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Índex

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In Memoriam. Concepción Escobar Hernández (1959 2025), Eminent International Law Scholar and Practitioner

The community of international lawyers in Spain and beyond is in mourning, as their colleagues grieve the unexpected and premature loss of Professor Concepción Escobar Hernández (Concha for her many friends and colleagues), who passed away in August 2025 when she was at the height of her intellectual powers and of her many occupations and commitments in our field of work.

Professor Concepción Escobar had a long, distinguished and productive career as an academic scholar and also as a practitioner in the international legal field, both in Spain and elsewhere, in particular in multilateral settings, whether in European institutions or in universal bodies such as the UN, international tribunals or the Red Cross.

In those varied activities, Professor Escobar always carried with her not just a wide and deep knowledge of international law and institutions but also a profound sense of the rule of law and of the struggle for justice in international affairs. While she stood firm in her understanding of the law as a set of commonly accepted norms appropriate for regulating social relations, she never lost sight of the importance of the fundamental principles underlying those norms and their ethical aims, especially the essential dignity of human beings.

As a scholar, Professor Escobar started her career at the Complutense University of Madrid, where she worked with Professors Manuel Diez de Velasco and Gil Carlos Rodríguez Iglesias, and at the *Institut de Hautes Études Internationales* in Geneva. In 1987 she obtained the PHD in Law at the Complutense University of Madrid with a doctoral dissertation on the UN Commission of Human Rights and its special public procedures covering situations or matters of particular concern for the international community, a work that was published as a book the following year.

Pursuing her academic career, Escobar became full profesor of international law at the University of Cantabria in Santander, where she worked from 1995 to 2001 and where she continued thereafter to organize and lead summer courses in international and European law. In 2001 Professor Escobar obtained the chair on the same discipline at the *Universidad Nacional de Educación a Distancia*, in Madrid (UNED the Spanish Open University), where she worked continuously until her death. For several years, she was Dean of the UNED Law Faculty (2002 2004) and subsequently Director of its International Law Department (2013 2021). While at UNED she also taught at the *Instituto Universitario Gutiérrez Mellado* of studies on peace and security. From 2004 on, she also held a Jean Monnet Chair on European Law and Institutions at UNED.

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During her long tenure at UNED, Professor Escobar was very active, *inter alia*, in directing or coordinating editions of major collective works of doctrinal and docent interest, such as *La Unión Europea ante el siglo XXI* (2003), *Instituciones de Derecho comunitario* and *Instituciones de la Unión Europea* (from 2006 onwards) or the 18th edition of her master Diez de Velasco's *Instituciones de Derecho internacional p*úblico (2013).

Moreover, Professor Escobar's teaching on international law went further than in purely university settings, as her activity as a docent also extended to the Spanish Diplomatic School where she taught for almost three decades, also coordinating the area of international legal studies as well as to the School for the Judiciary. She also participated in research and publishing activities at the Center for Political and Constitutional Studies and at the *Elcano* Royal Institute for International and Strategic Studies. Her scholarship was recognized in 2007 by the Royal Academy of Legislation and Jurisprudence by electing her as an "académica correspondiente".

Professor Escobar's lecturing was not restricted to Spanish institutions. She also taught courses on the international protection of human rights at the American University's Washington College of Law and participated in the annual courses on international law convened by the Organization of American States' Legal Office each summer at Rio de Janeiro. Of particular importance was her magisterial course on "Immunities of foreign officials in international law" given at the prestigious Hague Academy of International Law in 2019.

With regard to her activities as a practitioner, they were varied and covered almost three decades. Professor Escobar was a member of the Spanish Delegation to the Rome Conference on the International Criminal Court (1998) as well as to the ICC Preparatory Commission and then to the ICC Assembly of States Parties. Following the signature of the Rome Statute and its ratification by Spain, she was also actively involved in the interdepartmental process of drafting legislation for its implementation in Spain, in both its sustantive and procedural aspects.

From 2004 to 2012 Professor Escobar was Head of the International Legal Office at the Spanish Ministry of Foreign Affairs and Cooperation. This was a very intense period in which, besides providing advice to the main authorities in the Ministry, and the Government as a whole, on international legal matters, she represented Spain in many international legal bodies, including in particular the UN General Assembly's Sixth (Legal) Committee, the ICC Assembly of States Parties, the Council of Europe`s CAHDI (Committee of legal advisers) and the EU's COJUR (Group of experts on international law).

In this context, Escobar was particularly active in the multilateral negotiations relating to the ICC and the crime of aggression, leading to the role she played as the co-head of the Spanish Delegation and the Chair of the Drafting Committee at the ICC Review Conference held at Kampala (Uganda) in 2010 which resulted in amendments to the Rome Statute on the crime of aggression as well as on certain war crimes.

Moreover, Professor Escobar represented Spain in indernational judicial proceedings, including before the International Court of Justice (consultative prcedure on the *Unilateral Declaration of Independence of Kosovo*, 2008 2010) and the International Tribunal on the Law of the Sea (*M. V. Louisa, San Vicente and Grenadines v. Spain*, 2010

2013), cases in which she acted as both agent and leading counsel. She also took part in the Spanish teams acting in cases before European courts, advising on relevant issues of general international law as they related to the applicable European law.

From 2008 to 2014 and again in 2024 2025, Professor Escobar was a member of the Permanent Court of Arbitration and, as such, formed part of the restricted group of Spanish international lawyers entitled to put forward persons qualified to be considered for election to international courts, especially the International Court of Justice and the International Criminal Court. From 2011 onwards she was also on the list of arbitrators and conciliators of the UN Convention on the Law of the Sea.

From 2011 to 2022, Professor Escobar was a member of the International Law Commission, the main expert body advising the UN and its member States on the codification and progressive development of international law. On top of taking part in the ILC's work on many diverse issues, she became the special rapporteur on the topic "Immunity of State officials from foreign criminal jurisdiction", submitting eight reports and leading the drafting and first reading approval of a set of articles which continue to be the basis for the ILC's work on this matter, now on the second reading phase. During that period, she continued to attend meetings of the UN General Assembly's Legal Committee, in order to explain and defend the ILC's work on the topic assigned to her.

Professor Escobar's commitment to international humanitarian law led her to an intense activity linked to the Red Cross Movement. From 1999 onwards, she was a member of the Centre of Studies on International Humanitarian Law of the Spanish Red Cross, which she would later lead. She was instrumental in the creation of the Spanish National Commission on International Humanitarian Law, a mixed advisory body of the Spanish Foreign Ministry in which she was very active, both during her time at the head of the International Legal Office and later as a representative of the Spanish Red Cross. She also participated in several sessions of the International Conference of the Red Cross held in Geneva, either as a member of the Spanish government or of the Spanish Red Cross delegations.

During this later period, she also took part in a number of sessions of the Ibero-American Week on International Justice, held at The Hague each summer in connection with the ICC and the ICJ, in order to show her commitment to international justice in its various dimensions and to stress the role played by Ibero-American jurists in that endeavour.

As a culmination of her long and fruitful career as a scholar and practitioner in the field of international law, Professor Escobar had been designated in 2025 as a member of the section of Public Law of the Spanish National Codification Commission and, separately, put forward as a candidate for election to a post of judge of the International Criminal Court. Regrettably, her untimely death has suddenly and fatally truncated the prospects for the lasting legacy that she could have left in those institutions.

* * *

Thus far I have striven to present a portrait, as complete and objective and possible, of Pofessor Escobar's brilliant academic career and many activities in the public service. Nevertheless, this protrait would be incomplete and would lack color and relief if I would

not reflect in it my own experiences and feelings after many years working besides her or in close contact with her.

As I remember, we first met sometime in 1997 when I had just been chosen by the Spanish Foreign Ministry to lead the Spanish Delegation in the negotiations being conducted at the UN in preparation for the Rome Conference on the creation of an international criminal court, as well as prospective Head of the Delegation to the Rome Conference itself. On that juncture, I had insisted within the Ministry that we should form a Delegation that would encompass legal experts from various ministerial departments (mainly Foreign Affairs, Justice and Defence) and also from several independent agencies (especially the Attorney General's Office and the General Council of the Judiciary), as well as the Spanish Red Cross. That suggestion was approved and the Delegation was taking shape satisfacforily. But I felt that we still needed the addition of an international law professor with good knowledge of the matters involved in the negotiation.

It was then that I heard Professor Escobar taking part in a roundtable discussion at a Spanish institution on matters relating to human rights and international humanitarian law. I was struck by the clarity and profundity of her presentation and by the way she answered questions or comments from the audience. After the session, I approached her, we talked for a while and I became convinced that she was the person that we needed for our Delegation, not only because of her knowledge of international law but also for her commitment to human rights and justice as well as to multilateral institutions and procedures.

Soon thereafter, I offered her to join our Delegation, she eagerly accepted and we had the satisfaction of having with us a first class colleague and a great member of the team for what proved to be a historic endeavour of developing a new quasi-universal independent institution entrusted with administering criminal justice for the most serious crimes of international concern. Very soon Professor Escobar had become simply dear Concha for all of us in the Delegation, which worked closely for several years in Madrid, New York, Rome, The Hague and other places during that complex and fruitful negotiation.

Following the success of the negotiation at the Rome Conference and the ensuing Preparatory Commission which developed many of the instruments derived from the founding Statute, we then worked on the draft legislation to ensure the future cooperation between Spain and the ICC, as well as the reform of material criminal law in Spain to take account of the Statute. In those endeavours Concha had a notable part, providing not only her deep knowledge of the matter at hand but also her fine drafting skills, her good sense and her tenacity until the correct solution was found to each problem we faced.

That long collaboration was just the beginning of a close friendship that was to last until the end of her days. Soon thereafter, when I ceased my functions as Head of the International Legal Office at the Foreign Ministry in order to return to New York as Permanent Representative of Spain, I had no doubt about who should replace me at that delicate function: I strongly recommended her to the Ministry's leadership and Professor Escobar became the new Head of the Office, which she was going to lead for eight intense and productive years.

During those years, we continued to be in contact and working together, especially during the UN General Assembly sessions and the ICC Assembly sessions held in New York. Then the opportunity arose to have a Spanish national as a member of the ILC and again I had no doubt that the right candidate should be Concha. Professor Escobar was duly elected by the ILC to fill an occasional vacancy and then elected by the General Assembly to a full mandate for which she would again be reelected five years later: more than a decade in which she was the first Spanish ILC member to serve as a special rapporteur on an important and delicate subject which had proven too hard to crack for other ILC members before.

Our contacts and exchanges of views continued from time to time during the following years. I remember in particular the high-level seminars she conducted at UNED on current issues of legal interest in international affairs and, on the other hand, our participation, together with other successive heads of the Foreign Ministry's International Legal Office, in an unprecedented roundtable held in late 2014 at the Jaume I University in Castellón which unfortunately has had no continuation since on the importante issue of "Spain and the use of force, 1990 2015: a legal reappraisal", whose proceedings were published in the pages of this *Yearbook*, vol. 19, 2015.

More recently we had again the oportunity actively to collaborate on several diverse endeavours, including the Hague Ibero-American Week on International Justice, the National Commission on International Humanitarian Law, the Spanish national group of the Permanent Court of Arbitration and, last but not least, on my own doctoral program at UNED for which she readily and generously accepted to become the director of my draft dissertation. In all those activities, and particularly in the last, I had again the opportunity to enjoy Concha's company, her unfailing good sense and wise advice and her continuous support and encouragement.

We will all and more than anyone his lifelong companion and supporter, Professor José María Contreras, himself a noted scholar and practitioner of the law on relations between the State and religious faiths miss dearly Concha's presence and example, as a dedicated legal scholar, as a committed promoter of good causes at the national and international levels, as an informed and caring citizen and simply as an exceptionally fine human being. Her work and legacy, together with her shining example, remains permanently among us. Let us say with the poet: "To live in hearts we leave behind is not to die".

Juan Antonio Yáñez-Barnuevo
Ambassador of Spain

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The Classics' Corner

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The law of the forum and the method of attribution: reflections on its primary role

Elisa Pérez Vera*

INTRODUCTION

The core mission of Private International Law is to solve legal disputes involving more than one jurisdiction and one body of legislation. In terms of the first of these, both regarding the international judiciary power (establishment of the 'sanction') and the recognition and implementation of foreign sentences (sanctions' that are already established), the law of the forum is used exclusively to determine the corresponding legal order, that is, *qua fori*. The following reflections refer to the hypothesis that in the second of these spheres, the law of the forum also carries out a fundamental role in establishing the applicable legal order for international legal relations and contexts.

From the outset, it should be stressed that our field is concerned with international legal relations and contexts, that is, cases wherein at least one of the essential elements is in some way foreign, thereby creating contact with a different legal order from that of the domestic order. This domestic order has a crucial function in defining the aim of Private International Law, which will be reflected throughout the entire process of assigning a specific legal order for the legal category in question, and which must be expressed in a normative process, which may be carried out by means of a multitude of processes or methods.

The constitutional nature of the principle of equality of legal orders has become established, both in terms of the need for a generalized scope in the application of foreign legal orders, as well as for Private International Law itself.[1] However, a broader and more comprehensive principle should be established regarding the requirement that, once the relevant foreign legal order has been established for the case in question, an appropriate law should also be indicated regarding its foreign elements. Indeed, it would seem logical and coherent that the legal order provides a legal distinction between national and international legal traffic.

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1 On this point, see Vitta, E. (1964), 'Il principio dell'uguaglianza tra "lex fori" e diritto straniero', in *Riv. Trim. Dir. Proc. Civ.*, XVIII/4; Wengler, W. (1963), 'Les conflits de lois et le principe d'égalité', *Revue Critique*, pp. 201-231 and 503-527.

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2. Nevertheless, one of the processes that Private International Law uses in order to regulate international legal issues fails to take into account the point raised above. Peremptory norms[2]assimilate international traffic into domestic traffic and regulate both in the same way due to their immediate introduction into a state's domestic legal order. In terms of the specific themes[3]which are affected by these principles and criteria in the process of norm creation, there is no doubt that the law of the forum is both exclusive and excluding: only the principles and criteria of the legislator and their jurisdictional interpretation can lead to such a drastic adaptation. For this reason, peremptory norms cannot be applied in such a way outside a particular legal order, as this would require the mediation of a norm of conflict and, therefore, the internationalisation of the case, which runs contrary to the initial and necessary irrelevance attributed to its foreign element.[4][5]

3. Outside of this possibility, which is quantitative- and qualitatively exceptional, the different systems of positive Private International Law find themselves compelled to use specific regulations — distinct from domestic law — where the legislator considers legal categories to be international. This regulation can be developed through two systems: direct assignation of the legal consequences for a typified legal category, or indirect regulation of the legal order applicable to the legal category in question. The first of these refers to the substantive procedure which is reflected in the domestic material norms of Private International Law. The second, which comes through the method of attribution, is expressed through the positivisation of conflict norms.

   The material norms of Private International Law characterise the legal category in that they directly determine its legal consequences, embodying the law of the forum as a concept which responds to the idea that 'in some circumstances international life, requires a different — and sometimes contrary — form of regulation to that of domestic law, without resorting to the interference of a foreign legal order'.[6] We thus observe that the substantive procedure expresses the particular conceptions of the forum on which legal order should deal with particular international legal categories, and whether the norms should be domestic or international.

   Regarding the first type of norm, the forum by definition plays an exclusive role in that the domestic material norms are a projection of its own socio-legal characteristics, only tempered by the fact that the object of regulation has been defined as external. This makes us aware that it is necessary to define one of the principal distinguishing criteria of these norms in comparison with peremptory norms.

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2 Here I use the term coined by Dr. Francescakis rather than those used by Nussbaum and De Nova.

3 Francescakis, PH, (1968), *Encyclopédie Dalloz*, Paris. I A-E, 'Conflits de lois', nº 125.

4 Such as in Spanish law with the principles of indissolubility and confessionality in marriage: see González Campos, J. D. (1967), 'Nota sobre la sentencia Benedicto-Barquero, 15 April 1966', *R. E. D. I.* XX. pp. 367 and ff.

5 Graulich, P. (1963), 'Règles de conflit et règles d'application immédiate', *Mélanges en l'honneur de J. Dabin*, Paris, pp. 629 and ff.

6 Miaja de la Muela, A. (1963), 'Las normas materiales de Derecho internacional privada', *R. E. D. I.* XVI, p. 436.

In principle the process of substantive regulation and its domestic deployment (that is, from the perspective of each legal order)has its field of application in terms of certain themes with which the forum is most concerned. In this sense we can consider, for example, the regulations regarding nationality or immigration, or the complex issue of international legal powers. However, this type of international norm does not limit its application to such specific, and in some way marginal, themes, but rather invades themes that, traditionally reserved for Savignian procedures, contain aspects on which the legislator of the forum wishes to establish certain, specific criteria. We thus see that in article 732-3 of Spain's legal code that Spanish citizens can make a will holographically in a foreign country, even though the *lex loci* does not permit this, thereby correcting the excessive generality and indetermination of the conflict norm of article 11-1.

Together with the type of material norms mentioned in the foregoing paragraph, every system of Private International Law includes legal rules in which the basic guideline is the harmonisation of its own solutions with those of other legal systems, thereby achieving a certain degree of homogeneity. Within this we should include all manifestations of uniform law, both where this is sought by an individual state (such as in the case of former colonies with respect to metropolitan law) and where there is a collective project through international agreements. There is, beyond any doubt, a strong effect from international values and legal concepts from foreign legal systems which, especially in cases where uniformity is sought collectively, can be clearly seen in the transactional nature of norms. However, the role of the forum remains key in that it is the body which interprets and applies these values and foreign concepts.

4. To conclude, the specific regulation for international legal traffic can be pursued through the indirect establishment of its legal consequences. In such cases, we move into the sphere of attribution procedures and conflict norms in that this becomes positivised. Indeed, the conflict norm indirectly determines, through the legal connection, the legal consequences of the case being examined, as it assigns its regulation to a certain foreign legal order. In this sense it provides the only possible channel within the law of the forum to 'import' norms from other legal orders. For this reason, I consider that it is within the ambit of the law of the forum where we find a systematic framework for the principle of equality of legal orders. Indeed, it is here that we are able to observe that this principle produces undeniable consequences, which are reflected in the appeal made by *lex fori* to certain norms from foreign lawin order to collaboratively formulate the most appropriate solution for a particular international relation or situation.

It is precisely due to the fact that *lex fori* appears during the process of attribution within a framework of equality with other legal systems that the problem of the primary role of the domestic legal order over foreign legal orders becomes relevant. In this article I will focus on this, and the following reflections distinguish between the two broad phases in the process through which conflict norms are applied: firstly, the localisation of the case, and secondly, the implementation of a material resolution for it.

I. *'LEX FORI'* AND THE LOCALISATION OF THE DISPUTE

5. Within international public law the concept of the state, with its inherent sovereignty, leads to the concept of legal equality between states and the different powers they are bestowed with. In parallel to this, within Private International Law legal equality is based on both legislative activity and legal frameworks. Therefore, the principle of equality, together with the demands that laws have international effectiveness, puts limits on a state's legislative powers in the same way it does to other states. This requires recognition of a certain scope of generalised application of foreign law.[7]

From a broader perspective, justice, in terms of the application of law to the reality which it is designed to regulate, necessarily requires an awareness and consideration of the legal systems with which a certain reality interacts. For this reason, appeals to justice play a central role in a wide variety of constructions of Private International Law. To this effect, I consider it to be irrelevant to distinguish between material justice and formal justice: in the quest for the most ideal regulation for international legal traffic, justice appears as an unambiguous concept that resonates with all parties and which justifies the application of foreign legal norms within the law of the forum.[8]

This notwithstanding, the acceptance of a scope of application for foreign law simultaneously brings up the issue of its particular nature. The foreignness of a particular legal norm necessarily implies some special features that may not permit its direct assimilation into legal processes. Indeed, when a judge investigates a foreign norm, they look at *what it is,* that is as a legal regulation in its country of origin; this does not mean it should be treated as an established legal regulation in the country in which it is being applied. As Professor De Angulo notes, 'Foreign law is applied as foreign law, but only when it is called for by the domestic conflict norm; there is no incorporation of foreign law into the law of the forum, and its application is nothing more than a legal consequence of a national norm. The aim is not to incorporate a foreign norm but rather to use it to characterise a case: we subsume certain legal proceedings into a foreign legal framework.'[9]

In short, we must remember that the application of a foreign law is not an objective in itself but rather a means;[10] the objective here is the fair resolution of a legal dispute and, in this sense, its application in conjunction with domestic law works to do what is fair and proper.[11]

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7 See Aguilar Navarro, M. (1958), 'Afinidades existentes entre el Derecho internacional público y el Derecho internacional privado', *R. E. D. I.* XI, nº 1-2.

8 See Arminjon, P. (1928), *Précis de Droit international privé*, 3rd ed., and 'L'objet y la méthode du Droit international prové', R. C. A. D. I. I, vol 21, pp. 440-441. And, more recently, Graveson, R. H. (1961), 'Judicial Justice as a Contemporary Basis in the English Conflicts Law', *XXth Century Comparative and Conflicts Law*, volume in honour of H. E. Yntema, Leyden, pp. 307 and ff.

9 De Angulo Rodríguez, M. (1969), *El Derecho extranjero en el proceso civil español*, PhD thesis, Granada, p. 172.

10 Zajtai, I., (1958), *Contribution à l'étude de la condition de la loi étrangère en Droit international privé français*, Paris, p. 29.

11 Vouilloz, B. (1964), *Le rôle du juge civil à l'égard du droit étranger*, Freiburg, p. 81.

Given that the fundamental characteristic of the attribution method — in contrast to other methods of positivisation used by Private International Law — is that it calls for the collaboration of foreign law, which is thus the possible legal consequence of the application of a domestic conflict norm, I believe that Motulsky is right when he observes that *'tout l'accent, on le voit, est mis sur la régle de conflit: c'est d'elle que la loi étrangere tient son titre d'intervention*.'[12] This thus brings us to the problem of the structure and nature of the conflict norm.

6. With regard to the first question, and despite the solid arguments which support unilateralist conceptions of the conflict norm, out of respect for national sovereignty I believe in a bilateral approach, though I am aware of the problems involved in its application in practice. On the one hand, the bilateral technique would require a supranational legislator to ensure consistency in resolutions. And on the other hand, as a result of the previous point, the bilateral system by default involves a division between the law of the forum and foreign law owing to the state-centred nature of its origin;[13]there is thus a difference derived from the legal nature of foreign law itself that, when applied outside its territory, only enjoys an indirect mandatory nature (which derives from the system of the forum).While both systems are exemplary, within law of the forum we see both *auctoritas* and *potestas*, whereas foreign law receives its mandatory nature from the order of the forum, with which it collaborates to produce a suitable resolution to the international legal traffic in question.

   In terms of the legal nature of the conflict norm, I believe that this forms part of each national legal system, with the same legal scope and power as any other material act from within the same system. Compliance is thus imposed on the judge, who must apply this norm, dispensing with the legal consequence — national or foreign — that this might directly or indirectly bring about. Compliance is also imposed on private actors, who may select one from various connections that a conflict norm may contain.[14]

7. As Professor Aguilar[15] would put it, the collision norm positions international legal traffic as a river that flows between two banks, one representing foreign law and the other the law of the forum. And between these banks it is necessary to construct a bridge, a collaboration which allows 'de faire "vivre ensemble" des systems jurídiques differents.'[16]

   In this way, the Savignian method of conflict norms, which provides an essential coordinating function between the legal system of the forum, in which these norms are rooted, and foreign legal orders whose general application is specified with the updating of the typified legal connections.This means, however, despite the international nature of these rules, their national roots and the fact that the

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12 Motulsky, H. (1960), 'L'office du juge et la loi étrangère', *Mélanges Offerts à J. Maury*, Paris, p. 361.

13 On the appropriateness of the bilateral system, despite its shortcomings, see Aguilar Navarro, M. (1963), *Derecho internacional privado*, I. I., Madrid, p. 10.

14 Yanguas Massia, J. (1958), *Derecho internacional privado*, 2nd ed., Madrid, p. 339.

15 Aguilar Navarro, M. (1964), *Derecho internacional privado*, I. II., Madrid, p. 57.

16 Batiffol, H. (1956), *Aspects philosophiques du Droit international privé*, Paris, p. 16.

coordinating mission I mentioned above is expressed in practice through a process of integration of the foreign norm into the domestic legal system, that we must bear in mind the guiding nature of *lex fori* in this process. From a broader perspective, Professor Batiffol notes this paradoxical situation which I highlight above when he writes that '*Le droit international privé donne le spectacle d'une enterprise apparemment internationale menée par chaque Etat pour son propre comte*.'[17]

8. By way of summary, we can thus affirm that the attribution procedure offers the only possibility of taking into consideration foreign law and, therefore, in this context, questions the primary role of the law of the forum. Nevertheless, although the coordinating function that this procedure responds to does, in itself, reserve a preeminent role for *lex fori* throughout its development, we should indicate the effect of this in the two different stages that the process of applying the conflict norm involves: an initial phase of localisation, both formal and 'conflictual', and a second phase involving the material resolution in which the adaptation of orders is carried out at the level of substantive norms.

   In order to verify the relevance of the law of the forum in this first stage of localisation of the case within the most appropriate legal framework in line with its international nature, it is worth briefly analysing the functional corrections through which the forum mitigates the indirect character of the conflictual method.In the first phase of the application process of the conflict norm, localisation is focused on defining the legal category and its legal connections; in this sense we look at the general problems of characterisation, fraud and *renvoi*.

9. *Characterisation*, as an intellectual operation that forms part of all legal reasoning, has been defined by Motulsky as '*toute traduction d'un objet de connaissence en termes de droit*.'[18] Indeed, a characteristic of legal rules is that they are expressed in general terms so that their application to a particular set of events represents a transition the adaptation of the general to the tightly defined, of the abstract to the specific.

   In addition, and due to gaps in legal language, the term *characterisation* is also used to designate the concepts or categories on which this reasoning is carried out. The operation of characterisation is thus understood as a choice between various possible 'characterisations'.[19]However we understand characterisation, it generates special difficulties in Private International Law, as the conflict norm uses concepts which are, in principle, taken from the domestic law in which they are embedded. Therefore, as Batiffol observes, the conflict of characterisations can be interpreted as '*celui de savoir selon quelle loi le juge doit qualifier l'objet du litige pour déterminer la loi qui lui est applicable quand les differentes lois en conflit adoptent des qualifications différentes*.'[20]

   In any of the three aspects of the characterisation problems within Private International Law (determination of the situations contained within the conflict norm, the precision of the points of connection, and establishment of the part of

17 Batiffol, H. (1956), *ibid*. p. 103.
18 Motulsky, H. (1969), 'Procédure civile et commerciale', *Encyclopédie Dalloz*, II. F-Z, Paris, p. 651, n. 27.
19 Francescakis, Ph, (1967), 'Qualifications', *Encyclopédie Dalloz*, op. cit., p. 703, n. 4.
20 Batiffol, H. (1967), *Droit international privé*, 4th ed., Paris, p. 332.

the foreign law which is called for by the conflict norm),[21] within the options for characterisation — in accordance with lex *civilis fori, lex civilis causae* or through autonomous concepts derived from studies of comparative law — it is impossible to ignore the nexus between the conflict norm and the material order to which it pertains. The law of the forum will thus be the obligatory starting point, regardless of whether, in terms of characterisation, we see a problem of 'interpretation' of the conflict norm, or whether we interpret it as a problem of integration of the foreign norm or institution into one or another conflict norm of the forum.

Not only is the law of the forum responsible for deciding, in accordance with its own criteria, which institutions should be internationalised,[22] it is also responsible for defining the appropriateness of the concepts of a foreign norm once its application has been accepted. In this function the forum will have to stress the social functions of legal institutions (Rabel), or use the '*qualification pour fonction*', as proposed by Batiffol;[23] but the application of a foreign norm or institution will only lead to coherent results if, after studying its meaning, we 'translate' it into the legal categories of the forum, from where we will see the other acts with which it has to 'coexist'.

10. The second of the problems which I wish to briefly analyse is that of *fraud to the law*. Due to the particular structure of the conflict norm, this occurs where there is a legal but false modification of the connection within the norm that designates the application of a particular law with the sole aim of evading the consequences of its application. Hence, the concept of fraud to the law, which is unviable within a strictly legal and formal interpretation, appears, in the words of Professor Aguilar, 'as a notion which is equidistant between two forces which attract it […] and which aims to simultaneously save a human life and protect the authority and imperative of certain norms.'[24]

In short, it is the relative mobility of the two points of connection which allows the interested parties to 'move' or modify them; for this reason, we should distinguish between the sanction for fraud, whereby a new, real connection has been falsely created, from the sanction which the law can apply for false or fraudulent acts. Within fraud to the law, the alteration of the connection and the subsequent localisation of the legal relationship in a legal order different from that which is primarily authorised occurs through actions which are lawful but which overlook the *ratio legis* of the manipulated conflict norm.[25]

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21 The difference between these aspects is set out by Professor F. de Castro (1933), 'La cuestión de las calificaciones', *Revista de Derecho privado*, p. 219. This is generally accepted within the doctrine today. See Garde Castillo, J. (1947), *La 'institución desconocida' en Derecho internacional privado*, Valladolid, p. 52; Francescakis, PH, (1968), *Encyclopédie Dalloz*, I, A-E, Paris, pp. 490-491.

22 Francescakis, PH, (1958), *La théorie du renvoi,* Paris, especially pp. 21-2.

23 Rabel, H. (1933), 'Le problème de la qualification', *Revue de droit international privé*, pp. 1-62 ; also, by the same author (1958-60), *The conflict of laws. A comparative study*, 2nd ed., 4 vols., University of Michigan, Ann Arbor. Batiffol, H. (1956), op. cit., pp. 44 and ff.

24 Aguilar Navarro, M. (1964), *Lecciones de Derecho internacional privado*, I, II, Madrid, p. 88.

25 See, amongst others, Maury, J. (1952), *L'éviction de la loi normalement compétent : l'ordre public international et la fraude à la loi*, University of Valladolid; Graulich, P. (1961), *Principles de Droit international privé*, Paris, especially p. 161.

Regarding the international element as an integral part of the notion of fraud, I fully share the ideas of Professor Aguilar, who states:

> If by subjective element we understand an intention to deceive which harms third parties, then we must reject this element. If, by talking about the presence of a subjective factor we allude to an overlap of aims which explains the fraud to the law and the behaviour of the agent who carries out the fraud then it is not possible to omit the subjective dimension.[26]

Within Private International Law, fraud to the law has two aspects: it can consist of either the false internationalisation of a domestic case, or of hiding the connections which would lead to it being subject to a foreign law, thereby evading the application of a particular foreign law. In the first of these cases (fraud to the law of the forum), the sanction, in line with the unenforceability of the consequent effects, would offer a new mechanism of defence for the forum, which again becomes present throughout the process of the application of the conflict norm. In the second case (fraud of foreign law), we encounter a tension between the mandatory nature of the conflict norm and the inevitable tendency towards the application of *lex fori*, owing, in my opinion, to ethical reasons. In all cases, the problem can be interpreted from a perspective of the forum as a fraud to the conflict norm and not to the foreign legal order.

