By adopting a unitary and closed model, the CSDDD misses the opportunity to establish a comprehensive and effective framework for addressing the intersecting dimensions of discrimination faced by migrant workers adversely incorporated to value chains.

Compared to the progress achieved in international human rights law, the anti-discrimination framework proposed by the CSDDD is limited. The annex does not incorporate some of the important international instruments for addressing complex forms of discrimination. Key international instruments, such as the International

[51] G. Holly; S.A. Lysgaard, *Legislating for Impact: Analysis of the Proposed EU Corporate Sustainability Due Diligence Directive* (Danish Institute for Human Rights, Copenhagen, 2022), at 14.

Convention on the Elimination of All Forms of Racial Discrimination[52], the Convention on the Rights of Persons with Disabilities[53], or the Convention on the Elimination of All Forms of Discrimination Against Women[54] (CEDAW), are not included. The absence of CEDAW in the annex is particularly concerning, given that this instrument is a milestone in addressing direct and indirect gender-based discrimination. It has also been instrumental in recognizing intersectionality as an essential approach to understanding the overlapping layers of discrimination and exclusion faced by women.[55] Without the listing of CEDAW, the CSDDD hinders the adoption of a comprehensive gender-based approach, especially in migratory contexts where it is crucial to highlight the conditions of migrant women in gendered labor roles that carry heightened risks of rights abuses.[56] Although the text mentions that "depending on the circumstances, companies *may need* to consider additional standards" (Recital 33 CSDDD, emphasis added), this approach suggests to be insufficient. For example, the recitals acknowledge that companies should adopt a HRDD approach that considers intersectional factors, such as migratory status. In this context, "companies should pay special attention to any particular adverse impacts on individuals who may be at heightened risk due to marginalisation, vulnerability or other circumstances" (Recital 33, CSDDD). However, this recognition of intersectionality and a gender-based approach is not reflected in the operational and annex part of the document, which limits its practical impact.

(G) CONCLUSION

The CSDDD represents a historic milestone in the regulation of mHRDD in the BHR framework. It offers a unique opportunity to respect human rights across global value chains, particularly for groups in situational vulnerability such as migrant workers that face intersectional discrimination in lower value chain tiers. Nevertheless, the Directive current limitations underscore the need for a more expansive, holistic and comprehensive regulatory framework during its transposition. To truly respect the rights of these individuals, Member States must adopt more robust measures that not only comply with the CSDDD provisions but extend beyond them, ensuring that human rights are respected in every aspect of business operations, both domestically and abroad.

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52 International Convention on the Elimination of All Forms of Racial Discrimination (adopted on 21 December 1965, entered into force on 4 January 1969) 660 UNTS 195.

53 Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force on 3 May 2008) 2515 UNTS 3.

54 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted on 18 December 1979, entered into force on 3 September 1981) 1249 UNTS 13.

55 The CEDAW Committee, in its General Recommendation No. 28 on Article 2 of the Convention, highlights that intersectionality is crucial for understanding the obligations of States Parties, which must recognize and prohibit intersecting forms of discrimination that negatively affect women (para. 18). Moreover, the Committee emphasizes that States must take measures to eliminate discrimination against women, extending this responsibility to national companies operating outside their territory, ensuring that they do not perpetuate discriminatory practices at the international level (para. 36), see Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (adopted on 16 December 2010) UN Doc. CEDAW/C/GC/28.

56 K. Brickell and J. Speer, 'Gendered and Feminist Approaches to Displacement', in P. Adey *et al.*, *The Handbook of Displacement* (Palgrave Macmillan, Cham, 2020) 131, at 137.

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Change and World Order in Classical Realism: Understanding the Revisionist Challenge

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Abstract: A revisionist state is one pursuing a subversive policy over the status quo and trying to implement its vision in the new world order to come. This basic statement that can easily be found in the current literature on revisionism is far from neutral. The problems when defining revisionism, the status quo to be disrupted, or the motivations of the revisionist actor have impeded a full comprehension of the phenomenon. The penetration of this ambiguous term in Trump's rhetoric obliges the discipline to examine closely the treatment that revisionism has received in the literature and the nuances that have been omitted with the lapse of time. This paper performs this task in two ways: firstly, by underlining all the difficulties when dealing with revisionism in International Relations to create a multi-programme foundation for the discussion, and then by going back to Classical Realism to examine how revisionism was first drafted and treated by the literature. This choice of Classical Realism responds to its role as the first research programme discussing revisionism. Therefore, a theoretical review has been performed using the works by Schuman, Carr, Schwarzenberger, Morgenthau, Kissinger, Organski and Aron to understand the evolution of Classical Realism. Thanks to this, three phases (coining, stigmatization, and deconstruction) are identified, and several conclusions are drawn about the rights and wrongs of Classical Realism when dealing with revisionism, which have penetrated the following literature due to reductionist interpretations of such a complex phenomenon. This field of research should be a priority of International Relations Theory in the coming years to undo past mistakes and ensure the clarity of the terms coined and used in the academia and in international politics in general.

Keywords: revisionism, world order, International Relations Theory, Classical Realism, International Security.

(A) INTRODUCTION: CLASSICAL REALISM AND REVISIONISM

The birth of International Relations as a scientific discipline in 1919 was promoted under the conviction that great wars could be stopped through education. This utopian verdict was founded on the idea that common sense could create a harmony of interests among all nations in the world order. However, the interwar period proved idealists wrong. Academically, the first debate in International Relations Theory, among idealists and realists, emphasised the limitations of the former's analysis for its utopian character, far from reality. But more importantly, politically, the challenge posed by Nazi Germany to the interwar regimen created through the Treaty of Versailles served as evidence of the shortcomings of the idealist approach. The subsequent contributions, especially from the Realist research programme[1], underlined the importance of analysing the world for what it is instead of focusing only on what it could be.

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[1] The intended use of the term 'research programme' implies following Imre Lakatos' contribution to the Philosophy of Science. Contrary to Kuhn's 'paradigms', Lakatos (1978, pp. 47-52) defines a 'scientific

As a consequence of this debate, Realism is based on the idea of states as supreme actors, within an anarchic environment, struggling for power in the pursuit of their national interests, among which survival is the most important. These basic foundations have evolved from Classical Realism, between the 1930s and the 1960s, to Neorealism in the 1970s and 1980s and Classical Neo-Realism since the 1990s. This trend in the Realist programme also meant a transition between the focus of the power to be pursued by states: from a political power that encompassed all the spheres of national and foreign policy in Classical Realism to the inclusion of economic power and even cultural power by the rest of the subprogrammes within Realism. The central position of the Realist research programme along the different International Relations debates has stressed the relevance of Realism as a ground foundation to comprehend complex theoretical concepts within the discipline.

An integral part of the Realist research programme has been its understanding of states like actors participating in this struggle for power irrespectively of their political systems. This 'black boxes' argument has been significantly questioned by theoretical contributions like the peace democratic theory, but the US participation in several armed conflicts in the 2000s blew the credibility of this criticism. In any case, this attempt to assign different attributes according to the national politics of the states is far from new. When Carr in 1937 discussed international politics in the interwar period, he distinguished between two rival groups, one led by Germany, Italy and Japan, and another led by France and the Soviet Union. Regarding this, Carr mentioned:

> "The current habit of classifying countries by the type of political theory professed by their government is misleading. The rival groups are linked not so much by a common political faith as by the fact that the first group is, for varying reasons, dissatisfied with the territorial settlement of the world made in 1919-a settlement which the second group desires to maintain."[2]

Classical Realism, in the post-World War II scenario, started to formulate a cleavage between states participating in the world order according to different characteristics. Among them, while Kissinger envisioned a distinction between national political values, the contributions made by scholars like Schuman, Morgenthau or Organski emphasized the formulation of state categories based on power calculus. Through this last approach and influenced by the antagonism derived from the ideological confrontation between the US and the USSR, a distinction started between two groups of states: those defending the preservation of the status quo, led by the US, and those attempting to subvert the existing world order, represented by the USSR and China. In other words, contrary to the Realist theoretical hard core affirming that all states attempting to increase their power

research programme' as the theory or group of theories that share an irrefutable 'hard core' around which a protective belt is built, named 'positive heuristic'. This positive heuristic refers to the auxiliary hypotheses that can be tested and refuted to reinforce the programme, allowing a certain degree of evolution that would strengthen the hard core. However, the most significant part of this contribution is the fact that transitioning from one research programme to another is not the result of a scientific revolution, as Kuhn defended, but of the struggle and dialogue between different programmes, which provide feedback and question certain hypothesis to sophisticate the hard core. This vision of the theory as the result of changes promoted by external factors, including other programmes, is shared throughout this entire article.

[2] E.H. Carr, *International Relations since the Peace Treaties* (Macmillan and Co., London, 1937), at 258.

to pursue their national goals, certain nations, named status quo, have been identified as contributing to the stability of the world by refusing or resisting the struggle for power.

This contest between the conservationist and the revisionist forces has penetrated the diverse realist theoretical models advocating for stability. On the one hand, the balance of power defends the preservation, through the method of alliances, of the multiple units existing within the system under the threat of a power aspiring to universal domination. On the other hand, the power transition theory explores the challenge posed by rising powers aspiring to subvert the existing international system that privileges the dominant power, which imposed that order after gaining its hegemony. In both cases, despite their disagreements on whether the stability lies in a multipolar or a unipolar system, the theories have pointed out the existence of certain nations adopting a more aggressive stance within international politics, separating them from the status quo powers.

Consequently, the distinction between status quo powers and revisionist states has been included in theories that are part of the positive heuristic of Realism, even if it was a contradiction of its hard core. This anomaly has remained in the Realist research programme due to the undertheorization of the term 'revisionist'. Without a clear concept of what revisionism is, realist scholars have used the term without a clear distinct meaning, provoking the misuse of the concept and the terminological confusion that has remained in the theory. Far from being just a matter of words, this misunderstanding has penetrated the practice of international politics. In 2017, the Trump Administration's National Security Strategy stated that China and Russia were revisionist powers as they "want to shape a world antithetical to US values and interests."[3] When an academic misunderstanding trespassed the limits of the academia and entered the public debate, the problem is much more significant and leads to this necessary reflection about how this confusion about revisionism was made.

(B) THE PROBLEM OF REVISIONISM: HOW TO WORK WITH AN UNDEFINED TERM

The revisionist state is assigned with a capital role in the theoretical explanations about state interactions, and, even more, the breach of the stability. Despite this fundamental role that state revisionism seems to play in the literature, the term 'revisionist state' is complex, confusing and even diffuse. This ambiguity has not limited its use by the Classical Realist scholars, who have understood revisionism according to their historical context. As Johnston stated: "Perhaps because […] Nazi Germany is the paradigmatic revisionist state, international relations theory has tended to assume that we should recognize a revisionist state when we see one. But it is not always obvious."[4] Therefore, this section is devoted to understanding very briefly what the revisionist state is and what is not.

As a preliminary approach, the revisionist state is perceived as an actor which, in its unrestrained lust for power, promotes change in international society, posing a threat to

[3] United States Government, *National Security Strategy of the United States of America* (December 2018), at 25.
[4] A. I. Johnston, 'Is China a Status Quo Power?', 27 (4) *International Security* (2003), 5-56, at 10 [doi: 10.1162/016228803321951081].

the system as a whole and endangering structural stability, as formulated by Boulding.[5] This threatening character means that the revisionist state is normally associated with systemic actors, which are the ones holding the capacity to pose a schism around systemic stability. On the opposite side, status quo powers are those who, preliminarily, seek to maintain the world order as it is. Having said this, one of the fundamental problems in understanding the revisionist state lies precisely in apprehending the status quo that it denies and proposes to change. This question has rarely been addressed by the theoretical literature, leading to confusion over the object of revisionism. In any case, what is important is that revisionist states and status quo states represent two realities of the forces of transformation: resistance and change, preservation and revision.

From a micro-international perspective[6], the revisionist actor tends to be linked to the state. From the Realist perspective of states as supreme actors, the revisionist state is protected under its sphere of sovereignty in the anarchic context. This state presents an unlimited lust for power, apparently overpassing the *animus dominandi* that is attributed to all states according to Morgenthau.[7] Additionally, due to the systemic importance of its proposal for change, the revisionist state is linked with a great power, that is, a member of Schwarzenberger's international oligarchy.[8] This serious contender in the international hegemonic competition seeks, due to the resistance of status quo states, a preponderance of power to remove any opposition to their change proposals and pave the way for the implementation of its revisions within the international system.

At a macro-international level, revisionism is generally promoted in a heterogeneous international society, developing universal aspirations to build a unipolar or homogeneous system. Because it is tough to determine which type of polarity or heterogeneity will be more peaceful, i.e. with no armed conflicts, the aspiration on this macro-international level should be for adaptative stability, as Gilpin formulates.[9] This adaptive stability allows for the contemplation of demands for change without the need to automatically consider any reform motivated by a state as a cause of systemic instability. Consequently, the goal is not only the absence of wars or the preservation of the system but both simultaneously. Thus, this objective avoids being stuck in the debate between balance-of-power or power-transition theories, as the aspiration should not be power parity or preponderance but adaptive stability granting peaceful change at the systemic level.

This analysis tries to break the conceptual stretching, using Sartori's words[10], of revisionism due to the stigmatization it has associated. The term has been used to describe

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5 K. E. Boulding, 'Stability in International Systems: The Role of Disarmament and Development', in R. B. Gray (ed), *International Security Systems: Concepts and Models of World Order* (Peacock Publishers, Itasca, 1969), at 195-196.

6 This distinction between micro-international and macro-international was first made by R. Calduch-Cervera, *Relaciones Internacionales* (Ciencias Sociales, Madrid, 1991), at 31, and then developed in R. Calduch-Cervera, *Proyecto Docente de Relaciones Internacionales* (Universidad Complutense de Madrid, Madrid, 2000), at 353-355.

7 H. Morgenthau, *Scientific Man vs. Power Politics* (The University of Chicago Press, Chicago and London, 1965), at 192-193.

8 G. Schwarzenberger, *La Política del Poder: Estudio de la Sociedad Internacional* (Fondo de Cultura Económica, Mexico City, 1960), at 91.

9 R. Gilpin, *War and Change in International Politics* (Cambridge University Press, Cambridge, 1981), at 13.

10 G. Sartori, 'Concept Misformation in Comparative Politics', 64(4) *The American Political Science Review* (1970), 1033-1053, at 1041 [doi: 10.2307/1958356].

any opposition to an existing international system at a specific time and regional context, but it is not value-free. Drawing parallelism with the term 'terrorism', one may even say that one man's revisionist state is another man's state fighting for justice in the world order. From a dynamic perspective of international society, the power fluctuates, and the unflexible preservation of a particular system installed after a major war tends to be problematic when facing any kind of antagonism. According to Organski, factors like long-standing friendship or cultural proximity could reduce the resistance to change in the case of a new challenger, as happened with Great Britain and the US in the early 20th century.[11] Therefore, national interests and narratives also affect the identification of revisionism. Considering the Anglophone leadership of the discipline, this implies a particular cosmovision to notice when dealing with the revisionist challenge theoretically speaking.

In this regard, six fundamental prejudices can be found in International Relations Theory when working with this undefinition of revisionism: (1) the preferred stability is structural stability to maintain the system as it is; (2) the existing international society benefits all the units within; (3) any proposal for change in the world order is problematic and should be considered as destabilizing; (4) the maintenance of the international status quo is a public good carried out by certain great powers and would require the efforts of all actors in the system; (5) the revisionist state is, therefore, an actor that poses a threat to the international system and must be defeated before it achieves its disruptive goal; and (6) the revisionist state is driven by an extraordinary lust for power which makes it selfishly prefer conflict to security.

The bias stipulated in these six erroneous statements comes from a privileged perspective of those powers who still enjoy a place in the sun.[12] From that interested point of view, the maintenance of the status quo is the only course of action when a proposal for change is made, with the entire system necessarily pursuing the interests of the advantaged dominant nation. Any alternative is perceived as devious and an existential threat to sovereignty and systemic values, and this is why any minor state that supports it will be considered disloyal to the system as a whole. This stigmatization is the result of the destabilizing role theoretically attributed to the selfish revisionist state, identification of stability with structural stability, a positive bias towards the status quo and the generosity of those defending it, and a negative bias towards any change to be proposed in the international system for apparently attacking the interests of the majority of states.

This confrontation has tended to be perceived as a dualism between good and evil. This distinction between binomial categories is the result of an 'artificial' heterogeneity, that is, an effort to underline the differences between political communities to justify the sacrifice of this fight.[13] As a result, the contenders are perceived to be either the

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11 A. F. K. Organski, *World Politics* (Alfred N. Knopf, Nueva York, 1958), at 441.

12 The expression 'a place in the sun' comes from a speech delivered by Von Bülow, German Secretary of State for Foreign Affairs, in 1897: "We don't want to put anyone in the shade, but we too demand our place in the sun". This is cited in M. Murray, 'Identity, Insecurity, and Great Power Politics: The Tragedy of German Naval Ambition Before the First World War', 19(4) *Security Studies* (2010), 656-588, at 677 [doi: 10.1080/09636412.2010.524081].

13 The inspiration for this term is found in R. Aron, *Peace and War: A Theory of International Relations* (Routledge, New York, 2017), at 102-103. It was developed in P. A. Sánchez Rodríguez, *El Revisionismo*

'saviours' of the international system with their defence of the status quo or the risk and threat to stability posed by revisionist actors. This comprehension of international society and the traditional search for stability has derived into an antagonistic stance that is more common in authoritarian regimes promoting a homogenizing vision to which all members of society must adhere or be punished for their dissent. This is the effect reached by propaganda in such a heterogeneous reality as the international arena, where there is an evident difficulty in establishing common values and defining a shared order and tranquillity.

In other words, it is unclear what the revisionist state is, but it is logical to assume that it has a negative connotation. This is the case especially when used to describe realities like Napoleon in the 19th century, Nazi Germany and the Soviet Union in the 20th century and currently Russia and China, which were systemic rivals of the Anglophone dominant powers at the time. Despite this confusion and the conceptual stretching mentioned before, the label 'revisionist' has become a refined disqualifier on the Western side, as were in the context of the Cold War the mutual accusations of imperialism by both blocs. Connected to this, it is also remarkable how the term revisionism in the international system is often confused with other types of revisionism, like historical revisionism, Marxism revisionism or geopolitical revisionism (also called irredentism), which have nothing to do with the revisionist state that has been presented above.

On a final note, it is pertinent to separate also other concepts that have traditionally been assimilated in all cases with revisionist powers: 'dissatisfied states' and 'unsatiated states'. The former is the result of the ambiguity provoked by Organski in the formulation of the power transition theory when understanding that dissatisfaction was the distinctive characteristic of the challenger.[14] Despite this, dissatisfaction is just a sentiment that can lead to revisionism, but it is not a sufficient condition for the development of a revisionist policy, even less a synonym.[15] In the case of 'unsatiated states', the confusion comes from the early Classical Realist idea that revisionism is the materialization of an unlimited lust for power that distinguishes them from satiated status quo states. As in the case of dissatisfaction, the satiety or the lack of it may represent a problematic situation to the emergence of revisionism, but it should never be mistaken with revisionism itself from a systemic perspective.

This terminological confusion is also translated into other terms that, in particular works, have incorrectly not been labelled as 'revisionist' while examining the proposal for change within the world order. This is the case, for example, of Morgenthau's imperialist policies,[16] Schuman's unsatiated nations,[17] Chan's dissatisfied powers,[18] or Kissinger's

Internacional en el Programa Realista: Construcción Crítica de un Concepto Ambiguo (Universidad Complutense de Madrid, Madrid, 2023), at 118-120.

14 A. F. Organski, *supra* n. 11, at 325-333.

15 To understand more about this, see P. A. Sánchez-Rodríguez, 'Addressing Dissatisfaction in the World Order: From Revisionism to Russian Resentment' (Tesi di Laurea Magistrale at Università degli Studi Roma Tre, Rome, 2019), at 91-112.

16 H. Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (Alfred A. Knopf, New York, 1948), at 26-46.

17 F. L. Schuman, *International Politics: An Introduction to the Western State System* (McGraw-Hill Book Company, New York and London, 1933), at 509-510.

18 Some examples are S. Chan, 'Can't get no satisfaction? The recognition of revisionist states', 4 *International Relations of the Asia-Pacific* (2004), 207-238, at 216 [doi: 10.1093/irap/4.2.207]; and S. Chan, 'Exploring Puzzles

revolutionary systems.[19] Despite the diverse wording, all these concepts refer to the characteristics commonly attributed in the literature to revisionist states. Nevertheless, it is important to mention that, as it has been underlined throughout this section, the nature of revisionism has found no consensus. Subsequently, it is unclear if it is a label with a definitional nature capable of identifying directly states under it, if it refers to certain policies developed by those states, or if it is the heterogeneous system some states aspire to fulfil against the existing values. In the next section, a preferred formula of 'revisionist states' will be followed for being the most common in the literature.