11. To round off this first phase of the attribution procedure that consists of the localisation of a case within the framework of a legal system, we must refer to the issue of *renvoi*. This negative competition between legal systems[27]takes place when there is an examination of 'the scope of the reference of the foreign law'[28]which is brought into effect through the conflict norm of the law of the forum. In order to understand the role of the conflict norm, the problem should be looked at not as a clash between foreign and domestic collision norms but rather in terms of the search for an improved coordination. Activities focused on the coordination of legal systems can be seen not just in the substantive field of material norms, but also in the harmonisation of contrasting localisations which different systems of positive Private International Law effectuate.[29]If this is indeed the case, the governing task will obviously be carried out by the forum and, in any case, the acceptance or rejection of the renvoi will always be in accordance with criteria from the domestic legal order, even within the specific English system of 'foreign court theory.'[30]

II. *'LEX FORI'* AND THE MATERIAL RESOLUTION OF INTERNATIONAL LEGAL TRAFFIC

12. The effects of the law of the forum on the first logical phase of the process of applying the conflict norm, known as the localisation phase, highlights a basic fact which many

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[26] Aguilar Navarro, M. (1964), op. cit., volume II, p. 97.
[27] Francescakis, PH, (1958), op. cit., pp. 260 and ff.
[28] Aguilar Navarro (1955), *Derecho internacional privado*, I, Madrid, p. 387.
[29] Batiffol, H., (1967), 'Réflexions sur la coordination des systèmes nationaux', *R. C. A. D. I.* I, vol. 120, pp. 169 and ff., especially p. 173.
[30] SuayMilio, J. (1956), 'Una solución jurisprudencial inglesa: el doble reenvio', *R. E. D. I.*IX, pp. 87 and ss.

scholars of private international law tend to overlook: each domestic legal order constitutes a system which contains conflict norms as an arbitrated means for the regulation of international legal traffic. The definition of a material resolution for a case will be guided by this *lex fori* in which the collision norm is embedded.

Furthermore, as a regulation system in which the variables remain unknown until their possible specification in terms of the material content of the legal orders involved, the application of the conflict norm brings with it unknown consequences, making this something of a 'leap into the void'. The application of conflict norms can lead us to legal systems which we know nothing about and with which we nevertheless have to coordinate with our own *lex fori in* order to find a harmonious solution to legal relations.

In addition, the localisation of a particular legal relation into a foreign legal order through the conflict norm does not mean that the forum is completely removed from ruling the case in question. Nevertheless, it does mean that although the forum is the appropriate venue from which to 'create' a resolution, some aspects of the case should be regulated by a foreign law, and that there will thus need to be a system of 'articulation' between the two systems in order to reach a coherent legal solution. In this line, Professor Batiffol observes:

> *La solution d'un conflit des lois ne conduit jamais, si une loi étrangère est compétente, à l'application d'une loi unique: il y a au moins le concours de la loi étrangère applicable au fond et de la loi du juge saisi gouvernant la procédure.*[31]

From this perspective, I believe that behind all the 'technical' issues of the attribution process there lies a problem of adaptation, that is, of coordination or articulation of the legal rules which should govern the various aspects of cases of international legal traffic.[32]

During the localisation phase we have seen how the forum can use a series of mechanisms to combat the indeterminate nature of the attribution process. Now, in the phase of the quest for a material solution, the forum can also resort to various mechanisms to adapt the foreign legal order that has been designated to the case in order to ensure that it fits within the system of the forum. In this sense, I will examine two interrelated issues separately: public order and adaptation in its strictest sense.

13. *Public order* represents a case in which it could be 'socially impossible' to apply foreign law. In more technical terms, the public order argument consists of the 'exceptional exclusion of a foreign material norm that has been designated by the relevant collision norm'[33] due to certain legal arrangements of the forum which prevent the assimilation of foreign laws which contradict these arrangements.

In this classic approach to the issue of public order, we see an exclusion of the foreign law which affects basic principles of the socio-legal structure of the forum

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31 Batiffol, H. (1967), op. cit., p. 174.

32 In this line, see Offerhaus, J. (1964), *L'adaptation en droit international privé*, (in Dutch), review in *Revue Critique*, pp. 627-628.

33 Aguilar Navarro, M. (1964), op. cit., p. 154.

state. Such an approach obviously implies an intense analysis of the pre-eminent role of *lex fori*. However, even from a more spiritual perspective of the problem, this role continues to be pre-eminent: public order appears as a clash not between national and international norms, but rather between two different assessments of the situation carried out by the forum itself. That is, a clash between the best localisation for the case, as expressed through the forum's conflict norm, and material justice, which comes from the forum's substantive law. What we see here is an indispensable condition that is required for coordination to be possible[34] public order functions as a measure of the degree of assimilability of foreign norms and institutions, highlighting once again the *prius de la lex fori*.

14. On the other hand, the problem of *adaptation in its strictest sense reflects* a final effort from the forum to coordinate the situation that arises from the application of the conflict norm, which is necessary when the conflict rules oblige the judge of the forum to simultaneously employ material rules which come from different legal orders and which, as a consequence, lack the logical cohesion and compatibility which rules from the same order would share.

The *adaptation problem* is a corollary of the process of the application of the conflict norm, and it is dealt with primarily in the judicial domain. As Cansacchi posits:

> *Les législateurs, en fixant dans leur propre système de droit international privé les rattachements aux ordres juridiques étrangers, n'ont pu prévoir si ces ordres juridiques seraient pas 'rapportables' entre eux et avec l'ordre du for; ils n'ont pas même pu poser des principes ou des règles générales pour indiquer au juge façon de résoudre les innombrables antinomies qui peuvent se vérifier entre les règles matérielles en concours.35*

By situating the theme within the sphere of jurisprudence we see a differentiating feature between the regulation of the case which leads to the adaptation of legal norms from different systems of positive law and that of a substantivist procedure. In the first instance we see how a jurisprudential action attempts to coordinate the outcome of the conflict rules, in the second process we see that the material norms through which the substantivist method is positivised directly determine the legal consequences of the typified case.It is important not to confuse that which is a substitution of one process of positivisation for another and that which is simply a correction of mechanical or unknown consequences that one of these processes of attribution can bring into effect. As Professor de Nova insight fully observes:

> *Il s'agit ici de coordonner les résultats du fonctionnement des règles usuelles de conflit, et non pas de les remplacer par un règlement immédiat et autonome du cas d'espèce, comme les auteurs susvisés le voudraient.36*

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34 Essential reading on this perspective is Lagarde, P. (1959), *Recherches sur l'ordre public en Droit international privé*, Paris.

35 Cansacchi, G. (1953), 'Le choix et l'adaptation de la règle étrangère dans le conflit de lois', *R. C. A. D. I.*, II vol. 83, p. 112.

36 De Nova , R. (1948), 'Solution du conflit de lois et règlement satisfaisant du rapport international', *Revue Critique*, pp. 202-203, and references which he makes to the works of Hijamns, Frankel, Kollewijn and Jitta.

What these processes of adaptation and coordination at the jurisdictional level highlights the creative role of the judge in Private International Law. From another perspective, this also underlines the tension which exists between the internationalist aims of these activities and their execution by means and criteria from within the forum, whose role essentially focuses on the localisation procedure.

CONCLUSIONS

In the foregoing reflections I have endeavoured to highlight the way in which, despite the formal equality that exists between foreign laws and the law of the judge, *lex fori* enjoys a privileged role due to the general possibility that exists for its application in setting the legal regulation for international legal traffic.[37]This can be seen in three fields:

A. When the forum is faced with a case of international legal traffic, its first task consists of selecting the technique or procedure to be used in order to successfully deal with the case. Only when there is not an assimilation of the private international relationship into internal legal processes (peremptory norm), nor is there a specific regime designated for the relationship (substantive technique), is it possible to use conflict norms, whose attribution procedure constitutes the only channel through which to import foreign law.

B. When the law of the forum has accepted the internationalisation of the case without providing a direct solution, thereby resorting to the conflictual method, the forum will then locate the case within the legal order which it deems most appropriate, in line with the forum's categories and ways of interpreting legal institutions. In this sense, only in exceptional circumstances will the forum take into account formal foreign law in terms of its connections in *renvoi* and preliminary hearing (as far as its own legal system permits this),and its teleology of legal characterisations.

C. Finally, following the use of the attribution procedure,when the forum comes to define a material solution for the case, the relevant collision norm may contain a reference to its own domestic legal order or to that of a foreign order. However, even in the latter case, *lex fori* will 'control' the content of the foreign legal order in question by means of a series of functional corrective mechanisms which may even lead to it being discarded and the subsequent application of the order of the forum (characterisations, public order, fraud of law, adaptation).

The above points lead us to consider the 'special intensity' of the *lex fori* in the planning of the legal solution for international legal traffic. This does not involve the discrediting of the foreign elements present in the case, given that the forum may examine the possibility of renouncing its powers to preside over the case through its recognition that the applicable legal norm may be foreign. Furthermore, it should be borne in mind that, despite the foreign element present within the case, the situation or

[37] On the 'basic' nature of the law of the forum, see, amongst others, Ehrenzweig, A. A., (1967), *Private International Law*, Law from 1967.

relationship in question displays a prior link to the legal order of the forum, namely the link that comes from there being sufficient legal connections in order to attribute it to international jurisdiction.

Rather than advancing a thesis, what I have endeavoured to do is to draw attention to a reality which, when related to legal uniqueness and fragmentation, could appear to be nationalistic if it were to be interpreted as a value judgement or theoretical proposition. In terms of outlining the reality of this theme, what these observations offer is, in my opinion, an interpretation which fits the underlying dynamic of international legal traffic. In this sense, rather than positing a conclusion, what the analysis sets out is a starting point.

I do not believe that such a reality should be circumscribed by a specific positive legal order, but rather we observe the functional structure of private international law with the abstraction of each legal order. What needs to be reiterated is that this analysis constitutes a starting point from which we can ascertain the *nationalism* or *internationalism* of a specific legal system.[38] If, as we have observed, the process which allows us to reach a solution for the broad issue of international legal traffic is going to be influenced by the constant involvement of the legal order of the forum, its characterisation as international will be based more on its openness to foreign norms, principles and criteria, rather than its interiorisation of such values. The label of internationalist should be withheld in the case that it fails to comply with the double requirement that I referred to at the beginning of these reflections: on the one hand, the need for a differentiated interpretation of the external or internal nature of legal traffic; and on the other hand, the manifestation of this internationalist aspect within a specific regulation in one or more cases. Only in this way can we avoid the betrayal of the internationalist vocation of our discipline by its national roots.

[38] On this point see Carrillo Salcedo in this edition.

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General Articles

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The rediscovery of advisory opinions of the International Court of Justice as a tool for international public interest litigation

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Abstract: In the context of the growing judicialization of international relations, this study focuses on the resurgence of advisory opinions of the International Court of Justice as a legal tool for the protection of international public interest. It analyses three main dimensions: their role in the reaffirmation, consolidation and progressive development of the obligations to protect the general interests of the international community; their usefulness as an instrument available to international organizations particularly the United Nations General Assembly for the defence of these interests; and the increasing involvement of non-state actors in both the request for and the conduct of advisory proceedings.

Keywords: advisory opinions International Court of Justice international public interest-international litigation

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(A) INTRODUCTION

In the current international disorder,[1] some states are deliberately turning their backs on the international legal order based on rules created after the Second World War.[2] Others seem, paradoxically, to have rediscovered existing legal tools to claim their compliance, though they had not yet used them to their full potential. These legal tools are, among others, the compromissory clauses of certain international treaties for the protection of the general interests of the international community, *erga omnes* obligations, requests for provisional measures before international courts, interventions by third states in judicial proceedings or, the object of this paper, requests for advisory opinions.

Thus, a growing recourse to international judicial settlement can be observed, particularly in the context of armed conflicts, human rights violations and environmental degradation.[3] This judicialization of non-compliance with international law is used as a complement or last resort in the face of the failure of other mechanisms and multilateralism to prevent or mitigate international crises and to strengthen the international rule of law.

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1 J.M. Pureza and J. Alcaide-Fernández, 'La Guerra en Ucrania: ¿Qué (des)orden antecede a qué nuevo (des) orden)?', 44 *Revista Electrónica de Estudios Internacionales* (2022) [doi: 10.17103/reei.44.10].

2 Among others: A. Remiro Brotóns, 'La utopía de un nuevo orden basado en el derecho, el multilateralismo y la solidaridad', 13 *Paix et Sécurité Internationales* (2025) [doi: 10.25267/Paix_secur_int.2025.i13.xxxxx].

3 Among others: R. Fernández Egea y M. García Casas, 'La era de la judicialización del Derecho Internacional', *Aquiescencia. Blog de Derecho Internacional*, published on 31 March 2023, accessed 25 November 2025.

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But this phenomenon is not limited to contentious proceedings. It has also manifested in the use of quasi-jurisdictional mechanisms such as human rights treaty bodies or in a growing recourse to the advisory function of international tribunals.

We will focus on the advisory function of the International Court of Justice (ICJ), a court that has never had such an extensive list of cases pending before it more than twenty, including contentious and advisory proceedings. Nonetheless, the advisory function no longer operates under its exclusive purview. This function is gradually being extended to more courts, alongside an increase in its use. This trend can be clearly seen in the four recent requests for advisory opinions on climate change before: the International Tribunal for the Law of the Sea (ITLOS), adopted in July 2024;[4] the Inter-American Court of Human Rights (IACtHR), adopted in May 2025;[5] the ICJ itself, adopted in July 2025;[6] and the African Court on Human and Peoples' Rights, requested in May 2025.[7] These four proceedings also reflect the current furore in climate litigation, which has escalated from national to regional and international levels and from contentious and quasi-jurisdictional to advisory proceedings.[8]

The request for advisory opinions from the ICJ in the context of protecting public interests is not new, as shown by the well-known 1996 case concerning the legality of the threat and use of nuclear weapons,[9] but it has reemerged in recent years. The latest advisory opinions in response to requests submitted to this Court by the United Nations General Assembly (UNGA) illustrate this trend: the 2019 advisory opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965;[10] the 2024 advisory opinion on those arising from Israel's policies and practices in the Occupied Palestinian Territories, including East Jerusalem;[11] the aforementioned 2025 advisory opinion on the obligations of states with regard to climate change; and, most recently, the 2025 advisory opinion on Israel's obligations concerning the presence and activities of the United Nations (UN), other international organizations and third states.[12]

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4 ITLOS, *Request for an Advisory Opinion submitted by The Commission of Small Island States on Climate Change and International Law, List of cases: No. 31, Advisory* Opinion, 21 May 2024.

5 IACtHR, *The Climate Emergency and Human Rights (Interpretation and scope of Articles 1(1), 2, 4(1), 5(1), 8, 11(2), 13, 17(1), 19, 21, 22, 23, 25 and 26 of the American Convention on Human Rights; 1, 2, 3, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," and I, II, IV, V, VI, VII, VIII, XI, XII, XIII, XIV, XVI, XVIII, XX, XXIII, and XXVII, of the American Declaration of the Rights and Duties of Man)*. Advisory Opinion AO-32/25 of May 29, 2025. Series A No. 32.

6 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025.

7 *Request for Advisory Opinion No.001 of 2025: In the matter of a request by the Pan African Lawyers Union (PALU) for an Advisory Opinion on the obligations of States with respect to the climate change crisis*, 02 May 2025.

8 Among others: B. Mayer and H. Van Asselt, 'The rise of international climate litigation', 32(3) *Review of European, Comparative & International Environmental Law* (2023)175-184 [doi: 10.111/reel.12515].

9 ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports (1996) 226.

10 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, ICJ Reports (2019) 95.

11 ICJ, *Legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion,* 19 July 2024.

12 ICJ, *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory, Advisory Opinion*, 22 October 2025.

In the following sections, we will analyse the main features of ICJ advisory opinions as a tool of international public interest litigation, with special emphasis on how the most recent cases have been approached and developed and the innovations that have occurred in them. After framing these cases in the context of the growing judicialization of efforts to protect the general interests of the international community, we will analyse their role in the reaffirmation, consolidation and progressive development of the obligations to protect these interests. We will then consider its usefulness as an instrument for their defence in the service of international organizations and, in particular, the UNGA. Finally, we will explore the rising role of non-state actors in the request and development of these advisory proceedings.

(B) INTERNATIONAL PUBLIC INTEREST LITIGATION BEFORE THE ICJ

The expression "international public interest litigation" refers to actions brought before international courts and tribunals to safeguard interests shared by the international community.[13] In contentious cases, they are brought by states that are not directly affected by the alleged damage but act in the common interest. The three contentious cases pending before the ICJ in which it has been asked to rule on breaches of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide are paradigmatic in this regard:[14] *The Gambia v. Myanmar*,[15] *South Africa v. Israel*[16] and *Nicaragua v. Germany*.[17]

The concept of "strategic litigation" is also frequently used in this context. It can be defined as litigation that seeks to promote structural change rather than the resolution of individual grievances[18] or the attempt to obtain a political or other advantage through the

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13 B. E. McGarry, 'Obligations Erga Omnes (Parties) and the Participation of Third States in Inter-State Litigation, 22(2) *The Law & Practice of International Courts and Tribunals* (2023) 273-300, at 274 [doi: 10.1163/15718034-bja10099].

14 Y. Suedi and J. Bendel, 'The Recent Genocide Cases and Public Interest Litigation: A Complicated Relationship', *Ejil:talk!*, published on 5 April 2024, accessed 25 November 2025.

15 ICJ, *Application instituting proceedings and request for provisional measures filed in the Registry of the Court on 11 November 2019. Application of The Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia V. Myanmar)*, General List No. 178, 2019.

16 ICJ, *Application instituting proceedings and request for the indication of provisional measures, 29 December 2023. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel).* General List No. 192, 2023.

17 ICJ, *Application instituting proceedings and request for the indication of provisional measures, 1 March 2024. Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*. General List No. 193, 2024

18 Among others: M. Ramsden, 'Strategic Litigation before the International Court of Justice: Evaluating Impact in the Campaign for Rohingya Rights', 33(2) *European Journal of International Law* (2022) 441-472 [doi: 10.1093/ejil/chac025]; J. Almqvist, 'La Corte Internacional de Justicia como foro para el litigio estratégico de Derechos Humanos', in S. Torrecuadrada García-Lozano (dir), *Los desafíos de la Corte Internacional de Justicia y las sinergias entre la Corte y otros órganos jurisdiccionales* (Wolters Kluwer España, 2021) 215; or M. De Arcos Tejerizo, 'La fragmentación judicial en la resolución de disputas de derechos humanos ¿Qué rol puede ejercer la Corte Internacional de Justicia', in S. Torrecuadrada García-Lozano and C. Espósito (eds), *Los desafíos de la Corte Internacional de Justicia frente a los derechos humanos. III Jornadas sobre los nuevos retos de la Corte Internacional de Justicia*, (La Ley, 2022) 87.

law that would not otherwise be possible, given the imbalances of power in international relations.[19] Another close notion is the more generic and vague concept of "lawfare",[20] sometimes used with a negative connotation and insinuating an abusive recourse to jurisdictional mechanisms.

Regardless of the nuances these expressions may have, we refer to cases in which the international public interest — or the general, common, collective or shared interests of the international community or a group of states — are to be defended by jurisdictional means. In other words, these are interests protected by the community structure of international law, still in the process of crystallization, governed by the principle of solidarity[21] and which give international law its public dimension.[22] While international public interests may raise questions about their specific beneficiaries and the substantive international law they cover,[23] they can generally be understood in two ways: (1) as those that transcend the particular interests of each state and of the entities directly affected by the breach of the norms that protect them[24] or (2) as those about which there is a consensus that they should not be left to the free disposition of individual states or among them but instead should be recognized and sanctioned by international law as a matter that concerns all states.[25]

These interests have been created and protected through what Ángel Rodrigo has called the community toolbox.[26] Of particular relevance for international public interest litigation are: the multilateral treaties for protecting collective interests with particular characteristics in terms of conclusion, reservations and responsibility for breach; *erga omnes* obligations, especially *erga omnes partes* obligations; peremptory or *ius cogens norms*; and the extension of the standing to invoke the international responsibility of states in cases of breaches of obligations arising from these norms.

One of the limitations of the community structure of the international legal order is its institutional deficit. This leads to the paradox that, in order to defend the general interests of the international community, it is necessary to have recourse to the mechanisms for the application and guarantee of international norms existing in

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19 D. Guilfoyle, 'The Chagos Archipelago before International Tribunals: Strategic Litigation and the Production of Historical Knowledge', 21(3) *Melbourne Journal of International Law* (2021).

20 G.P. Noone, 'Lawfare or Strategic Communications?', 43(1-2) *Case Western Reserve Journal of International Law* (2010) 73-85.

21 Among others: M. Díez De Velasco, *Instituciones de Derecho Internacional Público* (18th ed.,Tecnos, 2013) at 92-93.

22 Among others: O. Casanovas y La Rosa, 'La dimensión pública del derecho internacional actual, in N. Bouza i Vidal *et al.* (eds), *La Gobernanza del Interés Público Global: XXV Jornadas de la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales* (Tecnos, 2015) 57; or A.J. Rodrigo, 'Las normas de interés público en el Derecho Internacional', in N. Alonso Moreda, J. L. de Castro Ruano, I. Otaegui Aizpurúa (eds), *Cursos de Derecho internacional y Relaciones Internacionales de Vitoria-Gasteiz 2024* (Valencia, Tirant lo Blanch, Blanch, 2025) 273.

23 M. Esnault, 'On the pertinence of 'public interest' for international litigation', in J. Bendel and Y. Suedi (eds), *Public Interest Litigation in International Law* (Routledge, 2024) 9.

24 G. Gaja, 'The Protection of General Interests in the International Community. General Course on Public International Law (2011)', 364 *The Hague Academy Collected Courses* (Brill | Nijhoff 2014), at 21.

25 B. Simma, 'From Bilateralism to Community Interest in International Law', 250 *The Hague Academy Collected Courses* (Brill | Nijhoff, 1994), at 233.

26 Á.J. Rodrigo Hernández, 'Más allá del Derecho Internacional: el Derecho Internacional Público', in R. Méndez Silva (coord), *Derecho Internacional* (Universidad Nacional Autónoma de México, 2019) 57, at 91-92.

the bilateral structure, including its judicial means.[27] Tensions thus arise between these general interests and the bilateral and consensual nature of the international judicial system, originally designed for the defence of individual state interests.[28] This system will consequently impose important limitations on the defence of the public interest through contentious proceedings,[29] which mainly concern the need for states to accept the jurisdiction of international tribunals, and on their standing to bring a case before it, even in the case of violation of *ius cogens* norms or *erga omnes* obligations.

The ICJ recognised in an iconic *obiter dictum* from the 1970 Barcelona Traction case the existence of *erga omnes* obligations, namely, the obligations of a state towards the international community as a whole, and that given the importance of the rights involved, all states can be held to have a legal interest in their protection.[30] These obligations may originate in general international law as well as in international treaties. Obligations *erga omnes partes* are generally understood, as the *Institut de Droit international* (IDI) described them, as those "under a multilateral treaty that a state party to the treaty owes in any given case to all the other states parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these states to take action."[31] However, the existence of obligations *erga omnes partes* derived from customary international law has not been excluded by the International Law Commission (ILC).[32]

Ius cogens or peremptory norms of general international law were defined in Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969 as those accepted and recognized by the international community of states as a whole as norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[33] Furthermore, in the event of serious breaches of these norms, a qualified regime of international responsibility of the state applies.[34] The most common basis of *ius cogens* norms is customary international law, though treaty provisions and general principles of law may also serve as their grounds.[35] Obligations deriving from peremptory norms will always be obligations *erga*

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27 *Ibid.* at 93-94; or R. Huesa Vinaixa, 'A bilateral dispute with a multilateral dimension: issues of jurisdiction and ius standi in Gambia v. Myanmar (provisional measures)', 39 *Revista Electrónica de Estudios Internacionales* (2020) [doi: 10.17103/reei.39.11].

28 Á. J. Rodrigo Hernández and B. Vázquez Rodríguez, 'International climate litigation as a case of international litigation in public interest', 28 *Spanish Yearbook of International Law* (2024) 209-216, at 210 [doi: 10.36151/SYBIL.28.10].

29 P. Wojcikiewicz Almeida, 'Enhancing ICJ Procedures in Order to Promote Fundamental Values: Overcoming the Prevailing Tension between Bilateralism and Community Interests Get access Arrow', in M. Iovane *et al.* (eds), *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry* (Oxford University Press, 2021) 241-263, at 242-243.

30 ICJ, *Barcelona Traction, Light and Power Company, Limited, Judgment,* ICJ Reports (1970), at para. 33.

31 IDI, *Resolution 'Obligations Erga Omnes in International Law'*, Krakow Session, 2005, at Article 1(b).

32 ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', in II(2) *Yearbook of the International Law Commission* (2001), at 126 (commentary to Article 48).

33 See also: ILC, 'Draft Conclusions on the identification and legal consequences of peremptory norms of general international law (jus cogens), adopted by the International Law Commission', in II(2) *Yearbook of the International Law Commission* (2022), at Conclusion 2; or R. Casado Raigón, 'Derecho dispositivo y derecho imperativo', in J. M. Beneyto Pérez and C. Jiménez Piernas (eds), *Concepto y Fuentes del Derecho Internacional* (Tirant lo Blanch, 2022) 274, at 286-288.

34 ILC, *supra* n. 33, at Conclusion 19; and Articles 40 and 41 ARSIWA.

35 ILC, *supra* n. 33, at Conclusion 5.

omnes, although not all obligations *erga omnes* derive from peremptory norms. However, the relationship between the two categories is still far from peaceful today and tends to overlap in ICJ jurisprudence.[36]

With regard to the consensual nature of its contentious jurisdiction, the ICJ has reiterated in case law after the *Barcelona Traction* judgement that the *erga omnes* nature of an obligation does not exempt the need for the state's consent to its jurisdiction.[37] As remarked, among others, by Professor Antoni Pigrau i Solé, in the current state of evolution of international law, not even an *ius cogens* norm is powerful enough to affect the right of a state not to give its consent to be judged by the ICJ.[38] Until now, it has only been possible to take international legal action for breach of *erga omnes partes* obligations. That is, in situations where the defendant States are parties to multilateral treaties and have accepted the jurisdiction of the Court, usually through the compromising clauses of those treaties.[39]

The ICJ's judgement in the *East Timor* case[40] made it clear that the *erga omnes* character of an obligation also does not affect the doctrine of the indispensable third party or Monetary Gold Principle — the case in which the ICJ first invoked it to determine that it could not rule on the merits of a case when the legal interests of a state that has not consented to the exercise of its jurisdiction constituted the very object of the decision sought.[41] However, it should be noted that subsequent case law, both from the ICJ and at other international tribunals, suggests that this principle would not apply either if the responsibility of the respondent state can be determined without the need for prior determination of that of another state,[42] or if the rights or obligations of the third state have already been determined by a competent international authority.[43]

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36 See, among others: M. Iovane & P. Rossi, 'International Fundamental Values and Obligations Erga Omnes', in M. Iovane *et al*. (eds), *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry* (Oxford University Press, 2021) 46-67, at 54; E. Carli, 'Obligations Erga Omnes, Norms of Jus Cogens and Legal Consequences for "Other States" in the ICJ Palestine Advisory Opinion', *Ejil:talk!*, published on 26 August 2024, accessed 25 November 2025; or ICJ, *Obligations of States…*, *supra* n. 6. Declaration of Judge Tladi, at 10-11.

37 Among others: ICJ, *East Timor (Portugal v. Australia), Judgment*, ICJ Reports (1995) 90, para. 29.

38 A. Pigrau Solé, 'Reflections on the effectiveness of peremptory norms and erga omnes obligations before international tribunals, regarding the request for an advisory opinion from the International Court of Justice on the Chagos Islands', 55 *Questions of International Law*. Zoom-out (2018) 131-146, at 137.

39 Among others: ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment*, ICJ Reports (2012) 422; ICJ, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment*, ICJ Reports (2014) 226; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections,* Judgment, ICJ Reports (2022) 477. See also: E. Carli, 'Community Interests Above All: The Ongoing Procedural Effects of Erga Omnes Partes Obligations Before the International Court of Justice', *Ejil:talk!*, published on 29 December 2023, accessed 25 November 2025.

40 "(...) the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*" (ICJ, *East Timor…*, *supra* n. 37, at para. 29).

41 ICJ, *Case of the monetary gold removed from Rome in 1943 (Preliminary Question), Judgment of June 15th, 1954*, ICJ Reports (1954) 19.

42 Among others: ICJ, *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment*, ICJ Reports (1992) 240.

43 Among others: PCA, *Larsen v. Hawaiian Kingdom, Award, 5 February 2001, Case No. 1999-01. Hawaiian Kingdom, Award*, 5 February 2001, Case No. 1999-01; or ITLOS, *Dispute concerning delimitation of the maritime*

Concerning standing to bring a case in defence of general interests, the ICJ expressly stated in its 1966 *South West Africa*[44] judgement that, given the state of development of international law at that time, there was no possibility of bringing an *actio popularis*, namely the right of any state to take legal action in vindication of a public interest,[45] as there was in some national systems. Nevertheless, since then, the crystallization of the notion of *erga omnes* obligations in ICJ jurisprudence, supported by other developments such as the inclusion of Article 48 in the ILC Draft Articles on Responsibility of States for internationally wrongful acts of 2001 (ARSIWA),[46] has consolidated the recognition of the standing of both injured and non-injured states to invoke the breach of *erga omnes* obligations. But, as we have already examined, it has so far only been possible to substantiate cases of this kind before the ICJ in relation to obligations *erga omnes partes* provided for in multilateral treaties, and not in connection with obligations *erga omnes partes* derived from customary international law or other sources of international law nor in relation to obligations *erga omnes stricto sensu*.[47]

In this context, the advisory function of the ICJ serves as an alternative or complement to its contentious function in the defence of the international public interest. This role is especially significant in view of the reduction of compromissory clauses in treaties referring contentious matters to the ICJ, as well as the withdrawal of some states' declarations accepting the Court's compulsory jurisdiction.[48] Furthermore, it could be argued that advisory opinions inherently involve a public interest element, as their primary purpose is to address legal issues arising from questions of international law.[49]

(C) THE ADVISORY FUNCTION OF THE ICJ

boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections, Judgment (28 January 2021). In detail: B. McGarry and N. Zargarinejad, 'All that Glitters Is Not Monetary Gold. Indispensable Parties and Public Interest Litigation before International Tribunals, in J. Bendel and Y. Suedi (eds) *Public Interest Litigation in International Law* (Routledge, 2024) 137.

44 ICJ, *South West Africa, Second Phase, Judgment*, ICJ Reports (1966) 6, at para. 88.

45 *Ibid.*

46 Annex to GA Res. 56/83, 28 January 2022. According to Article 48(1) 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".

47 See, among others: C. Espaliù Berdud, 'Locus standi de los estados y obligaciones erga omnes en la jurisdicción contenciosa de la Corte Internacional de Justicia', 72(2) *Revista Española de Derecho Internacional* (2020) 33-59 [doi: 10.17103/redi.72.2.2020.1a.01]; C. Gil Gandía, 'Momentum de la actio popularis y la Corte Internacional de Justicia', 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* (Aranzadi, 2023)123; or Y. Suedi & 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* (Routledge, 2024) 34, at 55-58.

48 Among others: J. Crawford, F. Baetens, and R. Cameron, 'Functions of the International Court of Justice', in C. Espósito & K. Parlett (eds), *The Cambridge Companion to the International Court of Justice*, (Cambridge University Press, 2023)13, at 35; or P. Urs, 'Obligations *erga omnes* and the question of standing before the International Court of Justice', 34(2) *Leiden Journal of International Law* (2021) 505-525 [doi: 10.1017/S0922156521000091].

49 C.A. Cruz Carrillo, 'The role of advisory opinions in addressing public interest issues', in J. Bendel and Y. Suedi (eds), *Public Interest Litigation in International Law* (Routledge, 2024) 170, at 173.

Pursuant to Article 65(1) of the ICJ Statute, the Cout may give advisory opinions on any legal question at the request of any body authorized by or in accordance with the Charter of the UN (the Charter) to make such a request. This is a function inherited from its predecessor, the Permanent Court of International Justice (PCIJ), whose attribution of an advisory function was, at the time, an innovation in international practice.[50] In the case of the PCIJ, only the Council and the Assembly of the League of Nations — which never exercised this function — had the competence to request advisory opinions. In the context of the ICJ, the organs that can do so were expanded: the UNGA or the Security Council may request advisory opinions on any legal question, while other organs of the UN and the specialized agencies that the UNGA authorizes may do so on legal questions arising within the scope of their activities.[51]

For the Court to consider the admission of a request for an advisory opinion, the issues raised must be of a *legal nature*. In other words, the Court's advisory role does not require the consent of any particular state.[52] The approval of a request for an advisory opinion by a majority of the members of the UNGA — the organ that most frequently makes use of this power — would be indicative of a fairly general consensus that it is a matter of interest to the international community and that transcends the bilateral nature that a dispute may initially have. Moreover, the ICJ Rules of Court provide that if an advisory opinion is requested upon a legal question pending between two or more States, they may appoint *ad hoc* judges.[53]

However, the fact that the ICJ has jurisdiction to issue an advisory opinion does not mean it is obliged to exercise it.[54] Article 65 of the ICJ Statute reflects this discretionary power of the Court by establishing that it "may give advisory opinions", although it has not yet refrained from exercising its jurisdiction in any advisory case submitted to it.[55] According to its consistent jurisprudence, when faced with a request for an advisory opinion, the ICJ must first consider whether it has jurisdiction. If it does have jurisdiction, it then must ascertain whether there are any compelling reasons why, in the exercise of its discretion, it should decline to issue the advisory opinion.[56]

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50 M. Pomerance, 'The advisory role of the International Court of Justice and its "judicial" character: past and future prisms', in S. Muller, D. Raic, and J.M. Thuránszky (eds), *The International Court of Justice. Its Future Role After Fifty Years* (Brill, 1997) 271.

51 Article 96 of the Charter of the UN. See, in detail: C. D. Espósito, *Jurisdicción consultiva de la Corte Internacional de Justicia* (McGraw-Hill, Madrid, 1996); and M. Hinojo Rojas, *A propósito de la jurisdicción consultiva de la Corte Internacional de Justicia* (Universidad de Córdoba, Servicio de Publicaciones, 1997).

52 As the court stated in its Advisory Opinion on the interpretation of Peace Treaties with Bulgaria, Hungary and Romania: 'The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take" (ICJ, *Interpretation of Peace Treaties*, Advisory Opinion. I.C.J. Reports 1950, p. 65 (first phase), at 71.

53 Article 102 of the Rules of Court.

54 ICJ, *Legal consequences arising…*, *supra* n. 11, at para. 31.

55 The former PCIJ refrained from adopting an advisory opinion on one occasion, in the case of Eastern Karelia (PCIJ, *Status of Eastern Karelia*, Advisory Opinion of 23 July 1923), on the grounds that it was a bilateral dispute between the parties involved.

56 Among others: ICJ, *Legal Consequences of the Separation…*, *supra* n. 10, at para. 65.

In this regard, in the context of the advisory opinion on Israel's policies and practices in the Occupied Palestinian Territories, adopted in 2024, the Court recalled that an example of a 'compelling reason' would be where an advisory opinion has the effect of circumventing the principle that a state is not obliged to allow its disputes to be submitted to judicial settlement without its consent.[57] However, the Court considered that the fact that, in order to answer the questions put to it, it may have to pronounce on legal issues on which Palestine and Israel have expressed divergent views did not turn the matter into a bilateral dispute.[58] Nevertheless, and especially in cases where it would be difficult to obtain the consent of the states involved to resort to the ICJ's contentious function, it is obvious that the advisory procedures are being used as a form of disguised contentious proceedings or a "soft" litigation strategy.[59] Also, in its recent 2025 advisory opinion on Israel's obligations concerning the presence and activities of the UN, other international organizations and third states in and in relation to the Occupied Palestinian Territories, the Court did not consider that issuing the opinion would prejudge any elements of the pending contentious case of *The Gambia v. Myanmar*, nor that this constituted a compelling reason to decline the request.[60]

The Court's settled jurisprudence has also clarified that the fact that the questions posed by an advisory opinion may contain political aspects is insufficient to exclude its character as a legal question. Possible political motives that may have inspired it, or the political implications that it may have, are also irrelevant.[61] Above all, it appears that the Court prioritizes advisory opinions as a tool to help international organizations fulfil their functions and advance public interests.[62]

(D) THE ROLE OF ICJ ADVISORY OPINIONS IN THE REAFFIRMATION, CONSOLIDATION, PROGRESSIVE DEVELOPMENT AND IMPLEMENTATION OF THE OBLIGATIONS TO PROTECT THE GENERAL INTERESTS OF THE INTERNATIONAL COMMUNITY

One of the great utilities of the advisory proceedings before the ICJ is the important role that these opinions may play in the reaffirmation, consolidation and progressive development of the obligations to protect the general interests of the international community. This is something that the ICJ also does through its contentious function. However, in the case of advisory opinions, it has the advantage, as we have just examined, that the exercise of its jurisdiction is, in principle, limited only by the fact that what must be submitted to it is a legal question. Moreover, as Alain Pellet has pointed out, the Court

57 *Ibid*. at para. 34.

58 *Ibid*.

59 M. Stavridi, 'The Advisory Function of the International Court of Justice: Are States Resorting to Advisory Proceedings as a "Soft" Litigation Strategy?', *JPIA*, published on 22 April 2024, accessed 25 November 2025.

60 ICJ, *Obligations of Israel…*, *supra* n. 12, at paras. 26-31.

61 Among others: ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports (2010) 403, at para. 27.

62 Y. Suedi, 'Advisory Jurisdiction and Consent: the Thin Line between Advisory and Contentious Proceedings', 24(1) *The Law & Practice of International Courts and Tribunals* (2025) 31-54 [doi: 10.1163/15718034-bja10131].

probably feels freer to seek more imaginative solutions when it performs its advisory function than when it adopts judgements that are *res iudicata*.[63]

The ICJ's own website describes how, despite not being legally binding, advisory opinions carry great legal weight and moral authority. They also often constitute an instrument of preventive diplomacy and contribute to the maintenance of peace, as well as to the clarification and development of international law and, therefore, to the strengthening of peaceful relations between states.[64]

Indeed, unlike ICJ judgements, advisory opinions are not binding.[65] But all ICJ jurisprudence, both its judgements and its advisory opinions,[66] constitute, by virtue of Article 38 of the ICJ Statute, subsidiary means for the determination of rules of law. As aptly described by Antonio Remiro Brotóns, they constitute precedents, which do not bind but mark a path to follow unless there are solid reasons to deviate from it.[67] There is thus a clear tendency to equate the determinations made by the ICJ even those without binding force with international law itself.[68] Advisory opinions, in particular, are seen in practice as a kind of authoritative and objective interpretation of international law for the world[69] even more so when they concern the general interests of the international community.

A clear example of these legal effects were those given by the 2019 ICJ advisory opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 by the subsequent decision of ITLOS regarding preliminary objections in the case concerning the delimitation of the maritime boundary between Mauritius and the Maldives in the Indian Ocean.[70] The Special Chamber of ITLOS observed that although ICJ advisory opinions cannot be considered legally binding, they constitute an authoritative statement of international law on the issues they address.[71] It also noted that the judicial determinations made therein carry no less weight and authority than those of judgements because they are taken with the same rigour and scrutiny by the principal judicial organ of the UN with competence in international law.[72]

Accordingly, in that particular case, the Special Chamber considered that the determinations made by the ICJ principally, that the process of decolonization of Mauritius was not legally completed when Mauritius acceded to independence in 1968,

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63 A. Pellet, 'Decisions of the ICJ as Sources of International Law?', in 2 *Gaetano Morelli Lectures Series* (International and European Papers Publishing, Rome, 2018) 7, at 20.

64 ICJ, Advisory Jurisdiction, accessed 25 November 2025.

65 However, it is possible to make them binding by virtue of an international treaty. See, P. D'Argent, 'Advisory Opinions, Article 65', in A. Zimmermann *et. al*. (eds), *The Statute of the International Court of Justice. A Commentary* (Oxford University Press, 2019) 1784, at 1810.

66 Pellet, *supra* n. 63, at 18.

67 A. Remiro Brotóns, 'Luces y sombras de la Corte Internacional de Justicia (1990-2021)', in J. Soroeta Liceras *et al*. (eds), *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2021* (Tirant lo Blanch, 2022), 231, at 279.

68 V. Rezadoost, 'Unveiling the "author" of international law-The 'legal effect' of ICJ's advisory opinions', 15(4) *Journal of International Dispute Settlement* (2024) 506-533 [doi: 10.1093/jnlids/idae015].

69 See, among others: M.A. Tigre, 'It Is (Finally) Time for and Advisory Opinion on Climate Change: Challenges and Opportunities on a Trio of Initiatives', 17 *Charleston Law Review* (2024) 623-723, at 627.

70 ITLOS, *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections, Judgment*, 28 January 2021.

71 *Ibid.* at para. 202.

72 *Ibid.* at para. 203

following the separation of the Chagos Archipelago and that the United Kingdom was under an obligation to terminate its administration of the Chagos Archipelago as soon as possible had legal effect in the case before it.[73] Thus, it did not accept the Maldives' preliminary objections to the jurisdiction and admissibility of Mauritius' claim relating to the indispensable third-party character of the United Kingdom,[74] nor that the sovereignty dispute between Mauritius and the United Kingdom remained unresolved, recognizing Mauritius as the coastal state with respect to the Chagos Archipelago for the purposes of delimiting a maritime boundary.[75]

The legal weight and moral authority of ICJ advisory opinions derive from the very organ from which they emanate. The Court, in the words, once again, of Remiro Brotóns, continues to be the solar centre of the judicial settlement of inter-state disputes because of its unique generalist (*ratione materiae*) and universal (*ratione personae*) character, its status as the principal judicial organ of the UN, its de facto concentration of the most important public disputes and the body of jurisprudence that has accumulated over decades.[76] The generalist nature of the ICJ also places it in a privileged position to carry out a systemic interpretation of principles and norms from different branches of international law.

ICJ advisory opinions can also contribute to the consolidation and progressive development of obligations to protect the general interests of the international community by helping to consolidate principles, clarifying the customary character of certain norms, or their status as *erga omnes* obligations or *ius cogens* norms. They are also better equipped to handle cases in which the breach of those obligations has not necessarily already occurred, or if the breaches have been committed by multiple parties.[77] These interpretations and developments may, in turn, feed back into the applicable law in future contentious cases before the Court itself or other international tribunals as in the aforementioned example of the *Chagos* case , regional and national courts, or quasi-jurisdictional mechanisms such as human rights committees.

Compared to contentious proceedings, ICJ advisory proceedings may have some disadvantages, such as more abstract fact-finding which will be carried out only to the extent necessary to answer the legal question submitted or less involvement of states in the proceedings, which are not of a controversial nature. In relation to the more abstract determination of the facts, ICJ Judge Georg Nolte recalled in his Separate Opinion to the 2024 Advisory Opinion on Israel's Policies and Practices in the Occupied

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73 *Ibid.* at para. 205-206.

74 *Ibid.* at para. 247-248.

75 *Ibid.* at paras. 250-251. See: S. Thin, 'The Curious Case of the 'Legal Effect' of ICJ Advisory Opinions in the Mauritius/Maldives Maritime Boundary Dispute', *Ejil:talk!*, published on 5 February 2021, accessed 25 November 2025. In a similar sense, the IACtHR has also stated that "(...) while an advisory opinion of the Court does not have the binding character of a judgment in a contentious case, it does have undeniable legal effects. Hence, it is evident that the State or organ requesting an advisory opinion of the Court is not the only one with a legitimate interest in the outcome of the procedure". IACtHR, *Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15 "Reports of the Inter-American Commission on Human Rights" (Art. 51 American Convention on Human Rights), requested by the State of Chile*, at para. 26.

76 Remiro Brotóns, *supra* n. 67, at 232.

77 J. A. Hofbauer, "Not Just a Participation Trophy? Advancing Public Interests through Advisory Opinions at the International Court of Justice", 22(2) *The Law & Practice of International Courts and Tribunals* (2023) 234-272 [doi: 10.1163/15718034-bja10092].

Palestinian Territories that this circumstance, coupled with the consensual nature of the Court's jurisdiction, prevents such determinations from having the conclusive effect attributed to findings of fact for the purpose of determining state responsibility in a contentious proceeding.[78] However, advisory proceedings may complement, facilitate, or even constitute an alternative to the contentious function when the needed consent or standing for that function fails, although, obviously, they do not replace it.[79]

On the contrary, advisory proceedings could be an easier way of obtaining a court ruling on issues such as climate change, where the specific requirements on attribution and causal link in the context of international responsibility may make its determination quite complex in the context of contentious proceedings.[80] In this regard, in its recent *Climate Change* Advisory Opinion, the Court stated that it 'cannot, in the context of these advisory proceedings, specify precisely what consequences are entailed by the commission of an internationally wrongful act of breaching obligations to protect the climate system from anthropogenic GHG emissions, since such consequences depend on the specific breach in question and on the nature of the particular harm.'[81], and that 'the responsibility of individual States or groups of States requires an *in concreto* assessment that must be undertaken on a case-by-case basis.'[82] However, this did not prevent the Court from clarifying the general application of the rules on state responsibility for internationally wrongful acts in the context of climate change.[83]

In addition to paving the way for future legal action, advisory proceedings may do so in connection with political action or international negotiations.[84] As a former president of the Court has stated, they also constitute a privileged means for the Court to defuse tensions and prevent conflicts by applying the law.[85] Although advisory opinions are not a substitute for negotiations, they can also facilitate and strengthen them by clarifying their legal parameters. For example, the *Chagos* Advisory Opinion paved the way for the agreement between the United Kingdom and Mauritius, concluded in October

78 ICJ, *Legal consequences arising…*, *supra* n. 11. Separate Opinion of Judge Nolte, at para. 5, *in fine*.

79 *Ibid.* at para. 4.

80 See also in this regard: 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* (Aranzadi, 2023) 209, at 229.

81 ICJ, *Obligations of States…*, *supra* n. 6, at para 445.

82 *Ibid*., at para. 106. Among others, see also, in Judge Jusuf's separate opinion to the *Climate Change* Advisory Opinion, a particular criticism of the fact that the Court 'missed a historic opportunity to clarify not only for all States but also, in particular, for those who have most suffered from the adverse effects of climate change, in a clear and tangible manner, the legal consequences of the failure of gross GHG-emitting States to take appropriate action to protect the climate system from such emissions, including through regulations of fossil fuel production, fossil fuel consumption and the granting of subsidies or exploration licenses for fossil fuel' (ICJ, *Obligations of States … supra* n. 6. *Separate Opinion of Judge Yusuf*, at para. 40).

83 ICJ, *Obligations of States…*, *supra* n. 6, at paras. 444-455.

84 As Professor Antonio Remiro Brotóns has pointed out, the Court's orders, judgements and advisory opinions point to the field of value judgments, beyond ethical principles, and are an instrument of pressure for politics (translation of the author). A. Remiro Brotóns, 'Un pueblo deambula en Gaza', 72(1) *Revista Española de Derecho Internacional* (2024) 307-328, at 326 [doi: 10.36151/REDI.76.1.15].

85 M. Bedjaoui, 'Posibilidades de la función consultiva de la Corte: balance y perspectivas', 4(8) *Relaciones Internacionales* (1995).

2024, on the exercise of sovereignty over the Chagos Archipelago.[86] Likewise, one of the arguments with which the promoters of the *Climate Change* Advisory Opinion justified their request was its potential to strengthen the negotiations under the UN Framework Convention on Climate Change and the Paris Agreement.[87] In this context, advisory opinions also provide an opportunity to scrutinize the arguments of states participating in the written and oral phases of the procedure, in contrast to the frequent opacity of multilateral negotiations on climate change.[88] Furthermore, submissions made by states in the context of advisory proceedings may be considered subsequent practice with regard to specific treaty obligations, or contribute to the development of practice or *opinion iuris* in connection with rules or principles of general international law.[89]

In other cases, when the ICJ's advisory function is exercised in more complex and entrenched situations, such as the Israeli-Palestinian conflict, it is more difficult to see an imminent practical effect. Indeed, it is simply disheartening to note that more than twenty years after the ICJ issued its Advisory Opinion on the legality of the wall built by Israel in the Occupied Palestinian Territories in 2004,[90] not only has the wall not been dismantled, but its construction continues, as does the expansion of settlements.[91] In these cases, the main value of advisory opinions remains that of reaffirmation, clarification and progressive development of international law, as well as the sedimentation of the legal parameters that should guide the cessation of breaches of international law and the patterns of conduct of the international community in these contexts.[92] This is a value that, indeed, is not so far removed from the actual value that ICJ judgements in contentious cases have in practice in many cases.

Advisory cases with a relevant scientific and technical component can also serve to settle scientific disputes and reinforce scientific consensus, as well as to confirm the interaction between science and international law, or even contribute to changing attitudes and behaviours in this regard.[93] This was the case in the recent *Climate Change* Advisory Opinion, which used the reports of the Intergovernmental Panel on Climate Change (IPCC) as a scientific parameter, considering them to 'constitute comprehensive

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86 J. Curtis, 'British Indian Ocean Territory: 2024 UK and Mauritius agreement', *Research Briefing, House of Commons Library*, published on 31 October 2024, accessed 25 November 2025.

87 See: *Vanuatu ICJ Initiative*, accessed 25 November 2025.

88 Remarks by Professor F. Sindico in I. Kaminski, 'Can law help us save the planet?', 3 *Unite for Nature* (2024) 14-17, at 17. Once the oral phase of the advisory proceedings has begun, the written statements (Article 106 of the Rules of Court) and the verbatim records and recordings of the oral interventions, which are often broadcast live, are usually made available to the public on the Court's website.

89 L. Vladyslav & M. Cohen, 'Climate Change Before International Courts and Tribunals: Reflections on the Role of Public Interest in Advisory Proceedings', 85(1) *Heidelberg Journal of International Law* (2025) 97-125, at 123 [doi: 10.17104/0044-2348-2025-1].

90 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports (2004) 136.

91 ICJ, *Legal consequences arising..., supra* n. 11, at para. 67.

92 See, among others, *ibid.* at para. 273-283.

93 P. Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law', 28(1) *Journal of Environmental Law* (2016)19-35 at 26 and 29 [doi: 10.1093/jel/eqw005]; or N. Ning & C. Yang, 'The judicial dimension of climate governance: The role of the International Court of Justice', 34 (1) *Review of European, Comparative and International Environmental Law* (2025) 194-209, at 205 [doi: 10.111/reel.12608].

and authoritative restatements of the best available science about climate change at the time of their publication'.[94]

Finally, advisory procedures can also indirectly contribute to the clarification and progressive development of international law in matters of public interest through their "media" dimension, helping to draw and maintain international attention to the issues they address.[95]

(E) THE ADVISORY OPINIONS OF THE ICJ AS AN INSTRUMENT AT THE SERVICE OF INTERNATIONAL ORGANIZATIONS, AND ESPECIALLY OF THE GENERAL ASSEMBLY, FOR THE DEFENCE OF THE GENERAL INTERESTS OF THE INTERNATIONAL COMMUNITY

International organizations, the highest expression of institutionalized multilateral cooperation,[96] are generally considered, at least in theory, as promoters of the international public interest or even directly embodying it. Some of the ways in which they can do so are by serving as a platform for the formulation of that interest; by developing ideas and consensus on it; by coercing their member states or others; or simply by fulfilling the functions for which they were created and which in many cases respond to that same idea of international public interest.[97] In addition, the bodies and agencies with the competence to do so also promote the general interests of the international community by requesting ICJ advisory opinions that deal with those interests.

Although the possibility of international organizations having access to the Court as parties to contentious proceedings was proposed and debated during the San Francisco Conference at which the Charter was negotiated,[98] the ICJ Statute makes it clear that only States may be parties in cases before it.[99] Nonetheless, the Court may request from "public international organizations" — that is, from an international organization of states, according to Article 69(4) of the Statute — information relevant to cases before it and shall receive information presented by such organizations on their own initiative.[100] Furthermore, when the interpretation of the constituent instrument of a public international organization or an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public

94 ICJ, *Obligations of States… supra* n. 6, at para 284.

95 As P. D'Argent has pointed out, "[t] To a certain degree, advisory opinions have attracted much more public attention than most of the bilateral disputes entertained by the Court under its contentious jurisdiction because issues 'of principle' are often put to the Court — which may also explain the continued investment and scrutiny by Member States when it comes to the composition of the Court". D'Argent, *supra* n. 65, at 1810.

96 J. M Sobrino Heredia, 'El componente institucional de las organizaciones internacionales', in A. M. Badia Martí, L. Huici Sancho (dirs), A. Sánchez Cobaleda (ed), *Las Organizaciones Internacionales en el Siglo XXI* (Marcial Pons 2021) 45, at 45.

97 J. Klabbers, 'What Role for International Organizations in the Promotion of Community Interests', in E. Benvenisti and G. Nolte (eds), *Community Interests Across International Law* (Oxford University Press, 2018) 86.

98 M. N. Shaw, Rosenne's Law and Practice of the International Court: 1920-2015 online (Brill | Nijhoff 2016), at II (171).

99 Article 34(1) of the Statute of the ICJ.

100 Article 34(2) of the Statute of the ICJ and Articles 69(1) and 69(2) of the Rules of Court.

international organization concerned and shall communicate to it copies of all the written proceedings.[101]

Conversely, in advisory proceedings, international organizations play a leading role. On the Court's website, one can read in the description of its advisory jurisdiction that "[s]ince States alone are entitled to appear before the Court, public (governmental) international organizations cannot be parties to a case before it. However, a special procedure, the advisory procedure, is available to such organizations and to them alone."[102] Thus, international organizations have an indispensable role in the request for an advisory opinion and in the written and oral phases of the proceedings.

First, only certain international organizations can request these opinions. As the ICJ has repeatedly pointed out, advisory opinions are intended to assist the body requesting them by providing the elements of law necessary to carry out its functions.[103] Those bodies are, moreover, entitled to decide for themselves on the usefulness of an advisory opinion in light of their own needs.[104] Second, upon receipt of a request for an advisory opinion, the Registrar of the ICJ shall notify any international organization which, in the opinion of the Court, is likely to be able to furnish information on the question. The Court will be prepared to receive their written or oral statements during the advisory proceedings.[105] Those international organizations that have made such submissions may comment on the statements made by other states or international organizations.[106] Third, other international organizations that so request may also be authorized by the ICJ to submit written or oral submissions and to respond to those made by other states and international organizations, if they are considered able to provide information on the question within the meaning of Article 66 of the ICJ Statute.[107] A growing number of international organizations are seizing this opportunity, especially following the *Wall* Advisory Opinion, and as evidenced by the record number of 13 organizations authorised to participate in the *Climate Change* proceedings. Most of these organizations have intervened to represent general interests, particularly those of the Global South, where most of them are based. Among them, the African Union, the Organization of Islamic Cooperation and the League of Arab States have been especially active in advisory proceeding in recent years. In the context of the *Climate Change* Advisory Opinion, a significant number of intervening international organizations represented the interest of island states, including The Alliance of Small Island States, the Pacific Community, the Pacific Islands Forum, the Melanesian Spearhead Group, and the Parties to the Nauru agreement.[108]

None of this prevents states from also playing an important role in advisory proceedings, especially when the request comes from the UNGA. Although states cannot

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101 Article 34(3) of the Statute of the ICJ, Article 69(3) of the Rules of Court.

102 ICJ, *Advisory jurisdiction*, accessed 25 November 2025.

103 Among others: ICJ, *Legal consequences arising...*, *supra* n. 11, at para. 37.

104 *Ibid.*

105 Article 66(2). of the Statute of the ICJ.

106 Article 66(3) of the Statute of the ICJ.

107 ICJ, *Request for advisory opinion. Procedure followed by the International Court of Justice*, 2003, at 1(section II. B).

108 In detail: S. Thin, 'The Benefits of an Open-Door Policy: International Organisations and the Promotion of Common and Community Interests in ICJ Advisory Proceedings', 27(1-2) *International Community Law Review* (2025) 162-187 [doi: https://doi.org/10.1163/18719732-bja10139].

directly request an advisory opinion, they participate directly in the discussion of the legal issue and its adoption at the UNGA. As in the case of international organizations, once a request for an advisory opinion has been received, the Registrar will also notify all states entitled to appear before the Court. Any other state that has not received such a communication may also express its wish to submit a written statement or to be heard, and the Court will decide. The states that have submitted written or oral statements, or both, may comment on those submitted by other states or international organizations.[109]

In practice, the Court has been generous in inviting to these proceedings both states and international organizations,[110] which are increasingly participating in them. More than fifty did so in the proceedings on Israel's policies and practices in the occupied territories;[111] almost a hundred in the Climate Change proceedings — the highest number in the history of advisory proceedings before the ICJ[112]; and forty-five in the proceedings on Israel's obligations concerning the presence and activities of the UN, other international organizations and third states.[113]

As we have already discussed, advisory opinions may be requested by the UNGA or the Security Council on any legal question or by other bodies and specialized agencies of the UN authorized by the UNGA on legal questions arising within the scope of their activities. The UNGA has made and makes by far the greatest use of this prerogative. In a smaller number of cases, the Economic and Social Committee and specialized agencies have also requested advisory opinions, mainly on internal organizational matters.[114] It should be noted in this regard that the World Health Organization (WHO) had also requested an advisory opinion from the Court on the legality of the use by a state of nuclear weapons in armed conflicts, which clearly falls within the notion of international public interest litigation that we are examining. However, the Court considered that it lacked competence on the matter, since the request did not concern a question arising within the scope of that organization's activities, in accordance with Article 96(2) of the Charter.[115] The Security Council only requested one, the *Namibia* Advisory Opinion, adopted by the Court in 1971.[116]

Given the difficulty of decision-making in the outdated and dysfunctional Security Council, the request for an advisory opinion by this body, although it would be less representative in terms of the number of states participating in its formulation compared

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109 Article 66 of the Statute of the ICJ.

110 A. Paulus, 'Advisory Opinions, Article 66', in A. Zimmermann *et. al.* (eds), *The Statute of the International Court of Justice. A Commentary* (Oxford University Press, 2019) 1812, at 1819.

111 ICJ, *Legal consequences arising…*, *supra* n. 11, at para. 47.

112 ICJ, *Obligations of States in respect of Climate Change (Request for Advisory Opinion). Filing of written comments*, Press Release No. 2024/61,16 August 2024.

113 ICJ, *Obligations of Israel…*, *supra* n. 12, at para. 37.

114 The UN organs and agencies that have been authorized in this regard and the cases in which they have made use of this prerogative may be consulted at the *ICJ webpage*, accessed 25 November 2025.

115 ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, p. 66.

116 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*, ICJ Reports (1971)16. On other occasions, the Security Council has considered a request for an advisory opinion, but its members have been unable to reach an agreement. See, M. N. Shaw, Rosenne's Law and Practice of the International Court: 1920-2015 online (Brill Nijhoff, Leiden, 2016), at II (171).

to those of the UNGA, would certainly send a critical message of unanimity or at least non-opposition, if some abstain among the permanent members of the Security Council, which is becoming increasingly difficult. However, should such circumstances arise in the near future, it is safe to say that it will be a matter of public interest the maintenance of international peace and security, the *raison d'être* of this body, certainly is but one that will probably not involve or affect its permanent members very directly, who would otherwise probably exercise their right of veto. In any case, the limited practice of this body in this field generates uncertainty as to whether or not a request for an advisory opinion is subject to a veto under Article 27 of the Charter.[117]

For its part, the general mandate and universal membership of the UNGA make it a body with special legitimacy to protect the general interests of the international community.[118] According to the practice of this body, in order to request an advisory opinion, only a majority of votes from the members present and voting is required. In other words, advisory opinions have not been included among the important questions that must be decided by a two-thirds majority of the members present and voting according to Article 18(3) of the Charter, and Article 18(2) applies instead.[119]

The majority required for adopting the request at the UNGA endows it with legitimacy. At the same time, although the efforts of some states to obtain an advisory opinion on a legal issue of public interest may be frustrated if a significant proportion of other states do not support it, this voting system prevents possible vetoes by a small group of states. Thus, it has been possible to approve requests for advisory opinions such as those on *Chagos* or those related to actions of Israel in the Occupied Palestinian Territories without unanimity among UNGA member states. Obviously, the greater the majority of states voting in favour of an advisory opinion in the UNGA, the greater the legitimacy of

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117 D' Argent, *supra* n. 65, at 1791.

118 In Pierre D'Argent's words: "When requested by the GA, advisory proceedings may appear as a form democratic aspiration by the international community, providing an opportunity for a transparent public debate based on legal considerations, rather than power politics. The post-Cold War requests have also tended to be marked by a certain degree of activism, seeking authoritative confirmation of certain strongly held legal views in the furtherance of legal progress", *ibid.*, at 1810-1811.

119 *Ibid.* at 1790. According to Article 18(3), the UNGA could, by a majority of its members present and voting, include the request for advisory opinions in the category of questions to be decided by a two-thirds majority, but this has not yet been done (*ibid.*). Several controversial issues have arisen in relation to the exercise of this power to request advisory opinions by the UNGA, such as whether it is possible to request them if the Security Council is considering the matter or whether it can be done in the context of an emergency session convened in accordance with the *Uniting for Peace* Resolution (GA Res. 377A(V), 3 November 1950). These questions have been repeatedly clarified by the Court's jurisprudence. The Court has thus established, on the one hand, that the request for an advisory opinion does not in itself constitute a "recommendation" of the UNGA. Therefore, its adoption does not contravene Article 12 of the Charter, which precludes the UNGA from making recommendations with respect to a dispute or situation while the Security Council is exercising the functions assigned to it by the Charter with respect to that dispute or situation. On the other hand, the ICJ has also confirmed that the UNGA may request an advisory opinion in a session convened in accordance with *Uniting for Peace* Resolution if the Security Council, due to a lack of unanimity among its permanent members, fails to carry out its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression. The Court has further pointed out that it is not necessary for a proposal for such a request to have been submitted to the Security Council. In detail: *ibid.*, at 1769-1971.

that request. Notably, the request for the *Climate Change* Advisory Opinion was the first to be adopted unanimously by the UNGA.

This voting system can also make it possible to correct or counteract situations of power domination in international relations and give a voice, among others, to peoples struggling for the recognition and/or effectiveness of their right to self-determination as has been the case with the Saharawis,[120] the Palestinians,[121] or the Chagossians[122] as well as to the countries of the Global South. The *Climate Change* advisory proceedings illustrated this last assumption in a scenario in which multilateral negotiations are progressing slowly, ineffectively and without providing a satisfactory response to the claims of these countries, especially Small Island Developing States (SIDS). The latter had already attempted to initiate advisory proceedings before the ICJ without success in 2011. That year, Palau led the proposal for a request for an advisory opinion on the responsibilities of states under international law regarding activities causing greenhouse gas emissions under their jurisdiction or control that harm third states.[123] SIDS not only mobilized before the ICJ; the Commission of Small Island States on Climate Change and International Law (COSIS),[124] created at the initiative of Antigua and Barbuda and Tuvalu in 2021, also requested the advisory opinion on climate change adopted by ITLOS. COSIS includes Vanuatu among its members, the state that led the request for the *Climate Change* Advisory Opinion before the ICJ.