(C) ANALYSING REVISIONISM IN CLASSICAL REALISM

The most recent literature about revisionism[20] has been inclined to identify the theoretical starting point of their research in Schweller's announcement of the 'return of the revisionist state' in 1994.[21] This popular article by Schweller provided new popularity to revisionism within the International Relations Theory after the abandonment of the term by Neorealism, except for Gilpin. This re-emergence of revisionism in the literature has also been attributed to the debates between Mearsheimer's distinction between Offensive and Defensive Neorealism,[22] or power-transition scholars following, developing and reinterpreting Organski's original formulation of the theory. However, as Rynning & Ringsmose point out:

> "A central concern of world politics today is the likelihood that one or several powerful states will seek to revise the Western order, and we argue that the Classical Realist understanding of international politics must be revitalized to enable us to understand war and peace in our time. Classical Realism has the tools for grasping why some states develop revisionist foreign policies and seek to upset politics among nations."[23]

Therefore, it is considered relevant to go to the root of the problem regarding the ambiguity that has crystallized in the literature, and Classical Realism offers the first theoretical incursion into revisionism of the world order. This research has been

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in Power-Transition Theory: Implications for Sino-American Relations', 13(3) *Security Studies* (2004), 103-141, at 108 [doi: 10.1080/09636410490914077].

19 H. A. Kissinger, *A World Restored: Europe After Napoleon, The Politics of Conservatism in a Revolutionary Age* (The Universal Library, New York, 1969), at 12.

20 To cite some of them: J. W. Davidson, 'The Roots of Revisionism: Fascist Italy, 1922-39', 11(4) *Security Studies* (2002), 125-159, at 125 [doi: 10.1080/714005356]; L. Moure Peñín, *El Programa de Investigación Realista ante los Nuevos Retos Internacionales del Siglo XXI* (Universidad del País Vasco, Bilbao, 2009), at 282-283; B. Pisciotta, 'Russian revisionism in the Putin era: an overview of post-communist military interventions in Georgia, Ukraine, and Syria', 50 *Italian Political Science Review/Rivista Italiana di Scienza Politica* (2020), 87-106, at 88 [doi:10.1017/ipo.2019.18]; and N. Egel & S. Ward, 'Hierarchy, revisionism, and subordinate actors: The TPNW and the subversion of the nuclear order', 28(4) *European Journal of International Relations* (2022), 751-776, at 753 [doi: 10.1177/13540661221112611].

21 R. Schweller, 'Bandwagoning for Profit: Bringing the Revisionist State Back In', 19(1) *International Security* (1994), 72-107, at 72 [doi: 10.2307/2539149].

22 J. J. Mearsheimer, *The Tragedy of Great Power* Politics (W. W. Norton & Company, New York and London, 2001), at 19-29.

23 S. Rynning & J. Ringsmose, 'Why Are Revisionist States Revisionist? Reviving Classical Realism as an Approach to Understanding International Change', 45 *International Politics* (2008), 19-39, at 35 [doi: 10.1057/palgrave.ip.8800217].

conducted to cover the main authors of Classical Realism who wrote about revisionism in their seminal works from 1933 to 1962. The list is far from comprehensive, but it is believed that an analysis of seven scholars from Classical Realism offers a significant vision of the treatment revisionism received when it was first mentioned. Therefore, the selection of the works, and their original dates of publication, to be analysed are: *International Politics* (1933) by Schuman,[24] *International Relations after the Peace Treaties* (1937)[25] and *The Twenty Years' Crisis* (1939)[26] by Carr, *Power Politics* (1941) by Schwarzenberger,[27] *Politics among Nations* (1948) by Morgenthau,[28] *A World Restored* (1957) by Kissinger,[29] *World Politics* (1958) by Organski,[30] and *Peace and War* (1962) by Aron.[31]

The comprehensive study that has been performed[32] regarding Classical Realism evidenced the existence of three phases concerning the treatment of revisionism in the world order: (1) a phase of irruption into the Realist programme with Schuman and Carr, marked by the Treaty of Versailles and from a limited understanding of revisionism; (2) a phase of consolidation in the Realist programme with Schwarzenberger, Morgenthau and Kissinger, who, affected by polarization during World War II and in the early-Cold War context, will begin the stigmatization of revisionism in their analysis of very particular historical realities that have been misinterpreted to apply to all cases; and (3) a phase of deconstruction with Organski and Aron, who, from their critical views, have made it possible that revisionism is much more than the modification of a legal document or an unlimited lust of power, as it is affected by interests, dissatisfaction and passions to which states are no strangers, as the Realist research programme defended from its hard core.

However, one cannot understand the treatment of revisionism in interwar Classical Realism without starting with the Treaty of Versailles. This document marked much of the European politics of the period and its representation of the status quo made it, along with France as its guardian, the target of proposals for change in the 1930s. Consequently, the early Classical Realism of Schuman and Carr, in addition to discussing how natural revisionist aspirations are in an anarchic reality, understands revisionism as an appropriate reaction to a dictated peace serving as the basis for narratives favouring stability and peace. However, this could hardly fit with the situation experienced by Germany or with Italian and Japanese aspirations. For these authors, therefore, the starting point is a revisionism fundamentally centred on the desire to revise the Treaty of Versailles. This policy, despite its systemic implications, does not see destabilization as its end, but rather as the means to achieve its objectives of change.

Subsequently, it has been perceived that Schwarzenberger and Morgenthau, with a vision more centred on power as an accumulation of resources, work on a different

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24 F. L. Schuman, *supra* n. 17.
25 E. H. Carr, *supra* n. 2.
26 E. H. Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (Macmillan Press, London, 1939).
27 G. Schwarzenberger, *supra* n. 8.
28 H. Morgenthau, *supra* n. 16.
29 H. A. Kissinger, *supra* n. 19.
30 A. F. K. Organski, *supra* n. 11.
31 R. Aron, *supra*, n. 13.
32 For a complete analysis of the contribution of these scholars, see P. A. Sánchez-Rodríguez, *supra* n. 13, at 208-353.

kind of revisionism. This is based on the desire for expansion and control of the rest of the units of the system or an ambition for resources to guarantee the survival of the state. In this way, the change occurring during the Second World War is observed, which associated revisionism not with a sense of justice, but with greed. This greed, for Schwarzenberger, is justified by raw power politics, while for Morgenthau is justified by the very nature of politics itself. In other words, both understand international reality as a constant struggle, in which states seeking to expand their resources at the expense of other systemic actors can be considered imperialist and therefore in conflict with those seeking to maintain their positions and the system itself.

In a way, Kissinger, with his fundamentally historical work focused on the praise of individualism in the first half of the 19th century, has served as a link between this imperialist revisionism of Schwarzenberger and Morgenthau and the veneration of the status quo when the United States already held a hegemonic position in the international system. Thus, with his contribution to 'revolutionary' revisionism as the one seeking to establish a new system of values around a different principle of legitimacy, Kissinger was already dealing with heterogeneity, which would be extensively worked by Aron. The problem with his contribution is that, coming from the Napoleonic case, Kissinger perfectly represents the confusion of revisionism regarding concepts, subjects, and objects, for his work is full of contradictions which, when taken this work as a reference, lead to the crystallization of this ambiguity.

Finally, the third phase of Classical Realism is constituted by Organski and Aron, who are considered the initiators of the process of deconstructing revisionism in the realist programme. Organski, formulating his power transition theory, returns to Schuman's and Carr's contributions to understand that, in a reality in full hegemonic competition, the state which, despite ascending finds an order imposed they cannot modify, will develop a dissatisfaction that would turn them into a destabilizing factor within the system. Organski thus lays the foundations for the understanding of a hegemonic and dissatisfied, but also natural and cyclical, revisionism. Moreover, one of Organski's main contributions is based precisely on the understanding of the positions for and against change as mere narratives in which neither of them enjoys a moral monopoly or presents better intentions, as in both cases states will try to gain access or maintain systemic benefits.

This questioning of the stability provided by the maintenance of the status quo will also be partially maintained in Aron's contribution. This scholar, starting from a very broad theoretical framework, will dedicate part of his work to eliminating the relation of revisionism with elements such as offensive strategies or conflict. Thus, Aron recognizes the reciprocal nature of revisionism and maintenance of the status quo, but from a perspective centred on substate actors or the entities constituting an empire, drawing inspiration from the case of Algeria and France. As a result, his work, especially regarding polarity and heterogeneity, demonstrates, using a sociological approach, a significant bias due to the bipolarity and dual heterogeneity of the Cold War context and the French experience, which leads him to attribute revisionist labels sometimes without a clear profile. Consequently, Aron's work is considered to be the most successful contribution when deconstructing the stigmatization of revisionism from the second Classical Realism, but it fails to provide an approach to solve the theoretical problems his work creates.

The real problem of this analysis is that Organski's and Aron's deconstruction efforts to break the stigma associated with revisionism were never continued by Neorealists like Waltz or Gilpin. In fact, it was Buzan in 1983,[33] from the English School of International Relations, who resumed this academically serious approach to revisionism and developed a better understanding of revisionism in the classical English vision of international society. Therefore, Neorealism crystallized the terminological confusion of revisionism by not providing a clear understanding of what it meant and how the categories of status quo states and revisionist powers could be applied from a structural perspective. This failure to continue the work initiated by the third phase of Classical Realism underlines that the beginning of the problem and the solution were already provided in Classical Realism. Therefore, it is required to recognize the merit of Rynning and Ringsmose when remarking on the undermined role of Classical Realism in the literature about revisionism.

(D) CONCLUSION: THE ROLE OF CLASSICAL REVISIONISM IN THE REVISIONISM LITERATURE

This paper has underlined the misconception about revisionism in International Relations Theory, which is evidenced by the lack of a common definition in the literature and the terminological confusion with other terms that are used as equivalents. The Realist research programme, where revisionism started to be recognized as an option for states' foreign policy, has also served as a complex group of theories to explain state behaviour. The evolution within the programme proves the exercise performed to bind the Realist hard core, with limited success when dealing with revisionism. In fact, it has been considered that the distinction between status quo states and revisionist states is an anomaly to the Realist rational consideration of all states pursuing power with very limited restraints of the *animus dominandi*. Nevertheless, due to its role in the conformation of the revisionist label, Classical Realism was revised looking for answers about the term.

The result of this literature review has been the identification of three fundamental patterns in the revisionism literature: (1) a value-free coining of the term based on the particular historical context of Germany's attempt to subvert the Treaty of Versailles, and the system created around it; (2) a stigmatization of revisionism based on drawing parallelisms with the past and the scientifically-ideal advocation for general laws in International Relations with not enough scientific validity, due to the few cases involved; and (3) a deconstruction of the term to explore causes and factors influencing the behaviour of states pursuing this path in international politics. As it has been mentioned above, this process from coining to deconstructing the term offers enormous possibilities in terms of analysis because it allows the discipline to observe that the awareness about the misunderstanding of revisionism is not new, although Classical Realist solutions were abandoned by the later literature, especially by Neorealism.

Before moving forward with this conclusion, it is required to warn the reader about the reductionist effort performed in this section. Classical Realism is far from simple and,

[33] B. Buzan, *People, States, and Fear: The National Security Problem in International Relations* (Wheatsheaf Books, Surrey, 1983), at 175-181.

while the categories created have endured, only a careful reading of its works can really provide an understanding of their nuanced usage, which has not endured. For instance, it is insufficient to confront Carr's revisionist states, primarily motivated by justice, with Morgenthau's imperialist states, which are driven by a pursuit of power. Similarly, while Kissinger's revolutionary states, seeking to redefine principles of legitimacy, may share some patterns with Schwarzenberger's "black sheep" states inspired by universalist ideologies, they diverge from Organski's challengers, who seek dominance within the existing power hierarchy, or Carr's multifaceted revisionist entities.

Having stated that, several conclusions[34] can be drawn about how Classical Realism treated revisionism in its literature and whose virtues and weaknesses, due to the lack of consideration by Neorealism, had remained until the 1980s and 1990s and even perpetuated until today. First, international revisionism is considered strictly associated with state behaviours and policies, which is coherent with the Realist view of states as the supreme actors of the system. Second, revisionist states are identified as actors trying to challenge, alter or subvert the international system, posing a threat to dominant powers, or other conservatives forces within the system, which may lead to the depiction of the revisionist state as the "enemy" of the system, especially from a structural stability perspective.

Third, despite this stigma, Classical Realists diverge on the motivation driving state revisionism. For some, revisionism is rooted in selfish ambitions, such as unlimited lust for power, revanchism, or ideological universalism. In other cases, revisionism is linked to the seeking of justice in the international order, including correcting historical injustices, addressing systemic abuses of power by dominant actors, or just representing the dynamic nature of the international system. Fourth, the political-military focus on Classical Realism significantly shapes its understanding of revisionism, as the political-military substructure is perceived as the arena where great powers compete for hegemony and where revisionism is identified. Although economic and social factors are acknowledged, this approach that subsumed them under the political-military substructure also provokes that the confrontation between status quo and revisionist powers is depicted in political terms, concerning peace agreements, the pursuit of peace and the desire to establish a new world order.

Fifth, connected to the last conclusion, peace agreements are seen in Classical Realism as artificial constructs imposed by victorious powers to secure their interests, and therefore, as a cause of dissatisfaction for the vanquished. Nevertheless, the crystallization of this attitude in hegemonic competition leads to a certain resistance to change, because the revisionist actors, if succeed, will impose a new system favourable to themselves, perpetuating a cycle of structural stability disguised as peace. Sixth, Classical Realism recognizes the multifaceted nature of revisionism, from a natural response to dictated peace to an imperialist and universalist tool to establish new principles of legitimacy, or just means to power-seeking ambitions This diversity suggests that revisionism is a broad, complex phenomenon that includes multiple dimensions and meanings and, as explained above, it cannot be fully comprehended with reductionist approaches.

[34] The complete version of those conclusions can be found in P. A. Sánchez-Rodríguez, *supra* n. 13, at 355-362.

Seventh, due to this complex nature, the Classical Realist literature has tended to identify two types of changes: incremental adjustments to be accommodated within the existing system, and systemic transformations that require the establishment of a new order. This difference between changes in the order and changes of the order represents one of the main innovations offered by Schwarzenberger and Aron to reduce a reductionist vision of revisionism. Eighth, even with this attempt at categorization, revisionism remains a broad and ambiguous concept in Classical Realism due to the attempt to build general laws over a phenomenon based on stereotypical cases that are affected by their historical contexts and the political preferences of the analysts. As a consequence, an uncareful reading of those classical works has been translated into the creation of overly simplistic frameworks, losing the richness of details in their original articulations.

Ninth, Classical Realists agree on the role of revisionist states in the outbreak of hegemonic conflicts. Due to the resistance presented by status quo powers to systemic mechanisms of peaceful change, revisionist states are condemned to the use of violence to achieve their systemic goals, which has made them perceived as initiators of major international wars. Finally, there is a very limited common identification of historical examples of revisionist states in Classical Realism. Nazi Germany is the only accepted archetype of state revisionism, but there is no full consensus on commonly cited cases such as Napoleonic France of the post-1945 Soviet Union. This emphasis underlines the importance of the interwar period and the Treaty of Versailles in the construction of the concept of revisionism, which has since struggled to find similarly paradigmatic cases.

In short, the analysis of the literature clearly demonstrates that the contributions of the Classical Realists are far from being obsolete in the debate on revisionism. Not only the deconstruction of this stigmatization associated with revisionism started by Organski and Aron in Classical Realism, but the ten conclusions we have drawn from Classical Realism's treatment of state revisionism have also marked many of the subsequent analyses of state revisionism. In particular, the perpetuation of indefiniteness and ambiguity, which dominates the contributions in Classical Realism, is probably the vestige that has been most visible in the later literature, despite the influence of Neorealism and the return that Schweller announced regarding the revisionist state. Indeed, revisionism has returned to theoretical approaches, but it has done so by dragging along what could already be read in Classical Realism.

The subsequent confusion in the most recent literature is the result of an uncareful reading of Classical Realism. As decades have passed by, the theoretical misunderstanding around revisionism has become even more widespread, making its comprehension and theoretical use even more difficult. A renowned effort is required in International Relations Theory to take responsibility for past mistakes in the academia and perform a careful examination of the literature to understand what revisionism is and open a new debate over this concept that has a profound impact on the current hegemonic competition between the US and China. Without these clear categories, the International Relations scholarship can hardly avoid the penetration of these ambiguous concepts into the practical realm of international politics. With unpredicted actors like Trump, this effort should be one of the top priorities of International Relations Theory and International Security research groups in the coming years.

SYbIL | Spanish Yearbook of International Law

Book's review

SYbIL | Spanish Yearbook of International Law

ARREDONDO, Ricardo. *Diplomacia. Teoría y Práctica*, (Aranzadi, Pamplona, 2023)

It is inevitable to know, approximately, how many pages the book you have just started reading contains. But it is equally unavoidable to feel a certain anxiety when there are only twenty pages left, and you look at its thinness with surprise. This is exactly what happened to me with this book, which I review here from an academic perspective.

Not only are traditional politics and democracy in crisis in a constantly changing world opening the door to dangerous figures who present themselves as new heroes fighting imaginary enemies but global diplomacy, responsible for maintaining peaceful relations between states and other international actors, is also showing signs of wear and obsolescence. Therefore, it is urgent and necessary to make a case for restoring the sense and importance of diplomacy, which is precisely what we find in the book under review.

Diplomatic and consular law, as well as diplomacy, are complex fields. Mastery of regulatory techniques and legal categories, both public and private, must be coupled with an openness to new developments. As the author notes, diplomats are "conscientes de los cambios que se están produciendo en el ejercicio de la diplomacia. Entendemos, como se ha destacado a lo largo de esta obra, que si bien las funciones esenciales de la labor diplomática y consular siguen siendo las mismas; el modo de desempeñarlas ha cambiado y estamos preparados para ello" (p. 578).

This book is the result of the valuable work of Professor and diplomat Ricardo Arredondo, author of other manuals on diplomacy and various academic texts. His perspective is trustworthy, as it combines theoretical knowledge with practical experience. The work offers a comprehensive view, from the historical foundations of diplomacy and the consular function to their application in current contexts. Notably, it concludes with reflections and proposals on the future of diplomacy; thus, the work's perspective encompasses the past, present, and future. In this way, it demonstrates that time is an agent of change in international relations.

Readers will observe the professor's defense of diplomacy as key to peace, conflict resolution, and the building of strategic alliances, adapting to the times. Without diplomacy, global cooperation would be impossible, leaving the world in constant tension and uncertainty. Moreover, the book adopts a method infused with Latin soul, which should not surprise us, given the author's academic background and sources.

The systematization is exemplary. The work is divided into twelve chapters, through which the author masterfully guides the reader both in depth and form, whether the reader is an expert in law or a general audience. This is achieved through excellent writing and highly pedagogical examples. The chapters can be read either continuously or independently. The text follows a classical structure with a continuous thread, beginning with a historical perspective, traversing the basic notions and development of the topic under analysis, and concluding with a view of diplomacy and the consular function in the present and, above all, with a look toward the future.

Chapter I is dedicated to the historical perspective. The author provides a meticulous description of the stages of diplomacy, particularly in Latin America, from a pre-Columbian, colonial perspective to the independence of the colonies from the colonizing state (mainly Spain). The author's notes on the various customs and cultures of the indigenous peoples in matters of diplomacy are particularly noteworthy, even though many of these customs gradually disappeared, while others persisted: "El uso de coca como instrumento para lograr la paz y como herramienta de protocolo, negociación y abordaje de múltiples problemas y solución de conflictos" (p. 49).

Chapter II presents the basic notions of diplomacy and diplomatic and consular law, and their connection with the general sources of Public International Law. Thus, Ricardo Arredondo conceptually situates the reader in the meaning of these notions, allowing for a more comprehensive understanding of the subject matter covered in the book.

Chapter III discusses general issues of Public International Law, such as the types of international actors and their legal personality in the international legal order. The author analyzes the expansion of state and non-state actors in international relations and their participation in the diplomatic realm, though the state remains the primary subject of International Law.

Chapter IV should be read together with Chapters V, VI, and VII, as they address diplomacy as a whole:

> On the one hand (Chapters IV and V), the author describes various modalities of diplomacy, classified according to the actors involved (bilateral or multilateral), the method employed (conferences, summit meetings, special missions), its character (public or private), the intervening body (state, subnational, or others), or its areas of action (politics, culture, human rights, humanitarian issues, science, environment, among others). Regarding environmental diplomacy, the author covers both environmental and climate issues. However, as far as this issue is concerned, I disagree: I believe that climate diplomacy should be treated as an entity separate from environmental diplomacy, given their different legal norms and summits.
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> In Chapters VI and VII, the professor addresses the concept and types of diplomatic missions, as well as the members of such missions. What distinguishes this manual are the conceptual and contextual nuances the author introduces, such as the notion of "private servant" and the classist and pejorative reasoning that led to the change in this designation.