Finally, the role of the Secretary-General of the UN in advisory proceedings should not be overlooked. Although there have been discussions about this possibility, he does not have the competence to request advisory opinions.[125] Yet, given the Secretary-General's status as "a symbol of United Nations ideals and a spokesperson for the interests of the world's peoples, in particular the poor and vulnerable among them",[126] it would not be an entirely unrealistic proposal for advisory opinions dealing with the general interests of the international community. Nonetheless, he currently plays a dual role in these proceedings: first, he represents the UN in cases in which this international organization intervenes, and second, he acts as a more neutral representative of the public interest, providing the Court with the necessary information to enable it to decide on the issues before it.[127]

(F) THE ROLE OF NON-STATE ACTORS IN ICJ ADVISORY OPINIONS REQUESTS AND PROCEEDINGS

The increasing judicialization of the defence of the general interests of the international community has also been accompanied by greater media interest in both contentious

120 ICJ, *Western Sahara, Advisory Opinion*, ICJ Reports (1975) 12.
121 ICJ, *Legal Consequences of the Construction…*, *supra* n. 90; and ICJ, *Legal consequences arising …*, *supra* n. 11.
122 ICJ, *Legal Consequences of the Separation…*, *supra* n. 10.
123 See, among others: A. Pigrau i Solé, 'Cambio climático y responsabilidad internacional del Estado', 26 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* (2022) 45-80, at 75; or Fernández Egea, *supra* n. 80, at 222.
124 In detail: *COSIS website*, accessed 25 November 2025.
125 They are formally transmitted to the Court by him or her or by the highest administrative officer of the body or agency authorized to request the opinion (Article 104 of the Rules of Court).
126 UN, *The role of the Secretary-General*, accessed 25 November 2025.
127 Paulus, *supra* n. 110, at pp. 1824-1825.

and advisory proceedings, as well as greater participation in them by states, international organizations and other actors. In the case of other actors, however, this participation is still mainly informal.[128]

Neither the individual, legal persons, nor non-governmental organizations (NGOs) have standing before the ICJ. They could intervene in a proceeding before the ICJ by means of Article 50 of its Statute, by virtue of which "[t]he The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion". It has even been suggested that they could invoke this article to enable their participation as *amicus curiae*.[129] However, the ICJ has barely employed this article in practice and only to allow individual experts to participate.[130]

Sometimes, non-state actors or actors whose statehood may be controversial have been allowed to participate in advisory proceedings through what appears to be the ICJ's extensive interpretation of 'state' in the context of Article 66(2) of its Statute due to the unique circumstances of those cases.[131] For instance, Palestine was invited to participate in the advisory proceedings concerning the wall; Israel's policies and practices in the occupied territories; and Israel's obligations concerning the presence and activities of the UN, other international organizations and third states. This is due to Palestine's status as a UN observer state and co-sponsor of the resolutions requesting such advisory opinions.[132] Similarly, in the *Kosovo* Advisory Opinion, given that the question submitted to the ICJ concerned the unilateral declaration of independence of the Provisional Institutions of Self-Government of Kosovo on 17 February 2008, its authors were invited to submit written contributions.[133]

We have also examined how a request for an advisory opinion by the UNGA may serve, if approved by a majority of its members, to give a voice, among others, to countries of

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128 See, among others: P. Wojcikiewicz Almeida and M. Cohen, 'Mapping the 'public' in public interest litigation: an empirical analysis of 'participants' before the International Court of Justice', in J. Bendel and Y. Suedi (eds), *Public Interest Litigation in International Law* (Routledge, 2024) 98.

129 Wojcikiewicz Almeida, *supra* n. 29, at 260.

130 ICJ, *Corfu Channel case, Judgment of April 9th, 1949*, ICJ Reports (1949) 4I*; CJ, Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment*, ICJ Reports (1984) 246; ICJ, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment*, ICJ Reports (2018) 139; ICJ, *Maritime Delimitation in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment*, ICJ Reports (2018) 139.; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment*, ICJ Reports (2022) 13.

131 Y. Suedi, *The Individual in the Law and Practice of the International Court of Justice* (Cambridge University Press, 2025) at 90-95; or G. Hernández, Gleider I., 'Non-state actors from the perspective of the International Cout of Justice', in J. D' Aspremont, Jean (ed.), *Participants in the international legal system: multiple perspectives on non-state actors in international law* (Routledge, 2011) 140, at 150-15.

132 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Order of 19 December 2003*, ICJ Reports (2003) 428; ICJ, *Legal consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Order of 3 February 2023, ICJ Reports (2023) 6; and ICJ, *Obligations of Israel in relation to the presence and activities of The United Nations, other International Organizations and third States in and in relation to the Occupied Palestinian Territory (Request For Advisory Opinion). Order of 23 December 2024*, ICJ Reports (2024). See: Paulus, *supra* n. 110, at 1819-1820.

133 ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Order of 17 October 2008*, ICJ Reports (2008) 40. Note that the notion of "written intervention" does not appear in either the Statute or the Rules of Court of the ICJ. See: Paulus, *supra* n. 110, at 1819-1820.

the Global South or to certain peoples struggling for the recognition and/or realization of their right to self-determination. This body can also constitute an indirect channel for the intervention of non-state actors, including civil society and individuals. Although they cannot directly request an advisory opinion, they can play a significant role in campaigning in favour of their request, thereby attempting to influence the position and vote of states.[134]

The mobilization of civil society has been particularly noteworthy in the case of the *Climate Change* Advisory Opinion. Its request originated in a campaign launched by students at the University of the South Pacific for an advisory opinion on climate justice and seeking the support of Pacific Islands Forum (PIF) leaders. This initiative sparked a global youth movement looking for state support in their respective regions.[135] In 2021, Vanuatu[136] announced that it would lead the diplomatic process to support this request, and, in 2022, a global alliance of civil society organizations also joined this campaign. Ultimately, Vanuatu led a core of 18 states in drafting a resolution, which was eventually co-sponsored by 132 states and adopted by consensus.[137] This significant involvement of civil society in the process of requesting this advisory opinion is also reflected in the content of the opinion itself, which in many respects mirrors the demands of the campaign.[138]

This is not the only such example in the history of the ICJ's exercise of its advisory function. Notably, the *World Court Project* campaign,[139] initiated in 1992 by a group of NGOs, aimed to obtain a declaration from the Court on the total prohibition of nuclear weapons. It was at the germ of the subsequent adoption of UNGA Resolution 49/75 K to request from the ICJ the other major advisory opinion on environmental issues on which it has pronounced on the legality of the threat or use of nuclear weapons.[140] It should also be noted that there has been a shift in the perception of the role of NGOs and civil society by the judges of the Court. In the aforementioned *Nuclear Weapons* Advisory Opinion, some judges had argued that the Court should have refused to rule on the matter due to the influence that certain NGOs had exerted on the adoption of the resolution in the UNGA.[141] This concern seems to have dissipated in subsequent advisory cases, including the one relating to climate change.

Since NGOs do not enjoy standing before the ICJ, once an advisory proceeding is initiated, they can only submit their points of view to the Court extra-procedurally.

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134 In this sense: Cruz Carrillo, *supra* n. 49, at 179.

135 In detail: *World's Youth for Climate Justice*, accessed 25 November 2025.

136 E. Kosolapova, 'ICJ to Rule on States' Climate-related Obligations: How Did We Get Here', *SDG Knowledge Hub*, published on 20 March 2024, accessed 25 November 2025.

137 GA Res. 77/276, 29 March 2023. See also M. Wewerinke-Singh, J. E. Viñuales & J. Aguon, 'The Role of Advocates in the Conception of Advisory Opinion Requests' 117 *AJIL unbound* (2023) 277-281[doi:10.1163/15718034-bja10131].

138 S. A. Parmar, 'Beyond State Centrality and Positivism: Weighing the 2025 Advisory Opinion on Climate Change", *AsianSIL Voices*, published on 16 August 2025, accessed 25 November 2025; or L. Robb & V. Prasad, 'Both a 'Global' and an 'International' Court of Justice', *Völkerrechtsblog*, published on 15 August 2025, accessed 25 November 2025.

139 See: Disarmament and Security Centre, The World Court Project, accessed 25 November 2025.

140 ICJ, *Legality …*, *supra* n. 9.

141 ICJ, *Legality…*, *supra*, n. 9. Dissenting opinion of Judge Oda, at 128; or Separate Opinion of Judge Guillaume, at 65.

However, this has not prevented them, especially in cases where the general interests of the international community were at stake, from carrying out important *lobbying* activities in favour of the request for advisory opinions or the presentation of claims in contentious proceedings; sending communications to the Court on their own initiative; or having their materials included as part of the official documentation provided by the parties, or being referred to by the Court itself.[142]

In contentious proceedings, NGOs can only participate indirectly if the parties or the Court have recourse to their materials. Conversely, in advisory proceedings, following the adoption of the Court's Practice Direction XII, they may submit a written statement and/or a document on their own initiative. Although such statements and/or documents will not be considered part of the case file, they will be placed in a designated location in the Peace Palace and considered as publications readily available and States and intergovernmental organizations presenting written and oral statements in the case may refer to them. As Andreas Paulus has pointed out, the adoption of this Practice Direction was likely a response to the large number of *amicus curiae briefs* sent to the Court by NGOs in advisory cases, such as those concerning nuclear weapons or the wall.[143] This Practice Direction refers only to *international* NGOs, so those without such status would be excluded. This exclusion, together with the fact that their submissions are not part of the case file and are not published on the ICJ website, has generated mixed feelings about the usefulness and progressiveness of this provision.[144]

More recently, in the context of the *Climate Change* Advisory Opinion, for the first time, the ICJ has considered a non-purely intergovernmental organization as an international organization under Article 66 of its Statute and consequently authorized to participate in the proceedings.[145] This organization is the International Union for Conservation of Nature (IUCN), which is not constituted by states alone and was not created by an international treaty.[146] It has, therefore, not simply been treated as an NGO, which, as we

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142 Among others, in the Gabčíkovo-Nagymaros case, the annexes to the parties' briefs included materials prepared by NGOs (ICJ, *Gabcíkovo-Nagymaros Project (Hungary / Slovakia), Judgment*, ICJ Reports (1997) 7); while in the case of armed activities on the territory of the Congo between the Democratic Republic of the Congo and Uganda (ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment*, ICJ Reports (2005) 168, the Court referred to documentation from various NGOs. See: M. N. Shaw, Rosenne's Law and Practice of the International Court: 1920-2015 online (Brill | Nijhoff, 2016), at II (10).

143 Paulus, *supra* n. 110, at 1828.

144 V. Lanovoy, 'Access to and participation in proceedings before international courts and tribunals', in E. Sobenes, S. Mead, B. Samson (eds), *The Environment Through the Lens of International Courts and Tribunals* (Springer, 2022), 415, at 424; or Wojcikiewicz Almeida and Cohen, *supra* n. 128, at 123.

145 ICJ, *Obligations of States in respect of Climate Change (Request for Advisory Opinion) – The Court authorizes the International Union for Conservation of Nature to participate in the proceedings*, Press release 2023/29, 14 June 2023.

146 By virtue of Part III of its Statutes of 5 October 1948, revised on 22 October 1996, and last amended on 13 December 2023 (including Rules of Procedure of the World Conservation Congress, last amended on 13 December 2023), IUCN is composed of: A: (a) States, government agencies and subnational governments; (b) political and/or economic integration organizations; B: (c) national non-governmental organizations; (d) international non-governmental organizations; C: (e) indigenous peoples' organizations; and D: (f) affiliates-namely: 1400 governmental and civil society organizations, together with a worldwide network of more than 16,000 experts, and 160 countries. It is constituted in accordance with Article 60 of the Swiss Civil Code as an international association of governmental and non-governmental members (Part 1 of its Statutes).

have just examined, could only submit a written statement that would not be considered part of the case file. This is an innovation by the Court, since it had previously interpreted the term 'international organizations' as synonymous with a public international intergovernmental organization within the meaning of Article 34(2) of the Statute except on one occasion, which did not result in an actual intervention in the proceedings.[147]

In the case of individuals, while the question of their standing before the ICJ was examined by the Committee of Jurists established by the League of Nations to draft the Statute of the former PCIJ in 1920 and there were experiments in international law that granted international standing to individuals in the first half of the 20th century,[148] they had never enjoyed it before either the PCIJ or the current ICJ. This essential component of the humanization of international law, which has been possible in human rights courts and committees, is still incomplete when we refer to the highest international jurisdiction.[149]

It also entails a clear limitation in the role of the ICJ in human rights,[150] although these are increasingly prominent in its case law, which has integrated them into general international law and its various sectors.[151] The intervention of individuals as parties or non-parties in ICJ proceedings is thus not contemplated, except, generally, through states, as part of their delegations, or as witnesses or experts.[152] In advisory proceedings, for instance, statements from individuals have been included in the arguments of participating states, as in the *Chagos* case, where Mauritius included those of five Chagossians who had been forcibly removed to the United Kingdom. In addition, the

147 The International League of the Rights of Man was authorized to intervene in the proceedings concerning the international status of South-West Africa (ICJ, *International status of South-West Africa, Advisory Opinion*, ICJ Reports (1950) 128. However, the International League did not submit its written statement in time or in proper form. *Paulus, supra* n. 110; or D. B. Garrido Alves, 'The concept of international organization in the practice of the International Court of Justice', *Ejil: Talk!*, published on 27 July 2023, accessed 25 November 2025.

148 A. A. Cançado Trindade, *El acceso directo del individuo a los Tribunales Internacional de Derechos Humanos* (Universidad de Deusto, 2001), at 31-34. In detail on early examples of the attribution of international standing to the individual, such as the Rhine navigation system, the 1907 project for an International Court of Dams, the Inter-American Court of Justice or the League of Nations systems for the protection of minorities: A. A. Cançado Trindade, 'Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century', 24(3) *Netherlands International Law Review* (1977) 373-392 [doi: 10.1017/S0165070X00016375].

149 Among others: C. Jiménez Sánchez, 'El derecho humano de acceso a la justicia en tribunales internacionales: pasado y futuro del derecho internacional', in C. Jiménez Sánchez and C. M. Zamora Gómez (eds), *El derecho humano a la justicia en tribunales internacionales* (Editorial Comares, 2024) 1; R. Huesa Vinaixa, 'Los derechos humanos ante la Corte Internacional de Justicia (algunos problemas de acceso a la función contenciosa)', in J. Soroeta Liceras and N. Alonso Moreda (eds), *XIX Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián* (Aranzadi, 2019) 109; C. Gil Gandía, 'El despertar del individuo en la corte internacional de justicia', in S. Torrecuadrada García-Lozano (dir), *Los desafíos de la Corte Internacional de Justicia y las sinergias entre la Corte y otros órganos jurisdiccionales* (Wolters Kluwer España, 2021) 279; or Almqvist, *supra*, n. 18.

150 R. Higgins, 'Human Rights in the International Court of Justice', 20(4) *Leiden Journal of International Law* (2007) 745-751[doi: 10.1017/S0922156507004414]; or C. Esposito, 'Human Rights', in C. Espósito & K. Parlett (eds), *The Cambridge Companion to the International Court of Justice* (Cambridge University Press, 2023) 486, at 489.

151 B. Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice', 3(1) *Journal of International Dispute Settlement* (2012) 7-29 [doi: 10.1093/jnlids/idr022].

152 M. N. Shaw, Rosenne's Law and Practice of the International Court: 1920-2015 online (Brill | Nijhoff, 2016), at II(173).

tape recording of the testimony of one of them, Liseby Elysé, was presented during the oral hearings.[153] Similarly, in the *Nuclear Weapons* case, Lijong Eknilang, originally from the Marshall Islands, participated in the oral hearings in 1995, recounting the devastating effects of the Castle Bravo nuclear tests on the inhabitants of Rongelap Atoll.[154] In the recent *Climate Change* case, the intervention of representatives of the youth and vulnerable groups as part of the delegations of intervening states and international organizations, should also be highlighted.[155]

Finally, another innovation made by the ICJ in relation to the intervention of experts in the context of the *Climate Change* Advisory Opinion deserves to be emphasized. A few days before the oral hearings, members of the Court met with a group of past and present authors of the reports of the IPCC.[156] According to the press release issued by the Court, the purpose of this meeting was to enhance its understanding of the key scientific findings that the IPCC presented through periodic assessment reports covering scientific basis, the impacts and future risks of climate change, and adaptation and mitigation options.[157]

The ICJ has not specified the legal basis under which it made this invitation. It does not seem to fit *a priori* with the avenues of participation of experts or witnesses provided for in the ICJ Statute and its Rules of Court or the previous practice of this tribunal. These legal instruments do not contain a specific disposition for the treatment of evidence or the intervention of experts in advisory proceedings. However, Article 68 of the ICJ Statute provides that "[i]n the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable". In this sense, Article 30(2) contemplates the possibility — never used so far — of the Court appointing assessors to sit with it without the right to vote. There is no evidence that Article 50 has been used either. In practice, the Court consults experts who are not formally appointed. Known as *experts fantômes*, they provide opinions to certain judges or to the entire Court during deliberations and their identities and conclusions are not made public.[158] This form of

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153 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius, Written Comments of the Republic of Mauritius*, ICJ Reports 2018, at para. 4.114.

154 ICJ, *Public sitting held on Tuesday 14 November 1995, at 10.35 a.m., at the Peace Palace, President Bedjaoui presiding in the case in Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion Submitted by the World Health Organization) and in Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations)*, Verbatim Record, Year 1995, CR 95/32, International Court of Justice, The Hague, at 24-28. See R. Dharia, 'Vanishing Yams: A Food Microhistory in the Climate Change Advisory Opinion', *Völkerrechtsblog*, published on 14 August 2025, accessed 25 November 2025.

155 Robb & Prasad, *supra*, n. 138.

156 The IPCC was established in 1988 by the World Meteorological Organization and the UN Environment Programme to provide comprehensive assessments of the state of scientific, technical and socioeconomic knowledge on climate change, its causes, potential impacts and response strategies. The IPCC currently has 195 members. Its assessment reports are based on an open and transparent review by experts and governments from around the world of the thousands of scientific papers published each year in this field. See: *IPPC Website*.

157 ICJ, *Obligations of States in respect of Climate Change (Request for Advisory Opinion) – The Court meets with scientists of the Intergovernmental Panel on Climate Change (IPCC), Press release 2024/75*, 26 November 2024.

158 See: C. O. Parseghian and B. K. Guthrie, 'The Role of Scientific and Technical Experts', in Stephen C. McCaffrey, C. Leb, and R. T. Denoon (eds), *Research Handbook on International Water Law* (2019) 301, at 306-

expert intervention does not appear to have been used in this case either, as the Court met with the IPCC experts prior to its deliberations and published their names.[159]

(G) FINAL CONSIDERATIONS

The current period of effervescence in international public interest litigation demonstrates the willingness of many states to provide a jurisdictional solution to serious problems facing the international community that involve breaches of international law. This phenomenon is a response to the international situation of systemic crisis and polycrisis of recent years and, at the same time, is a sign of the maturity of the international legal system. States or, at least, some of them are seeking to reaffirm and develop it in order to address the problems of international society.[160] Clearly, these proceedings alone will not solve these crises, but they can complement and reinforce political and diplomatic action.[161] This can be achieved mainly by clarifying and strengthening their legal bases and trying to eliminate the uncertainty or dispute surrounding the applicable international law or whether it has been violated.

The main stumbling block that judicial protection of public interest continues to encounter is its tension with the predominantly bilateral character of international jurisdictional mechanisms originally designed for the protection of the particular interests of states. In the current development of the international legal order, states other than the injured state in the context of violations of obligations to protect general interests have only been able to resort to the contentious function of the ICJ in relation to obligations *erga omnes partes* contained in multilateral treaties and when all states involved have accepted the jurisdiction of the ICJ.

In this context, the advisory function of the ICJ serves as an alternative or a complement to its contentious function in the defence of the general interests of the international community. Although advisory opinions are not legally binding, they carry great legal weight and moral authority and have important legal effects, particularly in relation to the reaffirmation, consolidation and progressive development of obligations to protect those interests. They help consolidate principles, clarifying the customary character of some norms or their status as *erga omnes* obligations or as *ius cogens* norms. The ICJ is also in a privileged position to carry out a systemic interpretation of the international legal order.

In addition, these reaffirmations, interpretations or developments of international law could feed back into applicable law in future contentious cases before the Court, other international and regional courts, or national courts or quasi-jurisdictional mechanisms,

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307.

159 Among others: R. O. Franz Derler, 'Experts Fantômes at the ICJ', *Ejil:talk!*, published on 2 December 2024, accessed 25 November 2025. M. A. Becker and C. Rose, 'The Return of Not-Quite "Phantom Experts"? The ICJ Meets with IPCC Scientists', *VerfBlog*, published on 3 December 2024, accessed 25 November 2025.

160 In this regard, see also: V. Lanovoy, '*Guest Editorial by Vladyslav Lanovoy: The Importance of International Courts and Tribunals in a Troubled World*', *ESIL Newsletter*, Autumn 2023, accessed 25 November 2025.

161 In this regard, see also: C. Escobar Hernández, 'Una estrategia judicial para la Franja de Gaza', 76(1) *Revista Española de Derecho Internacional* (2024) 297-305 [doi: 10.36151/REDI.76.1.14].

such as human rights committees. They also establish legal parameters for political and multilateral action, helping to maintain media attention on the issues being addressed.

Advisory opinions are a particularly useful tool for bodies and specialized agencies of the UN in defence of the general interests of the international community. The UNGA is the body that makes the most use of this prerogative. Due to its composition and general competence, it is particularly well-placed to request advisory opinions. If provided with the necessary majority, the UNGA can also act as a spokesperson for countries in the Global South, peoples struggling for recognition and/or realization of their right to self-determination, and civil society.

Much remains to be done within the ICJ in terms of direct access by civil society and the individual, although non-state actors are increasingly present before the Court. For example, the ICJ can now formally receive NGO submissions in advisory proceedings, even if they are not considered part of the case file. In the context of the most recent advisory proceedings, the Court has also shown a certain flexibility and innovation – e.g. in considering the IUCN as an international organization that can thus intervene as such in the written and oral proceedings, or in meeting with IPCC experts. This shows its willingness to provide the best possible response with the means at its disposal, both to the growing public interest in these proceedings and to the scientific complexity of the issues on which it is sometimes called upon to pronounce.

Advisory opinions, therefore, offer advantages that deserve to be explored in depth in the context of strategic public interest litigation in an international context where the community structure of the international legal order – and, with it, the general interests of the international community – still has limited international jurisdictional means for their defence and protection. This growing public interest litigation is not without risks, including saturation of international tribunals, their politicization, and judicial pronouncements that are systematically disregarded and their consequent delegitimization. In the face of serious breaches of international law and the failure of political and diplomatic mechanisms, inaction is not an option either. International tribunals will also have to be up to the task – not an easy one – of adequately combining expectations about the protection and defence of the international public interest with an objective and rigorous interpretation and application of the international legal system and its progressive development. At the same time, this avalanche of public interest litigation cases could drive the reform of international judicial mechanisms, making them better suited to protecting the general interests of the international community.

SYbIL | Spanish Yearbook of International Law

No Land but Sovereign: Sea-Level Rise, Cultural Heritage, and the Possibilities of International Law

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and Emma Segelke****

Abstract: This paper examines the challenges posed by sea-level rise to the protection of cultural heritage in Small Island Developing States (SIDS), with a focus on the implications of potential submersion of state territory for both tangible and intangible cultural heritage. The paper begins by critically assessing the legal feasibility and limitations of emerging forms of deterritorialized statehood for the purposes of cultural heritage protection. It also considers alternative theoretical proposals as mechanisms to ensure the functional continuity of SIDS' statehood and the cultural rights of relocated communities despite territorial loss. Taking SIDS as a case study, it addresses three main questions: what cultural heritage should be safeguarded, who is responsible for its protection, and how such protection can be operationalized under international law. In answering these questions, the analysis balances decolonial perspectives with the traditional role of states and international institutions, as framed by two key UNESCO Conventions: The World Heritage Convention and the Convention for the Safeguarding of the Intangible Cultural Heritage. Relying on the principle of fairness in international law, the paper further advocates both an evolutive interpretation of relevant treaties and the application of the mutually supportive interpretation doctrine between cultural heritage conventions, human rights law and climate change instruments. By recognizing the fluidity and resilience of culture, and by ensuring the active participation of affected communities, this paper underscores the necessity of progressive legal frameworks to respond to sea-level rise, offering insights with implications for SIDS, relocated populations, and the broader international community.

Keywords: Sea-Level Rise, Cultural Heritage, Small Island Developing States, UNESCO.

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(A) INTRODUCTION

Cultural heritage faces multiple threats from climate change, sea-level rise being just one among them. Yet, what makes the study of this phenomenon of particular interest is the prospect of a *disappearing state* and the implications for the protection, management, and promotion of tangible and intangible cultural heritage. Notably, sea-level rise has posed an existential threat to Small Island Developing States (SIDS), which have already called for the adoption of drastic measures, such as the relocation of entire populations.[1]

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1 See the Australia-Tuvalu Falepili Union Treaty (adopted November 2023, entered into force August 2024), Article 3.

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Taking the SIDS as a case study, this paper aims to reflect upon the quest to protect cultural heritage in the event of complete submersion of a state's territory. Examining this issue also allows us to delve deeper into other pressing topics, such as the theoretical and practical challenges of new forms of deterritorialized statehood and the protection and promotion of the right to cultural self-determination of relocated populations.[2]

This paper addresses the questions of *what*, *who*, and *how* to safeguard cultural heritage located in SIDS. At the core of these inquiries lies the issue of cultural property ownership. While an exhaustive examination of the theoretical framework on the subject exceeds the scope of this paper, the analysis herein adopts Lucas Lixinski's "third way" of thinking about cultural property.[3] The rationale for this choice is twofold: first, it enables a departure from the paradigm of "cultural internationalism", which is often associated with the interests of developed states. Second, it ensures the participation of relevant communities in decision-making processes and cultural governance while preserving the role of states and international institutions in the management and safeguarding of cultural heritage.[4]

Further inspired by the idea of fairness in international law and given the multiplicity of applicable norms to the situation at hand, this paper advances an evolutive interpretation of the relevant international treaties to ensure that they "do not lose touch with present notions of what is fair".[5] Due to their particular attachment to the territory, immovable and intangible cultural heritage are most threatened by sea-level rise. Thus, this paper focuses on the World Heritage Convention and the Convention for the Safeguarding of the Intangible Cultural Heritage.[6] It suggests that these two conventions should be interpreted in a *mutually supportive manner* with human rights norms and climate treaties. To that aim, it resorts to treaty harmonization techniques, such as the mutually

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2 The right to self-determination has an internal and external aspect which should not be conflated. While the right to external self-determination amounts to a "right of secession" or "statehood", the right to internal self-determination, under which cultural self-determination is comprised, refers to the groups' political autonomy and agency. See S. Torrecuadrada, V. Aguilar, '¿Derecho a la Libre Determinación?', in S. Torrecuadrada, V. Aguilar (eds), *Políticas, Derechos y Territorios Indígenas en Venezuela* (Universidad de los Andes, Mérida, 2015), at 71-96.

3 See the seminal theory of J.H. Merryman, 'Two Ways of Thinking About Cultural Property', 80 *The American Journal of International Law* (1986), 831-853 [doi: 10.2307/2202065]; revisited in 'Cultural Property Internationalism', 12 *International Journal of Cultural Property* (2005), 11-39 [doi: 10.1017/S0940739105050046]; and the re-interpretation of such theory in L. Lixinski, 'A Third Way of Thinking about Cultural Property', 44 *Brooklyn Journal of International Law* (2019), 563-612, at 570.

4 Lixinski, *A Third Way…*, *supra* n. 3, at 578-579.

5 See A. von Arnauld, 'Fairness and International Law: Within or Without?', 6 *Academy of European Law Working Paper* (2024), 1-8 [doi: 1814/76749]. This approach has been favoured by the ILC to ensure the preservation of the rights of states affected by sea-level rise and promote legal stability, predictability, certainty and equity among them. See GA Supplement No. 10 (A/80/10), Chapter IV, para. 41.

6 Intangible cultural heritage is attached to a people, which arguably makes its protection contingent upon such people's physical existence. Yet, compared to its material counterpart, the adverse effects of climate change in intangible cultural heritage are more difficult to quantify and monitor. Moreover, some intangible expressions are undetachable from the land (e.g., *biocultural heritage*), making it particularly at risk. See F. Lenzerini, 'Protecting the Tangible, Safeguarding the Intangible: A Same Conventional Model for Different Needs', in S. von Schorlemer, S. Maus (eds), *Climate Change as a Threat to Peace – Impacts on Cultural Heritage and Cultural Diversity* (PL Academic Research, Dresden, 2014), 141-160, at 151.

supportive interpretation doctrine,[7] the systemic integration strategy,[8] or the principle of complementarity.[9]

The paper is structured as follows: it begins by situating the protection of cultural heritage threatened by sea-level rise within the broader debate on emerging forms of deterritorialized statehood. The physical disappearance of SIDS challenges UNESCO's cultural heritage conventions, which are premised on a classical, Westphalian notion of the territorial state to articulate their mechanisms of protection. The second section addresses *who safeguards*, clarifying the duties of management, preservation, and restoration of cultural heritage, with special attention to the legal status of relocated populations as holders of cultural and Indigenous rights. The third section turns to the question of *what to safeguard*, analysing the procedural obligations of deterritorialized and host states in identifying and safeguarding cultural heritage. The fourth section considers *how to safeguard* through a critical assessment of the proposals advanced by different stakeholders. It gives prevalence to those proposals more closely aligned with international standards of human rights and Indigenous rights in terms of access, enjoyment, and sustainable use of cultural resources. The paper concludes by reflecting on the most suitable fora to ensure the relational and communal protection of the cultural heritage of SIDS in this unprecedented scenario.

(B) SEA-LEVEL RISE, DETERRITORIALIZED STATEHOOD, AND RELOCATED POPULATIONS

(1) The existential threat of sea-level rise for SIDS

More than one-third of states are expected to be directly affected by sea-level rise, while many others will face indirect consequences, including the reception of relocated populations and the loss of access to natural and economic resources.[10] Given that sea-level rise affects the international community as a whole, responses to this phenomenon must necessarily be articulated at the international level. In particular, the irreparable

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7 See R. Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing Regimes' Debate?', 21 *European Journal of International Law* (2010), 649-679 [doi: 10.1093/ejil/chq046]; X Zheng, *The Complementarity Between the Nagoya Protocol and Human Rights* (Springer, Singapore, 2023), at 3-16; E. Morgera, 'Against all odds: The contribution of the Convention on Biological Diversity to International Human Rights Law', in D. Alland *et al* (eds), *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Martinus Nijhoff, Leiden, 2014), 983-995.

8 The systemic integration strategy is contained in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 *UNTS* 331. This strategy has been recently articulated in the ITLOS Advisory Opinion on Climate Change, where the Tribunal looked into Article 237 of UNCLOS as one of the so-called rules of reference and acknowledged the importance of coordination and harmonization between UNCLOS and external rules in order to inform the meaning of the former and ensure that it serves as a living instrument. See *Advisory Opinion on the Obligations of States in Respect of Climate Change and International Law*, Case No. 31 (2024), paras. 130-137.

9 See V. Chetail, 'Moving Towards an Integrated Approach of Refugee Law and Human Rights Law', in C. Costello *et al* (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, Oxford, 2021), 202-220.

10 ILC, Open-Ended Study Group on Sea-Level Rise in Relation to International Law (2018), at 224-230, para. 1.

harm that sea-level rise inflicts upon cultural heritage — and, by extension, cultural diversity — goes beyond SIDS and coastal populations, raising concerns of global public interest. First, because World Heritage sites are part of the cultural heritage of humankind regardless of their location.[11] Second, because the inherent value of cultural diversity, embedded in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, forms a "common heritage of humanity" that should be preserved for the benefit of all.[12] However, when dealing with climate change and related environmental disasters, states have shown an informal hierarchy in the protection of cultural expressions. In fact, under the United Nations Framework Convention on Climate Change (UNFCCC), only those cultural manifestations that could be useful to the states have been considered worthy of protection.[13] However, before considering any substantive measures, the issue of the statehood of potentially submerged states must be addressed.

(a) Strategies for the preservation of SIDS' territory

As the threat of partial or total submersion of SIDS intensifies, several strategies have been put forward to safeguard their physical existence. Among these, the construction of shoreline protections, reinforcements, and sea defences are lawful means of artificially preserving the SIDS' territory under international law.[14] However, this option is not only economically inefficient but it also creates additional problems, including marine pollution and the erosion of the territory's environmental and cultural integrity. A second strategy is the creation of artificial islands or new wetland and coastal ecosystems with a similar environment as the original island state. Although not forbidden under international law, the creation of artificial islands is limited by Article 60 of UNCLOS.[15] Moreover, for islands situated on atolls, it would go a long way in providing their inhabitants with an ideal terrain to recreate their intangible and mixed cultural heritage, which are inseparable from the land.[16] A third proposal calls upon SIDS to acquire new territory in advance in order to progressively relocate their government and population before submersion takes place. This acquisition can be carried out either through a purchase agreement — in the case of a privately owned territory — or by a treaty of cession, as exemplified by the case of Alaska.[17] In 2008, the President of the Maldives publicly

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11 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975), 1037 *UNTS* 151, preamble, para. 6.