Chapter VIII is masterfully dedicated to the consular function. Its structure is classic among academic texts. The author particularly highlights consular protection and assistance, a key responsibility of consular officials. This topic has provoked significant disputes between states and generated numerous judicial rulings in both national and international courts. Historically, states' efforts to protect their citizens abroad have caused conflicts. Sometimes, this resulted in unjustified privileges, as occurred with the capitulation regimes during colonial and semi-colonial times. This chapter, like the entire work, is dense in content. It serves as a concise manual on consular law and practice, notable for its extensive and updated case studies.

I am particularly fond of Chapter IX because the author provides a critical view of the current perspectives on multilateralism and its future, especially regarding

global issues that need to be addressed collectively, such as climate change, migration, drug trafficking, etc. Additionally, he confronts the contrasting narratives on the crisis of multilateral diplomacy: those who advocate for "una restructuración profunda del sistema multilateral" and those who aspire to "la reactivación de las instituciones multilaterales existentes" (p. 397). Overall, the content of this chapter could be divided into Chapters IV and XII.

A substantial part of Diplomatic and Consular Law, specifically concerning privileges and immunities, is covered in Chapter X. In this chapter, the author analyzes the rules governing the immunity of the state and its central organs. Arredondo distinguishes between functional and personal immunities, paying special attention to the immunity of Heads of State and Foreign Ministers. This chapter is dense with analysis of the jurisprudence of the International Court of Justice, other international tribunals, and numerous domestic courts. It also stands out for its abundant incorporation of doctrine, which constitutes a significant contribution to the treatment of privileges and immunities. The analysis and systematization of these privileges and immunities are remarkable.

My inclination towards asylum is likely to influence my preference for Chapter XI. The chapter offers a comparative perspective on the legal treatment of asylum in Latin America compared to other regions of the world, particularly the United States and the European Union. Through various examples, such as the case of Julian Assange, the author highlights the differences in the conception of asylum. In Latin America, asylum is considered a right, whereas in the United States and the European Union, it is granted temporarily, without a clear *opinio iuris* on the matter due to the diversity of state approaches. The author proposes the need to address this issue through an international instrument that codifies it, based on the work done in 1975.

The author concludes the book with Chapter XII, where he emphasizes the importance of diplomacy in achieving peace and communication in international relations. He also underscores the need for adherence to an appropriate legal framework. Additionally, he reflects on classical diplomacy and its adaptation to current times: technology, the post-pandemic context, the inclusion of non-state actors, and the importance of in-person diplomacy (*zoon politikon*). According to the author, the latter is crucial for creating synergies that technological networks cannot achieve. Furthermore, he defends the figure of the diplomat, noting that, far from being elitist, they are highly educated individuals who represent their country abroad.

The author provides an extensive and well-structured bibliography, both historical and contemporary, in English and Spanish, confirming that not everything is published in English and that it is indeed very relevant. Additionally, the author demonstrates excellent command of academic, jurisprudential, legal, cultural, historical, and other bibliographic sources.

In summary, this work will be of theoretical and practical use and a reference of undeniable interest for anyone wishing to delve into diplomacy. There is nothing left but to wish the author continued success, deepening and updating this line of work over time.

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SYbIL | Spanish Yearbook of International Law

BENEYTO, José María; JIMÉNEZ PIERNAS, Carlos (dirs.) y GALIMBERTI DÍAZ-FAES, Sandra (coord.). *Derecho de los Tratados*, (Tirant lo blanch, Valencia, 2024)

In a previous volume of this *Yearbook*, I had the opportunity to review the first volume of a saga on public international law under the direction of professors Beneyto and Jiménez Piernas[1]. Now, I have the pleasure to have in my hands the second volume of this collection devoted to the law of treaties. In this case, along with both directors, we are informed that Sandra Galimberti acts as coordinator, a somehow necessary editorial figure in this kind of collections, which accumulates numerous independent but somehow linked studies.

This volume 2 of the Collection — a *collection* of studies in itself —, begins with a prologue in which the directors explain the rationale and purpose of the so-called "Treaty of Public International Law", a feature absents from the first volume. However, plausibly it may be, they simply state that this is an "open", "inclusive", and "non-sectarian" set of contributions on the law of treaties. This arguably explains why the contributions are arranged in a canonical yet straightforward manner, focusing not on a commentary on the 1969 Vienna Convention on the Law of Treaties but on key questions concerning the current law of treaties in international law. The editors further explain that the rationale is for each of them to have its own autonomy and to be able to be read as an independent work. Therefore, as an editorial option, should be accepted as it is, with its pros and cons.

If in the first volume — on the concept and *sources* of international law — I publicly wondered how treaties were not included, the publication of this second volume explains that absence. In a similar vein, this volume also has a gap — the relationship between treaties and domestic orders —; but, on this occasion, the editors do advance that it will be the subject of study in the next volume, whose imminent appearance they announce.

In this second volume, the law of treaties is comprehensive and aptly covered by the different contributions[2]. It is done in a logically ordered manner, providing systematic clarity between chapters. That is, one finds what one expects to find in a scientific review of our main normative source in current international law. It is true that it would be enough to follow to a certain extent the order of the articles of the Vienna Convention of 1969, but this work stands out, not for being a conventional commentary, as we have already indicated, but rather an analysis of most essential elements regulated in that coding Convention.

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1 Mariano J. Aznar: "José María Beneyto y Carlos Jiménez Piernas (dirs.), *Concepto y fuentes del Derecho internacional* (Valencia, Tirant, 2022)", *SYbIL* 26 (2022), pp. 332-338.

2 Authors have all of them the double-profile of academicians and practitioners on international law.

For this, with the authorship of Spanish authors with only two Hispano-American colleagues: ICJ Judge Gomez Robledo and OAS Legal Advisor Toro Utillano[3], this volume offers some "transversal" chapters, with others more focused on particular questions of the law of treaties. Hence, among the first, we may find the chapters on the process of codification of the law of treaties, by Esperanza Orihuela; on the concept of treaty, written by Francisco Pascual; on the interaction between treaty and custom, written by Paz Andrés (and perhaps better nested in the first volume than in this second volume); or the last one in this volume, also by Francisco Pascual, on treaties and international organizations. Along with these contributions, all of them proposing and responding the main issues of these three seminal questions (what a treaty is, and how a treaty becomes "entangled" with other sources or interacts with other subjects), the rest of the chapters address main problems and solutions on current law of treaties: the conclusion and negotiation of treaties, as well as the means of expressing consent, by Araceli Mangas; the entry into force and effects of treaties, by Carmen Martínez; the provisional application of treaties, by Juan Manuel Gómez-Robledo; reservations and declarations to treaties, by Antonio Pastor; the interpretation of treaties, by Soledad Torrecuadrada; the amendment and modification of treaties, again by Antonio Pastor; and the "rescission" of treaties, by Luis Humberto Toro. In this last case, the title is misleading, perhaps because of the terminology used: first, when speaking of "rescission", its author refers both to the nullity and to the termination and suspension of treaties, as well as to the procedures for settling disputes arising from what Antonio Remiro catalogued as "pathologies" of treaties. Second, the title of this chapter seems to limit the analysis to the inter-American system, but this is not entirely the case, since its author offers references to the general system contained in Part V of the Vienna Convention of 1969 as well.

Something similar happens regarding the final chapter of the volume that titled "International organizations and treaty law: the tension between particularism and cross-fertilization". Although the title is appealing, it does not effectively summarize the chapter's intriguing analysis, that has more to do as the author himself explains with the presence of the principle of good faith and hierarchy in the application of international law in the various regional areas by regional courts and tribunals and the relationship between them. I sincerely but humbly believe that, first, the title does not do justice to the complex analysis that follows it; and, second, that perhaps its without doubt necessary presence in this collection would have been in another place.

The rest of chapters (and their titles) do perfectly perform their respective announced purpose. In conjunction, but perhaps not in context, they offer a complete explanation of what they reveal, including a critical analysis of main questions. However, in some chapters a more specific discussion is made on the practice in Spain or the European Union for example the chapters on the conclusion of treaties and on their amendment and modification or, as already noted, on the inter-American system (the chapter on the "rescission" of treaties). This is not a *fault* of the authors, but, interesting at they are,

[3] The editors also advance to us in their prologue to this volume that next one will include more Ibero-American authors in its list of contributors.

editorial suggestions may help to find a homogenisation of future contributions in next volumes.

But besides these perhaps minor questions, those who may use this volume will find a scientific tool of great use to those who work with international treaty law, both on the theoretical and practical level. If Esperanza Orihuela tells us about the process of the codification of customary rules of treaties onto conventional rules, Paz Andrés later shows us that endless, back-and-forth relationship "entangled", in her words between treaty and custom, to which Soledad Torrecuadrada also refers when analysing the rules of interpretation of treaties: those that the ICJ never tires of repeating are reflected in articles 31 to 33 of the 1969 Convention. To this, Carmen Capdevila adds her analysis of the sometimes-intimate relationship between treaties, and their respective hierarchical position among them. As she mentions echoing her *maestro* , treaties do not operate in the vacuum, something quite recently reminded by the ICJ when talking about "living instruments" and their linked "external rules".[4]

This volume also aligns to the "temporal" line of treaties, as reflected in the Vienna Convention: born, application and death of treaties, with a respective chapter on each phase as indicated above. But, perhaps due to my personal current interest when writing this review, within this idea of "temporal" approach to the life of treaties, I miss a point which I find of particular relevance in current international law: that of subsequent practice. It goes beyond the individual questions of treaty interpretation, of relationship between treaties, or even of interaction between treaty and custom, all of them well addressed by different authors in this volume. It touches questions of treaty application in general in cases so relevant like the prohibition of the use of force and the UN Charter, the changes into the law of the sea and UNCLOS, some basics on human rights and international humanitarian law and the old vintage codes for cases of war, or some aspects of international environmental law and the expansive adoption of different subsequent agreements sometimes tangentially on the same subject matter. A dedicated chapter on the topic of treaties and subsequent practice would have been highly valuable, enriching both the theoretical framework of treaty law and the practical application of conventional rules in an ever-changing world.

Another comment (again: also influenced by my personal interest) could be around the logical and only mention of international treaties, leaving without analysis the phenomenon of Memorandum of Understandings (MoU). Their absence in this volume is perfectly assumed since it is dedicated to treaties, and exclusively to treaties. But it is true that, given today's rich practice on MoU, that their presence in State and sub-State practice is becoming really relevant, sometimes as a prelude to a future treaty, and that their legal regime is so interesting in comparison with that of treaties, I personally would have greatly appreciated a chapter, even a brief one, on non-normative agreements in current international law.

Finally, as in previous volume in this collection, each chapter normally include not only a complete and up-to-date array of references to primary and secondary sources

4 *Request for an advisory opinion submitted by the Commission of Small Island States on climate change and international law, ITLOS Reports 2024*, para. 130.

but a final list of main classic and current general publications on the law of treaties, which includes the rich contribution of Hispano-American doctrine to this source of international law.

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SYbIL | Spanish Yearbook of International Law

BLÁZQUEZ RODRÍGUEZ, Irene. *La persona física y su estatuto. Nuevas perspectivas en la interacción entre el Derecho Internacional Privado y la libre movilidad intra-UE*, (Dykinson, Madrid, 2024)

Natural person in Private International Law (PIL) is under continuous study. The cosmopolitan character of individuals, together with the flexibility of border crossing, keeps this subject in incessant updating (which, in recent times, has addressed issues such as, *inter alia*, the connecting factor to determine the personal Law, the growing role of autonomy of will, or the answers given in terms of personal status before the normalisation of plurinationality or multiculturalism). Currently, one of the most notorious facts and which fully affects people and their status is the process of European integration; we are presently witnessing an authentic *ad European* dimension of natural person, who aims to have their status protected under uniqueness and continuity within cross-border relationships.

The present monography focuses appropriately on natural person from a comprehensive point of view who, in spite of enjoying physical mobility, aspires to achieve certain personal and/or family identity recognised in the current EU area of Freedom, Security, and Justice. The ideal place for this analysis is the confluence between a fundamental right of a European citizen, such as the free movement of people, and PIL as a branch of legal systems dealing with private cross-border relationships. This interaction impacts on individuals and necessarily resizes their personal status.

The present work is rightfully structured with four chapters that respond to a way of understanding the European construction itself called "mecano" accurately by Prof. Blázquez Rodríguez in which an unprecedented architecture can be successfully achieved with the incorporation of new pieces. With a European legal system that expands at different levels, on the one hand, new rights and prerogatives for individuals are created; and, on the other hand, new areas previously outside the competences of the EU are addressed. Therefore, the first three chapters brilliantly deepen into those elements that converge towards a new reality of natural persons and their status (namely, the free mobility understood *in extenso*, the mutual permeability between EU law and PIL and the fundamental status' new dimension of the EU citizen). Each one of these issues contribute to a greater prominence of the individual, who acquires an authentic European dimension and takes the place for a continuity of its "personal status" beyond the diversity of state regulations.

The first chapter deals with the right to free movement of people, which is the necessary foundation of legal status of individuals at European level. In particular, from an *ius privatum* perspective the essence and the current scope of mobility in the EU area of Freedom, Security and Justice are discussed. Certainly, a consolidated case law of the CJEU can be appreciated; it guarantees not only the movement of citizens across different member state borders, but also the recognition of private situations that go beyond state sovereignty in the regulation of international relationships. Prof. Blázquez Rodríguez acutely advocates for the recognition of freedom of movement even

beyond national connections, turning to a properly European status. By overcoming national bonds, the recognition of rights is achieved (that the author designates as "third generation" rights and which are focused on natural person and its family scope).

The second chapter analyses the interconnection and mutual conditioning between two disciplines PIL and EU Law , which must be understood within the process of European integration. Free movement of people is undoubtedly the institution that, through various ways, has already influenced key issues of PIL modulating its internal origin and helping the elaborate an entire institutional PIL system. In the same way, from a methodological point of view EU Law has also been permeable to certain PIL techniques, a key factor for an integrated European area (hence the principle of recognition). Two innovative contributions of Prof. Blázquez Rodríguez in this chapter should be specially noted (among others). Firstly, the plausible starting point chosen for the analysis: indeed, essential elements such as the concept of "mobility", "border crossing" and "border" are studied from the perspective of EU Law and PIL. Secondly, an exhaustive analysis of private Law' notion of "obstacle" to free mobility is wisely conducted through a case law travel built from the first judicial pronouncements on legal persons covering matters related to natural person: amongst those obstacles we can identify the lack of recognition of personal and legal identity or unstable situations regarding family relationships; we must remember that we are dealing with basic rights of individuals, where PIL is being shaped at the European level as a tool for the universalisation of fundamental rights.

The third chapter examines profoundly the citizenship of the EU and its complex articulation regarding state nationality. On the one hand, both the concept and the scope of the status of European citizenship are faced to understand its progress in private Law; special attention is given to key issues such as its consideration as a title of belonging, the quality of person or its supranational essence. On the other hand, under the consideration of EU citizenship as a fundamental status of EU nationals, classic axioms concerning the nationality or the determination of personal Law in cases of plurinationality or stable link with more than one state are questioned. In this context, a thorough debate is been opened to discuss the nature and the character of "nationality" bond in an integrated Europe. Prof. Blázquez Rodríguez argues precisely for flexibility on the exclusivity of the bond, *i.e.* towards a transformation in its contemplation as a nexus of belonging; in short, she advocates for a "functionalist" reading of nationality, a condition that must be compatible with the fact of being a citizen of the EU. Therefore, in cases under the protection of the CJEU, classic criteria of PIL such as the pre-eminence of *lex fori* are abandoned. Additionally, member states must rethink the compatibility of certain nationality rules with the European *status civitatis*, in particular concerning the obligation to renounce to nationality through residence.

Finally, the fourth and last chapter focuses on personal status and its cross-border continuity in the European Judicial Area. In her analysis, the author proposes a valuable definition of "personal status" as well as of its recognition adapting the classic notion to the specific framework of the European integration process. In the absence of specific normative protection, the legal foundation of this right is based on CJEU case law of notorious relevance (although incipient), whose precedent is ECHR case law.

In this sense, Prof. Blázquez Rodríguez transcends the analyses conducted to date in order to provide a real progress in the field. Firstly, she carries out a detailed exegesis of European case law addressing fundamental issues of personal status such as the name of natural person, the cross-border recognition of civil status or the gender identity from the recent case C-4/23 *Mirin* (CJEU 4th October 2024). Then and here her analysis is in particular highly innovative the author supports the existence in this case law of a fundamental right of the EU citizen to the continuity of its personal status, which can claim for such right within the framework of mobility (or even in view of the stable bond with different EU countries). In the remarkable words of Prof. Blázquez Rodríguez, we are witnessing a key moment for natural person: in the European Judicial Area there is a unique context with the necessary elements to transform this platform on which the individual is based that, transcending national rules, acquires a European dimension that welcomes key elements of its personal and family identity. In short, we are watching the elaboration of a renewed personal status at EU level or, if we prefer, of a new dimension of the EU citizenship circulating with its status.

In conclusion, this scientific work represents a very important development in the addressed subject due to the rigorous methodology followed, the precise delimitation of the object of study, the brilliant writing, the richness of the sources used and the motivating proposals made. Therefore, from now on, this book will be an indispensable reference for the study of this subject.

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CAMPINS ERITJA, Mar and FERNÁNDEZ-PONS, Xavier (eds.). *Deploying the European Green Deal. Protecting the Environment Beyond the EU Borders* (Routledge, London/New York, 2024)

The European Green Deal is the EU's growth strategy, consisting of a package of policy and legislative initiatives aimed at setting the EU on the path towards a green transition, with the ultimate goal of achieving climate neutrality by 2050. One of the key elements is its external dimension, as it should guide its foreign policy, not only through climate diplomacy and development cooperation, but also through normative instruments that defend its values and objectives, with the aim of promoting environmental protection on a global scale. Many of the initiatives that have been adopted will therefore have an external impact or effect, with an extraterritorial scope, which require an in-depth analysis from a legal perspective, as is achieved in this excellent book made up of a series of interesting contributions by relevant international experts. The research work is carried out within the framework of the Jean Monnet Chair in EU Environmental Law and has been coordinated by two of the national scholars in international environmental law and international economic law, which has provided a magnificent academic tandem for the tutelage of this outstanding research team.

The work is divided into fourteen chapters. It begins with introductory remarks by the book's coordinators, who examine the objectives of the *EGD* and the EU's competences for its implementation, as well as providing some terminological clarifications regarding the scope of its external dimension and the notion of extraterritoriality. This is followed by a set of chapters that address some sectoral initiatives that are particularly relevant for the development of its international dimension. Professor Xavier Fernández-Pons writes the first of these, entitled *Conditioning access to the European Union market on carbon footprint: the Carbon Border Adjustment Mechanism*, highlighting, after examining the compatibility of this mechanism with the rules of the WTO and the international climate change regime, the problems and difficulties in promoting sustainability on a global scale through unilateral trade measures. This controversy is also present in the field of maritime transport, as highlighted by Marta Abegón Novella in the work *EU regulatory action on maritime emissions: Unilaterally protecting the environment beyond IMO's global strategy*, which examines the initiatives within this international organisation, their legality under the Law of the Sea and the case law of the Court of Justice of the European Union.

Biodiversity loss is the subject of the following two contributions. Susana Borràs-Pentinat, with the study *The 2030 Biodiversity Strategy: The EU's international commitment and responsibility to reverse biodiversity loss*, analyses the actions adopted by the EU at European and international level, assessing whether this is a model for the conservation and sustainable use of resources that can be extrapolated beyond its borders, while Márcia Rodrigues Bertoldi, with the work *Understanding the deforestation initiative for European trade in products from the Brazilian Amazon*, analyses the extraterritorial effects of this measure, with special reference to its impact on this South American country.

Three papers complete this first section. The co-editor of the book presents an investigation entitled *Zero Chemical Pollution: A real new impetus for change?* In the author's opinion, this is a notable and commendable initiative, although, due to its generality and lack of definition, it runs the risk of ending up being a rhetorical exercise. Her colleague from the University of Barcelona, Xavier Pons Rafols, with the study *Farm to Fork: Strengths and Weaknesses of a European Strategy for a Global Transition towards Fair, Healthy and Sustainable Food Systems*, assesses, among other issues, the potential international impact of this instrument to promote a global transition towards safer and more sustainable food systems; while Gastón Medici-Colombo examines the tensions between investment protection forecasts and new climate objectives in the chapter *The European Green Deal and the Energy Charter Treaty: Chronicle of a Breakup Foretold?*.

The following five chapters bring together a set of contributions on cross-cutting aspects of the Green Deal that have an external impact. This part of the book begins with Teresa Fajardo del Castillo's research, *From Climate diplomacy to Green Deal diplomacy*, which explains the changes in this fundamental tool of external action, with which it seeks to reaffirm itself as a global normative power, as well as examining the new mechanisms within the framework of free trade and association agreements. It continues with the work of Ezgi Uysal and Willem A. Janssen, *The European Green Deal and Public Procurement Law: Its Extraterritorial Reach beyond the EU's Borders*, which explains the changes in public procurement following the publication of the Green Deal and its effects on external operators. Gonzalo Larrea, in the paper *The European Green Deal Investment Plan. The External Impact of Mobilizing Climate Finance with an Experimentalist Design*, presents its financial dimension. It is an experimental model, with the participation of the actors involved in the implementation of the EGD, which could be exported to other international environmental regimes. The study by Alfonso González Bondia, *Business, Human Rights and the Environment: From Corporate Social Responsibility to Mandatory Human Rights and Environmental Due Diligence*, deals mainly with the legal regulation that introduces due diligence obligations and their extraterritorial effects. And it is completed with the chapter *Implementation and enforcement of environmental legislation as a cornerstone of the European Green Deal*, by Alexandre Peñalver i Cabré, which analyses the most effective mechanisms for promoting compliance with environmental regulations, with special attention to the system of information provision.

In my opinion, this is a very complete research work, which aims, as the co-editors indicate in the final chapter written together with Teresa Fajardo, to reflect on the EU's capacity to promote the essence of the EGD beyond the EU's borders. My sincere congratulations on the final result, which is yet another example of the presence of strong research teams in this field at our university. I therefore consider this to be a reference work of essential reading for all those who study international law, EU law and international relations in environmental matters.

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CAMPUZANO DÍAZ, Beatriz, DIAGO DIAGO, Pilar, y RODRÍGUEZ VÁZQUEZ, Mª Ángeles, *De los retos a las oportunidades en el Derecho de familia y sucesiones internacional,* (Tirant lo Blanch, Valencia 2023)

The book *"From Challenges to Opportunities in International Family and Succession Law"*, directed by Professors Beatriz Campuzano Díaz, Pilar Diago Diago, and Mª Ángeles Rodríguez Vázquez, brings together in four parts, the contributions of nineteen authors presented at the VI AEPDIRI Seminar on current issues in Private International Law that took place in Seville in 2022.

The first part entitled *"The new solutions of the Brussels IIb Regulation (EU Regulation 2019/1111) and its application in Spain"*, collects works on two topics: divorce and parental responsibility. Non-judicial cross-border divorce, and in particular notarial divorce, is dealt with in two complementary papers by Professors Quinzá Redondo (*Recognition of non-judicial divorces in the European Union*), and Sánchez Jiménez, (*The Spanish notarial decision as a 'decision' in the context of the Brussels II ter Regulation*). One of the manifestations of the growing role of party autonomy in European private international family law is the progressive flexibility towards the reciprocal recognition of foreign non-judicial divorces. From the Spanish perspective, Professor Sánchez justifies the nature as "decision" of the Spanish notarial divorce and rightly criticizes the Spanish Communication to the European Commission in which it does not include notaries among the authorities that can issue the corresponding certificate.

Secondly, there are several contributions referring to parental responsibility and filiation. Two of them refer to issues raised by the Brussels II ter Regulation: the one by Professor González Marimón (*The maintenance of the pre-emption mechanism in the Brussels IIb Regulation: a missed opportunity*), in which she analyzes the novelties in the regulation of this mechanism applicable to cases of international child abduction, and the one by Professor Moreno Sánchez Moraleda (*Does Article 56(6) of EU Regulation 2019/1111 ensure the best interests of the child?*), in which she questions the application of this provision, which makes it possible to refuse the return, considering that it may contravene both the Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union. The third paper, signed by Professor Parra Rodríguez, (*Are minors the driving force behind the standardization of European law? A jurisprudential analysis of family law in European courts and its impact on the proposal for a European Certificate of Parentage*), analyzes the discussed proposal for a EU Regulation on parenthood, assessing whether it really favors the free circulation of public documents in this matter. She concludes that the proposed parenthood certificate proposal does not seem likely to achieve its intended objective because of the difficulty of some European States to accept family relationships contrary to their constitutional principles. Perhaps this work, for thematic reasons, and independently of how the seminar was structured, should have been included in the third part of the book referred to civil status and mutual recognition in which other contributions on this subject appear.

The second part of the book deals with the *"Economic regime of marriage and partnership, inheritance and organization of family assets"* and the works are grouped around three thematic axes.

Three chapters deal specifically with the economic regime of marriage. In the first one, Professor Jiménez Blanco, with the title *Equality between spouses and cross-border matrimonial property regimes*, makes a suggestive reading of EU Regulation 2016/1103 on matrimonial property regimes, from the perspective of the right to equality and non-discrimination between spouses. The work analyzes neutrality and equality in the connections in matrimonial property agreements and in absence of them and points out tools provided to guarantee them such as public order, police rules or the forum necessitatis. However, it warns that the Regulation cannot guarantee such equality with respect to all types of marriages, as it excludes from its scope of application "the existence, validity and recognition of marriage", which leaves its effects, particularly with respect to same sex marriages or polygamous marriages, in the hands of national laws.

Professor Checa Martínez (*Legal Institutions of International Estate Planning: The cross-border protection of family assets*), analyzes in his interesting work the so-called international estate planning as a category related to the protection, planning and transmission of family assets, referring to the matrimonial property regime but also to prenuptial agreements, wills or trusts. Finally, Professor Figueroa Torres (*Law applicable to marital contracts granted abroad under the new Puerto Rican private international law*) analyzes the Puerto Rican private international law in these matters included in the new Civil Code of 2020.

Two papers refer, secondly, to cross-border successions. Professor Merchán Murillo (*Digital succession and the Succession Regulation. Special reference to the European Certificate of Succession: Is its electronic processing possible?)* through multiple practical examples that greatly facilitate the understanding and scope of what he is dealing with, distinguishes in his work the digital identity of digital assets. The latter have a patrimonial content that can be transmitted mortis causa and are always cross-border in nature. He therefore concludes that digital succession property is included in the scope of application of EU Regulation 650/2012 and goes on to consider the electronic processing of the European Certificate of Succession in these cases.

In the chapter entitled *On the competence of the French notary to issue the "acte de notorieté" in cross-border successions in the EU*, Professor Melgarejo Cordón wonders why only the Brussels II ter Regulation defines as court any authority in any Member State with competence in matters falling within the scope of application of this Regulation', thus including notaries. This definition does not appear in the other regulations, particularly in EU Regulation 650/2012, which has opened the doctrinal debate on such consideration in matters of succession. And he exemplifies this question in the determination by the French notary of the last habitual residence of the deceased when issuing the acte de notoriété, a determination that, in his opinion, is of a jurisdictional nature and therefore binds him to the rules of international jurisdiction of Regulation 650/2012 and this *acte* should be considered as a decision and not as a public document.

This second part ends with a paper by Professor Chéliz Inglés entitled *Registered partnerships of convenience': combating fraud and proposals for improvement*, in which she

refers to the ex post sanctions of this fraud, but insists on the importance of a priori preventive control, which in her opinion would need in Spain a national regulation of registered partnerships.

The third part of the book brings together various works under the title *Civil status: "The new solutions of the Civil Register Bill and the impact of the principle of mutual recognition in the European Union"*. Three of the contributions refer to the proposal for a Regulation on parenthood, and the case law of the CJEU on the subject. Professor González Beilfuss writes on *Filiation in private international law: at the crossroads between the protection of human rights and mutual recognition*, a subject that she knows deeply as a member of the group of experts and working group created within the Hague Conference on Private International Law, which has been working on this subject since 2015. In her work, the author points out the pressing importance of having an international regulation of natural parentage and cannot leave the ECtHR and the CJEU alone in their solutions on specific cases. She analyses the work of the Hague Conference (centered on the establishment of filiation, with an eye on surrogacy), and of the European Union (with the proposed regulation centered on the spatial continuity of parentage already established and with an eye on homomarental filiation), and concludes that both lack a more general approach, with particular attention to the best interests of the child.

Professor Sales Pallarés (*The recognition of cross-border legal filiation is necessary for the respect of family life*), also analyses the proposals of both organizations, which, as she points out, initially led to an unfounded optimism, and insists on the importance of having an international regulation on the matter, based on respect for family life. Finally, in relation to this same issue, Professor Pérez Martín asks: *What if the CJEU had recognized same-sex parenthood? Hypotheses, challenges, problems and opportunities*, since the CJEU has limited itself in the two judgments handed down on the matter (Pancharevo and Rzeczhnik cases) to recognizing the exercise of the freedom of movement of daughters and mothers, but without recognizing the rest of the effects and rights of this family relationship.

There are two works referring to strictly registry matters: that of the lawyer of the administration of justice Ruiz de la Hermosa Gutiérrez on *Law 20/2011: the Register of persons*, in which he summarizes the regulation of this Register, and that of Professor Ortiz Vidal on Notaries, *oaths and promises of nationality: The impact of the free circulation of public documents in the European Union*, in which she positively values the fact that the oath and promise of nationality can now be made before a notary, and resolves some procedural questions such as the territorial jurisdiction of the notary, considering that it should be the notary of the applicant's place of domicile in Spain.

Finally, the book includes a miscellaneous section entitled *'The opportunities offered by international family and inheritance law in a transnational society'*, which brings together three works. Professor Adam Muñoz writes on *Situations of domestic violence in cases of international child abduction in the framework of the European Union*, and refers critically to the Brussels II ter EU Regulation which, in her opinion, should have contemplated domestic violence as a specific cause for refusing to return the child to the Member State of habitual residence from which he or she has been abducted, given that the child is also usually a direct or indirect victim of such violence.

Professor Fontanelles Morell analyses the ruling of the CJEU of 9 September 2021 in his work entitled *The inclusion of donations mortis causa in Regulation (EU) nº. 650/2012*. The ruling includes the irrevocable donation mortis causa with effects upon the death of the testator within the material scope of application of the Regulation, assimilating it to a succession agreement. However, this classification may be problematic, in the author's opinion, in other cases such as gifts upon death revocable and with patrimonial effects during the life of the donor , which do not conform to the pattern of the inheritance contract. For this reason, he suggests classifying the donation mortis causa in a functional manner and therefore as an autonomous category.

Finally, Professor Rodríguez Pineau, in her suggestive work entitled *The interpretation of private international family law: Brussels and The Hague meet in Luxembourg*, analyses the role of the CJEU in the interpretation, with common criteria and autonomous qualification, of European regulations and also of the Hague Conventions on family law, insofar as the latter form part of the European system of private international law, not only in intra-EU cases, but also in some cases related to non-Member States. The author considers that the role of the CJEU can be fundamental in reducing the complexity of the system and in constructing coherent solutions that facilitate convergence between jurisdictions.

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CARRIZO AGUADO, David, *La empresa familiar y su protocolo en el tráfico jurídico externo* (Aranzadi La Ley, Madrid 2024)

Family businesses are an important part of the business in Spain and in other European countries. The figures show this: the Institute for Family Businesses indicates that 89% of companies in Spain are family businesses, reaching 17 million companies run by families in Europe[1]. This translates into jobs and wealth, making family businesses one of the main drivers of employment in the European Union.

In addition to being synonymous with employment and productivity, family businesses are also, at times, synonymous with conflict and lack of understanding. One of the reasons is that the same people have different roles, both business and family (grandfather, father, father-in-law, advisor, administrator...) generating problems in the governance of the company. This means that in many cases the business does not survive in the second generation. What's more, according to certain studies, more than 90% of family businesses do not make it to the third generation. However, it is also possible to reverse this trend, family and business can coexist and become increasingly stronger, but for this to happen, anticipation plays a crucial role.

The book that we have the opportunity to write the recension to reflects this perfectly. Family and business require anticipation and foresight from a legal perspective. When different and diverse events occur in a business family, such as marriages, births, divorces or deaths, the grounds of the company can be shaken to the point of its disappearance. In this way, the agreements between family members who are also businessmen play a crucial role, especially when there is a foreign element in these relationships and events that arise. One of the most important that Dr. Carrizo studies is the family protocol. This is a legal instrument that allows the family business to be in a certain way "shielded" against certain personal events of its members.

The book "La empresa familiar y su protocolo en el tráfico jurídico externo" is a rigorous, suggestive and above all very necessary work. This is because there are few studies like this book that rigorously analyze the family business and its external legal traffic from a private international perspective. One of the reasons for the scarce bibliography on the subject is its complexity. For this reason, one of the first statements we can highlight about this publication is the courage of its author.

The author has divided the book into six chapters. The first two provide an introduction to the topic, answering questions that are essential to understanding the legal problems that are intended to be solved in later chapters. Thus, these initial chapters deal with aspects such as the importance of the family business in economic transactions and its challenges, why the family business has not been characterized by

[1] Vid www.iefamiliar.com/cifras/1 (retrieved December 1 2024).

internationalization until more recently or the essential characteristics that accompany this type of corporation.

Chapter three is devoted to the study of the family protocol. In this part of the work, the author offers an exhaustive development of a legal business with little legal regulation at both national and European level but which is of great importance for the good governance of the family business. Due to its *interpartes* nature, the provisions of the family protocol cannot be opposed to the company, however, despite its parasocial nature, indirectly the existence of a family protocol can affect greatly the company in times of change and uncertainty in the family, such as a death or a divorce. Thus, as Dr. Carrizo points out in this third chapter, in order for the family protocol to be effective for the purposes for which it is carried out, it is necessary to find the legal way for those provisions contained in the family protocol to transcend the mere agreement and can have effects on the company. For this, the business family can rely on other legal instruments such as the social statutes, the marriage settlements or the will.

Thus, chapters four, five and six are dedicated to three thematic blocks that are different from each other but that have a direct impact on a family company, these are: issues related to the family economic regime, shareholder agreements and the *mortis causa* transmission of the family business. These three chapters are the core of the work and are of great interest to understand the problems and, above all, the solutions that the author seeks to convey with it.

Chapter four is largely concerned with addressing aspects relating to the autonomy of the spouses' will in the light of *Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* (OJ No. 183 of 8 July 2016). The author is a great expert on European family law and on this Regulation in particular, as demonstrated by his previous works. In particular, the author focuses his study on one type of agreement between spouses: marital contracts, not addressing the fit in the family business of other agreements, which are increasingly common, such as those concluded before marriage or after the break-up has occurred.

In relation to the chapter five on shareholders' agreements, the author addresses a legally complex issue but resolves the thorny issues that arise in a simple and direct way. Doctor Carrizo's support in the most recent jurisprudence and in different authors makes this chapter a must-read for any jurist who needs to know how a family protocol can be a binding agreement for a company despite its private nature. The author is not afraid of Spanish material law, analyzing different doctrinal theses on the effectiveness of shareholders' agreements vis-à-vis the company. This analysis of material law is more than necessary because depending on the consideration of the nature of the family protocol, it will have a full impact on private international law. The author advocates an intermediate thesis, thus starting from a material position in which the family protocol is a contract but which could also benefit from the effectiveness of corporate law and affect the company and its partners as provided therein. This position leads the author to study in a very accurate way forums of international judicial competence and connecting factors in corporate law but also contractual matters.

Finally, in relation to the chapter six, another European Regulation on family matters takes centre stage: *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession* (OJ No. 201, of 27 July 2012). This chapter highlights aspects that are of key importance in the continuity of the company. These may range from the temporary management of the company to the determination of its ownership due to succession mortis causa. Issues that should be foreseen in advance and aligned with the business objectives but which are not always done, or if they are agreed in a family protocol, they still pose problems in practice because said protocol must be drawn up taking into account not only the family business, its partners, family members but also the existence of other assets and other family members who may not be part of the business but are part of the succession.

To conclude, we can simply congratulate the author on two fronts. On the one hand, for the topic chosen. It is a timely topic, little developed and which raises important legal questions. On the other hand, we congratulate him for how he studies the topic. The author has developed it exhaustively, without hesitation and with precision. Therefore, we can only end by recommending this book, not only to those jurists, whether they are students or practitioners of law, who need to know about the legal problems raised by family businesses from a cross-border perspective, but also to all those jurists who love private international law and who want to immerse themselves in a reading on a topic that does not leave anyone indifferent.

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SYbIL | Spanish Yearbook of International Law

CORTI VARELA, Justo; FARAH, Paolo Davide (Eds.). *Science, Technology, Policy and International Law*, (Edward Elgar Publishing, Cheltenham, 2024).

In today's rapidly changing world, where technological and scientific advancements reshape the fabric of human society, the international law field must evolve to accommodate these shifts. Exploring the Intersection of Science, Technology, and Law, edited by Justo Corti Varela and Paolo Davide Farah, provides a comprehensive and intellectually rigorous exploration of this dynamic interplay. This book represents a significant contribution to interdisciplinary scholarship, offering insights into the ways law can adapt to, regulate, and influence scientific and technological progress. With contributions from leading experts across disciplines, the book succeeds in delivering a nuanced and sophisticated analysis of the key challenges and opportunities that lie at the nexus of these different but clearly intertwined fields. Notably, this volume compiles contributions from experts originally presented during workshops held under the auspices of the European Society of International Law (ESIL).

The volume is structured to provide a logical progression, moving from philosophical foundations, principles, and theoretical frameworks to specific case studies and practical applications. This clarity of organization enhances the reader's engagement and reinforces the editors' overarching thesis: that effective governance at the intersection of science, technology, and law requires a collaborative, multidisciplinary approach.

Philosophical Foundations and Theoretical Frameworks: The book begins with an incisive introduction by the editors, who set the stage by examining the broader implications of the relationship between science, technology, and international law. They argue that law serves as both a framework for and a product of societal evolution, inherently shaped by technological and scientific developments. This perspective underscores the importance of legal adaptability and innovation in addressing the challenges posed by the rapid pace of modern advancements. Kirk Junker's Chapter 2, titled "Facts Are the Moveable Furniture of the Legal Mind, Not Stones of Science", delves into the philosophical underpinnings of facts in legal reasoning. Junker challenges the traditional understanding of facts as static and objective, proposing instead that they are dynamic constructs shaped by the interpretative frameworks of legal systems. This chapter invites readers to critically reconsider the role of facts in the pursuit of justice and highlights the epistemological tensions between law and science.

Regulatory Challenges in the Information Society: The interplay between science, technology, and law becomes particularly evident in the context of the information society, as explored in Chapter 3 by Giovanni Bombelli and Paolo Davide Farah. This chapter examines the regulatory complexities of a knowledge-based economy, where technological innovation often outpaces the development of legal frameworks. Bombelli and Farah provide a detailed analysis of the challenges posed by the proliferation of digital technologies, emphasizing the need for adaptive legal mechanisms to address issues such as data privacy, intellectual property, and cybersecurity.

Adapting Legal Systems to Scientific and Technological Advances: Flexibility is a recurring theme throughout the volume, and Imad Antoine Ibrahim's Chapter 4 offers a compelling exploration of this concept. Ibrahim discusses the use of flexibility mechanisms in global regulatory frameworks to accommodate scientific and technological developments. By examining case studies from environmental and healthcare sectors, Ibrahim demonstrates how legal systems can remain relevant and effective in the face of rapid change. The precautionary principle, a cornerstone of contemporary International Environmental Law and regulatory practice, is the focus of Chapters 5 and 6. Alessandra Donati's chapter provides a critical analysis of the principle's role under EU law, emphasizing its importance in managing risks associated with emerging technologies. Donati frames the precautionary principle as a "post-modern" tool for addressing uncertainty in a "post-truth" era, offering a nuanced perspective on its application in policymaking. Building on this discussion, Justo Corti Varela's Chapter 6 examines the precautionary principle in international courts, with a particular focus on its implications for the burden of proof. Corti Varela's analysis is a valuable contribution to understanding the evidentiary challenges that arise when adjudicating disputes involving complex scientific and technological issues.

Balancing Individual Freedoms and Public Interests: The tension between individual rights and collective interests is a recurring theme in the anthology, exemplified by Antonio Quiros Fons's Chapter 7 on conscientious objection. This chapter explores the delicate balance between protecting individual freedoms and ensuring that scientific advancements are guided by sound ethical and legal principles. Quiros Fons provides a thought-provoking discussion of the role of law in mediating these competing interests, offering valuable insights for policymakers and legal practitioners.

Technology and Democratic Processes: The integration of technology into democratic governance is another critical area of inquiry addressed in the book. Mihail Stojanoski and Lilla Vukovich's Chapter 8 investigates the use of smartphone applications in democratic processes, analyzing their potential to enhance citizen participation and transparency. While the authors acknowledge the transformative potential of digital technologies, they also highlight the risks of exclusion, misinformation, and surveillance, emphasizing the need for robust legal and institutional safeguards.

Regulating Emerging Medical Technologies: The regulation of emerging medical technologies presents unique challenges under international law, as discussed in Gemma Hobcraft's Chapter 9. Using the Human Fertilisation and Embryology Authority and mitochondrial donation as case studies, Hobcraft examines the intersection of science and law in the context of cutting-edge medical innovations. Her analysis underscores the importance of balancing scientific progress with ethical considerations and societal values.