12 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007), 2440 *UNTS* 311 (2005 UNESCO Convention), preamble, para. 2.

13 See E. Segelke, 'Incorporar una perspectiva de "derechos humanos" en el régimen del Derecho internacional climático con respecto al conocimiento ecológico tradicional de los pueblos indígenas y de las comunidades locales', 50 *Tempo Exterior* (2025), 26-44 [doi: 10.64130/temex.50.26].

14 R. Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States', *International Symposium of Islands and Oceans* (Tokyo, Japan, 22-23 January 2009), at 4. See also ILA, *Final Report of the Committee on International Law and Sea-Level Rise* (2024), accessed 22 December 2025.

15 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 *UNTS* 3, (UNCLOS).

16 See GA Res. 18/317, 16 July 2024, para. 29.

17 See the Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America (adopted on 20 June 1867), by virtue of which Russia sold Alaska to the United States for USD7.2 million.

declared his intention to purchase new land for relocation.[18] Yet, these acquisitions raise many concerns: first, virtually all territory is subject to state sovereignty, and the few unclaimed lands cannot be lawfully appropriated.[19] Second, there is no certainty that other states will make such offers, given fears of opening the floodgates to similar claims and triggering geopolitical tensions.[20] Moreover, even if an offer is made, negotiations would be marked by an inherent power imbalance due to the economic constraints of SIDS. Lastly, differences in climate, environment, space, and infrastructure at the relocated land may affect the preservation and development of cultural heritage. The same can be argued regarding the permanent lease of state territory.

Two pathways for the pre-emptive protection of SIDS' territories have been tested so far. In 2014, the government of Kiribati purchased 5,460 acres of land located in Fiji's second-largest island, Vanua Levu, from the Church of England.[21] This acquisition facilitated the relocation of some population under the framework of a culturally sound labour migration policy.[22] An alternative pathway stems from the belief that land can be wholly spiritual and/or immaterial. This view underpins Tuvalu's initiative to establish a digital twin state in the metaverse, or what Tuvalu's former Minister for Justice, Communication, and Foreign Affairs called "the world's first digital nation".[23] The idea of preserving the state digitally, with the wholeness of local communities' culture, spirituality and territory — also known as *fenua* — has merit, as it is based on the reclaimed agency of Tuvalu's Indigenous peoples and their right to self-determination.[24] It not only reconciles Indigenous cosmologies with Western institutions through a process of de- and re-territorialization of the metaverse, but it is also an insightful example of what performative or lived sovereignty means in the eyes of Indigenous peoples.[25] Still, moving into the digital space brings up issues regarding the international recognition of the sovereign digital state, inequalities in access to digital technology and the internet, and potential cybersecurity risks.[26] In addition, developing and maintaining a digital twin state requires substantial computing resources, which increase carbon

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18 D. Hodgkinson *et al*, "The hour when the ship comes in': a convention for persons displaced by climate change' 36 *Monash University Law Review* (2010), 69-120, at 70 [doi: 10.26180/5db7fcddd2c4a].

19 See, as a matter of example, Article IV of The Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961) 402 *UNTS* 71.

20 M.J. Aznar, 'El Estado sin territorio. La desaparición del territorio debido al cambio climático', 26 *Revista Electrónica de Estudios Internacionales* (2013), 1-23, at 8 [doi: 10.36151/].

21 A. Kraler *et al, Climate Change and Migration. Legal and policy challenges and responses to environmentally induced migration*, European Parliament (2020), at 59, accessed 22 December 2025.

22 See Kiribati's "Migration with Dignity" policy in S.N. McClain, C. Bruch, 'Migration with Dignity: A Framework to Manage Climate Change and Prevent Conflict', 9 *The Peace Chronicle* (2021). This relocation strategy has been criticised in K.E. McNamara, 'Cross-border migration with dignity in Kiribati', 49 *Disasters and displacement in changing climate* (2015), at 62, accessed 22 December 2025.

23 See Simon Kofe, *The First Digital Nation COP28 Update*, accessed 22 December 2025. This proposal has received mixed reactions by Tuvaluans. See G. Di Fonzo, 'Small Island Digital States: Exploring the Relationship Between Digitization, Statehood, and Climate Change-Induced Sea-Level Rise in Tuvalu' (PhD Thesis at McGuill University, Montreal, 2025), at 35-40; D. Rothe, *et al.*, 'Digital Tuvalu: State Sovereignty in a World of Climate Loss', 100 *International Affairs* (2024), 1491-1509, at 1502 [doi: 10.1093/ia/iiae060].

24 Rothe, *et al.*, *supra* n. 23, at 1492.

25 *Ibid.*, at 1503.

26 Within these risks is the threat of the digital state being absorbed by digital superpowers such as China or the US, in a sort of "digital colonialism". Cf., C. Pérez, 'Cambio climático, soberanía desterritorializada

emissions that may worsen climate change, making it a measure of last resort.[27] In light of these challenges, most SIDS have shifted the debate to what follows the physical disappearance of their territory.

(b) New forms of statehood beyond the 1933 Montevideo Convention

Under Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, there are four criteria for statehood: a defined territory, a permanent population, a government, and the capacity to enter into international relations. According to the principle of effectiveness in international law, if a state does not meet these criteria, it ceases to exist, with the unintended consequence of rendering its population stateless. To prevent this outcome, a view has emerged that Article 1 of the 1933 Montevideo Convention only governs the creation of states, but not their continuity or extinction.[28] In particular, SIDS have argued that international law does not contemplate the demise of statehood in the event of partial or total loss of territory due to climate change-related sea-level rise.[29] In turn, the continuity of statehood is consistent with various international law rules and principles, such as the right to self-determination or the principle of equity and fairness.[30] This argument has been further supported by the International Court of Justice in its Advisory Opinion on the *Obligations of States in respect of Climate Change*.[31]

Recognizing deterritorialized statehood allows SIDS to retain functional sovereignty over the natural and cultural resources formerly present in their territories and maritime zones.[32] This means that SIDS could retain their sovereignty to perform fundamental governmental functions, upheld through a juridical community of people acting as a relocated government. SIDS would also have their maritime entitlements preserved as they may be politically and economically imperative for their long-term survival as deterritorialized entities.[33] Crucially, it also ensures that SIDS continue to be

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y continuidad ¿digital? del Estado: reflexiones en torno a los pequeños Estados insulares en desarrollo del Pacífico', 76 *Revista Española de Derecho Internacional* 2 (2024), 143-169, at 167-168 [doi: 10.36151/REDI.76.2.6].

27 V. Seshadri, 'Why Tuvalu's digital twin plan is a cry for help, not a sustainable solution', *Illuminem* (2022), accessed 22 December 2025.

28 GA Supplement No. 10 (A/80/10), Chapter IV, para. 42. See also J. McAdam, "Disappearing States', Statelessness and the Boundaries of International Law', in J. McAdam (ed), *Climate Change and Displacement: Multidisciplinary perspectives* (Hart Publishing, Oxford and Portland, 2010), 105-129, at 106.

29 See the Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise (adopted 6 August 2023), preamble, paras. 8 and 12 (2023 Declaration on the Continuity of Statehood); and the AOSIS Declaration on Sea-Level Rise and Statehood (adopted 23 September 2024), preamble, para. 6 and Article 2 (2024 AOSIS Declaration).

30 See the 2023 Declaration on the Continuity of Statehood, preamble, para. 9; and the 2024 AOSIS Declaration, preamble, para. 7.

31 *Obligations of States in respect of Climate Change*, Advisory Opinion, ICJ General List No. 187, 23 July 2025, para. 363: "Once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood". This statement was criticized for understating the effects of sea-level rise, which affect both SIDS' territory and population. In his Separate Opinion, Judge Aurescu argued that this "one" element should not be interpreted in a strictly mathematical, restrictive manner (para. 20).

32 To ensure access to these resources, SIDS and some scholars have advanced an interpretation of Article 5 of UNCLOS allowing for the freezing of baselines in light of the principle of equity (systemic interpretation of Articles 59 and 74 of UNCLOS and SIDS' subsequent practice in light of Article 31(3)(c) VCLT). See some examples in Rayfuse, *supra* n. 14; J. Ödalen, 'Underwater Self-determination: Sea-level Rise and Deterritorialized Small Island States', 17 *Ethics, Policy & Environment* (2014), 225-237, at 228 [doi: 10.1080/21550085.2014.926086].

33 Rayfuse, *supra* n. 14, at 10.

member states to the UN and other international organizations such as UNESCO, which constitutes a vital support for the protection of their cultural heritage.

While continuity of statehood seems to be widely supported by the UN member states, no consensus exists on the shape that a deterritorialized state may take.[34] The recognition of deterritorialized statehood calls for a readaptation of the concept of *territory* to include non-physical spaces where state sovereignty can be exercised in compliance with the state's international obligations. This implies that treaty-based territorial requirements should be interpreted in an evolutive manner, considering non-Western, Indigenous, and decolonial performativity.[35] One of the most discussed theoretical proposals in this regard is Maxine Burkett's establishment of *ex-situ* nationhood, which "affords the benefits and rights of the state in perpetuity".[36] This proposal, although normatively central to recognizing the feasibility of the deterritorialized state, is not fully tenable on its own.

First, the notion of rights – including cultural rights – being held in perpetuity is hard to fathom from a state whose territory will eventually disappear. Emma Allen and Mario Prost suggest the "zombie state thesis" to conceptualize states *in limbo* and their need for a transitional period from full to diminished statehood.[37] By contrast, Jane McAdam doubts the long-term viability of displaced governance.[38] In response, Rosemary Rayfuse argues that functional sovereignty is transitional in nature, lasting either one generation (30 years) or one human lifetime (100 years).[39] Although she supports an *ex-situ* nationhood, she admits that it is unattainable within an international legal order based on the Westphalian notion of the state. Indeed, the concept of "*ex-situ* nation" reflects an evolutive interpretation of statehood shaped by the realities of the Anthropocene.[40]

The *ex-situ* nation comprises a government in exile coupled with a diasporic population that maintains a collective cultural identity beyond any territorial borders.[41] This setting invites critical reflection on the external dimension of the right to self-determination of deterritorialized states. SIDS have generally favoured an interpretation of self-determination which emphasizes cultural continuity over political sovereignty.[42] However, some scholars question whether the tandem of government in exile and diasporic communities constitute *real* self-determination, arguing that the latter can only be realized through the "moral and political authority to establish justice within

34 GA Supplement No. 10 (A/80/10), Chapter IV, para. 43.
35 Rothe, *et al.*, *supra* n. 23, at 1497.
36 M. Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era', 2 *Climate Law* (2011), 345-374, at 346 [doi: 10.3233/CL-2011-040].
37 Both authors advocate for a "legally proximate non-state status" as an alternative to the deterritorialized state. See E. Allen, M. Prost, 'Ceci n'est pas un Etat: The Order of Malta and the Holy See as precedents for deterritorialised statehood?', 31 *Review of European Comparative and International Environmental Law* (2022), 171-181, at 174 [doi: 10.1111/reel.12431].
38 McAdam, *supra* n. 28.
39 Rayfuse, *supra* n. 14.
40 Rothe, *et al.*, *supra* n. 23, at 1497.
41 Burkett, *supra* n. 36, at 369.
42 Rayfuse, *supra* n. 14. Cf., A. Torres, *Statehood under Water – Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill Nijhoff, Leiden, Boston, 2016).

a geographical region".[43] A more nuanced approach conceptualizes self-determination as a spectrum, with complete sovereignty and political independence at its endpoints.[44] Along this spectrum exist varying degrees of political autonomy, wherein sovereignty is distributed across different spheres of governance.[45] In this context, a government in exile would be able to safeguard the rights and interests of its citizens vis-à-vis host states in a lawful exercise of its functional sovereignty.[46]

Some examples of *ex-situ* nationhood can be found in the Palestine Liberation Organization and the Palestinian diaspora in Jordan, Lebanon and Syria; the Sahrawi Arab Democratic Republic, led by the Polisario Front and with a diasporic population in Algeria, Spain or Mauritania; and the Kurdish National Movement, with Kurdish presence in Turkey, Iraq, Iran, and Syria. Nevertheless, these cases differ from the SIDS, as they generally arise from temporary and exceptional circumstances involving unlawful occupation under international law. Even the notion of "exile" is problematic for SIDS, as it does not fully depict the situation of their governments. Overall, the issues of *ex-situ* nationhood are self-evident, yet concerning the protection of cultural heritage, the way these diasporic communities operate can be a valuable source of inspiration.

Maxine Burkett further proposes a UN trust territory for Pacific Island states, an international trusteeship designed to administer core governmental functions while preserving the legal personality of deterritorialized polities.[47] While institutionally appealing, reliance on UN trusteeship agreements modelled on the League of Nations Mandate System and the UN Trusteeship Council raises some concerns. The practice of the Mandate System and the UN Trusteeship Council shows that these regimes were rarely neutral mechanisms of temporary administration; rather, they often entrenched asymmetrical power relations that conditioned the exercise of self-determination on standards defined by the administering authorities. Precisely, Spanish and foreign scholarship have long emphasized that mandates and trusteeships functioned as techniques of internationalized governance rather than mere fiduciary agreements.[48] Historical examples of these trusteeship agreements already involved SIDS such as Nauru, Western Samoa, and Tanganyika, all of which suffered from institutionalized prolonged external control over their economic resources and political institutions.[49] Transposing this model to the context of deterritorialized SIDS due to sea-level rise,

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43 Ödalen, *supra* n. 32, at 232. See also G.E. Wannier, M.B. Gerrard, 'Disappearing States: Harnessing International Law to Preserve Cultures and Society', in O. Ruppel *et al* (eds), *Climate Change: International Law and Global Governance* (Nomos, Baden-Baden, 2013), 615-655.

44 Ödalen, *supra* n. 32, at 226.

45 Rothe, *et al.*, *supra* n. 23, at 1495.

46 Ödalen, *supra* n. 32, at 227.

47 Burkett, *supra* n. 36, at 370.

48 A. Miaja de la Muela, 'La emancipación de los Pueblos Coloniales y el Derecho Internacional', 39 *Anuales de la Universidad de Valencia* (1965), 1-173, at 56 *et seq* [doi: 10550/56008]; A. Remiro (ed), *Derecho internacional* (Tirant lo Blanch, Valencia, 2019), at 115-116. As to foreign doctrine, cf., A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005), at 115-195, esp. 121; regarding the Mandate System, see H. Duncan, *Mandates, Dependencies and Trusteeship* (Carnegie Endowment for International Peace, Washington DC, 1948) at 84-87.

49 See all the relevant GA resolutions in The United Nations and Decolonization, accessed 22 December 2025. This situation was also visible in the claims made by Nauru in the *Case Concerning Certain Phosphates Lands in Nauru*, ICJ Reports (1992) 240.

therefore, poses significant risks. To avoid replicating past structural deficiencies, any adaptation of these mechanisms requires stringent safeguards, such as clear temporal limits, robust participatory rights for affected populations, and enforceable guarantees of international recognition.

During the transitional phase from a territorial to a deterritorialized state, not only will sovereignty be reconfigured, but entire populations will also be relocated. In the latter process, the principle of proximity plays a crucial role. This principle requires the "least separation of persons from their cultural area", meaning that the selection of the host state should be guided by cultural and environmental affinities.[50] This principle has informed the Maldives' preference for relocation to Sri Lanka and India, and has similarly shaped the strategies of Lohachara Island, Carteret Islands, and Papua New Guinea.[51] At the international level, the Australia-Tuvalu Falepili Union treaty provides a special human mobility pathway for Tuvaluan citizens to relocate to Australia.[52] Yet, while this framework offers relative stability, many other SIDS lack access to comparable bilateral agreements that facilitate such transitions.

Eventually, one may still argue that there is no substitute for a territory endowed with profound spiritual significance. In Fiji, for example, some communities cannot separate from the physical embodiment of their land, which is regarded as an extension of the self. Similarly, Marshall Islanders attach deep spiritual meaning to their land, and for Ni-Vanuatuans, land assumes a maternal role. In fact, in many Indigenous languages, the term "land" is equated with "placenta", a conceptualization that cannot be encapsulated in colonial languages.[53] Therefore, while the principle of proximity may promote internal self-determination and uphold the principle of fairness, the spiritual dimension of land may be irremediably lost upon relocation.[54]

(2) The legal status of populations displaced by sea-level rise

Deterritorialized statehood offers a significant advantage in protecting SIDS populations against the risk of statelessness.[55] It is often unclear which international law regime is

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50 Hodgkinson *et al*, *supra* n. 18, at 79.

51 With regard to the Maldives, see G. Aktürk, M. Lerski, 'Intangible cultural heritage: a benefit to climate-displaced and host communities' 11 *Journal of Environmental Studies and Science* (2021), 305-315, at 308 [doi: 10.1093/acprof:oso/9780198267850.003.0001]; on the Carteret Islands, see J. Campbell, 'Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land', in J. McAdam (ed), *Climate Change and Displacement: Multidisciplinary perspectives* (Hart Publishing, Oxford and Portland, 2010), 57-80, at 72.

52 Articles 2 and 3 of the Australia-Tuvalu Falepili Union Treaty. It is expected that up to 280 Tuvalu citizens a year will move to Australia, meaning that it could take less than 35 years for Tuvaluan people to be relocated. See D. Dingwall *et al*, 'Australia's small Tuvaluan diaspora is about to grow fast – and it's determined to keep traditions alive', *AABC News*, 12 July 2025, accessed 22 December 2025.

53 Campbell, *supra* n. 51, at 60.

54 Lenzerini, *supra* n. 6, at 152; P. Raschidi, 'Indigenous peoples at the heritage-climate change nexus: Examining the effectiveness of UNESCO and the IPCC's boundary work' 51 *Review of International Studies* (2025), 42-63 [doi: 10.1017/S0260210524000196]. John Campbell also notes that "critical people-land union will decline", see *supra* n. 51, at 67.

55 For a thorough analysis on statelessness and related conventions applicable to SIDS see L. Yamamoto, M. Esteban, *Atoll Island States and International Law – Climate Change Displacement and Sovereignty* (Springer,

best suited to deal with SIDS populations' human and cultural rights in contexts of displacement. Specifically, there is an ongoing discussion as to whether they should be treated as climate migrants or climate refugees. Under international law, refugee status is granted to individuals fleeing their own state due to a foreseeable risk of irreparable harm to the right to life upon return.[56] At the core of this definition lies the concept of "persecution", which implies a deliberate active human agent.[57] Against this backdrop, scholars have proposed ways to expand the understanding of persecution: some draw on human rights law to broaden international refugee law; others rely on the evolutive interpretation of "refugee" in other international instruments like the Cartagena Declaration; and still others view climate-displaced populations as a "particular social group" subject to persecution.[58]

Even if the conventional definition of "refugee" does not contemplate *climate refugees*, in its Advisory Opinion on the *Obligations of States in respect of Climate Change*, the ICJ conferred this status to individuals who flee their country of origin due to threats from climate change and recalled the host states' obligations under the principle of non-refoulement.[59] Still, to talk about refugees implies the possibility of return, sooner or later, to the territory of the national state once the threat posed to the individual is over. This is not the case for populations who flee their country due to sea-level rise. Additionally, the terminology of *climate refugees* has been rejected by some SIDS.[60] While the label may be strategically used in the political arena "evoking a cosmopolitan and humanitarian ideal" , it simultaneously risks undermining the right to internal self-determination of climate-displaced peoples.[61] In recent years, multiple initiatives have sought to draft a new convention for the specific protection of climate-displaced persons, an idea which has been more or less well-received by scholars, but with limited support from states.[62]

Berlin, Heidelberg, 2014), at 251; K. Hee Eun, 'Changing Climate, Changing Culture: Adding the Climate Change Dimension to the Protection of Intangible Cultural Heritage', 18 *International Journal of Cultural Property* (2011), 259-290, at 262 [doi: 10.1017/S094073911100021X]; McAdam, *supra* n. 28.

56 See Article 1(a)(2) of the Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 *UNTS* 137, (1951 Refugee Convention).

57 Yamamoto, Esteban, *supra* n. 55, at 265.

58 *Ibid.*, at 232-233; Chetail, *supra* n. 9.

59 See *Obligations of States in respect of Climate Change*, para. 378.

60 At the International Conference on SIDS held in Apia (Samoa), the former President of Kiribati, Anote Tong, rejected the climate refugees' terminology. ABC News, 'Pacific Islanders reject 'climate refugee' status, want to 'migrate with dignity' SIDS conference hears', *ABC*, 5 September 2014, accessed 22 December 2025. Tuvaluans also rejected this terminology: see C. Farbotko, H. Lazrus, 'The first climate refugees? Contesting global narratives of climate change in Tuvalu' 22 *Global Environmental Change* (2012), 382-390 [doi: 10.1016/j.gloenvcha.2011.11.014]. Lilian Yamamoto and Miguel Esteban clarify their fear of being considered as "second class citizens" in Yamamoto, Esteban, *supra* n. 55, at 225.

61 Burkett, *supra* n. 36, at 358.

62 The only notable discussions revolve around the drafting of a new disaster-related convention, which could encompass climate change-related sea-level rise. State practice in this domain is, overall, quite limited. See F. Biermann, I. Boas, 'Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees' 10 *Global Environmental Politics* (2010), 60-88 [doi: 10.1162/glep.2010.10.1.60]; B. Docherty, T. Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' 33 *Harvard Environmental Law Review* (2009), 349-403; A. Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law', 30 *Law & Policy,* (2008), 502-529 [doi: 10.1111/j.1467-9930.2008.00290.x]; M. Prieur *et al*, 'Draft Convention on the International Status of Environmentally-Displaced Persons' 12 *Revue européenne de droit de l'environnement*, (2008), 395-406 [doi:

This situation, however, does not render international refugee law entirely inapplicable in the context of displaced SIDS populations, especially when interpreted and applied in conjunction with international human rights law.

If SIDS populations were instead regarded as *climate migrants*, a different legal framework would apply, namely, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which arguably offers a more sustainable long-term solution. International migration law provides "an indirect mechanism for imposing human rights obligations, or a 'backdoor liability'" on states.[63] The first question to address, though, is whether the status of migrants is truly more appropriate than that of refugees in the present case. In light of the circumstances of permanently relocated populations, the answer may well be affirmative. In fact, this is the approach adopted by Kiribati under its "Migration with Dignity" policy.[64]

Moreover, as communities that will become non-dominant within host states and thus will qualify as *de facto* minorities, relocated SIDS populations might fall within the scope of minority rights protection. While essential, minority rights do not constitute a self-standing regime. They are integrated into the broader framework of international human rights law, primarily articulated in Article 27 of the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Although these provisions have been interpreted expansively by the UN Human Rights Committee and have been invoked by minority and Indigenous groups alike, they remain limited in scope and largely individual in their orientation.[65]

By contrast, Indigenous rights are expressly grounded in the collective rights to self-determination, cultural integrity, and land-related rights. Instruments such as the ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) provide a more robust legal framework, one tailored to communities whose cultural survival, traditional knowledge systems, and cultural identity are intrinsically linked to land and collective practices.[66] Since SIDS are "Indigenous states with majority populations of Indigenous peoples with their distinctive languages and cultures", they meet both the objective and subjective criteria of indigeneity and should be recognized

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10.3406/reden.2008.2058]. Regarding state practice, see German Advisory Council on Global Change, *World in Transition: Climate Change as a Security Risk* (WBGU, Berlin, 2007).

63 Wannier, Gerrard, *supra* n. 43, at 638.

64 See, McClain, Bruch, *supra* n. 22.

65 See L. Lixinski, *International Heritage Law for Communities: Exclusion and Reimagination* (Oxford University Press, Oxford, 2019).

66 The ILO Convention (No. 169) concerning indigenous and tribal peoples in independent countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 *UNTS* 1, is the only binding treaty on Indigenous peoples' rights to this day but it only counts with 24 states parties as of December 2025. In turn, the UN Declaration on the Rights of Indigenous Peoples (GA Res. 61/295, 2 October 2007) was adopted with the affirmative votes of 143 states. Despite its *soft law* nature, international practice increasingly applies it, facilitating the crystallization of some of its elements into customary international law. Still, this process is uneven, with some norms gaining firmer customary status than others. See M. Barelli 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples', 58 *International & Comparative Law Quarterly Forum* (2009), 957-983 [doi: 10.1017/S0020589309001559].

accordingly.[67] Thus, to conceptualize relocated SIDS communities merely as migrant minorities would strip them of the stronger guarantees embedded in Indigenous peoples' rights, relegating them to a weaker tier of international protection. Affirming their Indigenous status extraterritorially would, in turn, ensure the preservation of their rights and avoid reproducing the colonial patterns of marginalization that Indigenous rights were meant to redress.

(3) The gaps in the international cultural heritage law regime

During the proceedings that gave rise to the ICJ's Advisory Opinion on the *Obligations of States in respect of Climate Change*, both the Melanesian Spearhead Group and the Solomon Islands expressed that sea-level rise had triggered the loss of traditional harvesting sites and species, as well as tangible Indigenous cultural heritage such as ancestral homes, burial groups, and other sacred sites.[68] Tonga described how forced migration caused by climate change led to the loss of Indigenous knowledge, rituals, and customs.[69] These examples illustrate how climate change in general, and sea-level rise in particular, have led to the loss of tangible and intangible cultural manifestations of SIDS communities.

The existing UNESCO framework is insufficient to safeguard tangible and intangible cultural heritage against the risks posed by sea-level rise.[70] This circumstance is not surprising if one bears in mind that, at the time of the negotiations of most UNESCO conventions, sea-level rise was not a pressing issue, nor was it considered a potential threat to cultural heritage. The only exception is the general reference to "changes in water level" as a potential threat to World Heritage properties under Article 11(4) of the World Heritage Convention. Still, this provision was associated with all types of water phenomena such as Venice's *aqua alta* and cannot thus be said to be a "climate change provision" *stricto sensu*.[71] This initial gap was filled by the Operational Guidelines to the World Heritage Convention, where references to climate change multiplied, although a reference to sea-level rise is still missing.[72] The same can be said about the Operational Directives of the Convention for the Safeguarding of Intangible Cultural Heritage.[73] In this case, the absence of any reference to sea-level rise is even more striking, as by the year 2003, environmental awareness had advanced significantly compared to the 1970s.

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67 D. Nakashima (ed), *Indigenous Knowledge for Climate Change Assessment and Adaptation* (Cambridge University Press/UNESCO Publishing, Cambridge, 2018), at 2.

68 See Melanesian Spearhead Group's written statement (paras. 18 and 71), and Solomon Islands' written statement (para. 29(4)).

69 Tonga written statement, para. 260. See also Kiribati's written statement (Annex 2, Statement 12, paras. 11-14) and the Expert Report by Anna Naupa and Dr Chris Ballard, in Annex A of Vanuatu's written statement (para. 7).

70 As suggested by Lenzerini, *supra* n. 6, at 151.

71 G. Carducci, 'What Consideration is Given to Climate and to *Climate Change* in the UNESCO Cultural Heritage and Property Conventions?', in S. von Schorlemer, S. Maus (eds), *supra* n. 6, 129-140, at 135.

72 The Operational Guidelines for the Implementation of the World Heritage Convention, WHC.25/01, 16 July 2025, paras. 111(d), 118, 118bis, 239(e). See also World Heritage Centre, *Policy Document on the Impacts of Climate Change on World Heritage Properties* (2008), accessed 22 December 2025.

73 Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage, 10.GA, 12 June 2024, paras. 178(a), 182, 188 and 191.

Yet, the most decisive developments in international environmental law emerged in the following decade with the adoption of the Cancun and Paris Agreements, subsequent to both UNESCO Conventions.[74]

Therefore, even if UNESCO is equipped to protect varied types of heritage, including natural heritage, it remains a political agency with limited capacity to tackle environmental catastrophes. Even if combating climate change lies outside its mandate, it can still rely on climate normative frameworks such as the UNFCCC when implementing cultural heritage policies.[75] An alternative and more feasible pathway lies in the advancement of an evolutive interpretation of existing UNESCO conventions. Such an interpretation would allow the reading of these conventions in light of contemporary threats, including climate change-related sea-level rise.[76] This mechanism is somewhat reflected both in the Operational Guidelines to the World Heritage Convention and the Operational Directives of the 2003 UNESCO Convention.[77] Moreover, the incorporation of a *climate change variable* in the 2019 Operational Principles for Safeguarding Intangible Cultural Heritage in Emergencies and in the Updated Draft Policy Document on the Impact of Climate Change on World Heritage Properties evidences a gradual institutional acknowledgement of climate change threats to cultural heritage protection. However, all these mechanisms rely on the premise of a territorial state in charge of identifying, protecting, managing and promoting cultural heritage.

Regarding the specific protection of cultural heritage in SIDS, other UNESCO conventions also reveal several shortcomings. On the one hand, the Convention on the Protection of Underwater Cultural Heritage limits its scope *ratione materiae* to "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, *for at least 100 years*".[78] While this time limit was introduced for pragmatic reasons, states can lower this threshold in their domestic laws for broader protection.[79] Yet, the 2001 UNESCO Convention does not apply to cases involving recent submersion.[80] On the other hand, the Convention

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74 COP Decision 1/CP.16, *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention* (adopted 11 December 2010); Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), 3156 *UNTS* 79.

75 Raschidi, *supra* n. 54, at 53.

76 For instance, Article 6(3) of the World Heritage Convention could be interpreted in order to place a duty on state parties to reduce their greenhouse gas emissions. See N. Higgins, 'Changing Climate; Changing Life Climate Change and Indigenous Intangible Cultural Heritage' 11 *Laws* (2022), 1-15, at 8 [doi: 10.3390/laws11030047]. As for the 2003 UNESCO Convention, Articles 11(a), 13(c) and 20(a) have been put forward as a way to access to international assistance and as a course for action against climate change. See Lenzerini, *supra* n. 6.

77 According to Federico Lenzerini, the Operational Directives represent a "formidable chance to update the global system of the 2003 UNESCO Convention in order to make it more responsive in the need of combatting the effects of climate change on intangible cultural heritage". See Lenzerini, *supra* n. 6, at 156. The same can be said concerning the Operational Guidelines to the World Heritage Convention.

78 Article 1(1)(a) of the Convention on the Protection of Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 45694 *UNTS* 1 (2001 UNESCO Convention) (emphasis added).

79 Only few countries have lowered this threshold, such as Australia (75 years). In the case of SIDS, there is little evidence about their will to do so. See A. Strati, *Draft Convention on the Protection of Underwater Cultural Heritage: A Commentary Prepared for UNESCO* (UNESCO, Paris, 1999), at 179.

80 The object and purpose of the 2001 UNESCO Convention is to protect underwater cultural heritage of historical and archaeological nature, which it is why it privileges *in situ* protection. See preamble, paras. 5

on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property also presumes the existence of a territorial state with a functional administration capable of managing inventories, carrying out maintenance and restoration works, and facilitating access to cultural properties.

Furthermore, both the World Heritage Convention and the 2003 UNESCO Convention have often been criticized for their limited normative force, notwithstanding their formal status as binding instruments of international law. Due to their non-self-executing character, many of their provisions are "intended as a matter of principles", and "virtually no real state obligation, in the technical sense of the term, are included in their texts".[81] In this regard, they epitomize the model of international standard-setting treaties, whose authority lies more in their persuasive and programmatic value than in enforceable state obligations.[82] This structural weakness is further exacerbated by the absence of effective enforcement mechanisms within UNESCO's institutional framework.[83]

As a result, an apparent normative gap persists within international cultural heritage law, leaving the safeguarding of cultural heritage at stake in emerging situations of sea-level rise. At the same time, the protection of the cultural rights of individuals, groups and communities affected by this phenomenon remains fragmented.[84] Building on the premise that cultural heritage constitutes an essential component of the protection, respect, and promotion of cultural rights, this paper frames the protection of the cultural heritage of SIDS populations through a human rights lens, thereby offering a more holistic and normative avenue to address this issue.