Procedural and Substantive Approaches to Scientific Evidence: Ciarán Burke and Alexandra Molitorisová's Chapter 10 offers a comprehensive examination of the procedural and substantive approaches to scientific evidence in legal decision-making. By comparing different jurisdictions and legal systems, the authors highlight the diverse ways in which scientific expertise is integrated into legal processes. This chapter provides valuable insights for improving the evidentiary standards and practices of courts and regulatory bodies.

Climate Justice and Global Governance: The ethical dimensions of climate justice are explored in Chapter 11 by Paolo Davide Farah and Alessio Lo Giudice. This chapter situates the concept of climate justice within the broader context of the Anthropocene, emphasizing the role of law in addressing the disproportionate impacts of climate change on vulnerable populations. The authors' analysis is both timely and poignant, offering a compelling vision for how legal systems can contribute to a more equitable and sustainable future.

Global Climate Governance: Anthi Koskina's Chapter 12 focuses on the science-based decision-making processes established under the Paris Agreement of 2015. Koskina provides a detailed analysis of the mechanisms through which scientific knowledge informs global climate governance, highlighting both the achievements and limitations of this approach. This chapter is particularly valuable for its practical insights into the implementation of international environmental agreements.

Synthesis and Future Directions: Finally, the analysis is brought together with a reflective chapter by the editors, who synthesize the insights and themes explored throughout the book. They emphasize the need for continued interdisciplinary collaboration and innovation in addressing the challenges posed by the intersection of science, technology, and law. The editors' concluding remarks provide a fitting end to a volume that is both intellectually rigorous and practically relevant.

Conclusion: *Science, Technology, Policy and International Law* is a landmark contribution to the field of legal studies, offering a rich and diverse array of perspectives on some of the most pressing issues of our time. Its interdisciplinary approach, coupled with its focus on real-world challenges and solutions, makes it an essential resource for scholars, policymakers, and practitioners.

The book succeeds in challenging preconceptions, encouraging critical thinking, and fostering a deeper understanding of the complex interplay between science, technology, and law. As technological advancements continue to reshape the legal landscape, this anthology will undoubtedly serve as a valuable reference for navigating the opportunities and risks that lie ahead.

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DE MIGUEL ASENSIO, Pedro A. *Conflict of Laws and the Internet*, (Edward Elgar Publishing, Cheltenham, 2nd edition, 2024)

1. A leisurely reading of the 2nd edition of this *magnum opus* of Professor Pedro de Miguel, after having had the opportunity to study the 1st edition in detail four years ago, demonstrates to what extent one of the most relevant characteristics of this new era — the cognitive era — is the exponential acceleration of the changes, something that had not happened before in the entire history of humanity, where the changes were always linear and punctuated sporadically by some exponential changes that always took centuries and millennia to repeat themselves. Instead, in just four years so many changes have occurred in the digital world !!!.

2. it is fair to announce in advance that Professor De Miguel surprises us again. If the 1st edition published in 2020 constituted a herculean effort to synthesize from a comprehensive perspective a still adolescent subject where, based on an academic vision of both private international law and intellectual property, the difficulties of adapting its postulates to the new digital world were highlighted, this 2nd edition goes much further and is even more complete. First, because it enshrines the conviction that European sources clearly engulf domestic ones on the construction of a system designed to provide answers to both intra-European and extra-European situations derived from online activities. Second, because it shows that in just four years the adolescent has become an adult and the number of complex issues has also multiplied exponentially, which may make advisable in the future to continue the effort including *de lege ferenda* considerations. And third, because the result is magnificent and becomes a magisterial treatise on the treatment of the EU private international law of the Internet.

3. The 1st edition has been accurately analized in numerous publications: among others, Moura Vicente, D., *Revista Española de Derecho Internacional,* 2021, Vol. 73-2, pp. 472-473; López-Tarruella Martínez, A., *Revista Electrónica de Estudios Internacionales*, 40, December 2020, DOI: 10.17103/reei.40.21; Palao Moreno, G., *Anuario Español de Derecho internacional privado*, Volume XIX-XX, 2019-2020, pp. 819-822; and Espiniella Menéndez, A, *Cuadernos de Derecho Transnacional* (October 2020), Vol. 12, 2, pp. 1495-1497. This note aims to briefly evaluate the major differences and the added value that the author proposes in this 2nd edition.

4. While Prof. De Miguel preserves the essence of the six chapters in which the 1st edition was structured, most of them have been enormously enriched. Chapter I ("Foundations") reflects both the Internet's growth phase and the fundamental principles of private international law applied to cross-border online activities. Regarding the first, the work highlights how the emergence of edge technologies implies an enormous variety of challenges for the system of private international law. To mention only some, a) the product liability and damage caused with the involvement of AI systems; or b) the development of blockchain technology leading to a more user-centric and decentralized Internet with the creation of new intermediaries — as cryptoexchanges — and the increased centralization due to the requirements for data exchange, data collection, and

concentration of computational power needed for blockchain, crypto-asset mining and machine learning; or c) the development of virtual three-dimensional spaces in which participants can interact, possibly through avatars, or d) the standard setting on essential patents and the development of FRAND commitments or licences by standard-setting organizations. Regarding the second, it is worth to mention the study of numerous rulings of the European Court of Justice (ECJ) issued in recent years referring to matters such as the scope of application of Brussels I (recast) Regulation (ECJ Judgments of 22 December 2022, *Eurelec Trading*, C-98/22, and of 8 September 2022, *IRnova*, C-399/21), the law applicable to divorce (ECJ Judgment of 16 July 2020, *JE (Law applicable to divorce)*, C-249/19) or the conditions for the recognition of judgments (ECJ Judgments of 7 April 2022, *H Limited*, C-568/20, or of 7 September 2023, *Charles Taylor Adjusting*, C-590/21).

5. Chapter II changes its title (from "Information Society services, internal market and illegal content" to "Digital services, internal market and content liability"), has been severely reviewed and expands on issues as relevant as a) how the e-commerce directive has been supplemented by the Digital Services Act 2022 (DSA) and its rules on specific due diligence obligations tailored to certain categories of providers of intermediary services, and b) how new EU instruments have brought to a much mature understanding of the impact of edge technologies in the internal market, such as the Directive (EU) 2018/1808 amending the Audiovisual Media Services Directive, the Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services, the Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online, the Regulation (EU) 2023/988 laying down essential rules on the safety of consumer products, and, above all, the AI Act and the Proposal Directive on AI Liability for defective products. All in all, the e-commerce directive has been gifted with very relevant decisions of the ECJ such as the judgments of 19 December 2019 (*Airbnb Ireland,* C-390/18), 3 December 2020 (*Star Taxi App*, C-62/19), and 27 April 2023 (*Viagogo*, C-70/22).

As to the developments specifically related to private international law, this second edition expands on the relevance of ECJ judgments related a) to jurisdiction (9 July 2020, *Verein für Konsumenteninformation*, C-343/19: the place of the event giving rise to the damage is in the Member State within the territory of which the products at issue were equipped with that software; and 22 February 2024, *FCA Italy y FPT Industrial*, C-81/23: where the contract was concluded in a Member State but the defective product was delivered in another Member State the place where the damage occurs is in that latter Member State) and b) to the applicable law (10 March 2022, *BMA Nederland*, C-498/20: the place where the damage occurred within the meaning of Article 4(1) Rome II is the place where the initial damage to the persons directly affected occurs) for the law applicable).

On the other hand, the AI Liability Directive Proposal lays down rules to enable claimants to substantiate non-contractual fault-based civil law claims for damages caused by an AI system on two areas: (a) the disclosure of evidence concerning high-risk AI systems; and (b) the burden of proof.

As to the law applicable to intermediary liability, the author concludes rightly that "the choice of law rules of the Rome II Regulation will normally lead to application of the liability rules of the DSA, insofar as the intermediary service provider targets its activity to an EU Member State" and that "the DSA decisively undermines the practical

significance of 'requirements concerning the liability of the service provider' as an issue falling within the 'coordinated field' of the E-Commerce Directive".

Finally, Chapter II has been enriched with a thorough reflection on the territorial scope of orders against illegal content as result of the application of art. 9.2 DSA, a topic where the author has shown in the past authoritative expertise.

6. Chapter III (Data Protection and Personality Rights, including Defamation) develops the consequences of the 2023 Data Act on the free flow of data within the EU and the 2022 Digital Markets Act (DMA) in relation to the application of the General Data Protection Regulation (GDPR), offering at the same time a complete UpToDate of the consequences for the GDPR of multiple ECJ judgments like those of 1 October 2019, (*Planet 49*, C-673/17), 11 November 2020, (*Orange Romania*, C-61/19), 8 December 2022 (*Google*, C-460/20), 12 January 2023 (*Budapesti Elektromos Művek*, C-132/21 — *Déréférencement d'un contenu prétendument inexact)*, 4 May 2023, Österreichische *Post — Préjudice moral lié au traitement de données personnelle*, C-300/21), 4 July 2023 (*Meta Platforms and Others — Conditions générales d'utilisation d'un réseau social*, C-252/21), 14 December 2023, (*Natsionalna agentsia za prihodite*, C-340/21), 14 December 2023 (*Gemeinde Ummendorf*, C-456/22), and 25 January 2024 (*MediaMarktSaturn*, C-687/21).

Four specific issues highlight the special added value of this Chapter III: first, the transfer of personal data to third countries, where the author develops the standard data protection clauses adopted by the Commission in 2021 and the ECJ Judgment of 16 July 2020, (*Facebook Ireland and Schrems*, C-311/18); second, the understanding that Directive 2020/1828 on representative actions for the protection of the collective interests of consumers is a very significant development to foster collective redress within the EU and has an impact on the application of arts 79 and 80 GDPR: third, the introduction of the strategic lawsuits against public participation (SLAPPs), that are usually brought in the form of defamation lawsuits and pose particular challenges to defendants in cross border situations; finally, the depth analysis of two ECJ judgments: 17 June 2021 (*Mittelbayerischer Verlag*, C-800/19), on the scope of the term 'personality right' and the consequences of the application of this judgment for the interpretation of art 7.2 Brussels I (Recast), and 21 December 2021 (*Gtflix Tv*, C-251/20) of particular significance in relation to the mosaic criterion, and to the determination of the place where the damage occurs.

7. Chapter IV (Copyright) introduces in this 2nd edition a reflection on a) the consequences of the specific liability mechanism applicable to online content-sharing service providers that give access to copyright-protected content uploaded by their users in cases in which no authorization has been obtained from the relevant rightholders (Article 17 of Directive 2019/790) and b) the adoption of the DSA, with its provisions on specific due diligence obligations tailored to certain categories of intermediary services providers. Our author discusses also in this Chapter the balancing between the freedom of expression and information on the one hand, and the protection of intellectual property on the other, something that it is determinant for the application of the liability exemption concerning online content-sharing service providers, and the obligations, such as prior automatic filtering of content uploaded by users, that can be imposed on them by copyright legislation, as reflected in ECJ judgments like 22 June 2021 (*YouTube and Cyando*, C-682/18 and C-683/18); and 26 April 2022, (*Poland / Parliament and Council*, C-401/19).

8. In Chapter V (Industrial Property and Competition Law), Prof. De Miguel includes in this 2nd edition a discussion on the consequences of the adoption of three new texts, mainly a) Regulation (EU) 2019/517, which confers implementing powers to the Commission and repeals Regulation (EC) No 733/2002 on the implementation of the '.eu' Top Level Domain, b) Regulation (EC) No 874/2004 laying down public policy rules concerning the '.eu' Top Level Domain, with effect from 13 October 2022, and c) Commission implementing Regulation (EU) 2020/857.

On top of that, he reviews the relevant case law of the ECJ related to jurisdiction (Judgments of 7 September 2023 (*Beverage City Polska*, C-832/21): under Article 8(1) Brussels I (recast) a single court may have jurisdiction to rule on the claims brought against all of the actors who committed those acts; and of 27 April 2023 (*Lännen MCE*, C-104/22): interpretation of Article 125(5) of the EU Trade Mark Regulation (EUTMR) to situations where the alleged infringer's online advertising or sales offers do not expressly and unambiguously mention the Member State concerned among the territories to which the goods in question may be supplied) and to applicable law (Judgments of 8 September 2022 (*IRnova*, C-399/21): the distributive application of a plurality of laws becomes relevant; and of 3 March 2022, (*Acacia*, C-421/20): Article 8(2) of the Rome II Regulation in *Nintendo* cannot be transposed to a situation where the holder of a Community design brings one or more targeted actions, relating to each of the acts of infringement within a single Member State, pursuant to Article 85(5).

Especially relevant in this Chapter is the in-depth study of the scope of application, content and enforcement of the DMA and its consequences for competition law. The DMA supplements EU competition rules by providing new tools to address unfairness in dependency relationships between very large platforms and their business users.

9. Finally, Chapter VI (Contracts and transactions) introduces two new items related respectively to the "Platform economy and digital markets", and to the "Access to and use of data due to the application of the EU Data Act", develops further the smart contracts, crypto-assets and crypto-markets (Regulation (EU) 2023/1114), and analyzes the new case law of the ECJ relevant to the matter: Judgments of 24 November 2022 (*Tilman*, C-358/21), 16 September 2021 (*The Software Incubator*, C-410/19), 14 September 2023 (*Diamond Resorts Europe and others*, C-632/21) and 14 September 2023 (*Club La Costa and others*, C-821/21 P).

10. As a conclusion, this thoroughly and ambitious revised 2nd edition of *Conflict of Laws and the Internet* is not only an updated analysis but offers a much more comprehensive approach than the 1st edition, masterfully explores all the relevant EU instruments and the ECJ case law and clearly reflects the complexities of private international law in the digital age. No doubt, a must-read.

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DURÁN AYAGO, Antonia, *Derechos humanos y métodos de reconocimiento de situaciones jurídicas: hacia la libre circulación de personas y familias* (Aranzadi, Pamplona 2024)

To begin the review of a book with such a suggestive and interesting topic as human rights and methods of recognizing legal situations in the context of the free movement of people and families, from an international and European perspective, it is necessary to indicate the relevance and focus of the work that it currently holds.

In the context of an increasingly interconnected world, the protection of human rights and the recognition of legal situations that enable the free movement of people and families have become essential topics for the development of international and European policies. The book "Human Rights and Methods of Recognition of Legal Situations: Towards the Free Movement of People and Families. International and European Perspective" addresses this contemporary challenge, exploring how human rights principles serve as the basis for ensuring the respect and protection of individuals in transit, as well as the recognition of their family and legal realities.

From an international and European perspective, the author analyzes the legal mechanisms and regulations that govern the mobility of individuals, highlighting the obstacles and progress in the implementation of policies that ensure respect for dignity and fundamental rights. The book proposes a critical review of existing legal instruments while presenting proposals to improve the regulatory framework, thus ensuring greater coherence and protection in cross-border contexts.

At this point, it is necessary to analyze the key aspects of the book, the topics it addresses, and its relevance in the field of human rights and international law.

In the first chapter, titled "Citizenship, Dignity, Free Development of the Individual, and Human Rights," the author contextualizes human rights, noting that while some issues may seem evident, in the general theory of human rights, many things remain unclear (Wladimir Woolftoff). The author presents the legal framework of reference for human rights and personal status, citizenship, dignity, and the free development of the individual. At the end of the first chapter, the focus is on the interpretation by the European Court of Human Rights (ECHR) concerning personal identity, which can be inferred as a person's private life.

The second chapter addresses the method of mutual recognition of legal situations, with particular reference to the principle of mutual recognition in the European Union. While this is not the only solution for all the cases that may arise in the field of international family law, and it would be beneficial to broaden the scope to other solutions, the focus should not be solely on the method of mutual recognition.

The third chapter discusses personal status and its universal portability. It analyzes the jurisprudence of the Court of Justice of the European Union (CJEU) regarding the names of natural persons, gender identity, filiation (with an analysis of the ECHR's case law), and marriage, particularly the concept of spouse.

In the fourth and final chapter, the book examines the path toward the free movement of people and families, offering a series of proposals to guarantee this right. It might have been more beneficial for the reader if this chapter had been more directly integrated into the previous chapters or addressed more concisely. This is followed by an epilogue that presents the conclusions of the work.

The author has tackled a topic of enormous interest, successfully highlighting its relevance in the current context and in people's daily lives. What stands out most is that she has not only identified an original and crucial area of study but has made a great effort to systematize a complex field, allowing the reader to understand its multiple facets and its real impact.

The effort to systematize is particularly evident in how the author organizes and presents her analysis of the subject. Rather than simply presenting scattered ideas, she has created a structure that allows the topic to be approached from different angles. This organized approach not only facilitates the understanding of the subject but also its practical application, demonstrating a clear commitment to clarity and accessibility.

The originality of the topic is another noteworthy aspect of this work. The author has chosen a field of study that is not only innovative but also touches on fundamental issues in people's lives, such as their rights, mobility, or the intersection of the private and the public in a globalized world. In an era where international mobility and the recognition of legal situations are increasingly relevant for millions of families, her work provides a fresh and necessary perspective for understanding these challenges. It is a work of great importance in people's lives.

Furthermore, the book is set in a highly current context, as the political and social tensions surrounding the free movement of people and the protection of human rights have gained significant importance on the international agenda. This contemporary approach makes the book not only useful for specialists in the field but also for a broader audience facing these dilemmas in their daily lives, such as migrants, transnational families, or legal professionals in general.

In summary, the author's effort to systematize an original, timely, and deeply important topic is a commendable achievement. Her ability to clearly and coherently organize complex issues and her focus on topics that directly affect people's lives make this book a valuable contribution to the field of law, specifically in private international law and human rights in an international context. The book's concluding sentence, with which those of us who work in private international law strongly identify, emphasizes that achieving the goals set out can be accomplished through this discipline. It reflects a sentiment shared by many of us in the field of private international law. Without a doubt, private international law, as demonstrated in this work, promotes the happiness and well-being of individuals. Any legal scholar aspiring to fully understand the principle of mutual recognition is practically obliged to read this work.

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ESPÓSITO MASSICCI, Carlos; PARLETT, Kate, (Eds.), *The Cambridge Companion to The International Court of Justice*, (Cambridge University Press, Cambridge, 2023)

Edited by Carlos Espósito, Professor of Public International Law at the Universidad Autónoma de Madrid, and Kate Parlett, a British lawyer specialized in public international law and international arbitration, this book offers a plural approach that provides the reader with a thorough understanding of the main judicial body of the United Nations, its functioning and contributions. It achieves this through well-balanced chapters that combine information with in-depth analysis, thus fully fulfilling the objectives of the Cambridge Companions series to which it belongs while offering insights for non-specialist readers, it also raises questions for reflection and debate among experts.

Divided into three parts, the first (chapters 1-5) deals with the role of the International Court of Justice (ICJ), the second (chapters 6-13) addresses its work in the peaceful settlement of international disputes, and the third (chapters 14-22) examines the impact of its jurisprudence.

Beginning with the body's role in dispute resolution and the development of international law, as well as its involvement in peacekeeping, all contributions are characterized by an objective examination of the specific dimension under study, openly acknowledging any weaknesses where relevant. It is also worth noting the interest given to certain aspects that tend to receive less attention in other publications. These include the role of the judge and their participation in the decision-making process, the institutional context in which the Court operates, the consideration of evidence and fact-finding procedures, working practices, and the peculiarities of the practice of law before the ICJ are presented.

The usefulness of the chapters on jurisdiction and procedure should also be highlighted, considering that recent human rights and armed conflict disputes before the Court, along with the growing reliance on strategic litigation, are helping to develop the procedural dimension of the Court's jurisprudence, adding new questions of jurisdiction and admissibility, strengthening the practice of provisional measures and encouraging the participation of third states through the intervention mechanism, together with the increasing number of requests for advisory opinions.

Finally, the systematic and precise studies on the jurisprudential contributions to the different sectors of international law provide a comprehensive overview, not only of the existing acquis but also of its future directions, with the protection of human rights clearly among them. Precisely, in his address to the Sixth Committee of the General Assembly, delivered on 25 October 2024, Judge Nawaf Salam, President of the International Court of Justice, highlighted the importance of the ongoing trend in the Court's jurisprudence towards a greater recognition of the rights and interests of the individual under international law, not only in its orders indicating provisional

measures, but also in its judgments. This trend reinforces the importance of dialogue with other courts, a topic also addressed in the book.

In the Pact for the Future, adopted by the General Assembly on 22 September 2024 (A/RES/79/1), the ICJ has deserved autonomous consideration, as is to be expected. In the action 17, the Heads of State and Government affirm that 'We will fulfil our obligation to comply with the decisions and uphold the mandate of the International Court of Justice in any case to which our State is a party' and they decide to 'Take appropriate steps to ensure that the International Court of Justice can fully and effectively discharge its mandate'. These references are encouraging because, as Carlos Espósito and Kate Parlett rightly point out at the end of the Introduction, 'Whatever its limitations, the Court is a central, essential and established institution for the peaceful settlement of international disputes and the advancement of the international rule of law'. Books such as this one effectively contribute to highlighting the accuracy of these assessments.

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FAJARDO DEL CASTILLO, Teresa, *El soft law en el derecho internacional y europeo: Su capacidad para dar respuesta a los desafíos normativos actuales* (Tirant lo blanch, Valencia, 2024)

The concept of soft law plays a key role in contemporary international law. Many international disputes involve provisions, agreements, or even simple statements that fall outside the traditional boundaries of international law. In the *Pulp Mills* case, for example, the International Court of Justice (ICJ) relied on guidelines and recommendations from international technical bodies.[1] Similarly, in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, the Court used non-binding resolutions of the United Nations General Assembly.[2] Despite the Court's initial reluctance, the influence of soft law in international law has significantly grown over time. Moreover, the challenges of reaching a consensus in a diverse and unequal international community, along with the need to complement complex international obligations with technical and dynamic decisions, underscore the promising future of soft law as an institution.

In this context, Dr. Teresa Fajardo's has recently published "*El Soft law en el Derecho Internacional y Europeo: su capacidad para dar respuesta a los desafíos normativos actuales*", edited by Tirant lo Blanch. In this new book, Dr. Fajardo addresses the main debates and theoretical gaps in this subject. As the author puts it, her work has two main objectives.[3] On the one hand, she aims to analyze soft law by reviewing the leading scholarly contributions and exploring their practical applications an objective she rigorously accomplishes. On the other hand, and I will go back to it later on, the author wants to generate scholarly debate on the topic.

Regarding the achievement of the first objective, I would like to highlight three key elements. First, the comprehensive literature review already makes this book a valuable resource. Fajardo brings together the perspectives of the most prominent contemporary scholars. Any jurist seeking to understand the leading academic works on soft law can easily navigate the literature through the second chapter. However, Fajardo goes beyond mere synthesis. She also undertakes the important task of categorizing these various perspectives. Specifically, she distinguishes between scholars who support a dichotomous approach (law versus non-law) and those who advocate for a continuum of norms with varying degrees of normative intensity.[4] Ultimately, she provides a theoretical framework that clarifies the practical interaction between soft law and other international norms.

Second, the author provides a balanced analysis of the concept, framing it not as an "all or nothing" instrument, but as a trade-off that brings both benefits and disadvantages.

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1 *Case concerning Pulp Mills on the river Uruguay (Argentina v. Uruguay)*, ICJ Reports (2010), at Par. 196

2 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1986), at Par. 188

3 T. Fajardo del Castillo, Teresa, *El soft law en el derecho internacional y europeo: Su capacidad para dar respuesta a los desafíos normativos actuales* (Tirant lo blanch, València, 2024) at 32.

4 *Ibid*., at 42

In this regard, her characterization of soft law as a symptom of the normative crises within international and regional legal systems is particularly noteworthy.[5] Fajardo argues that these crises are not accidental but driven by those advocating for a softer, principles-based legal framework.[6] Similarly, she warns how soft law can also be used by private actors to avoid public vigilance.[7] Nevertheless, she also acknowledges that in this context of normative crisis, soft law can serve as a pre-legislative phase, functioning as a consensus-building mechanism.

Third, from the very beginning, the author draws theses that run through the book. In the end, Fajardo summarizes these theses in 14 insightful conclusions. Of course, the formal requisites of this review do not allow an in-depth analysis of all such findings. However, there is one worth mentioning. Both International Law and European Union Law have equally incorporated soft rules. However, Fajardo explains how this institution's content, meaning, and legal consequences diverge between both legal systems.[8] Not many authors have Fajardo's capacity to synthesize these differences in a single book. As such, this work is poised to become a key reference in Spanish scholarship.

Regarding Fajardo's objective to stimulate scholarly debate on soft law, I would like to expand on one of her theses. Specifically, in discussing the role of soft law emerging from international treaties and organizations, the author argues that it does not legally bind the parties. I do not dispute this position. However, in such cases, soft law serves another critical function: it creates an obligation of diligence. As Judge Lauterpacht notices in his separate opinion on the *South West Africa* case:

> "a State is bound to give [to certain recommendations] due consideration in good faith. If, having regard to its own ultimate responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its decision".[9]

Judge Lauterpacht's perspective has gained acceptance in more recent jurisprudence and literature. For instance, in *Whaling in Antarctica*, Japan correctly argued that cooperation with an organization does not require compliance with its non-binding decisions.[10] However, the ICJ nuanced this stance, holding that the duty to cooperate obliges states to give due regard to such recommendations.[11] As Justice Charlesworth asserts in his Separate Opinion, soft law does not directly bind states, but parties must "consider these resolutions in good faith"[12] and "show genuine willingness to reconsider its position in light of those views."[13]

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5 *Ibid*., at 299
6 *Ibid*., at 21
7 *Ibid*., at 119
8 *Ibid*., at 15
9 *Advisory Opinion concerning the Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa Case: Separate Opinion of Judge Lautherpatch*, ICJ Reports (1955), at Par 119
10 *Case concerning Whaling in the Antarctic* (Australia v. Japan)*: Counter-memorial of Japan*, *Volume I*, ICJ Reports (2012), at Par 8.64
11 *Case concerning Whaling in the Antarctic* (Australia v. Japan), ICJ Reports (2014), at Par 83
12 Case concerning Whaling in the Antarctic (Australia v. Japan), Separate Opinion of Judge ad hoc Charlesworth (2014), ICJ Reports (2014), at Par. 13
13 *Ibid.*, at Par. 15

In this sense, it is evident that the obligation to give due regard can not be an obligation of result. It is rather a duty of conduct and, more specifically, an obligation of *due diligence*. Thus, as the ILTOS puts it, the standard or regard will be variable and change on a case-by-case basis.[14]

Moreover, I uphold that this obligation not only applies to the soft law emerging from an International Organization. Indeed, the paragraph above assumes that the parties must give due regard to resolutions with which they may disagree. *A fortiori*, the same standard should apply to those non-binding provisions of a treaty that the parties have negotiated, accepted, and ratified. The principle of good faith would strengthen this approach.

To conclude, Teresa Fajardo offers us a book that must be on the list of readings of any jurist interested in soft law. Her extensive literature review, the theoretical framework that the author develops, and the necessary debates that will emerge from it convert this book into one of the most significant publications of the year. I can wait to discuss with her whether the adoption of soft law in an international treaty or by an international organization establishes an obligation of *due diligence*.

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14 *Advisory opinion on the Responsibilities and obligations of States with respect to activities in the Area* (2011) Nº 17. International Tribunal of the Law of the Sea, at Par. 117

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FARAMIÑÁN GILBERT, Juan Manuel; ROLDÁN BARBERO, Javier y VALLE GÁLVEZ, Alejando (coords.), LÓPEZ ESCUDERO, Manuel; HINOJOSA MARTÍNEZ, Luis; MARRERO ROCHA, Inmaculada y MARTÍN RODRÍGUEZ, Pablo (eds.). *Unión Europea, Principios democráticos y orden internacional. Liber discipulorum en homenaje al profesor Diego J. Liñán Nogueras*, (Tirant lo Blanch, Valencia, 2024)

The book I have the pleasure of reviewing brings together a set of unpublished works by the disciples of Professor Diego J. Liñán Nogueras in the field of Public international law, European law and international relations. A reading of the contributions in this *Liber discipulorum* reveals, as can be seen in the *Academic Profile* of Professor Liñán, the existence of a solid research team on cutting-edge topics, which the honoured author always pursued throughout his academic career. Although the undersigned has unfortunately only had a few occasions to benefit from his teaching, I have been enriched by his research, which has given me, as I believe most of my colleagues in the discipline, a better understanding of the categories, institutions and the European and international legal system.

The book is divided into two parts: one dedicated to International law and international relations and the other to European Union law. The first of these begins with a work by Amelia Díaz Pérez de Madrid, entitled *The Timor Sea Conciliation, the first binding conciliation in the 1982 UN Convention on the Law of the Sea. A line in the water?* which examines the origins and purposes of this particular system of dispute settlement, as well as its future projection in the wake of this conciliation which was closed in 2018. This is followed by a study by Professor Teresa Fajardo del Castillo, *Flawed consensus, automatic majorities and soft law: from the Conference on Security and Cooperation in Europe to a future peace conference on Ukraine*, with an original proposal of the normative instruments that could be used to put an end to this terrible war. Closely linked to the previous theme, Juan Manuel de Faramiñán Gilbert addresses in chapter three *Consensus and dissent: an inveterate dialectic*, the channels of consensus as possible ways of resolving the conflict between Ukraine and the Russian Federation.

Globalisation and privatisation of international relations is the title chosen by Professor Inmaculada Marrero Rocha to analyse this process, characterised by three fundamental aspects: inequality between states, the limits of state control over the rights and welfare of individuals, and the pro-sovereignty turn sometimes sustained by a nationalist ideology. *Notes on the legal thought of Javier Liñán – Heideggerian traces and critical rationality in the notions of consensus and sovereignty in Javier Liñán,* written by Pablo Martín Rodríguez, carries out what the author defines as a "heroic act of revisiting the master", through an approach to some of his works that give rise to new interpretations or ideas. And *Time and international law* is the theme chosen by Javier Roldán Barbero, dedicated to reflecting on the temporal criteria in our world and in our legal system.

This first part ends with three chapters that examine different current issues. The first of these contains the contribution by Antonio Sánchez Ortega, *A view of scope.*

Analysis of the contemporary international environment from the perspective of the major systemic theories, which focuses on examining the structure of the international system; the second, *State sovereignty and cyberspace*, by Antonio Segura Serrano, analyses the most significant international legal rules and categories applicable to cyberspace. And the third, *On Spain's Geostrategic and Foreign Policy Shortcomings in the Area and Region of the Strait of Gibraltar*, by Alejandro del Valle Gálvez, advocates concerted action in the complex world of the Strait with an overall intelligence so that Spain can make use of the enormous potential of its geopolitical situation.

The second part, dedicated to European Union Law, begins with a study by Professor Valeria Di Comite on *European citizenship and students' right of movement: the difficult path towards a greater extension of the principle of non-discrimination on grounds of nationality in the European Union*, which considers different aspects of this issue, such as the right of access to studies, the right to benefit from maintenance allowance or the right of residence. It continues with the work of Luis M. Hinojosa Martínez on *Disinformation and freedom of expression in times of war: the RT France affair*, which, in addition to relevant questions on the limits of fundamental rights, considers the role of the EU in acting as a global figure in the face of other international powers. This is followed by a chapter on *The protection of the value of the rule of law in the case law of the CJEU*, written by Manuel López Escudero, which highlights the most relevant contributions in the courts, such as the articulation of the constitutional dimension, the protection of judicial independence and the validity of the mechanism of financial conditionality.

Carmen López-Jurado Romero de la Cruz presents an analysis of *The renewal of the European Union's common commercial policy in application of the concept of open strategic autonomy*, identifying the main regulatory instruments that shape it; José Rafael Marín Aís, in his chapter *The complex legal articulation of the European Union's duty to contribute in its relations with the rest of the world to improve the protection of human rights*, complemented by another, more focused on conditionality, by Mª del Carmen Muñoz Rodríguez, entitled *Defending democracy and human rights in the European Union's external action La defensa de la democracia y los derechos humanos en la acción exterior de la Unión Europea: Reality or Appearance?*

The last chapters of the book deal with three different topics: *An approach to European Union sanctions in the face of cyber-attacks*, by Carmela Pérez Bernárdez, with an analysis of the sanctions regime (background, legal basis and application); *Inter-institutional agreements: back to square one*? by Augusto J. Piqueras García, with an in-depth examination of their legal nature; *and Agencies of the Area of Freedom, Security and Justice and the Rule of Law in the European Union: Chronic antagonists?* by Lucas J. Ruiz Díaz, studying the practice and reforms for better governance in this area.

In short, we can find a set of contributions that rigorously analyse controversial and highly topical issues in international law, European law and international relations. Their reading, like the magnificent writings of Professor Liñán in his time, will undoubtedly allow us to better understand the complex current international and european reality.

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GUTIÉRREZ DEL CASTILLO, Víctor Luis, *Review of La subjetividad de la Santa Sede en la sociedad internacional. Estudio de sus fundamentos históricos y jurídicos a la luz del derecho internacional* [1], (Aranzadi, Madrid, 2024)

Although the international subjectivity of the Holy See has been the object of doctrinal debate since the late 19th century, there are not many monographs that deal with its complexity in an updated and systematic manner. In this respect, the work of Professor Gutiérrez proves to be particularly valuable, inasmuch as it presents a thorough legal construction of the conceptual pillars required to provide a well-founded answer to this topic.

To this end, the monograph is divided into two parts. The first addresses the historical and juridical foundations of the international subjectivity of the Holy See. In the interest of clarity, Chapter I begins with a delimitation of concepts, otherwise frequently misinterpreted, by making a distinction between the Holy See and the Apostolic See or Roman Curia and then delving into the international legal status of the Vatican City State and its interrelationship with the Holy See. The second chapter undertakes a parallel analysis of the historical evolution of the Holy See in the context of the historical milestones outlining the features of today's international society: the Peace of Westphalia (1648), the Congress of Vienna (1815), The Hague Peace Conferences (1899 and 1907), the Treaty of Versailles (1919), and the Charter of the United Nations (1945). The author rightly suggests the need for this analysis and points out that, in spite of being beset with difficulties, the Holy See never ceased to exercise the rights derived from its subjectivity on the international level and kept signing international agreements and engaging in constant diplomatic activity. In this connection, he highlights the significant role of the Lateran Pacts in giving the Holy See a new opportunity to participate in the construction of the international order, which intensified after the Second World War, as the historical context made it possible for the Vatican to bolster its international relations with third states.

From this standpoint, the second part of the work analyzes in detail the effectiveness of the Holy See's subjectivity in international society. This is where the author displays both his expertise and his knowledge of the dogmatic pillars of international law.

The third chapter focuses on how the Holy See projects its legal capacity vis-à-vis the international order in a manner comparable to that of States and recognized by the subjects and actors that make up the international community. This becomes manifest in the exercise of *ius legationes*, *ius tractatum* or *ius foederum*. The author makes a noteworthy analysis of the performance of the Holy See in settling international disputes and dwells

[1] *The subjectivity of the Holy See in international society: A study of its historical and legal rationale in the light of International Law* (T. N.)

especially on its role as international arbitrator and mediator, as well as on the study of its good offices and its participation in international forums and conferences.

After this analysis of international practice to support the effectiveness of international subjectivity, the fourth and final chapter examines the role of the Holy See and Vatican City in contemporary international society. Throughout the work, the author explains how the Holy See's own traits of neutrality and inviolability mark its evolution in the international order and its relationship with third states, as evidenced by its contribution to the construction of the new European order in the context of the Cold War and his participation in the organic structure of international society, both in the United Nations system and in regional organizations. Likewise, Mr. Gutiérrez Castillo sheds light on the legal and historical foundations of the Vatican City State and reminds us that its roots did not originate in the Papal States, which ended up disappearing after the completion of the Italian reunification process. To this effect, the author aligns himself with the prevailing doctrinal current, by virtue of which the independence of its subjectivity with respect to that of the Holy See is maintained.

Thus this work approaches, rigorously and successfully, a particularly complex issue by making a historical analysis that allows to understand the evolution of the particular condition of the Holy See and its relations with the States. In this regard, the author demonstrates his profound knowledge of the question of international subjectivity in public international law and, on this basis, explains the effectiveness of the international subjectivity of the Holy See. Of particular significance is his final analysis of the challenges facing this issue today and his conclusion on how the new geopolitics championed by Pope Francis entails a reconceptualization of the Vatican's traditional international policy, insofar as it involves parting with European centrality and the development of a diplomatic action that prioritizes peripheral realities.

In short, we are in the presence of a work deemed essential to unravel misconceptions and describe with elegance and brilliance the complex question of the international subjectivity of the Holy See.

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LAFUENTE SÁNCHEZ, Raúl, *Inteligencia Artificial y vehículos autónomos: responsabilidad civil extracontractual internacional*, (Aranzadi, Pamplona, 2024)

Artificial Intelligence represents the most significant driver of transformation and progress in this technological revolution. It is a technology that will not only optimize existing developments but also redefine or reinvent the use of technological tools to enhance and amplify human capabilities. In summary, artificial intelligence facilitates the ability of machines to learn, reason, and act in a manner that is analogous to human behavior. The cross-cutting integration of these technologies in different sectors presents significant challenges for legislators, with the autonomous vehicle sector being the focus of this review. The utilization of sophisticated AI algorithms facilitates the real-time processing of information, thereby enabling decisions pertaining to navigation and vehicle control. Consequently, the technology can detect obstacles, recognizing traffic signs and adapting to varying driving conditions. This undoubtedly contributes to a reduction in accidents, as the technology can react more rapidly and effectively to complex situations. The future is now.

The initial chapter is dedicated to an examination of the potential risks, advantages and challenges associated with the advent of artificial intelligence. Additionally, it presents an analysis of the pertinent legal framework from an international perspective, along with a detailed study of Spanish legislation. Furthermore, a comprehensive examination of the European Union context is provided, along with an investigation of the regulatory models that have been implemented in Germany, the United Kingdom, and the Netherlands. The United States, a leading nation in the research and development of these automated vehicles, is also examined. The second chapter analyses the non-contractual liability arising from the use of artificial intelligence systems applied to vehicle driving. Of note is the distinction made by Dr. Lafuente regarding the attribution of non-contractual liability that could exist between the driver as the party causing the damage and the manufacturer. This includes an exploration of the possibilities of shared liability and its transfer, as well as the potential agreements that could be established between both actors. It provides a comprehensive examination of the legal aspects related to the insurance of automated vehicles, articulating the regulatory framework in alignment with the jurisprudence of the European Court of Justice. Furthermore, the analysis considers the legal regime applicable to product liability at the European level under Directive 85/374/EEC, emphasizing the necessity for revision. In this context, fundamental issues such as the right to compensation, the claims procedure and the gathering of evidence, limitation periods, the burden of proof and its possible reversal, as well as the limitation or reduction of liability, are addressed. The chapter concludes with an examination of the US product liability system, which is presented as a potential reference model for the necessary development and updating of the EU legal framework. In the third chapter, prof. Lafuente emphasizes the necessity of updating the existing regulatory framework to address the novel risks that have emerged as a consequence of

the advancement of Artificial Intelligence. These risks are not adequately addressed by the current legal provisions. The author provides an analysis of the various legislative proposals on Artificial Intelligence that have been approved in recent years. These include the Proposal for a Regulation on civil liability for the operation of AI systems, which addresses its purpose, scope of application, and the different liability systems envisaged. In this analysis, the author identifies the relevance of these provisions in the context of damages derived from automated driving, which is characterized by the elimination of the human factor as a criterion for objective imputation of liability. This approach is particularly relevant in cases of manufacturing defects, safety failures or incidents arising from cyber-attacks, and the author provides a well-judged analysis of this. Conversely, the author also directs attention to the analysis of the Proposal for a Directive on non-contractual civil liability and Artificial Intelligence systems. This entails an examination of the implications of the proposal and a delineation of the EU legislator´s intention to conduct an assessment and potential revision of the regulation within a five-year period following the completion of the transposition period into national law. The fourth chapter addresses the question of international jurisdiction in the context of tort liability claims arising from the use of autonomous vehicles. In this context, Dr. Lafuente examines the existing problems, focusing on and developing six aspects of particular relevance. These include the forum of the defendant´s domicile, provided that it is located in the territory of the European Union; special jurisdiction based on the place of the harmful event, analyzed in the light of the evolution of case law of the European Court of Justice; and the forum in matters of insurance, highlighting the relevance of the direct action, which allows the injured party to claim directly from the insurer responsible for the damage caused. Furthermore, the author emphasizes the role of the party autonomy, which is explored through an exhaustive review of the different pronouncements of the ECJ on the subject and the determination of the competent judicial authority in cases where the insurer is domiciled outside the territory of the European Union. Finally, the author considers the interaction between the provisions of Regulation (EU) 1215/2012 and the European initiatives related to the regulation on Artificial Intelligence. In conclusion, the author addresses the applicable law to non-contractual civil liability for international claims involving autonomous vehicles. In the fifth chapter, the Rome II Regulation is examined, with particular focus on the exercise of party autonomy in the use of AI systems, the "lex loci damni" connection criterion and the determination of the applicable law in matters of non-contractual liability for damage caused by defective products. Furthermore, the article provides a comprehensive examination of Article 5 of the Rome II Regulation, encompassing the conflict of law rules that may prove pertinent to the regulation of damage caused by AI systems integrated in autonomous vehicles. Moreover, an examination of the 1971 Hague Convention on the Law Applicable to Traffic Accidents and the 1973 Hague Convention on the Law Applicable to Products Liability is beneficial to ascertain the potential advantages of the Rome II Regulation in comparison to these international instruments. In this context, Prof. Lafuente correctly asserts that party autonomy enshrined in the Rome II Regulation empowers the parties to select the applicable law in the aftermath of an accident, a prerogative that is not encompassed by the 1971 Hague Convention. Furthermore, he emphasizes that the connecting factor based on the common habitual residence of the victim and the party responsible for the accident, as provided for in the Regulation, has substantial advantages. This is particularly the case when both parties

have their habitual residence within the European Union, as this connecting factor fully corresponds to their legitimate expectations. The article concludes with a series of observations concerning the interplay and ramifications of the proposed Regulation and Directive on Artificial Intelligence vis-à-vis the Rome II Regulation and the Hague Conventions.