(C) THE INTERNATIONAL PROTECTION OF CULTURAL HERITAGE IN THE FACE OF SEA-LEVEL RISE AND DISAPPEARING STATES

(1) Who safeguards: the role of states, international organizations and local communities

In the event that SIDS become partially or totally submerged, the obligations to protect the cultural heritage of the displaced populations should be shared between the deterritorialized state and the host states. Regarding World Heritage sites and items inscribed on the Representative List of the Intangible Cultural Heritage of Humanity, UNESCO and its treaty bodies assume a central role in ensuring the continuity of their protection.[85] Given that "tangible and intangible [cultural heritage] often represent two

and 13, Article 2(5) and (10), and Rule I of Annex I.

81 Lenzerini, *supra* n. 6, at 144.

82 P.J. O'Keefe, L.V. Prott, *Cultural Heritage Conventions and Other Instruments: A Compendium with Commentaries* (UNESCO, Paris, 2011), at 78.

83 Scholars are divided about the need to create a specialized tribunal in cultural heritage matters: in favour, see M.C. Bassiouni, 'Reflections on Criminal Jurisdiction in International Protection of Cultural Property' 10 *Syracuse Journal of International Law and Commerce* (1985), 281-322, at 316; against A. Chechi, 'Evaluating the Establishment of an International Cultural Heritage Court' 18 *Art, Antiquity and Law* (2013), 31-58.

84 GA Supplement No. 10 (A/80/10), Chapter IV, para. 45.

85 Tuvalu and Nauru became party to the World Heritage Convention in 2023 and 2024, respectively. Out of the 1248 properties in the World Heritage List, 37 come from SIDS. In the case of the 2003 UNESCO

indissoluble components of the same complex cultural reality",[86] the following analysis will treat them in conjunction.

(a) The Duties of the Deterritorialized State

As previously mentioned, both the World Heritage Convention and the 2003 UNESCO Convention rely on the idea of a functional state administration to safeguard cultural heritage. However, when it comes to deterritorialized states, their administration may not be centralized nor even functional, especially during the first years after relocation. When it comes to the intangible cultural heritage of diasporic populations, the 2003 UNESCO Convention does not foresee an extraterritorial application of its provisions. It has been argued that, in these cases, the governments of the deterritorialized states would assume the role of trustees of the state assets on behalf of the displaced population while simultaneously promoting their cultural rights and interests vis-à-vis host state(s).[87] This way, the extraterritorial application of human rights norms and, in particular, the right to take part in cultural life in Article 15(1)(a) of the International Covenant on Economic Social and Cultural Rights, obliges the deterritorialized state to promote the protection of cultural heritage in the territory of any other states where immovable cultural heritage or its population have been relocated. According to the Committee on Economic Social and Cultural Rights, the right to take part in cultural life imposes a dual duty on states: a negative duty of abstention refraining from interfering with the exercise of cultural practices and access to cultural goods, binding upon host states ; and a positive duty to ensure participation, facilitation and promotion of cultural life, as well as access to and preservation of cultural resources, binding upon both the deterritorialized state and the host state.[88] Thus, it is upon the deterritorialized state to enable mechanisms in which the relocated populations can express their views about what cultural heritage should be protected and through which necessary means.

If deterritorialized states effectively retain their rights and obligations over their former maritime zones including the submerged territories treated as internal waters then they remain responsible for the protection of those elements of cultural heritage that could not be relocated pursuant to the relevant provisions in UNCLOS. However, UNCLOS only deals with archaeological and historical objects located within the Area and other areas under national jurisdiction, while, as previously mentioned, the material scope of the 2001 UNESCO Convention does not foresee the protection of recently submerged cultural properties.[89] There are, therefore, material and time constraints to the full protection of recently submerged cultural heritage.

Convention, out of the 849 listed items, only 38 are related to SIDS (updated December 2025).

86 Lenzerini, *supra* n. 6, at 156.

87 Rayfuse, *supra* n. 14, at 11.

88 CESCR, General Comment No. 21, E/C.12/GC/21, 21 December 2009, para. 6.

89 See Articles 149 and 303 of UNCLOS, respectively. Concerning underwater cultural heritage strictly so defined, deterritorialized states would continue to exercise jurisdiction over their territorial sea and adjacent zones, even if geographically remote, and would therefore remain bound by their obligations under the 2001 UNESCO Convention.

(b) The Duties of Host States

One of the primary concerns of climate-displaced communities is that host states would fail to appreciate the centrality of land to their cultural heritage, which could result in an insufficient protection of their cultural rights.[90] Regarding the protection of cultural heritage under the World Heritage Convention, cooperation and assistance follow the criteria set by the World Heritage Committee, irrespective of the location of the monument or site. This means that land-based, spiritual, and ancestral dimensions of cultural heritage tend to be protected even when communities are displaced or such heritage lies beyond their territorial control, as is the case, for instance, of the Old City of Jerusalem and its Walls.[91] The 2003 UNESCO Convention adopts a territorial and jurisdictional approach to safeguarding intangible cultural heritage, requiring state parties to protect that intangible cultural heritage present in their territory regardless of the nationality of the communities holding it. Despite acknowledging the impact of migration on intangible cultural heritage, the 2003 UNESCO Convention imposes a *territorial condition* aligned with the political borders of the state.[92] For displaced SIDS communities, this *territorial condition* means that only the state(s) in which intangible cultural heritage is practiced bear the responsibility to safeguard it. In such cases, communities are partly dependent on the protection granted by the host state, as well as cooperative mechanisms with other host states and the deterritorialized state.

With relocation, the intangible cultural heritage of SIDS communities' risks erosion and/or assimilation within the dominant culture of the host state. While, in theory, displaced communities may succeed in preserving their intangible cultural heritage for a limited period after relocation, in the long run these practices are inevitably subject, whether voluntarily or involuntarily, to the influence of the prevailing host culture. Intergenerational dynamics play a decisive role in this process: subsequent generations are more prone to adopt the customs, language and practices of the state in which they are born, thereby disrupting the chain of transmission that sustains "authentic" intangible cultural heritage.[93] This change is exacerbated in situations where there is a pronounced cultural divergence between the relocated community and the host state, as would likely be the case with many potential host states such as Australia, New Zealand or the US.[94]

In its Advisory Opinion on the *Obligations of States in respect of Climate Change*, the ICJ failed to mention that, under international human rights law, host states also have

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90 McAdam, *supra* n. 28, at 126; Campbell, *supra* n. 51.

91 See, the most recent World Heritage Committee's Decision 47 COM 7A.38 (2025).

92 Articles 11-15 of the 2003 UNESCO Convention. Cf., B. Ubertazzi, 'The Territorial Condition for the Inscription of Elements on the UNESCO Lists of Intangible Cultural Heritage', in N. Adell *et al* (eds) *Between Imagined Communities and Communities of Practice: Participation, Territory and Making of Heritage,* (Universitätsverlag Göttingen, Göttingen, 2015), 111-122, at 113; S. Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value* (AltaMira Press, Plymouth, 2012). This mechanism has been heavily criticized for contradicting the spirit of the 2003 UNESCO Convention in C. Bortolotto, 'Placing intangible cultural heritage, owning a tradition, affirming sovereignty', in M. Stefano, P. Davis (eds), *The Routledge Companion to Intangible Cultural Heritage* (Routledge, New York, 2017), 46-58, at 48.

93 Ödalen, *supra* n. 32, at 233. See also Lenzerini, *supra* n. 6, at 152.

94 Campbell, *supra* n. 51, at 78.

the positive obligation to take proactive measures to ensure that human rights, including cultural rights, are respected during the communities' presence in their territory.[95] It has been mentioned before that host states must refrain from interfering with the exercise of cultural practices and access to cultural goods. In turn, they must actively protect those cultural manifestations. By doing so, host states should comply with the principles of non-discrimination and national treatment enshrined in human rights law and international migration law, according to which they are obliged to provide migrants "at least as favourable treatment as that accorded to its nationals in comparable circumstances".[96] This means that those state parties to ICESCR have the specific legal obligation to take "the appropriate measures or programmes to support minorities or other communities, including migrant communities, in their efforts to preserve their culture".[97] On this basis, if migrants generally enjoy the protection of their cultural rights within host states, there is no reason why climate-displaced populations should not enjoy an equivalent standard of protection. While it is true that the obligations of host states are not heightened in the case of climate-displaced populations, extending them a preferential regime risks generating social tensions with other migrant communities, thereby raising issues of fairness and cohesion. A more constructive approach may thus lie in applying the principle of complementarity between international human rights law and international migration law, enabling a mutually reinforcing interpretation that strengthens the protection of cultural rights without formally creating a hierarchization among migrant communities.[98]

Given the interaction between international regimes on human rights, climate change law, and cultural heritage protection in the present case, we argue that these instruments should be interpreted in a mutually supportive manner following various treaty interpretation strategies. From the outset, it should be acknowledged that the mutually supportive interpretation is not a legal doctrine but part of a culture or mindset towards different legal institutions.[99] Initially, this doctrine was incorporated into almost every multilateral environmental agreement.[100] However, no authoritative body has yet

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95 *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Aurescu, para. 26. This view is reiterated in *Climate Emergency and Human Rights*, IACHR (2025), AO 32/25, para. 592. See also A/HRC/56/46, 24 July 2024, para. 76.

96 See Article 26 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 26 March 1976), 999 *UNTS* 171; Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 *UNTS* 3; and Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003), 2220 *UNTS* 3, (ICRMW).

97 See CESCR, General Comment No. 21, *supra* n. 88, para. 52(f). This is further recognized in Article 31 ICRMW, according to which states shall not prevent migrant workers and their family members from maintaining their cultural links with their state of origin; in this case, their deterritorialized state.

98 See especially Chetail, *supra* n. 9, at 210 and 216, "human rights and refugee law interact in *a mutually supportive manner* when they address the same right" (emphasis added). The same can be affirmed when it comes to migration law.

99 See M. Ntona (ed), *Human Rights and Ocean Governance – The Potential of Marine Spatial Planning in Europe* (Routledge, London, 2024), at 9 and 169.

100 See the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (adopted 10 September 1998, entered into force 24 February 2004) 2244 *UNTS* 337; Cartagena Protocol on Biosafety to the Convention on Biological Diversity (adopted 29

clarified the legal consequences of applying it or not.[101] As a result, states retain significant discretion in the interpretation and implementation of this doctrine, which in practice leads to its uneven and rather flexible application. Interestingly so, in its Advisory Opinion on the *Obligations of States in Respect of Climate Change and International Law*, the International Tribunal for the Law of the Sea mentioned the mutually supportive interpretation.[102] Yet, the Tribunal did not recognize this doctrine autonomously or as a self-standing principle. Instead, it was attributed to the fact that UNCLOS contains several clauses that refer to external rules, aiming at avoiding conflicts between state obligations stemming from different international law regimes.

Alongside the systemic integration recognized in Article 31(3)(c) of the VCLT, the mutual supportive interpretation can help mitigate the fragmentation of international law, a concern of particular significance in the context of SIDS. Arguably, this doctrine extends beyond the principle of systemic integration by requiring that treaties be interpreted in a manner that reinforces and ensures their cumulative, rather than competitive operationalization. In sum, it provides a cross-interpretative bridge aimed at reducing the risk that climate instruments neglect cultural impacts while cultural instruments refrain from engaging with certain climate change scenarios.

In the same vein, the principle of complementarity provides an alternative interpretative tool designed to foster cross-pollination and synergies among overlapping norms governing the same subject matter, instead of privileging one norm over another.[103] Certainly, when applied to international environmental law and international cultural heritage law, this principle would facilitate "a horizontal and cumulative articulation between them".[104] These suggestions may seem original, given that these interpretative devices were not originally conceived to advance cultural heritage protection. Nevertheless, when applied in relation to rights that straddle multiple legal regimes, the outcome is promising. It is reasonable to suggest that these interpretative tools could facilitate the emergence of a coherent framework around the protection of cultural autonomy, collective cultural identity, or even a right to cultural heritage more generally.[105] When cultural heritage law provisions are read together with human rights instruments, under the combined application of the principle of complementarity and the doctrine of mutually supportive interpretation, a compelling legal pathway emerges. A combined approach, grounded in human rights law and

January 2000, entered into force 11 September 2003) 2226 *UNTS* 208; 2005 UNESCO Convention. See also Pavoni, *supra* n. 7.

101 Only the UN Special Rapporteur on Climate Change, Elisa Morgera, resorted to this doctrine when dealing with the intersections between international environmental law and international human rights law in matters concerning cultural heritage. See Morgera, *supra* n. 7; Zheng, *supra* n. 7.

102 *Advisory Opinion on the Obligations of States in Respect of Climate Change and International Law*, Case No. 31 (2024), para. 325.

103 Chetail, *supra* n. 9. This principle was originally developed between international human rights law and international humanitarian law.

104 *Ibid*., at 210.

105 Such a right to cultural heritage was suggested by the former Special Rapporteur in the field of Cultural Rights, Farida Shaheed in 2011. See, A/HRC/17/38, 21 March 2011, para. 2. For the opposite view, see L. Pérez-Prat, 'Observaciones sobre el derecho al patrimonio cultural como derecho humano', 15 *Periférica: Revista para el análisis de la cultura y el territorio* (2014), 319-342 [doi: 10.25267/Periferica.2014.i15.22].

Indigenous rights[106] while drawing on environmental law,[107] can justify protective measures in host states and help fill gaps where existing international obligations alone are weak or ambiguous.

(c) Listening to Indigenous Voices: Introducing Decolonial Methodologies in the Safeguarding of SIDS' Cultural Heritage

While the complementarity principle and the mutual supportive interpretation doctrine offer an evident advantage to strengthening the protection of cultural rights of climate-displaced populations from SIDS in the long term, one may argue that such an exercise would be redundant if states recognized these communities as Indigenous peoples and guaranteed their right to cultural self-determination in the first place. Cultural self-determination, understood in its indigenous dimension, means that affected Indigenous communities must retain the primary authority over decisions pertaining to their cultural heritage. As a result of the evolution of the principle of self-determination in international law, cultural self-determination stands as an integral part of the right to internal self-determination, accrue not only to subjects of colonial domination, but also to Indigenous peoples more generally.[108] This interpretation finds support in Article 13 of UNDRIP, which recognizes the right of Indigenous peoples to maintain, control, protect and develop their cultural heritage, as well as in the spirit of the ILO Convention No. 169 and in the interpretative practice of the Human Rights Committee.[109] Although limited in its regional scope, the Inter-American Court of Human Rights clarified the collective rights of Indigenous peoples in relation to territory, culture and environment. In its recent Advisory Opinions on *The Environment and Human Rights* and *Climate Emergency and Human Rights*, the Court explicitly linked climate change and sea-level rise to the protection of cultural identity, underscoring states' obligation to respect and ensure Indigenous peoples' rights to consultation, participation, and free, prior and informed consent in matters that affect them.[110]

Applied to the case of SIDS, the right to cultural self-determination empowers relocated communities to decide and voice, both domestically and in international fora, which elements of their cultural heritage they wish to safeguard and transmit to future generations. Given the collective dimension of the right to self-determination, states are bound by corresponding *erga omnes* obligations to facilitate its exercise.[111] A first

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106 See CESCR, General Comment No. 23, E/C.12/GC/23, 7 April 2016 and General Comment No. 21, *supra* n. 89. The Committee interpreted the right to take part in cultural life in Article 15(a) ICESCR in an evolutive manner so as to encompass the protection of tangible and intangible cultural heritage of different groups, thereby obviating the need to rely on mutually supportive interpretation with other cultural instruments.

107 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993)1760 *UNTS* 78; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (adopted 29 October 2010, entered into force 12 October 2014), 3008 *UNTS* 3; and the Paris Agreement.

108 Torres, *supra* n. 42, at 269. See also A. Cassese., *Self-Determination of Peoples A Legal Appraisal* (Cambridge University Press, Cambridge, New York, 1995).

109 See CCPR, General Comment No. 12, CCPR/C/21/Rev.1/Add.9, 13 March 1984.

110 *The Environment and Human Rights*, IACHR (2017), AO OC-23/17, paras. 113-114 and 169; *Climate Emergency and Human Rights*, IACHR (2025), AO 32/25, paras. 407, 450 and 482.

111 *East Timor*, ICJ Reports (1995) 25, at 90, para 29.

step in fulfilling this obligation, alongside financial assistance, is to ensure that cultural self-determination is grounded in decolonial methodologies. Such methodologies seek to dismantle the epistemic hierarchies inherited from colonialism, which historically privileged Eurocentric understandings of law, governance and cultural heritage, over Indigenous worldviews and practices.[112] In the context of sea-level rise, these decolonial methodologies require embedding indigenous expertise and epistemologies into decision-making processes at every stage, from cultural heritage identification to the design of adaptation and relocation strategies.[113]

This new avenue brings a shift from a *consultative model*, where Indigenous voices are heard but rarely decisive, towards a *co-decisional model* of governance, aligned with the main tenets of the UNDRIP and UNESCO's 2018 Policy on Engaging with Indigenous Peoples.[114] It also advocates for the inclusion of Indigenous concepts of land, culture and intergenerational transmission of traditional knowledge. The example of Tuvalu's *Te Ataeao Nei* (Future Now) project, which mainstreams Tuvaluan cultural values such as *fale pili* (being a good neighbour) and *kaitasi* (shared responsibility) into international climate negotiations, demonstrates how decolonial methodologies can inform far beyond domestic adaptation strategies. but can also reshape global climate governance.[115] By grounding the protection of cultural heritage in decolonial approaches, both states and UNESCO can ensure that the response to sea-level rise respects both the cultural self-determination and the dignity of relocated Indigenous communities from SIDS.

(d) The Role of the International Community

The principle of international cooperation in protecting culture, cultural heritage and identity in the context of sea-level rise has been recognized in several international declarations.[116] The 2023 *Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise* affirms that the primary responsibility for such protection lies upon the members of the Pacific Islands Forum, both individually and collectively.[117] At the same time, states at the UN General Assembly high-level plenary meeting on 25 September 2024 emphasized the importance of equity, solidarity, and international cooperation in addressing issues related to sea-level rise. This position has been further reinforced by the ICJ in its Advisory Opinion on the *Obligations of States in Respect of Climate Change and International Law*.[118] The ICJ affirmed

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112 L.T. Smith, *Decolonizing Methodologies* (Bloomsbury, London, 2021), at 38-39; see also W. Mignolo, C. Walsh, *On Decoloniality: Concepts, Analytics, Praxis* (Duke University Press, Durham, Washington DC and London, 2018).

113 Higgins, *supra* n. 76, at 10.

114 See Articles 10, 19 and 32 of UNDRIP; UNESCO, *Policy on Engaging with Indigenous Peoples* (2018), at 22-27.

115 Rothe, *et al.*, *supra* n. 23, at 1499.

116 2023 Declaration on the Continuity of Statehood, preamble, para. 10; 2024 AOSIS Declaration, preamble, para. 8.

117 See 2023 Declaration on the Continuity of Statehood, para. 14.

118 In its Advisory Opinion on *Obligations of States in respect of Climate Change*, the ICJ stated that, on the basis of Article 1 of the UN Charter, and within the context of climate change, states have a customary obligation to cooperate (paras. 115, 140-142, 301-308 and 364). See also, GA Supplement No. 10 (A/80/10), Chapter IV, para. 46.

that "cooperation in addressing sea-level rise is not a matter of choice for states but a legal obligation" and that such cooperation requires states "to work together with a view to achieving equitable solutions, taking into account the rights of affected states and those of their populations".[119] These principles, applicable to all states, therefore contribute to the protection of cultural heritage threatened by sea-level rise.

Within UNESCO's institutional framework, the principle of international cooperation plays a central role. It is expressly recognized in Articles 6(1) and 7 of the World Heritage Convention, as well as in Articles 5 and 19 of the 2003 UNESCO Convention, which jointly enshrine the obligation of state parties to cooperate in the identification, protection, conservation and transmission of cultural heritage of "universal value". This obligation was reaffirmed in broader policy instruments, most notably the 2014 SIDS Accelerated Modalities of Action (also known as SAMOA Pathway), and its successor, the 2024 Antigua and Barbuda Agenda for SIDS (ABAS). They both call upon the international community to support SIDS in designing and implementing their own cultural policies. The commitments articulated in the SAMOA Pathway and ABAS extend to a wide range of concrete actions: assisting SIDS in identifying, inventorying and nominating heritage sites to the World Heritage Tentative List; enhancing cooperation in the sustainable management and conservation of World Heritage properties; and adopting an integrated and holistic approach to cultural heritage preservation. They also include strengthening technical capacities to safeguard and transmit intangible cultural heritage and traditional knowledge, as well as fostering the exchange of best practices in heritage management.[120] Additional actions involve promoting responsible public access, facilitating policy advice, and bolstering SIDS' capacities in the preservation, management and promotion of moveable heritage, museum collections, and associated knowledge systems. In practical terms, UNESCO has sought to give effect to these commitments through the dispatch of technical missions to SIDS, the establishment of targeted assistance projects, and the organization of meetings between the SIDS and the governing bodies of its cultural heritage conventions.[121]

However, while the principle of international cooperation provides a critical framework for supporting SIDS in safeguarding their cultural heritage, it is not without limits. When states cooperate to achieve "equitable" solutions, Judge Aurescu clarified that the principle of cooperation cannot be interpreted as imposing a burden on states to create new rights nor affecting their own. Thus, the principle of cooperation is limited to preserving the existing rights of the states affected by sea-level rise.[122] This means that SIDS may invoke the principle of cooperation to ensure the maintenance, respect, and

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119 *Ibid.*, paras. 364-365.

120 Regarding the SAMOA Pathway, para. 81 calls for efforts to develop domestic mechanisms to preserve natural, tangible and intangible cultural heritage. Likewise, the Antigua and Barbuda Agenda for SIDS (2024-2034) recognizes culture as a driver of resilient economies and resilience building.

121 See UNESCO, *SIDS – Culture*, 27 April 2023, accessed 22 December 2025. See also the priority given to requests from SIDS to International Assistance under the Operational Guidelines to the World Heritage Convention (para. 239(b)). Although the Operational Directives for the 2003 UNESCO Convention do not explicitly give priority to SIDS, the Committee must take into account the "special needs of developing countries" and "equitable geographical distribution" in examining international assistance requests, at §10.

122 *Obligations of States in respect of Climate Change*, Separate Opinion of Judge Aurescu, para. 23.

promotion of previously acquired or developed cultural heritage in host states. In the same vein, the ILC emphasized that the principle of cooperation between states needs to be calibrated according to the "capacities and resources of both the affected and the assisting states, particularly in the case of developing states", in the protection of persons affected by sea-level rise.[123] Importantly, this does not entail a generalized duty for assisting states to attend to every potential request from SIDS. Rather, cooperation must be pursued in a manner that respects the assisting state's own rights and obligations under international law.

Underscoring the principle of cooperation does not preclude an examination of the responsibility of certain states, particularly former colonial powers, for their historical and ongoing contributions to climate change. These contributions have exacerbated the vulnerability of the cultural heritage management systems of SIDS.[124] Some authors argue that the multicausal and protracted nature of climate change, scientific uncertainties, the contribution of private actors and the relatively weak obligations contained in environmental treaties complicates the attribution of legal responsibility for the impacts of sea-level rise in SIDS.[125] Yet, setting aside the issue of intertemporality of international law, the principle of cooperation does not invalidate the application of other established principles in international environmental law, such as the polluter-pays principle.[126] According to this principle, it is arguable that states with the highest levels of greenhouse gas emissions such as China and the US bear a proportionately greater responsibility to provide compensation for the adverse effects of climate change-related sea-level rise on the cultural heritage of SIDS. In fact, the World Heritage Committee has witnessed various attempts by the state parties to the World Heritage Convention to establish the responsibility of states in the Global North for the impacts of their high greenhouse emissions on World Heritage sites.[127] SIDS made individual claims invoking moral obligations to stabilize and reduce such emissions.[128] Importantly, *polluter states* may compensate affected SIDS populations in various ways, including financial compensation and material measures, which may include granting citizenship to those individuals who wish to be relocated in their territory.[129] However, such a proposal still remains largely a theoretical construct within the most utopian legal scholarship.

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123 GA Supplement No. 10 (A/80/10), Chapter IV, para. 69.

124 S. Loen, 'Thirsty Islands and Water Inequality: The Impact of Colonial Practices on Freshwater Challenges in the Dutch Caribbean', 2 *Blue Papers* (2023), 124-131, at 126-127 [doi: 10.58981/bluepapers.2023.1.12].

125 See G. Sciaccaluga, *International Law and the Protection of "Climate Refugees"* (Palgrave Macmillan, London, 2020), at 89.

126 *Obligations of States in respect of Climate Change*, paras. 145-146. The Court adopted a narrow approach that ignored the broader normative and jurisprudential grounding of these principles in international environmental law. See, Separate Opinion of Judge Bhandari, para. 2.

127 This was the case, *inter alia*, of Belize's Barrier Reserve. In its petition to the World Heritage Committee, the petitioners contended that Belize needed to enhance resilience of coral reef ecosystems through corrective measures, given that climate change was the primary threat to the integrity of this World Heritage site. See W. Burns, 'Belt and Suspenders: The World Heritage Convention's Role in Confronting Climate Change', 18 *Review of European, Comparative and International Environmental Law* (2009), 148-163, at 151-153 [doi: 10.1111/j.1467-9388.2009.00637.x].

128 Malé Declaration on the Human Dimension of Global Climate Change (adopted 14 November 2007).

129 C. Hayward, J. Ödalen, 'A Free Movement Passport for the Territorially Dispossessed', in C. Hayward and D. Roser (eds), *Climate Justice in a Non-Ideal World* (Oxford University Press, Oxford, 2016), 208-226. For

(2) What to safeguard: selecting the cultural heritage of significance to SIDS' displaced communities

When addressing the question of what to safeguard, matters of time and space arise, especially given potential divergences between *émigré* generations and subsequent culturally assimilated descendants. Article 7 of UNESCO Charter of Preservation on Digital Heritage provides that "selection principles may vary between countries, although the main criteria for deciding what digital materials to keep would be their significance and lasting cultural, scientific, evidential or other value". It also recognizes that such selections may evolve over time. Still, any subsequent review should be "carried out in an accountable manner, and be based on defined principles, policies, procedures and standards". This framework thus advocates for a participatory, bottom-up approach where all communities, including minorities and Indigenous peoples, regardless of their current location, shall be consulted in a meaningful way when determining which cultural heritage to preserve.

Moving beyond the expressed preferences of relocated communities, the practical question of what cultural heritage can reasonably and feasibly be safeguarded arises. Historically, intangible cultural heritage has received less institutional and legal attention than tangible heritage.[130] This is particularly true for oral traditions and minority languages, many of which are under threat of disappearing under conditions of climate-induced displacement. During periods of transitional statehood, the territorial state must bear the responsibility of implementing advanced registration tools to safeguard cultural heritage and, when necessary, may seek the cooperation of other states under the auspices of UNESCO. However, such cooperation must respect the cultural autonomy of affected communities. Third states cannot unilaterally impose any categorization of what constitutes cultural heritage but must instead meaningfully engage with SIDS populations. This latter requirement may give rise to a paradoxical situation in which states that fail to engage with local communities domestically are nevertheless obliged to do so in an international context. Viewed in this light, international cooperation obligations have the potential to foster more participatory models of cultural heritage governance worldwide. In this context as well, the principle of free, prior and informed consent must be applied to the creation of lists and registries that are still missing in many SIDS, so communities can maintain their agency over what elements of their heritage are preserved and transmitted.[131] Importantly, such processes need not exclude the involvement of other relevant actors, such as experts, states, and international organizations, their role being one of partnership on equal footing rather than one of hierarchical authority.

Crucially, the processes of identification, registration and preservation should occur pre-emptively, that is, prior to the submersion of the territory and the first wave of

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a human rights version of this proposal see S. Jolly, N. Ahmad, *Climate Refugees in South Asia – Protection Under International Legal Standards and State Practices in South Asia* (Springer, Singapore, 2019), at 75.

130 Hee Eun, *supra* n. 55, at 260.

131 This mechanism is already used in the context of access and benefit-sharing of traditional knowledge and genetic resources both of which constitute forms of intangible cultural heritage under the 2010 Nagoya Protocol to the Convention on Biological Diversity. See also Lixinski, *A Third Way…*, *supra* n. 3, at 599.

displacement, at the domestic level. Where this is no longer possible, they should be undertaken through international cooperation mechanisms. In either case, the guiding framework must be a combination of the principle of free, prior and informed consent and the principle of permanent sovereignty over natural resources, which, although traditionally tied to natural resources, can be extended by analogy to the ongoing control of mixed and cultural resources.[132] At the same time, it is important not to fall into a strategic essentialism, whereby communities are reduced to monolithic cultural identities for political convenience. Instead, both SIDS, host states and the international community must embrace pluralism and intersectionality within relocated communities, even if it complicates or lengthens decision-making processes. Ultimately, the central role of communities in cultural heritage governance is justified by the incapacity of submerged states to preserve immovable cultural and natural heritage *in situ* and by the deep historical, cultural and spiritual ties that render cultural heritage inseparable from its originating communities. Moreover, since the effective protection of cultural rights requires not only state action but also the empowerment of communities as right-holders and custodians of their own cultural identity, it follows that safeguarding the cultural heritage of SIDS cannot be reduced to state-centric mechanisms. Consequently, communities must be able to exercise control over their cultural heritage, even when physically located within the jurisdiction of host states.[133] Recognizing such authority for relocated SIDS communities is not merely a matter of protecting their own cultural heritage, but also their contribution to the cultural diversity of humankind.

(3) How to safeguard: methods to preserve and guarantee access to cultural heritage

Just as the loss of territory caused by sea-level rise unfolds progressively, so too does the erosion of cultural heritage. This gradual process makes timely preventive measures vital for safeguarding cultural heritage.[134] In this regard, some lessons can be drawn from pre-emptive heritage protection measures in times of natural disasters. Within the Sendai Framework for Disaster Risk Reduction 2015-2030, and after suffering from tropical cyclones, Fiji and Vanuatu integrated cultural heritage considerations into their Post-Disaster Needs Assessments, which led to the inventory of built environments, traditional meeting spaces and intangible cultural heritage; the strengthened coordination between cultural institutions and national disaster management agencies; and the creation of networks like Blue Shield Pasifika to enhance capacity-building and integrate cultural dimensions into disaster resilience strategies.[135] Moreover, during emergencies, UNESCO has already developed significant expertise in safeguarding cultural heritage through

[132] GA Res. 1803 (XVII), 14 December 1962.
[133] Lixinski, *A Third Way…*, *supra* n. 3, at 605.
[134] These measures will prevent taking the decision between human lives and cultural heritage if the crisis escalates. See P. Oruç, *Digitising Cultural Heritage. Clashes with Copyright Law* (Hart Publishing, Oxford, 2025), at 38.
[135] See The Pacific Platform for Disaster Risk Management, 'Build Back Better (BBB) and Heritage Safeguarding Strategy for the wellbeing of community in the Pacific', 26 October 2016; and the example of Training of Trainers (ToT) workshop carried out by Blue Shield Pasifika with the collaboration of Blue Shield International.

its tripartite framework of preventive, corrective and knowledge-sharing measures.[136] While cultural heritage should ideally be protected in an integrated manner, practical distinctions between tangible and intangible cultural heritage are necessary due to their distinct modalities of protection.