In summary, this monograph represents an excellent contribution to the field of private international law and is essential reading. Professor Lafuente displays a profound understanding of a complex subject matter, approached with outstanding rigor. Through a legal technique that is distinguished by its depth, clarity of exposition, argumentative coherence and impeccable structure, he facilitates the reader's understanding of the various problems raised and successfully resolves them. It is beyond doubt that this book will become a fundamental point of reference in the of law for all legal professionals and academia.

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MEDICI-COLOMBO, Gastón. *La Litigación Climática sobre Proyectos: ¿Hacia un punto de inflexión en el control judicial sobre la autorización de actividades carbono-intensivas?*, (Tirant lo Blanch, Valencia, 2024)

Climate change litigation is a rather novel and amorphous puzzle with a laborious, but also stimulating, unravelling. It takes place in a complex context formed by the not always clear prerogatives and duties emanating from a dynamic international climate change regime, the multiplicity of different jurisdictions affecting the very same activities and the added difficulty of certain gaps discouraging or watering down the adoption of ambitious ecological measures. This overall picture gets more complicated with the increasing amount and variety of cases, wherein manifold legal arguments are mobilized by different actors, creating the perfect scenario to cherry-pick among those arguments in order to corroborate a pre-set diagnosis of (international) law's relation with climate change.

Dr. Gastón Medici-Colombo's book, built on his PhD dissertation, consciously engages with these two challenges. As to the latter, by focusing on the jurisprudence centered around the decision-making of public agencies to assess the (alleged) climate impact of planned carbon-intensive projects (p. 30), the book identifies an object of study that presents, and invites to, befitting comparability. This choice is more than well-supported in the light of the ongoing lack of commitment to a phasing out from major fuel-producing countries and companies[1] and the gap that specialized academic literature experiences with respect to a thorough and exclusive analysis of this type of cases. At the same time, regarding the former challenge, the author knowingly embraces the imprecise predictability that the aforementioned intricate elements pose in order to flesh out their legal role, while assessing their juridical evolution overtime, in the cases selected.

La Litigación Climática sobre Proyectos, in a clear example of the unavoidable intersection between science and the legal tackling of climate change, borrows the concept of *tipping point* from the IPCC with the objective to distinguish a jurisprudential change that goes beyond the mere general consideration of climate change in the decision-making of planned carbon-intensive projects (p. 498). This tipping point would occur through a process of sedimentation in so far as the accumulation of many juridical sentences would bring to the fore different legal arguments affecting the existent regulatory landscape. Namely, bearing in mind the multiplicity of jurisdictions where this network of climate change cases take place and the ensuing heterogeneous solutions they generate (p. 230), the author seeks a transversal shared core of legal arguments provoking the judicial internalization of a meticulous assessment of the climate stability dimension of planned projects.

[1] United Nations Environment Programme (2024) "Emissions Gap Report 2024: No more hot air … please! With a massive gap between rhetoric and reality, countries draft new climate commitments", p. 10.

The structure that this work follows to determine to what extent this tipping point can be assembled enrichens the critical analysis of the cases selected. In this sense, the first and second chapters of the book examining the regulatory answer to climate change and the many peculiarities of climate change litigation, respectively do not have to be read as a mere contextualization that simply helps to get closer to the judicial decisions, for they strongly contribute to sharpen the toolbox through which many aspects of these decisions would otherwise be impossible to unveil. This is the case for the territorial accounting of greenhouse gas emissions under the international climate change regime and its relation with the concept of carbon budget (p. 149), as well as the counter-hegemonic democratic tinge behind many applications that also reaches some judiciaries (p. 250).

It is the third chapter where, throughout 240 pages, the bulk of the most relevant parts of climate change decisions can be found. Dr. Medici-Colombo unpacks the content of an enviable number of 93 judicial decisions out of the 116 cases that are fit to be part of the object of his study. More than 85% of those decisions are adjudicated in 13 Global North countries, whereas the remaining ones are found in 12 jurisdictions of the Global South. This clearly generates a partial representation of how carbon-intensive projects are authorized, and judicially approached, worldwide. Nevertheless, this cannot be blamed to the author due to the few cases that end up being decided before a judge in the Global South and the different geographically-dependent methods through which such projects are battled, which are not fully captured by judicial lenses.

The acceptance and attention devoted to the indirect effects and accumulative climate impacts of carbon intensive projects are central argumentative elements that the book strives to detect in the selected cases. In the United States of America and Australia, which account for more than half of the decisions assessed, judges have considered that these climate effects and impacts meet a causal nexus and test of reasonability so as to be part of the environmental domestic laws through which such projects ought to be assessed. Nevertheless, as it is skillfully nuanced on several occasions, this does not have to be confused with an outright rejection of the project assessed; for example, in the United States of America, none of the 30 analyzed decisions resulted in such rejection (p. 318). At the same time, it is also recalled that some countries, such as New Zealand, do not even recognize this causal nexus.

The final chapter returns to the ambitious initial objective behind this book and extensively problematizes the possibility to assemble a tipping point that forces public decision-makers to carefully scrutinize the climate dimension of decision-making by public agencies regarding carbon-intensive projects. While stressing that the accumulation of legal arguments is there waiting to be connected such moment has not arrived yet. The conclusion itself might seem, at first sight, foreseeable, but the innovation lies in how Dr. Medici-Colombo, by grouping together arguments from cases occurring in different jurisdictions, audaciously reveals the room for manoeuvre that the law confers to craft ambitious climate change measures. This is epitomized by two instruments, appearing in certain decisions, that are not mandatory for decision-making authorities under international law but which are not forbidden neither: the use of carbon budgets (p. 570) and the attribution of fossil fuel emissions to the country where they are produced albeit they are burned elsewhere (pp. 537-538). By adopting

this propositive stance, the final chapter initiates a dialogue with certain legal aspects, especially relevant from the standpoint of distribution of resources and democratic legitimacy, present in the first and second chapters. Simultaneously, this allows the author to warn that the judicial debunk of baseless arguments such as the Marked Substitution Assumption do not entail that their substitutes certain energy market model techniques are automatically free of normative assumptions with an inherent dubious socio-ecological ordering and impact (p. 548).

To conclude, *La Litigación Climática sobre Proyectos* is an indispensable book that exhaustively identifies the ins and outs of more than 100 climate change cases and, in a stimulant vein, maps how they progressively lean the law to play a decisive role in preventing the closure of the window of opportunity to avert a dangerous climate change. The analytical depth through which the author addresses the concrete, and timely-justified, focus on carbon-intensive projects highlights legal insights which are also, without any doubt, relevant for climate cases beyond the scope of his study.

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OANTA, G. A. (Dir.), *Los derechos humanos en el mar ante los desafíos de la transición ecológica y digital*, (J.M. Bosch Editor, Barcelona, 2023)

More than 70% of our planet is covered by seas and oceans, on which humanity depends to a large extent and over which States project their jurisdiction with limited extension and variable intensity. Throughout history, the uses and exploitation of these spaces have been an indicator of technical and technological progress, as well as a privileged way for economic, political and social development. This interest is now joined with climate change, because it has a negative impact on the state of health of the seas and oceans and because these spaces play a determining regulatory role in the world's climate. In this context, and in the spectrum of tools for combating climate change, digital technologies are opening up new possibilities for adopting measures to minimize the ecological footprint of human activities and also for adapting to a changing climate environment, but like other disruptive phenomena, they pose challenges, questions and dilemmas that require attention and analysis.

The book that is the object of this review not only addresses, simultaneously, the opportunities and challenges posed by the ecological and digital transition in the maritime environment, but does so from the perspective of its impact on people, thus offering an undoubtedly interesting approach to the interaction of the Law of the Sea and International Human Rights Law under the effects of this double transition. This approach uses mainly but not exclusively the EU as the focus of analysis, given EU declared interest in placing people at the core of this double transition.

The complexity and ambition of such an approach owes to the rigorous trajectory of Professor Gabriela A. Oanta, director of the publication and holder of the Jean Monnet Chair on the Law of the Sea attached to the Salvador de Madariaga University Institute of European Studies of the University of A Coruña, of which she is also director. As with previous publications, this one was preceded by an outstanding international conference in March 2023, with the participation of experts from several universities in Spain, France, Greece and Italy, and the collaboration of various national and European academic institutions.

The structure of the book offers, first, an overview of the challenges and opportunities posed by the ecological and digital transition in the marine environment (Part I), and then addresses its impact on human rights at sea, from the perspective of marine spaces and resources (Part II) and of the people of the sea, in particular vulnerable human groups that 'transit' these spaces (Part III).

The five chapters included in Part I provide a timely selection of topics that highlight the impact of the ecological and digital transition on the maritime environment and seemingly unexpected consequences of some of the policy decisions approved for the management of these spaces. Thus, Chapter 1 discusses the measures adopted by the EU to reduce the environmental effects of the maritime transport sector and the support offered to this end by innovations resulting from the digital transition. Its author,

Professor Sobrino Heredia, identifies the tensions that European companies face in the context of international competition and highlights the problems that the "unstoppable" technological revolution in maritime transport poses for the protection of fundamental rights and data security. As Dr. Sobrino warns, the undoubted benefits associated with the sustainability-digitalization binomial do not exclude the need for adequate funding for its implementation and an inclusive approach that minimizes the difficulties faced by people in the sector. Chapter 2 addresses the EU actions aiming at greening the Blue Economy and achieving a twin ecological-digital transition in the maritime environment. In Professor Stribis view, the initiatives and policies already adopted "go hand in hand, complementing each other, and benefitting mutually from their achievements", so he encourages EU's actors to continue on the same path. In Chapter 3 Professor Huici Sancho presents the EU's approach to coastal and maritime tourism and, given the relevance of the sector for the Blue Economy, defends the need for clear public policies on the matter. In this line, she highlights the positive contributions of the EU to the development of the ecological and digital transition of tourism, which does not exempt the need for a better planning that takes into account the different actors involved. Chapter 4 is devoted to "autonomous ships". Professor Mkrtichyan Minasyan identifies the instruments and initiatives that underpin their current weak international legal regulation. Such incipient regulation, he notes, presents challenges and opportunities for the maritime industry, the business model and employment in the shipping sector, and opens up relevant questions as the determination of liability. Part I closes with a chapter on "the problem of the privatization of the seas": Professor Nathalie Ros warns of such privatization dynamics, through various forms of private appropriation of marine spaces and resources which, she says, violate human rights in relation to the sea, particularly collective and transgenerational rights belonging to local or indigenous communities and to the international community itself; the ecological and digital transition would be simultaneously providing arguments and facilitating such privatization.

As indicated before, the following chapters focus on the problems associated with human rights at sea and the ecological and digital transition, organized under two specific perspectives: marine spaces and resources (Part II) and the people of the sea (Part III).

Part II begins with a study on the problem of fisheries subsidies, through a dual multilateral and EU prism. The first allows Professor Teijo García to locate the objective of reducing harmful fisheries subsidies in SDG 14.6 and to identify the limits of the commitments reached within the WTO. Under the second prism, he analyzes EU legislation in this area and identifies the main obstacles to its reform. The analysis is an excellent example of the "significant obstacles" that are created in practice by combining the three dimensions of the notion of "sustainable development". The exploitation of fishery resources is also the focus of Chapter 7, under the perspective of the requests posed by the ecological and digital transition to the EU Common Fisheries Policy. Professor Oanta gives a balanced and positive assessment of the evolution experienced by this policy, but also points out three specific needs that should be addressed in relation to the ecological and digital transition: adequate funding, training of European operators adjusted to the changes resulting from digitization, and the implementation of a transitional process for the introduction of ecological and digital requirements. Chapter 8 discusses the Proposal for a Regulation to prohibit the placement and availability on the

EU internal market of products made with forced labor and their exports and examines its compatibility with WTO and GATT rules. Particularly, the chapter focuses on the control of fisheries products entering the EU market and debates some challenges of traceability in the framework of the EU digital transition. As professor Bürgin points out, a proper certification system under control of the competent authorities will be needed, and the digital transition can contribute to this end, while also accounting for preventing discrimination against economic operators who are not (yet) sophisticated users. The opportunity of Chapter 9 from the perspective of International Human Rights Law is obvious: the permanent sovereignty of peoples over their natural resources including marine resources as a corollary of their right to self-determination. And the "judicial review" before the European Court of Justice of the EU-Morocco fishing agreements regarding the exploitation of the fishery resources of Western Sahara allows Professor Soroeta to demonstrate in a substantiated and detailed manner the full validity and timeliness of international law in this field. Part II of the book closes with Chapter 10, a suggestive approach to the protection of underwater cultural heritage. Professor Pavoni argues for the emergence of a human rights approach to cultural heritage, applicable to the UNESCO Convention on the Protection of the Underwater Cultural Heritage, its basic core being the collective and individual right to access, enjoy and participate in the protection of underwater cultural heritage. His argument is based on the analysis of the relevant jurisprudence of the ECtHR and the evolution of international human rights law, demonstrating the influence of human rights on the practice of interpreting and applying cultural heritage law.

Part III of the book focuses on the impact of the ecological and digital transition on the human rights of the 'people of the sea', an expression that rightly includes fishermen and workers in the maritime fishing sector and particularly vulnerable individuals and groups in the maritime domain.

Thus, Chapter 11 centers on migrants by sea and addresses certain aspects of EU immigration and asylum policy that are relevant to the control of irregular immigration, specifically in the Mediterranean. Professor Díaz Peralta identifies the problems generated by the absence of a coordinated EU search and rescue system, the obstacles faced by NGO vessel operations, and the deficient guarantee of the right to asylum and the principle of non-refoulement attributable to EU naval military operations in the Mediterranean and to certain actions of Frontex. The chapter closes with considerations on the risks of the use of artificial intelligence in the field of migration and, overall, offers clues for interpreting the scope of the EU Pact on Migration and Asylum, adopted after the book's closing date. Chapter 12 then focuses on three vulnerable groups in the maritime environment (victims of child or forced labor and migrant workers) and identifies the applicable legal framework for the protection of their rights. Professor Sánchez Ramos highlights the potential positive contribution of the ecological and digital transition to the protection of these vulnerable people, both through traceability systems in the value chain of fisheries products and through the help that technological advances can provide to verify the absence of human or labor rights violations along the entire supply chain. Changing to 'cultural rights', Chapter 13 examines the main effects of climate change and ecological transition measures on the way of life of fishermen and fishing communities, and analyzes the requirements that international human rights law imposes on measures that promote ecological transition but have the potential to

interfere with the way of life and cultural rights of these individuals and communities. The analysis leads Mr. Schreinmoser to identify a prohibition of any measure that would have a substantial negative impact on the cultural practices of minorities and indigenous peoples, where no concrete collision with the right to a healthy environment can be invoked. Then, from the perspective of labor and social security law, Professor Carril explains in Chapter 14 the conditioning factors and specificities of decent work at sea and the obstacles that may prevent its continuity due to the ecological and digital transition. On the same subject, Chapter 15 presents the close relationship between decent work and sustainable fisheries, and the reasons for the limited effectiveness of the IMO and ILO conventions on the subject. On this basis, Dr. Carballo identifies the positive contribution of non-binding instruments adopted within the framework of the FAO, as well as of various initiatives to strengthen social dialogue and corporate social responsibility in the fisheries and aquaculture sector. The book closes with Chapter 16, centered again on the irregular trafficking of migrants by sea and the risks and alternatives offered by the ecological and digital transition. Professor Morgades warns about the impact of digitalization on the EU strategic lines and measures, with a probable increase in the 'securitization' of European migration policy, and finds in the ecological transition the potential to offer certain guarantees for the protection of the rights of persons subject to this irregular traffic.

In short, this book offers an overarching examination of the consequences of the ecological and digital transition on the interaction between the Law of the Sea and Human Rights Law, demonstrating the importance of keeping human rights in mind as 'the' center of interest. Moreover, the range of issues studied and their thorough analysis provide a necessary frame of reference for any further research on any of them.

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RODRIGO, Ángel J., *La autonomía del Derecho Internacional Público*, (Aranzadi, Pamplona, 2024)

The existence of an ordered and coherent system of norms and principles of an international scope is a matter of course today. Public international law, unique, universal and complex, exists and governs the international community. Nonetheless, the legal nature and the basis for the bindingness of the norms that make up this order, as well as the autonomy, relevance and legitimacy of the international legal order itself, remain issues of systemic uncertainty.

In a context of significant essential and structural changes within the international community, of galloping material hyperspecialisation and, to some extent, a concerning fragmentation of public international law into relatively autonomous regimes or subsystems, Professor Rodrigo Hernández undertakes an admirable exercise of generalist research (currently in danger of extinction) to return the interpretative international law community to the foundations of the international legal order. This research is carried out, moreover, in the conviction that he is fulfilling the institutional duty which, in his view, all international law officials have to defend the (relative) autonomy and unity of public international law against the attacks of sceptics and corrupt states who seek to benefit from its fragility.

The central idea that the author of this book seeks to convey to the reader is clear from the first page to the last: in a scenario of important changes in the international community, which constitutes the social substrate upon which the international legal order is built, it is necessary to adopt a new conception of public international law that extols its autonomy, relevance and legitimacy. This conception is that of international inclusive legal positivism, which establishes that in international law there is a complex rule of recognition that is integrated by formal criteria of identification of a procedural nature, based mainly on the sources, and inclusive identification criteria, which take into account the substantive content of international norms and their necessary connection (but not dependence) with morality and politics. Such a complex rule of recognition, together with inclusive identification criteria, facilitates the defence of the legal character of international norms and, ultimately, the relative autonomy of international law as a necessary myth to reinforce its relevance and legitimacy.

In the first chapter of the book, Professor Rodrigo Hernández analyses, on the one hand, the origin and functions of the science of international law, starting from the premise that its mere conceptualisation as a 'science' is not exempt from criticism and challenges. As early as the times of Francisco de Vitoria and Hugo Grotius, the legal nature of *ius gentium* was debated and argued philosophically from an eminently positivist perspective, since only if international law is positive does the science of international law constitute an autonomous science. On the other hand, the confirmation of the existence of a science of public international law, the author asserts, has a dual function: descriptive, insofar as it serves to demonstrate the existence of legal norms; and constitutive, as it supports the constitution of an international legal system.

The second chapter, in my view, masterfully addresses one of the problems that generates most ontological scepticism and systemic uncertainty in the science of public international law, namely, the basis of the binding nature of international norms, an issue whose debate, for some authors, is absurd and outdated given the maturity of this legal system. However, the relatively recent irruption of the *soft-law* phenomenon as a set of norms with an attenuated degree of normativity, either by their form or their content, which influence and have effects among the subjects of the international community, has reopened the debate and it is necessary to offer new answers to the following questions: what is it that makes a norm become part of the international legal order? And why does this international legal order bind? Professor Rodrigo Hernández seeks to address these questions by drawing on the studies of several prominent authors in the field. Based on the analysis of these theories, the author highlights those that ground their contributions in classical voluntarist positivism, according to which a norm becomes legal and binding by the will of states when they express their consent and self-limit their power (G. Jellinek), by the unity of state wills (H. Triepel) or by the principle of *pacta sunt servanda* (D. Anzilotti). Other authors, defending Hans Kelsen's thesis, base their contribution on the supreme fundamental norm as the source of the validity of international legal norms. More recently, some authors have shifted the centre of gravity of the basis for the binding nature of international norms from states to the international community and its shared values and interests. However, despite the sophistication of the arguments offered by this series of authors, Professor Rodrigo Hernández highlights the limited explanatory performance of the positions that base the foundation of the binding nature of international norms on the will of states, disconnecting and isolating international law from the changes that have occurred in the international community since the end of World War II, in which states are no longer the only subjects with international legal personality.

The next question that the book attempts to resolve, which is closely linked to the previous one, is that of the legal nature of international law. In this debate, as Professor Rodrigo Hernández points out, there is growing support for the realisation that international law is a social fact in which it is necessary to claim a minimum threshold of normativity in order to consider a norm as a legal norm, and thus be able to differentiate it from other norms with a lesser degree of normativity or legal authority. In short, it is a matter of proposing criteria that help to distinguish law from non-law. Thus, the answers systematised in this third chapter, among which H. Hart's rule of recognition stands out (although for H. Hart international law is a primitive law), have, according to the author, a greater explanatory performance than those based on classical voluntarist positivism, as they not only explain the basis of the binding nature of international norms, but also help to identify formally legal norms and to distinguish law from non-law.

Having analysed the different ways of explaining the basis of the binding and legal nature of international norms, the fourth chapter of the book goes into the defence of the autonomy of international law, describing first of all what is to be understood by this autonomy. If anything is clear throughout this research work by Professor Rodrigo Hernández, it is that international law exists and is an autonomous and independent legal system that does not require morality or politics to exist, which does not mean that it is neutral, as it is closely connected to them. Such a connection is necessary, though not sufficient, to give international law legitimacy and relevance. In this chapter,

the author explains the autonomy of international law by means of the social thesis of sources. The acceptance of the social thesis of sources to explain the autonomy of international law derives from the complex rule of recognition together with inclusive identification criteria, which in the fifth chapter will be referred to as international inclusive legal positivism.

Thus, in the penultimate chapter of the book, Professor Rodrigo Hernández defends international inclusive legal positivism as the most suitable conception at present to explain the basis of the binding nature of international norms, the legal nature of these norms, international law as a set of relevant social facts, the validity and relevance of this law in the international community, and its relative autonomy from morality and politics. Inclusive international legal positivism consists of affirming that there is a complex rule of recognition, successor to H. Hart's rule of recognition, which constitutes a convention with a constitutive dimension from which the validity of international law as a whole derives, and a series of inclusive identification criteria, which make it possible to explain the incorporation into the international legal order of criteria of political morality on which the primary rules depend, while maintaining the formal requirements based on the sources (*pedigree*) to acquire the status of a norm in the international legal system. Within this chapter, the author's analysis of the conclusions of the International Law Commission on the identification of *jus cogens* norms is significantly illustrative.

The last chapter of the book takes up the question of the autonomy of international law, already formulated within the framework of inclusive international legal positivism, in order to analyse its characteristics and to underline the need to defend it. As this sixth chapter shows, the autonomy of public international law should not be understood as a condition that isolates the international legal order and disconnects it from questions of morality and politics. Such a conception is a myth, but a necessary myth. Public international law is not neutral, the autonomy of this law is relative, as it has a contingent connection with moral argumentation and international politics. The permeability of this type of arguments is necessary, in the author´s view, because it gives legitimacy to international law. However, this characteristic of the relativity of the autonomy of international law makes it at the same time relational, dynamic and fragile. More and more states are making instrumental use of the moral values that international law protects and turning it into a weapon to be used for their own interests (*lawfare*).

In this scenario, Professor Rodrigo Hernández assigns us a task. The international legal interpretative community has the institutional duty and ethical responsibility to defend the relative autonomy of public international law from the perspective of legal formalism, but also by resorting to arguments of political morality identified and shared in the international community. Only by positioning ourselves in the new conception of international inclusive legal positivism and defending the relative autonomy of public international law in our research and studies will we be able to build a valid, relevant and legitimate legal order for the international community, resistant to the attacks of sceptics and corrupts.

In short, Professor J. A. Rodrigo Hernández's book, highly recommended for all those wishing to return to the foundations of international law, rescues complex legal-philosophical debates that hyperspecialised international law scholars tend to shy away from, contributes with new perspectives, and brings them to the forefront at a time when

the risk of fragmentation in public international law is pressing. As the author asserts, the fragmentation of public international law into relatively autonomous regimes or subsystems is not a problem itself. However, this risk becomes a reality, and fragmentation turns into a challenge when those charged with identifying, studying, interpreting, and applying international law disconnect from the foundational principles and general issues that underpin it. Just as Professors Dupuy and Casanovas once defended and as Professor Rodrigo Hernández today defends, with extraordinary mastery and command of language and sources, international law scholars must be the guardians of the unity and relative autonomy of public international law, rather than exclusively specialists in specific international regimes.

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SANTOS VARA, Juan, *El Nuevo Pacto de la Unión Europea sobre Migración y Asilo* (Tirant lo Blanch, Valencia, 2024)

Migration and asylum are constantly at the top of the EU political agenda, since the human and institutional consequences of deficiencies in the supranational management of these phenomena tend to turn limited legislative harmonization and poor implementation into crises. And precisely the so-called 'refugee crisis' the EU was confronted with in 2015-2016 was mostly the result of an uncomplete and inefficient Common European Asylum System (CEAS), whose reform represents the core objective of the New Pact on Migration and Asylum the Commission proposed in September 2020. This Pact contained political orientations to gear these policies in the coming years and was accompanied by a set of legislative proposals concretizing an apparent 'fresh start' on migration, asylum and border management. After almost four years of disagreements between EU institutions and among Member States themselves, defending quite distant positions as regards mainly the tension between solidarity and responsibility on the reception of asylum seekers and the examination of their protection claims, the Council and the European Parliament finally agreed, in May 2024, to approve a normative package as legislative expression and thus 'blessing' of the Pact consisting of modifications to already existing norms of the CEAS and the adoption of new ones. On the substance, the former relate, among other aspects, to asylum procedures, qualification for international protection, reception conditions, and the Eurodac fingerprint database, while the new acts cover asylum and migration management, screening and border return procedures, reaction to situations of crisis and force majeure, or resettlement and humanitarian admission. The whole reform, as the Commission puts it, will allow the Union and its Member States to rely on faster and more efficient procedures for asylum and return, with stronger individual safeguards not always easy to reconcile with urgency , to act against the abuse of the system by further securing the external borders and preventing secondary movements of asylum seekers; to make solidarity and fair sharing of responsibilities on border management and asylum work; as well as to adequately respond to unanticipated pressures and crises caused by particular migratory pressure.

Within this context, the book by Prof. Santos Vara, devoted to analyze the main novelties foreseen in the New Pact and specified in the legislative proposals associated to it, is certainly welcome, since this work aims at assessing whether the new legislation will be apt to tackle the challenges faced by the EU on migration and asylum and provide well-functioning policies in these areas, both in ordinary times as in times of crisis. A second objective of this monograph seeks, more particularly, to assess if the legislative proposals allow the Union to fulfill the obligation enshrined in art. 78 TFEU, the legal basis binding it to develop a common asylum policy that offers an adequate statute to third-country nationals in need of international protection and respects the *non-refoulement* principle. By undertaking this research, Santos Vara achieves to provide the keys to the political and legal challenges underpinning the reform, and highlights the limitations that, primarily in terms of human rights protection, derive from some of the most relevant and controversial elements of the proposed reform, which are now part

and parcel of EU asylum and migration law. Although the book, because of its publication date, focuses on the letter of the proposals associated to the Pact and not on the final versions of the legislative acts that have been recently adopted, mostly in the form of regulations, by the EU co-legislators, the analysis by Santos Vara of those proposals whose most important features are definitely preserved to a large extent in the final acts appears tremendously valuable in order to correctly understand the political challenges this reform raises, the logic behind the diverse negotiating positions (and their evolution) defended by the different institutional actors, as well as the implications of this legislative reform from the perspective of both human rights protection and the efficiency and normative coherence of the system itself. The monograph does not, understandably, comprehend the proposals related to the whole legislative package which occupies now hundreds of pages of the Official Journal, but concentrates on those that certainly cover some of the most salient aspects of the reform, such as the pre-entry screening procedure, the main amendments to the CEAS particularly, the asylum border procedure, the modification to the Dublin rules, and the solidarity mechanism , as well as the external dimension of EU asylum and migration policies.

More in detail, the book is divided into four chapters. The first one brings to light the lack of coherence in the design and implementation of the CEAS before the reform, by explaining the functioning of the Dublin rules on the determination of the Member State responsible for examining an asylum application, and then showing the deficiencies of the current CEAS as regards the imbalances caused by the Dublin system, the need for an integrated approach on implementation, as well as the lack of efficient mechanisms to put solidarity at work and to face situations of crisis. This political and normative context allows the author to present the response provided by the Union to the refugee crisis of 2015 and to place the New Pact on Migration and Asylum within that precise context, by assessing the recourse to this political instrument, the return of the intergovernmental dynamic or the complexity of the negotiations on the legislative proposals conforming the Pact and the political considerations behind them, whose command by the author, shown here and throughout the book, provides a clear added value to understand the spirit of the new rules.

The second chapter examines the pre-entry screening procedure to which third-country nationals will be subject to at the external borders (introduced by Regulation 2024/1356), aimed at contributing, according to the Commission, to the setting of a seamless migration process. Attention is especially paid by the author to the legal fiction of non-entry this (not so) novel procedure creates; the role EU agencies such as Frontex and the EUAA will play at the screening reintroducing, because of its similarities, the controversial practices typical of the hotspots approach ; the impact this stage of control may have on the fundamental rights of persons affected; and the ambiguous relationship between the pre-entry screening and the principle of solidarity in practice. It is worth noting how the author constantly confronts, throughout the book, the projected reforms with the positions expressed by the ECJ and the ECtHR through their case-law on the current legislation. It will be crucial to see how the Luxembourg Court in particular interprets the new provisions in light of EU law safeguards, taking into account that some changes in secondary law prescriptions might lead to relevant jurisprudential shifts.

In the third chapter, Santos Vara focuses on the analysis of the proposals which specifically make up the reform of the CEAS, by paying attention and puzzling out the meaning and implications of some of its most salient elements. To that effect, this chapter first examines the systematic recourse to the asylum border procedure (as foreseen in Regulation 2024/1348, the *Asylum Procedures Regulation*) and the integration of both the asylum and return decisions in these cases. It then proceeds to the analysis of two transcendental pieces of the new Regulation on Asylum and Migration Management (Regulation 2024/1351): on the one hand, the modification to the Dublin rules on the distribution of responsibility for examining asylum applications, which preserves, to a great extent, the current legal regime with some contentious exceptions, such as the obligations imposed on asylum seekers and the new rules affecting unaccompanied minors; as well as, on the other hand, the mandatory mechanism of flexible solidarity aimed at balancing the system through Member States' contributions in the form of relocations of asylum seekers and refugees and other alternative measures, a mechanism that Santos Vara interestingly assesses in terms of differentiated integration, a very well-known process in the EU migration and asylum policies.

The fourth and final chapter addresses another essential component of the EU migration and asylum policies, its external dimension, which undoubtedly occupies a prominent place within the text of the New Pact and when it comes to its implementation too. As Santos Vara rightly points out, strengthening cooperation with third countries on migration and asylum receives more attention particularly when the Union is confronted with disagreements and lack of progress on the negotiations relating to the internal dimension of these policies, as if, paradoxically, it would be easier to achieve consensus with third countries that among Member States themselves. The analysis offered in this chapter delves into three features of the external dimension of EU migration and asylum policies that continue to raise legal objections. Indeed, the informalization of cooperation instruments, the externalization of migration management functions to third countries, and the increasing recourse to negative conditionality with regard to return and readmission commitments are still very present under the New Pact, confirming the latter's non-innovative approach to the detriment of rule of law considerations.

The book concludes with thoughtful and acute remarks on the assessment of the New Pact, the approach underpinning it, and the intricate issues raised by its core elements, questioning that the Pact and the normative acts it brings about, focused on limiting access to the territory and ensuring returns, are able to address the structural weaknesses of the EU migration and asylum system. In sum, this monograph provides a solid and accurate analysis of the spirit and main contours of a legislative reform whose interpretation and actual application, which has been delayed, for most of the regulations, until 2026 in order to properly prepare for its implementation, will continue to occupy the center of the political and legal debate on migration and asylum at both the supranational and national levels in the years to come. The book by Santos Vara therefore offers a very valuable reading for seizing the sense of the new rules and grasping the implications these may have on the efficiency of the EU migration and asylum policies and the rights of persons they are meant to protect.

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TORRES CAZORLA, María Isabel, *La mediación como mecanismo de arreglo pacífico de controversias en Derecho Internacional Público* (Tirant lo Blanch, Valencia, 2024)

The book under review deals with a classic topic in public international law. It adds to the long list of academic works on mediation as a peaceful mechanism to settle controversies among states (pp. 245-263). It is welcome, however, because the author claims the pertinence of mediation before a world currently dominated by the proliferation of armed conflicts, the violation of the purposes and principles of the Charter of the United Nations in full impunity and the emergency of the climatic change. All together are threatening the future of humanity.

In her foreword, professor Diago also shares the view that even in adverse contexts mediation represents the last chance to settle conflicts. As far as the current conflicts show the emergency of non-state actors, mediation needs to be adaptated to new changes (p. 16). Mediation means that a third party, impartial and neutral, enables the dialogue and negotiation between the two conflicting parties who voluntarily accept the mediation (p. 17).

The work is divided into five chapters which follow a logical structure. Moreover, it contents some conclusions. The first chapter (pp. 25-73) is a general introduction to the topic of means to peacefully settle international disputes in a historical perspective. While both legal and political disputes always existed in the world, the author pays special attention to the origins and evolution of the states obligation to peacefully settle disputes in both The Hague Peace Conferences of 1899 and 1907. Their main outcome was the 1889 Convention for the Pacific Settlement of International Disputes regulating three means of political settlement (i.e. good offices, mediation and international commission of inquiry) and one legal settlement procedure (the Permanent Court of Arbitration, still in force). All of them were optional and only the arbitration award is binding to the parties.

Next, the author deals with the practice developed by the Society of Nations and the United Nations Organization in the field of mediation. Article 2(3) of the 1945 UN Charter stated that "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". It was followed by Article 2(4) by which "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". In addition, Chapter VI ("Pacific Settlement of Disputes") reminds that parties to any dispute shall seek a solution by "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement…" or other peaceful means of their own choice [Article 33(1)], all of them optional. Moreover, GA Resolution 2625 (XXV) of 1970 and the 1982 Manila Declaration on the Peaceful Settlement of International Disputes (which named the good offices), as well as the Organisation for Security and Co-operation

in Europe (OSCE, 1994) and its Tribunal on Conciliation and Arbitration restated the UN Charter and made no significant progress to the issue.

The second chapter (pp. 75-110) presents a classification in two categories of means to peacefully settle disputes in international law since the adoption of the UN Charter, namely: First, the no jurisdictional means (i.e. negotiation, good offices, mediation developed by GA Resolution 65/283 of 22 June 2011-, conciliation developed by GA Resolution 50/50 of 11 December 1995 and fact-finding, all of them no binding). Second, the jurisdictional means (arbitration and judicial settlement, both optional but binding their decisions; a clear distinction between them is provided in p. 99).

The third chapter (pp. 111-165) deals with the distinction between good offices and mediation. While they are similar mechanisms, mediation allows the third party to propose ways of settlement (p. 117). Once the mediator is accepted by the conflicting parties, the mediation procedure is very flexible and may be used in any situation, but it is more suitable to prevent conflicts, once initiated, or to consolidate peace when the conflict is over (p. 122). Ways and functions of the mediation must be carried out confidentially, as detailed in p. 132. The incumbent of the mediation may be a personality, third state(s) or an international organization, in particular the UN where the Secretary-General appoints special representatives/envoys for each conflict, to offer good offices and mediation between conflicting parties (pp. 142-145), In any case, the mediator must be impartial (p. 150), but no neutral (pp. 152-153); he or she needs a thorough knowledge of the situation (p. 161) and be trained in mediation techniques (p. 164).

The fourth chapter is the central theme of the book (pp. 167-193), focussed on the international mediation at the UN system and the tools developed by the Secretary-General, such as the 1992 Manual on the peaceful settlement of disputes among states, the 2010 Manual for UN mediators and the 2011 Mediation start-up guideliness. In accordance with them, mediation requires to be accepted by the parties in conflict and the mediator be credible and well supported by the international consensus (p. 168).

Next, the author reviews the role paid by the UN principal organs in the field of mediation. Firstly, the Security Council has the primary role since it may, at any stage of a dispute, "recommend appropriate procedures or methods of adjustment" [Article 36(1) of the UN Charter]. Should the continuance of the dispute endanger the maintenance of international peace and security, it shall "recommend such terms of settlement as it may consider appropriate" [Article 37(2)]. Should all the parties to any dispute so request, it may "make recommendations to the parties with a view to a pacific settlement of the dispute" (Article 38). Following SC Resolution 1325 (2000), UN peace-keeping operations shall adopt a gender approach, paying attention to the special protection that women and girls deserve in conflicts. The Secretariat Department of Political Affairs provides a permanent team of independent experts in mediation. UN-Women claims to increase the number of women in mediation procedures. Moreover, SC Resolution 2686 (2023) encourages the Secretary-General to involve women, youth, civil society and religious leaders in mediation procedures (pp. 169-177). Lastly, OHCHR and DPPA issued in 2023 their first practical note on enhancing the quality and effectiveness of mediation efforts through human rights.

Secondly, the General Assembly may make recommendations with regard to "general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments" [Article 11.1 of the UN Charter]. Unless the SC is acting in such situation (Article 12), the GA may recommend measures for the peaceful adjustment of any situation, including those resulting from a violation of the purposes and principles of the UN Charter (Article 14). Moreover, the current war of aggression in Ukraine moved the GA to bypass the SC and take action in accordance with GA Resolution 377(V) of 1950 ("United for Peace") (pp. 178-180).

Thirdly, the Secretary-General may bring to the attention of the SC any matter which may threaten the maintenance of the international peace and security (Article 99 of the UN Charter). In addition, he or she shall perform such other functions as are entrusted to him or her by the UN principal organs (Article 98). According to this mandate and encouraged by the World Summit of 2005, the Department of Political Affairs and its network of special representatives/envoys and presences in the field have developed a consolidated practice in order to offer good offices and/or mediation to conflicting parties, covering 36 situations in 2009. Unfortunately, the Russian war of aggression in Ukraine or the Israeli Palestinian genocide in Gaza, including the aggression in Lebanon and the extension of the war to Yemen, Syria and Iran, show *inter alia* the limits of mediation when one party to the conflict (respectively, Ukraine and Israel) prefers war to peace and is fully supported by USA and its allied from NATO and the EU (pp. 180-189).

Fourthly, some examples are provided on the practice developed by UN specialized agencies in the field of mediation, whose constitutive treaties may prescribe one or more ways to settle disputes. This is the case of the International Civil Aviation Organization (ICAO) and mediation activities carried out by its Council; the UNESCO 1962 Protocol Instituting a Conciliation and Good Offices Commission to be Responsible for Seeking the Settlement of any Disputes which may Arise between States Parties to the Convention against Discrimination in Education and its 2005 Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation; the World Intellectual Property Organization (WIPO) and its Arbitration and Mediation Center; and the International Bank for Reconstruction and Development (IBRD) (pp. 189-193).

The fifth chapter deals with several examples of international mediation provided by regional international organs, such as the EU and its methods of alternative dispute resolution (ADR) including mediation; the 2003 Strategy on European Security; the mediation role carried out by the EU High Representative for Foreign Affairs and Security Policy, established in 1999, including in the fields of international co-operation for development, human rights, electoral observation and peace-keeping operations. They were followed by the 2009 EU Concept on Strenghthening Mediation and Dialogue Capacities and the 2020 New Concept on Mediation addressing peace mediation based on values such as human rights, democracy, rule of law, gender approach, religion, environment and climatic change. However, the EU is loosing relevance in the context of polycrisis dominating the current international relations (pp. 198-207). Mediation activities carried out by other intergovernmental regional organizations (OAS, ASEAN, AU) and some non-governmental organizations (International Committee of the Red Cross, Center for Humanitarian Dialogue), are also described (pp. 208-231)

Professor Torres Cazorla concludes that the international mediation is always necessary and should be the rule rather than the exception in the international arena. Many disputes and conflicts discussed along the book proved that mediation may be a success. However, the emergency of non state actors, the proliferation of civil wars for long periods and the reiteration of the use of force in violation of the purposes and principles of the UN Charter without consequences, place the author in her conviction that mediators are the last chance (pp. 233-243). Even in times of crisis, the BRICs Summit held on 24 October 2024 showed regional emerging powers (i.e.: China, Brazil, South Africa, Türkiye and India) offering good offices and mediation to settle current and alarming armed conflicts.

Alternatively, we should consider that the current proliferation of armed conflicts (the Secretary-General quoted more than one hundred in 2023) is fueled by the alarming increase of the world military expenditure (according to SIPRI, 2,4 billion dollars in 2023); in the same year, FAO reported 2.330 million people suffering from grave or moderate food insecurity. The Pact for the Future, adopted by the GA on 22 September 2024, proved that reform of the obsolete UN Charter shall not be possible. World polycrisis, including the dramatic climatic change, make urgent the adoption of bold measures in the international arena. Therefore, we propose the refoundation of the World Organization on a more democratic basis; less co-operation and more integration and solidarity among states and world people; full recognition of justiciable solidarity rights such as the rights to development and to environment, the human right to peace and the right to disarmament. The future World Parliament should integrate tripartite delegations from all states (i.e.: government, parliament and civil society). The World Executive, also tripartite, should be able to enforce its decisions to prohibit wars and impose peaceful means to settle any dispute, including international mediation. And the World Court of Justice must be compulsory to all states, including a new permanent chamber on human rights, and its decisions to be enforced.

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