One proposal for the protection of immovable cultural heritage is the relocation to a new territory acquired by purchase or treaty of cession. Yet, as argued before, these transfers of territory and sovereignty are not only unlikely but also somewhat burdensome for 'developing states' such as SIDS. When confronted with flooding — for instance, as a consequence of the construction of a dam — some major monuments have been relocated to a nearby land within the territory of the state.[137] Extraterritorial relocation is usually temporary, lasting until conditions allow the cultural properties to be returned. Permanent relocation to another state has resulted in a gift from the state of origin to the state of relocation, meaning that the former lost sovereignty over such cultural resources.[138] Relocation brings two main issues: first, if relocated to a remote place, access to cultural heritage by the former local communities can be very difficult. Second, different atmospheric conditions may damage the reallocated cultural properties, thereby undermining their physical integrity.

Regarding movable cultural heritage, the International Council of Museums and Sites (ICOMOS) noted that it should be preserved through existing methods of conservation and restoration, thereby discarding the need for radically new techniques.[139] When cultural objects are in endangered territories — mostly as a result of armed conflicts — they have been relocated to museums in states deemed reasonably safe and historically appropriate.[140] Yet, when it comes to intangible cultural heritage, this mechanism raises conceptual and practical concerns. By definition, intangible cultural heritage is dynamic, performative and rooted in the social practices of communities. As such, attempts to *museumize* living heritage, by dislocating it from the communities and context in which it originates, risk stripping it of its spiritual meaning and vitality.[141] Therefore, intangible cultural heritage is better protected either through people's cultural rights or digitalisation processes.

Precisely, the potential disappearance of cultural heritage due to, *inter alia*, environmental degradation, led UNESCO to adopt the Charter on the Preservation of

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136 UNESCO, *Managing Disaster Risks for World Heritage* (2010), at 32 *et seq*; Hee Eun, *supra* n. 55, at 268-269.

137 For instance, as part of the Ilisu dam campaign, some cultural and religious buildings in Hasankeyf had to be relocated to nearby municipalities. See B. Aykan, 'Saving Hasankeyf: Limits and Possibilities of International Human Rights Law' 25 *International Journal of Cultural Property* (2018), 11-34 [doi: 10.1017/S0940739118000036]; B. Drazewska, "Hasankeyf, the Ilisu Dam, and the Existence of "Common European Standards' on Cultural Heritage Protection', 2 *Santander Art and Culture Law Review* (2018), 89-120 [doi: 10.4467/2450050XSNR.18.020.10374].

138 This was the case, for instance, of the Temple of Debod, donated by the government of Egypt to the Kingdom of Spain in 1968 in gratitude for Spain's collaboration in the International Campaign to Save the Monuments of Nubia. The Temple of Debod was originally built in the 2nd century B.C. and it was threatened by the construction of the Aswan Dam in the 1960s. In 1972, it was dismantled, reconstructed, and publicly displayed in Madrid's Parque del Oeste.

139 Hee Eun, *supra* n. 55, at 269.

140 See N. Borrelli *et al* (eds), *Ecomuseums and climate change* (Ledizioni, Milan, 2022). This is the case, for instance, of Ukraine, whose many artworks have been temporarily stored in several European museums.

141 J. Blake, *International Cultural Heritage Law* (Oxford University Press, Oxford, 2015), at 205-210.

Digital Heritage. As previously mentioned, the Charter is a non-binding instrument, but it constitutes an important normative framework that can support proposals to create a virtual repository of the tangible and intangible cultural heritage of SIDS populations, as exemplified by Tuvalu's *Te Ataeao Nei* (Future Now) *Project: Preparing Today to Secure Tomorrow*.[142] First, Article 1 of the 2003 Charter defines digital heritage broadly to include not only "digitally born" cultural expressions, but also "cultural resources […] converted into digital forms from existing analogue resources". This formulation allows digitization efforts in SIDS to encompass the reproduction of tangible heritage through 3D scans and VAR models, among others and the preservation of intangible cultural heritage through living online archives nurtured with audio-visual media. Second, the Charter emphasizes not only the preservation but also the accessibility of digital heritage to the public, something of utmost importance for the relocated communities that constitute a new diaspora.[143] Still, the Charter places the primary responsibility for establishing the legal, institutional, and technical infrastructure for preserving digital heritage on the territorial state, with UNESCO playing a coordinating role.[144] This raises some challenges for SIDS, which often face financial and technological limitations. In 2020, a UNESCO study on the state of digital heritage showed that SIDS exhibit uneven capacities in terms of digitization means, training, and archival systems, thereby creating a risk of cultural loss due to a lack of sufficient resources.[145] This situation leads to the issue of available funds for the protection of the cultural heritage of SIDS populations.

Deterritorialized SIDS are meant to continue managing their maritime zones and exploiting their maritime resources. While this can be a good source of income, it might not be enough to protect, maintain, and promote cultural heritage. Once again, the principle of cooperation, binding upon all states of the international community, can take many forms. For the sake of protecting cultural heritage, and following the example of previous international campaigns, states have usually provided technical, financial, and material support.[146] Within the framework of the World Heritage Convention and the 2003 UNESCO Convention, treaty-based funding is already available to safeguard listed properties and items in danger.[147] Additionally, other cultural expressions may benefit from the UNESCO Heritage Emergency Fund, established in 2015 to protect cultural heritage during emergencies. Although the Fund may not be tailored to the specific vulnerabilities of SIDS facing sea-level rise, it is noteworthy that 17 out of the 98 states that have benefited from it to date are SIDS.

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142 See Initiative No. 3 of State of Tuvalu, *Future Now Project: Preparing Today to Secure Tomorrow*, accessed 22 December 2025.

143 Article 8 of the Charter on the Preservation of Digital Heritage (adopted 15 October 2003).

144 *Ibid.*, Articles 2 and 12, respectively.

145 UNESCO, *Museums around the world in the face of Covid-19* (2020), at 4-5, accessed 22 December 2025.

146 This was the case of the Aswan High Dam project in Egypt, in which UNESCO coordinated an international campaign to relocate and conserve the temples of Abu Simbel and other endangered monuments. See UNESCO Office Cairo and Regional Bureau for Science in the Arab States, *International Campaign to Save the Monuments of Nubia* (2020). See also UNESCO, *International Safeguarding Campaign of the City of Venice* (1966), accessed 22 December 2025.

147 See Article 13 of the World Heritage Convention and Article 6 of the 2003 UNESCO Convention, respectively.

A detailed discussion on how the costs of these and other potential funds for supporting SIDS in cultural heritage protection should be allocated goes beyond the scope of this paper. Yet, it can be argued that such an allocation should adhere to established principles of environmental law. As noted earlier, various principles of environmental law support the view that the international community collectively bears responsibility for the consequences of climate change. According to the principle of common but differentiated responsibility, states with the greatest contributions to climate change and better economic and technical capacities should bear the largest share of costs.[148] This principle can be complemented by the polluter-pays principle[149] and preventive norms such as the precautionary principle,[150] the rule of prevention,[151] and the no-harm principle.[152] Despite all these legal paths, compliance remains uncertain due to states' ongoing reluctance to fulfil their *soft law* commitments in the field of cultural heritage and climate change law. Finally, from a decolonial approach, it can be argued that former colonial states bear a higher moral responsibility to redress past climate injustices and support the protection and management of SIDS cultural heritage, ensuring that the communities least responsible for climate change are not disproportionately victimized.

(D) CONCLUSION

This paper has focused on the normative gaps within the current international cultural heritage law regime when confronted with the unprecedented challenges posed by sea-level rise in SIDS. To effectively tackle the adverse consequences of this phenomenon on cultural heritage, several avenues remain underexplored. One option is the adoption of a new international treaty specifically aimed at safeguarding cultural heritage endangered by sea-level rise.[153] However, from a realist perspective, the prospects of achieving a broad consensus on such an instrument seem limited, particularly in the current geopolitical *momentum*. The negotiation of a specialized convention would not only require overcoming divergent state interests but would also exacerbate the existing fragmentation that characterizes the international cultural heritage law regime. An alternative and more desirable pathway lies in the advancement of an evolutive interpretation of existing UNESCO conventions. This second option has been briefly explored in this article.

Either way, proving a clear and legally cognizable causal link between sea-level rise and the destruction of cultural heritage in SIDS remains a Homeric endeavour. Precisely, this challenge underscores the need for a mutually supportive interpretation

148 This principle, stated in the Principle 7 of the Rio Declaration on Environment and Development (A/CONF.151/26 (Vol. I), 12 August 1992), was further discussed in Yamamoto, Esteban, *supra* n. 55, at 264.

149 Principle 16 of the Rio Declaration on Environment and Development. See also Yamamoto, Esteban, *supra* n. 55, at 267.

150 O. De Schutter *et al*, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of states in the area of Economic, Social and Cultural Rights', 34 *Human Rights Quarterly* (2012), 1084-1169, at 1112-1118 [doi: 10.2307/23352240].

151 UN Doc. A/CONF.48/14/Rev.1, 5-16 June 1972.

152 *Corfu Channel*, ICJ Reports (1949) 4, at 22; *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, ICJ Reports (1996) 226, at 242.

153 Carducci, *supra* n. 71, at 138.

of UNESCO's cultural heritage conventions, read in harmony with international human rights law and international environmental law. Concerning the relevant *corpus* of human rights law, the range of applicable instruments – from international covenants to regional agreements and Indigenous peoples' treaties and declarations – is indeed extensive. In light of the normative *lacunae* within UNESCO's treaty framework, the most compelling view is that safeguarding cultural heritage under the threat of sea-level rise in SIDS should be pursued through a human rights-based approach, one that ensures continuity of protection from the deterritorialized state to the host state, and reciprocally back to the affected communities.

Finally, the proposals advanced in this paper are subject to temporal limitations. As communities of SIDS face mass displacement and potential assimilation into host societies, the cultural ties to their cultural heritage located in the recently submerged territories may weaken. Still, it would be overly pessimistic to assume that the loss of territorial attachment automatically leads to the erosion of cultural heritage, as culture is inherently dynamic and adaptive, and displaced communities have consistently shown extraordinary resilience in preserving their cultural heritage. For this reason, it is essential to keep the discussion alive as to what cultural heritage must be given continuity in light of the diasporic communities' wishes and needs. The human right to take part in cultural life, together with the Indigenous peoples' and minorities' autonomy over their cultural expressions, combined with international migration law, provides a complementary legal basis for protecting cultural heritage beyond the territorial nexus, enabling diasporic communities to maintain cultural continuity even amid SIDS' existential threats. Consequently, rather than reducing cultural heritage to a mere testimony of a vanished state – in the classical Westphalian sense –, we should embrace its dynamic and evolving nature. Accordingly, international law must adapt to this fluidity, ensuring that both tangible and intangible cultural heritage continue to be safeguarded not only as vestiges of a glorious past, but as living elements of identity, dignity and resilience for those communities navigating the turbulent tides of sea-level rise.

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Ecocide in the Middle East? A Case Study of the ICC Investigation on the Situation in the State of Palestine

Jonatan Rigo García*

Abstract: The risks possessed by the environmental consequences of armed conflict for the very foundations of human living conditions have been long studied. However, nature continues to be impaired by wars the world around, while the relevant provisions of international humanitarian and criminal law prove to be inadequate. Despite these pitfalls, recent figures on the scale of the environmental destruction caused during the 2023 Israel-Hamas conflict deserve a thorough legal analysis. On the occasion of the warrants of arrest issued by the International Criminal Court against Israeli leaders, this paper seeks to assess whether there were reasonable enough grounds to charge them with causing excessive environmental damage. In order to do so, the present study will first conduct a comprehensive review of the criminal elements of Article 8(2)(b)(iv) of the Rome Statute, based on previous literature and relevant jurisprudence of international criminal tribunals. Afterwards, employing both analytical and doctrinal methods, it will contrast the legal findings against the factual background of the case. With the aim to stress the necessity of enhancing the current legal framework to protect the environment during both war and peace, this paper elaborates further on the limitations of the war crime of excessive environmental damage, while shedding light on the unnoticed environmental violence placed upon Gaza.

Keywords: ecocide environment Israel Palestine International Criminal Court Rome Statute

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(A) INTRODUCTION

On 21 November 2024, the International Criminal Court (ICC) Pre-Trial Chamber I made public the warrants of arrest for both Israel's Prime Minister Benjamin Netanyahu and former Minister of Defence Yoav Gallant.[1] The warrants were issued for allegedly committing the following crimes within the ICC's jurisdiction against the Palestinian population. On the one hand, the war crimes of starvation of civilians as a method of warfare (Article 8(2)(b)(xxv) of the Rome Statute or RS) and intentionally directing attacks against civilian population (Article 8(2)(b)(i) RS). On the other hand, the crimes

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1 'Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant', ICC, published on 21 November 2024, accessed 31 January 2025. The Chamber also issued a warrant of arrest for the leader of Hamas' military wing, the al-Qassam Brigades, Mohammed Diab Ibrahim Al-Masri. However, at the time of writing Hamas has confirmed his death and accordingly the Court has withdrawn the charges. See, *Situation in the State of Palestine*, 'Decision terminating proceedings against Mr Mohammed Diab Ibrahim Al-Masri (Deif)', 26 February 2025, ICC-01/18-417.

https://doi.org/10.36151/SYBIL.29.05

against humanity of murder (Article 7(1)(a) RS), other inhumane acts (Article 7(1)(k) RS), and persecution (Article 7(1)(h) RS).[2]

During the Preliminary Examination, the ICC Office of the Prosecutor (OTP or the Office) found reasons to believe that "the Israeli Defence Forces [IDF] committed the war crime of intentionally launching disproportionate attacks in relation to at least three incidents (Article 8(2)(b)(iv))".[3] However, the OTP never clarified whether these disproportionate attacks referred to civilian casualties or injuries, or damage to either civilian objects or the natural environment as provided for in Article 8(2)(b)(iv) of the Rome Statute.[4] Ultimately, the Office dropped these charges in its official application for the referred warrants of arrest and therefore precluded the Court of any examination on the merits of an alleged war crime of environmental damage, at least with respect to the involvement of Mr. Netanyahu and Mr. Gallant.

Bearing in mind recent figures on the scale of the environmental destruction in Gaza and the little attention that international legal literature is devoting to the environmental dimension of the conflict so far, this paper seeks to analyse whether there were sufficient grounds for an indictment under Article 8(2)(b)(iv) RS, second alternative.[5] As one author has put it, "the recent war on the Gaza Strip is a case study of illegality and arguably of environmental catastrophe".[6] In this regard, we use ecocide merely as a doctrinal, descriptive term which encapsulates the most serious cases of mass-scale damage to the natural environment, whether in times of war or peace.[7] We do not confer it normative content inasmuch as it is not yet recognised as a crime under international law, even though there are those who have characterised the acts criminalised by Article 8(2)(b)(iv) RS, second alternative, as wartime or military ecocide.[8] Thus, the reference to ecocide serves us to depict the type of devastation caused in Gaza, and to compare it against the deficiencies of

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2 For a general analysis of the conflict's legal issues, see, e.g., R. van Steenberghe, 'The Armed Conflict in Gaza, and Its Complexity under International Law: Jus Ad Bellum, Jus in Bello, and International Justice', 37 Leiden Journal of International Law (2024) 983-1017 [doi: 10.1017/S0922156524000220]; T. Dannenbaum and J. Dill, 'International Law in Gaza: Belligerent Intent and Provisional Measures', 118 *American Journal of International Law* (2024) 659 683 [doi: 10.1017/ajil.2024.53].

3 ICC, OTP, *Report on Preliminary Examination Activities 2020*, 14 December 2020, par. 221.

4 Henceforth any mention to Art. 8(2)(b)(iv) without further reference must be understood to mean the Rome Statute.

5 According to a World Bank's assessment, the direct damages to the environment (including agriculture) are worth an estimate of US$1 billion. See, World Bank, European Union, and United Nations, *Gaza Strip Interim Damage Assessment: Summary Note*, 29 March 2024, at 6.

6 M. B. Qumsiyeh, 'Impact of the Israeli Military Activities on the Environment', 81 *International Journal of Environmental Studies* (2024) 977 92, at 9 [doi: 10.1080/00207233.2024.2323365].

7 On ecocide see, e.g., D. Robinson, 'Ecocide Puzzles and Possibilities', 20 *Journal of International Criminal Justice* (2022), 313 47 [doi: 10.1093/jicj/mqac021]; L. G. Minkova, 'The Fifth International Crime: Reflections on the Definition of "Ecocide"', 25 *Journal of Genocide Research* (2023), 62 83 [doi: 10.1080/14623528.2021.1964688]; E. Cusato and E. Jones, 'The "Imbroglio" of Ecocide: A Political Economic Analysis', 37 *Leiden Journal of International Law* (2024), 42 61 [doi: 10.1017/S0922156523000468].

8 P. Hough, 'Trying to End the War on the World: The Campaign to Proscribe Military Ecocide', 1 *Global Security: Health, Science and Policy* (2016) 10 22, [doi: 10.1080/23779497.2016.1208055]; R. Killean, 'Ecocide's Evolving Relationship With War', *Environment and Security* (2025) [doi: 10.1177/27538796251347111]. View which we ourselves share in J. Rigo-García, 'Ecocide: From a War Crime to an International Crime?', 23 *The Opole Studies in Administration and Law* (2025) 97 124 [doi: 10.25167/osap.5413].

the current international criminal legal framework,[9] the only provision of which currently dealing with environmental harm directly is the aforementioned Article 8(2)(b)(iv).[10]

After briefly introducing the procedural background of the investigation, we will turn to the complexities of that provision and assess its compatibility with the situation in the Gaza Strip. To this end, the study, mainly limited *ratione temporis* to November 2024 (i.e., the date on which the warrants of arrest were issued), is divided in three major analyses: legal, factual, and evidentiary. It must be stressed that this paper will not engage with the merits, or lack thereof, of other Israel's or Hamas actions and policies, regardless of how unlawful they may be.[11] It will certainly not discuss their possible qualification as genocide under the ongoing proceedings before the International Court of Justice (ICJ). This is not to rest importance to both sides' wrongdoings committed under Israel's continued regime of occupation on Palestinian territory, but to highlight another violation of international law which has received less attention so far. Although environmental harm during either an international (IAC) or non-international (NIAC) armed conflict, or an occupying context, could be addressed through other provisions under the Rome Statute, this paper will focus solely on the prohibition provided for in Article 8(2)(b)(iv), second alternative, as it stands today, and whether the environmental damage caused by the conflict in the Gaza Strip since October 2023 may amount to a violation of it.[12]

All things considered, this could be a significant opportunity for the Prosecutor to demonstrate their "commitment to the rigorous investigation and prosecution of environmental crimes", as stated in the OTP's new Draft Policy on Environmental Crimes (Draft Policy).[13]

(1) Procedural background

The procedural and substantive history of the ICC's investigation on the *Situation in the State of Palestine* (ICC-01/18) can be consulted through several sources.[14] As far as we are

9 During the Rome Conference, three scope-diverging versions of Art. 8(2)(b)(iv) were originally discussed, the finally adopted falling back, in the words of Freeland, "on the traditional and outdated approach that environmental harm is to be regarded as an unfortunate 'bi-product' of warfare". See, S. R. Freeland, *Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court* (Intersentia, Louvain-la-Neuve, 2015), at 206; and UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 3 *Official Records*, "Reports and other documents", 2002, UN Doc. A/CON R183/13(Vol. III), at 16.

10 On 9 September 2024, Vanuatu filled an amendment proposal to add ecocide as the fifth crime against peace in the Rome Statute, embracing entirely the definition put forward in 2021 by the Independent Expert Panel convened by Stop Ecocide Foundation. See, ICC, Assembly of States Parties, *Report of the Working Group on Amendments, International Criminal Court*, 1 December 2024, ICC-ASP/23/26. For the original, see Stop Ecocide Foundation, 'Independent Expert Panel for the Legal Definition of Ecocide', *Commentary and Core Text*, June 2021, at 5.

11 For a factual and legal analysis of Hama's attacks on 7 October 2023 see, Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, *Detailed findings on attacks carried out on and after 7 October 2023 in Israel*, 10 June 2024, UN Doc. A/HRC/56/CRP.3.

12 On prosecuting environmental harm at the ICC see, generally, M. Gillett, *Prosecuting Environmental Harm before the International Criminal Court*, (Cambridge University Press, Cambridge, 2022) [doi: 10.1017/9781009070027].

13 OTP, Draft Policy on Environmental Crimes Under the Rome Statute, 18 December 2024, par. 12a.

14 For a succinct summary of last year's activities regarding the investigation, see, e.g., United Nations General Assembly (UNGA), Report of the International Criminal Court on its activities in 2023/24, 19

concerned, suffice it to say that on 20 December 2019 the Prosecutor announced the conclusion of the Preliminary Examination, determining that there were grounds to opening an investigation.[15] Investigation which was officially launched on 3 March 2021,[16] while on 20 May 2024 the Prosecutor announced the filing of the application for the aforementioned warrants of arrest. In response, Israel filled in September a challenge to the jurisdiction of the Court pursuant to Article 19(2), and an Article 18(1) notice on the investigation's request. Both were rejected on 21 November 2024, the same day the warrants of arrest were issued.[17]

As above mentioned, the OTP'S Report on Preliminary Examination Activities of 2020 informed of the possible commission by the IDF of the so-called "war crime of excessive incidental death, injury, or damage" according to the Elements of Crimes (EoC hereinafter),[18] provided for in Article 8(2)(b)(iv) RS, which reads as follows:

> Article 8. War Crimes
>
> […]
>
> 2. For the purpose of this Statute, "war crimes" means:
>
> (b) […]:
>
> (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[19]

The charge was ultimately left aside upon the issuance of the warrants of arrest, at least for what concerns to Mr. Netanyahu and Mr. Gallant given that the investigation is ongoing and "[f]urther applications for warrants of arrest [could] be submitted".[20] Moreover, the OTP may request the Pre-Trial Chamber to modify the current warrants by adding other crimes if all requisites are satisfied pursuant to Article 58(6) of the Rome Statute.

Be that as it may, there are several points that need to be considered here. In the first place, the Office stated that there were reasons to believe that the IDF intentionally launched disproportionate attacks in relation to at least three incidents, even though it

August 2024, UN Doc. A/79/198; ICC, OTP, *The law in action for all. Office of The Prosecutor Annual Report 2024*, 4 December 2024.

15 OTP, *supra* n. 3, par. 220.

16 UNGA, *Report of the International Criminal Court on its activities in 2021/22*, 19 August 2022, UN Doc. A/77/305, par. 45.

17 *Situation in the State of Palestine*, 'Decision on Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute', 21 November 2024, ICC-01/18-374; *Situation in the State of Palestine*, 'Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice', 21 November 2024, ICC-01/18-375. Note, however, that Israel appealed Pre-Trial Chamber I's decision on the jurisdictional challenge, which was partially reversed by the Appeals Chamber on 24 April 2025, ordering the Chamber *a quo* to rule on the substance. At the time of writing the final decision on the jurisdictional challenge is still pending.

18 ICC, *Elements of Crimes*, 2013, ICC-PIOS-LT-03-002/15_Eng, at 13.

19 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 *UNTS* 3.

20 OTP, *supra* n. 14, at 21.

did not point which.[21] However, we do know that during the Preliminary Examinations, the OTP focused primarily on the events occurred between July and August 2014.[22] Since we could not find any other documented mention to Article 8(2)(b)(iv) between the report of 2020 and the issuance of the warrants of arrest, one could assume that the once alleged disproportionate attacks took place during that period. In a similar vein, the fact that the arrest warrants for both Mr. Netanyahu and Mr. Gallant were applied and issued for alleged crimes only committed from at least 8 October 2023 could explain the differing scope between the former and the Preliminary Examination.

Nevertheless, this fact should not rule out the possible commission of environmental crimes since the escalation of the conflict following Hamas' attack of 7 October 2023. If anything, it could imply that the Office did not have reasonable grounds to consider any of the accused as bearing criminal responsibility for that crime. In other words, a potential war crime against the environment could have been committed from either 2014 or 2023 onwards, although no suspect has been found or publicly identified on this matter. We argue that due precisely to the large-scale, unprecedented environmental destruction of the attacks occurred from October 2023, the threshold of Article 8(2)(b)(iv) RS, second alternative, could have been met.[23]

While the possibility of an indictment for wartime environmental damage in the ongoing ICC investigation on Palestine remains open, was this the case with respect to the issued arrest warrants? To begin with, we must return to the findings set out in the Preliminary Examination. As stated, the OTP did not specify whether the Israeli disproportionate attacks affected civilians, civilian objects, or, alternatively, the natural environment. A clue to an answer pointing to the second alternative is found in the referral of the Situation submitted by South Africa on behalf of itself, Bangladesh, Bolivia, Comoros and Djibouti in November 2023. These States referred to crimes allegedly committed since October 2023, in addition to those allegedly committed on a continuous basis since 2014 as claimed in the referral of the State of Palestine of 15 May 2018. On both cases, the abovementioned provision is mentioned, although the specific destruction of natural resources is described only regarding the events occurred from 2014 onwards, whereas since 2023 they refer to the destruction of objects indispensable for survival.[24]

Having said that, whether the Office is currently investigating the infliction of environmental damage by the Israeli military is eventually irrelevant for the theoretical exercise conducted in this work. What matters is whether the available evidence suggests that a disproportionate attack causing excessive environmental damage has taken place since October 2023, and therefore whether such a charge could have been included in the warrants of arrest or be brought in the future. To further analyse this hypothesis, and

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21 OTP, *supra* n. 3.

22 ICC, OTP, *Report on Preliminary Examination Activities (2019)*, 5 December 2019, par. 223.

23 It is stated that even though the environmental impacts of the 2014 Gaza War were significant, the damage since October 2023 has already been "at least many times worse" only two months into the conflict. See, Qumsiyeh, *supra* n. 6, at 5.

24 South Africa, Bangladesh, Bolivia, Comoros and Djibouti, State Party referral in accordance with Article 14 of the Rome Statute of the International Criminal Court, ICC, 17 November 2023.

the associated challenges, we will dedicate the next pages to assess Article 8(2)(b)(iv)'s elements against both the factual and legal backgrounds.

(B) APPLICABLE LAW. THE WAR CRIME OF EXCESSIVE INCIDENTAL DEATH, INJURY OR DAMAGE

Pursuant to the EoC, the conduct prohibited by Article 8(2)(b)(iv), second alternative, of the Rome Statute consists of the following material elements:

(1) The perpetrator launched an attack.

(2) The attack was such that it would cause incidental widespread, long-term and severe damage to the natural environment, which would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

(3) The perpetrator knew that the attack would cause widespread, long-term and severe damage to the natural environment, and that such damage would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

(4) The conduct took place in the context of and was associated with an international armed conflict.

(5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[25]

It is agreed that Article 8(2)(b)(iv) is constructed combining the humanitarian prohibitions against disproportionate attacks and serious environmental damage found in the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I),[26] which is problematic from a normative perspective as it will be shown below.[27] Moreover, most of the elements of this crime are either too vague or remain undefined both in the Rome Statute and the EoC, which bears great legal uncertainty. In fact, it has been stated that such obscurity was purposedly sought to limit the scope of the provision.[28] As a consequence, we will turn to other sources of international law, especially IHL, for the purpose of interpretation throughout our assessment, as the ICC may do so under

[25] Elements of Crimes, *supra* n. 18, at 13.

[26] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (adopted 8 June 1977, entered into force 7 December 1978), 1125 *UNTS* 3.

[27] M. Bothe, 'Jurisdiction Ratione Materiare. War Crimes', in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary. Volume I* (Oxford university Press, Oxford, 2002) 379, at 398; K. Ambos, *Treatise on International Criminal Law. Volume II: The Crimes and Sentencing* (Oxford University Press, Oxford, 2014), at 176; R. Arnold and S. Wehrenberg, 'Article 8. Paragraph 2(b)(Iv): Intentionally Launching an Attack in the Knowledge of Its Consequences to Civilians or to the Natural Environment', in O. Triffterer and K. Ambos, *Rome Statute of the International Criminal Court: A Commentary* (C. H. Beck, Hart and Nomos, München, 2016) 375, at 376; G. Werle and F. Jeßberger, *Principles of International Criminal Law* (Oxford University Press, Oxford, 2014), at 492 [doi: 10.1093/law/9780198703594.001.0001].

[28] M. Bassiouni and W. Schabas, *The Legislative History of the International Criminal Court. Second Revised and Expanded Edition* (Brill Nijhoff, Leiden, 2016), at 175.

Article 21(1)(b) RS. As a matter of fact, the Appeals Chamber has held in this regard that "the expression 'the established framework of international law' in the *chapeaux* of article 8(2)(b) […] when read together with article 21 of the Statute, requires the former to be interpreted in a manner that is 'consistent with international law, and international humanitarian law in particular'".[29]

Proof of the highly contentious nature of this provision is that the literature is divided in practically all of its elements. The subsequent sections will thus offer a summarised, yet necessary, discussion of the crime's guilty act (*actus reus*) and guilty mind (*mens rea*) elements.

(1) Contextual elements

Pursuant to the *chapeau* of Article 8(2)(b) RS, and the fourth and fifth elements of Article 8(2)(b)(iv) according to the EoC, the alleged criminal conduct must have taken place in the context of and have been associated with an IAC. Moreover, the alleged perpetrator must be aware of that circumstance. The so-called nexus requirement serves to distinguish between war crimes and other "ordinary" crimes committed through an armed conflict.[30] Aside from the general prerequisite on the existence of an armed conflict, the preamble of Article 8(1) RS contemplates another preliminary element common to all war crimes: the Court shall have jurisdiction over war crimes "in particular when committed as part of a plan or policy or as part of a large-scale commission". Due to space constraints and because of the focus of this work, placed particularly on environmental issues, we need to leave this matter out of our scope except for a couple of notes.

Mirroring previous jurisprudence from other international tribunals, in *Katanga* the ICC held that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[31] Its international nature will depend on whether "it takes place between two or more States, [which] extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance".[32] Given that the nature of the hostilities and whether they take place in an occupied territory must be determined on a case-by-case basis, we defer to the Court's future pronouncements.[33] Specially acknowledging the delicate issue of Palestine statehood for the present proceedings, where Israel's challenge to the jurisdiction of the Court is based precisely on its claim that Palestine is not a State.[34] It would be nonetheless convenient to recall that the status of Israel

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29 *Prosecutor v. Bosco Ntaganda*, 'Judgement on the appeals of Mr. Bosco Ntaganda and the Prosecutor against the decision of the Trial Chamber VI of 8 July 2019 entitled "Judgement"', 30 March 2021, ICC-01/04-02/06 A A2, par. 548.

30 A. Cassese, 'The Nexus Requirement for War Crimes', 10 *Journal of International Criminal Justice* (2012), 1395-1417, at 1395 [doi: 10.1093/jicj/mqs082].

31 *Prosecutor v. Germain Katanga*, 'Judgment pursuant to article 74 of the Statute', 7 March 2014, ICC-01/04-01/07, par. 1173.

32 *Ibid*., par. 1177.

33 *Ibid*., paras. 1181-1182.

34 See, 'Decision on Israel's challenge to the jurisdiction…', supra n.17, paras. 11-14. As noted by the Court, the recognition of Palestine as State Party applies only within the framework of the Rome Statute and does not affect the international law rules on statehood. *Situation in the State of Palestine*, "Decision on

as occupying Power regardless of its prolonged duration is not a matter of major debate, as reaffirmed recently by the ICJ.[35] Therefore, it would appear that the conditions for the existence of an IAC are a priori met, at least under the scenario of occupation.[36]

As to the "plan or policy" element, some commentators note that this clause was introduced to ensure that prosecution is limited to the most egregious cases.[37] However, the Court has inferred from the term "in particular" that these circumstances ought not to be regarded as prerequisites excluding jurisdiction.[38] Be that as it may, as possible proof, the OTP argued in *Al Bashir* that the "scale of destruction of civilian property, including objects indispensable for the survival of the civilian population, suggests that the damage was a deliberate and integral part of a military strategy".[39] Following the evidence that will be presented below, the same argument could be used regarding the conflict in Gaza to satisfy this threshold, whether applicable.

(2) Material elements

(a) Launching an attack

Although the ins and outs of an attack are not provided either in the Rome Statute or the EoC, beyond being of such extent as to meet the threshold of damage it is understood that the term does not differ from the criteria used for Article 8(2)(b)(i) and (ii) RS, i.e., as defined in Article 49(1) of Additional Protocol I.[40] Under this provision, which ICC Trial Chamber II first adhered to in *Katanga*,[41] "'attacks' means acts of violence against the adversary, whether in offence or in defence", which according to the *Commentary on the Additional Protocols* (the *Commentary*) of 1987 means combat action.[42] It refers, the *Commentary* goes on, "simply to the use of armed force to carry out a military operation at the beginning or during the course of armed conflict".[43] This means that every attack

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the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'", 5 February 2021, ICC-01/18-143, par. 108.

35 *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, 'Advisory Opinion', ICJ (2024), paras. 104-110. See, previously, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 'Advisory Opinion', ICJ Reports (2004), par. 78.

36 See cautions in van Steenberghe, *supra* n. 2, 996-997.

37 A. Cassese et al., *Cassese's International Criminal Law* (Oxford University Press, Oxford, 2013), at 80 [doi: 10.1093/he/9780199694921.001.0001]; M. Wagner, 'The ICC and Its Jurisdiction. Myths, Misperceptions and Realities', 7 *Max Planck Yearbook of United Nations Law* (2003), 409-512, at 455 [doi:10.1163/138946303775160313].

38 *Prosecutor v. Germain Katanga*, *supra* n. 31, par. 86.

39 *Situation in Darfur, The Sudan*, 'Public Redacted Version of the Prosecutor's Application under Article 58', 14 July 2008, ICC-02/05-157-AnxA, par. 404.

40 Werle and Jeßberger, *supra* n. 27, at 493; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, Cambridge, 2003), at 169.

41 *Prosecutor v. Germain Katanga*, *supra* n. 31, par. 798. This approach was unsuccessfully challenged before the Appeals Chamber in *Ntaganda*. See, *Prosecutor v. Bosco Ntaganda*, *supra* n. 29, paras. 1164-1168.

42 Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC and Martinus Nijhoff, Geneva, 1987), par. 1880.

43 *Ibid*., par. 1882. In turn, a military operation is thought to mean all the movements and activities related to hostilities, which are defined as acts of war that strike the enemy armed forces by any methods and means of warfare. See, Pilloud et al., *supra* n. 42, par. 1936; M. N. Schmitt, 'International Humanitarian Law and the Conduct of Hostilities', in B. Saul and D. Akande (eds), *The Oxford Guide to International Humanitarian Law* (Oxford University Press, Oxford, 2020) 147.

will normally be part of a broader military operation,[44] although there could be instances where the former consisted of a single attack, thus equating both terms in a narrow sense.[45] Ultimately, as remarked in the *Ntaganda* trial, the key point is that the attack, i.e. the use of armed force by any of the parties against the other, must take place "during the actual conduct of hostilities".[46]

That being said, the main issue with "attack" under Article 8(2)(b)(iv) relates, as far as we are concerned, to the number of acts of violence involved. According to the EoC, this offence, together with all the other attack-related or "conduct of hostilities" war crimes, and disregarding whether the wording of the Rome Statute speaks of "attacks" or "attacking", is committed by launching or directing a single attack.[47] This is not of concern regarding crimes such as attacking civilians or civilian objects given that the extent of the damage thereof is immaterial, and the offence is defined by the intent in targeting.[48] Conversely, Article 8(2)(b)(iv) only takes effect if the required damage is actually expected.[49] That is to say, it seems to indicate that one specific attack must be capable of causing such a destructive outcome.

The use of the singular "attack" must not be understood as consisting only of an isolated action such as a single bombardment, for an attack may be comprised of different parts or events.[50] However, the attack must be circumscribed to a certain time and space.[51] This apparently limits the scope of an attack to a specific operation in the narrow sense. Therefore, it may be argued that the singular "attack" of Article 8(2)(b)(iv) does not conflate the different attacks comprising the military operation as a whole.[52] This conclusion is highly problematic for two reasons: (1) only an attack on a massive scale could reach the prohibited threshold; (2) it appears to reject the possibility of accounting for the cumulative effect of multiple attacks in order to meet such a threshold, which is troublesome given the often cumulative and uncertain nature of environmental harm in general and in relation to hostilities.[53] Not in vain, the International Committee of the Red Cross (ICRC)

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44 Association for the Promotion of International Humanitarian Law, 'Observations by ALMA Association for the Promotion of IHL in the Case of The Prosecutor v. Bosco Ntaganda', in *Prosecutor v. Bosco Ntaganda*, 18 September 2020, ICC-01/04-02/06-2587 A2, par. 7; S. Oeter, 'Methods and Means of Combat' in D. Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, Oxford, 2008) 119, at 185-186.

45 Or the "specific military operation which constitutes the attack". See Oeter, *ibid*.

46 *Prosecutor v. Bosco Ntaganda*, 'Judgement', 8 July 2019, ICC-01/04-02/06, par. 1142.

47 K. Dörmann, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes', 7 *Max Planck Yearbook of United Nations Law* (2003) 341-407, at 380 ff [doi: 10.1017/CBO9780511495144].

48 Werle and Jeßberger, *supra* n. 27, at 491-492.

49 *Ibid*.; Peterson, "The Natural Environment in Times of Armed Conflict: A Concern for International War Crimes Law?", 22 *Leiden Journal of International Law* (2009) 325-343, at 336 [doi: 10.1017/S0922156509005846].

50 Oeter, *supra* n. 44.

51 Peterson, *supra* n. 49.

52 This would invalidate Gillett's view whereby the different strikes comprising Operation Ranch Hand during the Vietnam War would be "an attack" in this sense, for it would overstretch both the time and space limits of the term. See, M. Gillett, "Environmental Damage and International Criminal Law", in S. Jodin and M. Cordonier Segger (eds), *Sustainable Development, International Criminal Justice, and Treaty Implementation* (Cambridge University Press, New York, 2013) 73, at 78 [doi: 10.1017/CBO9781139507561.008].

53 R. White, 'Global Harms and the Natural Environment', in P. Davies, P. Leighton and T. Wyatt (eds), *The Palgrave Handbook of Social Harm* (Palgrave Macmillan, Cham, 2021) 89, at 95 [doi: 10.1007/978-3-030-72408-5_5]; M. Bothe et al., 'International Law Protecting the Environment during Armed Conflict: Gaps

recommends to consider both individual and cumulative effects for the assessment of instances of widespread, long-term and severe environmental damage.[54]

The thorny issue of the cumulative effects was already dealt with at the International Criminal Tribunal for the former Yugoslavia (ICTY). On the one hand, in *Kupreškić* the Trial Chamber argued that, making use of the Martens Clause, a violation of the rule of proportionality could still be found considering the cumulative effects of multiple attacks in cases where the incidental damage of a single attack did not appear to be unlawful per se.[55] On the other hand, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (ICTY Committee) was of the more reluctant opinion that "the mere cumulation of [individual attacks], all of which are deemed to have been lawful, cannot *ipso facto* be said to amount to a crime.[56]

(b) Incidental (or Collateral), and Excessive. The Problem with Proportionality

The wording of both the Rome Statute and the EoC concerning Article 8(2)(b)(iv) is plain in illustrating that the damage must be a consequence of the attack launched. However, does that mean that the attack must intentionally target any element of the natural environment? This is one of the most confusing elements of the crime among the literature. Whereas some authors appear to attach the *incidentality* of the result only to the first alternative, i.e. loss of or injury to civilians, for others it applies to the environment as well.[57] Yet others speak of intentional rather than incidental harm to the environment.[58]

According to the general principles of IHL, the environment, as a civilian object, is to be safeguarded against both direct attacks and excessive collateral damage, relative to military advantage.[59] Article 8(2)(b)(iv) RS focuses on the latter scenario, embracing the principle of proportionality.[60] Pursuant to Article 57(2)(a)(iii) and (b) of Additional Protocol I, this rule compels a military commander to refrain from launching an attack

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and Opportunities' 92, no. 879 (2010, 92 *International Review of the Red Cross* (2010) 569-592, at 577 [doi: 10.1017/S1816383110000597].

54 ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict. Rules and Recommendations relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentaries* (2020), par. 54.

55 *Prosecutor v. Kupreškić et al.*, Judgement, 14 January 2000, IT-95-16, paras. 525-526.

56 ICTY Committee, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 13 June 2000, par. 52.

57 On the former, Freeland, *supra* n. 9, at 205. On the latter, Werle and Jeßberger, *supra* n. 27, at 493; Arnold and Wehrenberg, *supra* n. 27, at 376.

58 M. A. Drumbl, 'International Human Rights, International Humanitarian Law, And Environmental Security: Can The International Criminal Court Bridge The Gaps?', 6 *ILSA Journal of International and Comparative Law* (2000) 305-341, at 312.

59 C. Droege and M.L. Tougas, 'The Protection of the Natural Environment in Armed Conflict Existing Rules and Need for Further Legal Protection', 82 *Nordic Journal of International Law* (2013) 21 52, at 27 [doi: 10.1163/15718107-08201003].

60 Indeed, footnote 36 of the EoC to this provision makes clear that "it reflects the proportionality requirement", which was confirmed by ICC Pre-Trial Chamber I in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the Confirmation of Charges', 30 September 2008, ICC-01/04-01/07, par. 274, footnote 374.

or cancel it on a legitimate target where it is expected to cause excessive collateral damage. That is to say, the acts covered by the principle of proportionality refer to attacks launched to destroy or damage a military objective, while harm to civilians or civilian objects or the natural environment is considered a secondary consequence.[61] Otherwise such an attack would first violate the principle of distinction, rendering proportionality inoperative and thus constituting a different crime.[62] As the ICC ruled in *Katanga*, attacks against military objectives incidentally affecting civilians are lawful so long as the damage is not "so great that it appears […] that the perpetrator meant to target civilian objectives".[63]

The foregoing should suffice to solve this conundrum given that, following the proportionality principle, the alternatives gathered under the scope of Article 8(2)(b)(iv) RS loss of life, injuries, and damage either to civilian objects or the environment are all different effects bounded by *incidentality*.[64] Applying excessiveness while leaving *incidentality* aside would make no sense under the proportionality rule. Moreover, the use of no commas in that provision between the term "incidental" and all the subsequent alternative results supports this idea of unity.[65] That notwithstanding, the seemingly different use of the terms "incidental" and "collateral" may lead to confusion. Indeed, the wording of the Rome Statute speaks only of "incidental", while footnote 36 of the EoC refers to "incidental injury and collateral damage." Likewise, a working paper submitted by the United States at the Rome Conference, appears to indicate that "incidental" is reserved for injuries and casualties while collateral for damage.[66] However, the same document explained that collateral damage includes "incidental injury or additional damage that was not intended"; therefore, it may be stated that the use of "incidental" should not make any difference regarding the unintentionality of the damage.[67] Thence, intentionality is what distinguishes incidental or "unavoidable damage" from deliberate damage, drawing the line between purely indiscriminate and disproportionate attacks.[68]

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61 See, generally, F. Moneta, 'Disproportionate Attacks in International Criminal Law," in P. Ambach et al. (eds), *The Protection of Non-Combatants During Armed Conflict and Safegurading the Rights of Victims in Post-Conflict Society: Essays in Honour of the Life and Work of Joakim Dungel* (Martinus Nijhoff, Leiden, 2015), 261; L. Gisel, '*The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law*' (ICRC, Quebec, 2016); L. Daniele, 'Incidentality of the Civilian Harm in International Humanitarian Law and Its Contra Legem Antonyms in Recent Discourses on the Laws of War', 29 *Journal of Conflict and Security Law* (2024) 21 54 [doi: 10.1093/jcsl/kraeoo4].

62 Daniele, *ibid.*, at 27; Pilloud et al., *supra* n. 42, par. 2207. This is precisely what occurred in the cases adjudicated by the ICTY dealing with proportionality, where it was concluded that most of the attacks involving civilian casualties were either directed at them or against civilian objects and, thus, did not fall under the scope of disproportionate attacks. See, e.g., Moneta, *ibid*; R. Bartels, 'Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials,' 46 *Israel Law Review* (2013) 271 315 [doi: 10.1017/S0021223713000083].

63 *Prosecutor v. Germain Katanga*, *supra* n. 31, par. 802.

64 Pilloud et al., *supra* n. 42, paras. 2212-2213.

65 Following the general rule of interpretation pursuant to Art. 31(1) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 *UNTS* 331 (Vienna Convention hereinafter), the ordinary meaning of a comma is to indicate a separation.

66 'United States of America: Proposal regarding an annex on definitional elements for part 2 crimes', UN Doc. A/CONF.183/C.1/L.10, in UN Diplomatic Conference, *supra* n. 9, at 235-236, par. 12.

67 *Ibid*., 232, § C, ¶ 1(c).

68 See, Daniele, *supra* n. 61; A. Sari, 'Indiscriminate Attacks and the Proportionality Rule: What Is Incidental Civilian Harm?', 30 *Journal of Conflict and Security Law* (2025) 203-239 [doi: 10.1093/jcsl/kraf010]. Cf.,

Accordingly, that the criminal conduct of Article 8(2)(b)(iv) only covers the environmental damage derived from attacking a legitimate target should not be controversial.[69]. Regrettably, elements of the natural environment, or related to, usually become military easily.[70] That is, those objects which "make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage", pursuant to Article 52(2) of Additional Protocol I. Nevertheless, where an element of the natural environment is lawfully attacked for being deemed as military, "there [still] may be long-term environmental damage beyond the actual destruction [sought]"; secondary harm which would thus enter our analysis, as long as there was no intentionality in it.[71]

This leads us to the requirement of excessiveness, which is to be assessed precisely against the anticipated military advantage offered by the attack. The balancing process or value judgement performed through such an assessment, known as the proportionality test, is seen as the decisive criterion for attributing criminal liability pursuant to Article 8(2)(b)(iv) RS, provided the remaining elements are met.[72] While, at the same time, it is the "vaguest and most difficult to apply rule" regarding the lawfulness of an attack.[73] In principle, regarding crimes involving value judgments such as the one at hand, it is not generally necessary that the accused personally completed such an evaluation correctly to be held criminally responsible, unless otherwise indicated.[74] Unfortunately, this is what Article 8(2)(b)(iv) expressly does.[75]

The first issue with the proportionality test is that tries to weight values that are inherently incomparable, for which there are no objective standards: military and humanitarian or environmental elements.[76] The second refers to the notion of excessiveness itself, for which there is not an agreed definition and ultimately depends on the subjective, context-related expectations of the military decision-maker, based on the information available at the time and the specific circumstances of the case.[77] Subjectivity which is

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Drumbl, *supra* n. 58, at 16, who argues that as long as the military advantage outweighs the environmental harm, even if intentional, the attack would be lawful.

69 See, e.g., Dörmann, *supra* n. 40, at *163*; K. Hulme, *War Torn Environment: Intepreting the Legal Threshold* (Martinus Nijhoff, Leiden, 2004), at 77; Peterson, *supra* n. 49, at 327; Werle and Jeßberger, *supra* n. 27, at 491; Gillett, *supra* n. 12, at 78. The last three, however, construe the offence as *not necessarily* requiring the environment to be the direct target of the attack, which is somewhat confusing.

70 Bothe et al., *supra* n. 53, at 576. For instance, a forest used to cover the enemy military.

71 S. Bagheri, 'The Legal Limits to the Destruction of Natural Resources in Non-International Armed Conflicts: Applying International Humanitarian Law', 105 *International Review of the Red Cross* (2023) 882 913,at 889 [doi: 10.1017/S1816383123000139].

72 Ambos, *supra* n. 27, at 177.

73 Schmitt, *supra* n. 43, at 153. On the vagueness of proportionality see also, B. Clarke, 'Proportionality in Armed Conflicts: A Principle in Need of Clarification?', 3 *Journal of International Humanitarian Legal Studies* (2012) 73 123 [doi: 10.1163/18781527-00301003].

74 Elements of Crimes, *supra* n. 18, at 1, par. 4.

75 *Ibid*., at 13, footnote 37. Although during the negotiation of the EoC, there were delegations claiming that the alleged perpetrator needed only to anticipate the extent of the damage and the military advantage, whereas the possible excessiveness ought to be determined by the Court. See, Dörmann, *supra* n. 40, at 164.

76 Bothe, *supra* n. 27, at 398; M. N. Schmitt, 'War and the Environment: Fault Lines in the Prescriptive Landscape', 37 *Archiv des Völkerrechts* (1999) 25-67, at 48; Oeter, *supra* n. 44, at 205.

77 See, Gisel, *supra* n. 61, at 52 *ff*.; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, Cambridge 2004), at 121-122 [doi: 10.1017/CBO9781316389591]; Schmitt,

magnified in cases of environmental damage due to its often-intangible nature.[78] This is explained because IHL accepts that a certain degree of incidental or collateral damage is inevitable, and would not violate the principle of distinction per se as long as justified by military necessity. In other words, the assessment of proportionality "incorporates a margin of appreciation in favour of military commanders".[79] The addition of the qualifier "clearly" to the requirement of excessiveness in Article 8(2)(b)(iv) further changes the already delicate balance of interests in favour of military considerations.[80] In this regard, the report of the ICTY Committee (ICTY Report hereinafter) was of the opinion that "the word 'clearly' ensures that criminal responsibility would be entailed only in cases where the excessiveness of the incidental damage was obvious".[81] Some voices point that only extremely unconventional methods or means of warfare, such as nuclear weapons, would fall under this clause.[82]

As to the military advantage, pursuant to Article 57(2)(a)(iii) of Additional Protocol I the *Commentary* states that "can only consist in ground gained and in annihilating or weakening the enemy armed forces".[83] Commentators agree that whereas the adjective "overall" inserted in Article 8(2)(b)(iv) RS broadened the scope to accounting for goals which go beyond an attack considered in isolation, bearing in mind the whole military operation, "direct" was meant to avoid relying on indeterminate or vague advantages.[84] Notwithstanding that the EoC explain that such advantage may or may not be temporally or geographically related to the attack,[85] it is understood that ex post justifications are excluded, i.e. advantages not foreseen and only evident in the aftermath of the operation.[86] This is well represented in the ICC case-law, where the Court has held repeatedly that "such an advantage must be definite and cannot in any way be indeterminate or potential".[87] In the absence of a more detailed definition, the *Commentary* explains that

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supra n. 43, at 153-155; H.P. Gasser, 'Protection of the Civilian Population', in D. Fleck (ed) *supra* n. 44, 237, at 249-250.

78 Freeland, *supra* n. 9, at 158.

79 Clarke, *supra* n. 73, at 78. See, also, Moneta, *supra n. 61*, at 264-265; Gisel, *supra* n. 61, at 8.

80 Ambos, *supra* n. 27, at 176. Although Dinstein argues that the very notion of excessiveness implies to be "clearly" discernible. See, *supra* n. 77, at 120-122. On the opposite, the prohibition to cause widespread, long-term and severe damage to the natural environmental provided for in Article 55(1) of Additional Protocol I is absolute, not requiring to be excessive.

81 ICTY Committee, *supra* n. 56, par. 21.

82 T. Smith, 'Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law', in N. Hayes, Y. McDermott, and W. A. Schabas (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Routledge, London, 2013), 41, at 51, citing Hulme. Although still debated, the applicability of the prohibition against excessive environmental damage to nuclear weapons remains controversial inasmuch they were apparently left aside of both Additional Protocol I and the Rome Statute. See, generally, G. Nystuen, S. Casey-Maslen, and A. G. Bersagel (eds), *Nuclear Weapons under International Law* (Cambridge University Press, Cambridge, 2014) [doi: 10.1017/CBO9781107337435].

83 Pilloud et al., *supra* n. 42, par. 2218. For a wider interpretation see Gisel, *supra* n. 61, at 11, who speaks of any consequence directly enhancing friendly military operations or hindering the enemy's.

84 Dörmann, *supra* n. 40, at 163; Bothe, *supra* n. 27, at 399; Arnold and Wehrenberg, *supra* n. 27, at 377-378.

85 Elements of Crimes, *supra* n. 18, at 13, footnote 36. This is contrary to the general understanding as provided in the *Commentary on the Additional Protocols*, where the military advantage must be relatively close. See Pilloud et al., *supra* n. 42, par. 2209.

86 Arnold and Wehrenberg, *supra* n. 27, 377.

87 *Prosecutor v. Germain Katanga*, *supra* n. 31, par. 893; *Prosecutor v. Bosco Ntaganda*, *supra* n. 46, par. 1162, footnote 3182.

it must be substantial and discards those that are "hardly perceptible and those which appear only in the long term".[88] In this sense, the ICTY Report noted that "attacks which are known or can reasonably be assumed to cause grave environmental harm may need to confer a *very substantial* military advantage in order to be considered legitimate".[89]

Taking into account only the damage caused after a specific attack while in turn subjectively assessing the advantage offered by it in light of the broader operation means, as Laursen put it, "dilut[ing] the significance of a single attack by pouring it into a sea of integrated attacks".[90] Here we face two issues: (1) the difficulty of determining the specific attack that caused the damage to the environment; and (2) the above-mentioned improbability of a single attack causing such a damage, in addition to be clearly excessive. Following the *obiter dictum* found in *Kupreškić*, it is argued that the Martens Clause could offer a possible solution to this cases where the unlawfulness of serious incidental damage to the environment is not readily apparent.[91] In a similar vein, Koppe defends the existence of a fifth fundamental principle of IHL reflecting the duty to protect the environment, similar but separated to that of humanity. The so-called "principle of ambituity [sic]" provides for an absolute limitation of the necessities of war in relation to the environment, which could be used to interpret existing conventional rules the obligations of which are unclear, such as Article 8(2)(b)(iv) RS.[92]

(c) Causation of Damage to the Natural Environment

The question we address here is whether the crime requires the actual causation of damage, i.e. a particular result. To address this issue, we must first clarify what ought to be understood as "natural environment" and "environmental damage". Despite the absence of a definition for "natural environment" in the Rome Statute, recourse may be used, for instance, to either the commentary of Article 26 of the International Law Commission's (ILC) Draft Code of Crimes against the Peace and Security of Mankind of 1991 or of Article 55 of Additional Protocol I, given their proximity to our subject matter. Even though both definitions resemble each other, resort to the latter may prove more accurate considering that the former was eventually dropped, and that Article 8(2)(b)(iv) RS is largely borrowed from Additional Protocol I.[93] Importantly, both definitions

88 Pilloud et al., *supra* n. 42, par. 2209.

89 ICTY Committee, *supra* n. 56, par. 22, emphasis added.

90 As cited in Freeland, *supra* n. 9, at 157.

91 *Prosecutor v. Kupreškić et al.*, *supra* n. 55; D. Fleck, 'The Martens Clause and Environmental Protection in Relation to Armed Conflict', 10 *Goettingen Journal of International Law* (2020) 243 266 [doi: 10.3249/1868-1581-10-1-fleck]. See also, ILC, *Draft Principles on the Protection of the Environment in relation to Armed Conflict, with Commentaries*, 2022, UN Doc. A/77/10, where, albeit concerned with State responsibility, Principle 12 recognises the application of the Martens Clause in this context as well.

92 See E.V. Koppe, 'The Principle of Ambituity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict', 82 *Nordic Journal of International Law* (2013) 53 82, at 59-67 [doi: 10.1163/15718107-08201004].

93 This is of relevance for, as noted by the OTP in its new Draft Policy, the term natural environment should be understood "in line with the meaning States have given it in the context of IHL". See, OTP, *supra* n. 13, par. 22. Similarly, the aforementioned ILC's Draft Principles refer to the environment "in line with the established terminology of international environmental law". See *supra* n. 91, par. 5 at 136. However, instances where the ICJ has dealt with environmental damage arising from armed conflict offer little

agree on that the natural environment ought to be understood here in the widest sense possible: as "to cover the environment of the human race and where the human race develops" in the first case, and "to cover the biological environment in which a population is living" in the second.[94]

Under Article 55 of Additional Protocol I the natural environment is meant to encompass not only those objects indispensable to civilian survival related to natural resources mentioned in Article 54(2), i.e. belonging to the human environment, but also "forests and other vegetation […], as well as fauna, flora and other biological or climatic elements".[95] Indeed, during the negotiating process of the Protocol, the Biotope Group explained that the concept "natural environment" is wider than "human environment", the latter being part of the former.[96] Such indispensable environmental objects mainly consist of everything that is not man-made but "may be the product of human intervention", like agricultural areas or drinking water as mentioned in the *Commentary*.[97] Therefore, collateral damage to these objects could qualify as harm to the environment in this broad sense. Alternatively, the targeting of such environmental objects or infrastructure,[98] could still indirectly damage other elements of the natural environment in the narrow sense (land, forests, seas…) as happened with the burning of oil wells in the 1991 Gulf War.[99] As a matter of fact, the weaponisation of this environmental infrastructure, especially water supplies, is not just a means of warfare that affects both civilians and the environment, but a strategy of domination not unknown to the Palestinian people.[100]

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guidance in this respect. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, 'Advisory Opinion' ICJ Reports (1996); or *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 'Judgement', ICJ Reports (2005) and its subsequent judgment on reparations of 2022.

94 'Report of the Commission to the General Assembly on the Work of its Forty-Third Session', 2 ILC Yearbook 1991, 1994, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), at 107, par. 4; Pilloud et al., *supra* n. 42, par. 2126. Likewise, the OTP has defined the natural environment as encompassing "the earth's biosphere, cryosphere, lithosphere, hydrosphere, and atmosphere, including outer space […], upon scientific recognition of the interactions that make up the environment". See *supra* n. 13, par. 21.

95 Pilloud et al., *ibid*.

96 Hulme, *supra* n. 69, at 18. Although other voices argue that the qualifier "natural" was added to factoring out "urbanised or industrial zones". Kiss, as cited in J. Wyatt, 'Law-Making at the Intersection of International Environmental, Humanitarian and Criminal Law: The Issue of Damage to the Environment in International Armed Conflict', 92 *International Review of the Red Cross* 92 (2010) 593 646, at 622 [doi: 10.1017/S1816383110000536].

97 Droege and Tougas, *supra* n. 59, at 25; E. Massingham, E. Almila, and M. Piret, 'War in Cities: Why the Protection of the Natural Environment Matters Even When Fighting in Urban Areas, and What Can Be Done to Ensure Protection', 105 *International Review of the Red Cross* (2023) 1313 1336, at 1315 [doi: 10.1017/S1816383123000395].

98 Note that these indispensable environmental objects will generally not be considered military objectives, and thus protected from direct attack, unless they are of dual use, i.e. used for both military and civilian purposes. See, Dannenbaum and Dill, *supra* n. 2, at 670; Schmitt, *supra* n. 43, at 162.

99 Bagheri, *supra* n. 71, at 889.

100 This strategy has been indeed a recurrent pattern during previous stages of the conflict. See, specially, UN Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories* (Goldstone Report hereinafter), 25 September 2009, UN Doc. A/HRC/12/48, paras. 913-1031; E. Weinthal and J. Sowers, 'Targeting Infrastructure and Livelihoods in the West Bank and Gaza', 95 *International Affairs* (2019) 319 340 [doi: 10.1093/ia/iiz015].

Turning attention to the notion of damage per se, and what potentially harmful actions would be punishable, neither the Rome Statute nor the EoC clarify the concept within Article 8(2)(b)(iv), and the Court has not had the chance to rule on that matter yet. Environmental damage has historically been defined based on human interactions in two distinct ways: namely, it is caused by human interferences, and, at the same time, it comprises the effects on human livelihoods.[101] Generally speaking, it is assumed to mean the "causation of a negative impact on the environment", where both the causes and the consequences may be either direct or indirect.[102] As to IHL, the prevailing rule is that indirect damages, usually known as reverberating effects, are as well included in proportionality assessments of collateral damage.[103] In Additional Protocol I, the environmental problems of the "remnants of war" were specifically thought to be covered by Articles 35(3) and 55(1).[104] Examples of direct and indirect damage are, respectively, the land erosion and cratering from bombardments or the pollution of water supplies through the destruction of, e.g., sanitation infrastructure.[105] Direct environmental harm in this sense may still be incidental or secondary in relation to the primary purpose and target of the attack, therefore actionable pursuant to Article 8(2)(b)(iv) RS.[106] However, not any damage — and thus not any means — will be sufficient to trigger criminal liability at the ICC, but damage that exceeds the legally determined threshold. In this regard, the commentary to the ILC's Draft Principles on the Protection of the Environment in relation to Armed Conflict (Draft Principles) stipulates that this standard of damage should not rely solely on how it was understood in the 1970's as harm to a specific object, but must consider ecological processes such as the interconnectedness of both living and non-living components of an ecosystem.[107]

It is worth noting, however, that during the *travaux préparatoires* of Additional Protocol I it was thought that battlefield damage incidental to conventional warfare such as artillery bombardment, i.e. immediate physical damage, would not normally be covered

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101 Hulme, *supra* n. 69, at 21-40; M. L. Larsson, *The Law of Environmental Damage: Liability and Reparation* (Norsted Juridik and Kluwer Law International, Stockholm and Cambridge, 1999), at 123-126; J Rudall, *Responsibility for Environmental Damage* (Edward Elgar Publishing, Cheltenham, 2024), at 4-5 [doi: 10.4337/9781803920719].

102 Hulme, *supra* n. 69, at 23; E. T. Jensen, 'The International Law of Environmental Warfare: Active and Passive Damage During Armed Conflict', 38 *Vanderbilt Journal of Transnational Law* (2005) 145–185, at 152-154. Simply put it, the OTP has opted for defining environmental damage as "any loss or deterioration of the natural environment", including "the impact on the health and well-being of a particular ecosystem's non-human as well as human inhabitants". See *supra* n. 13, par. 23.

103 Schmitt, *supra* n. 43, at 154. As opposed to it, Freeland argues that these indirect effects are not caused by the attack and should not be accounted for. See, Freeland, *supra* n. 9, at 158. Other authors suggest that indirect or reverberating effects should be more than a mere possibility to be accounted for. See, I. Henderson and K. Reece, "Proportionality under International Humanitarian Law: The 'Reasonable Military Commander' Standard and Reverberating Effects", 51 *Vanderbilt Journal of Transnational Law* (2018) 835–855, at 855.

104 Pilloud et al., *supra* n. 42, paras. 1451 and 1455.

105 Especially illustrative is the diagram showed in Wim Zwijnenburg, 'Data-Driven Environmental Decision-Making and Action in Armed Conflict', *Humanitarian law & Policy*, published on 1 June 2021, accessed 20 March 2025.

106 Gillett, *supra* n. 12, at 103. The author indeed affirms that the analysis of severity within Article 8(2)(b)(iv) encompasses the secondary effects of the attack.

107 Draft Principles, *supra* n. 91, par. 9 at 142.

by Articles 35(3) and 55(1).[108] This must not be read as excluding conventional weapons or tactics from the prohibition but as an acknowledgement of their improbability to reach the threshold of widespread, long-term and severe damage.[109] The same applies to Article 8(2)(b)(iv) RS: provided compliance with the remaining elements, the conventional or unconventional nature of the attack is irrelevant.[110]

Finally, as to material causation: is launching a disproportionate attack a crime of conduct or result? The controversy here stem from the contradictory use of the clause "will cause" and "would cause" in the Rome Statute and the EoC respectively.[111] Following the latter it is agreed by some authors that Article 8(2)(b)(iv) does not contemplate the actual materialisation of the damage to consummate the crime.[112] As a matter of fact, during the negotiations of the EoC it was finally agreed that the crime would be committed once the attack had been launched, even where "due to the failure of the weapon system the *expected* excessive incidental damage did not occur".[113] That is to say, the objective criminal act is fulfilled by launching an attack expecting or knowing its capability to cause such damage. Had the accused foreseen its excessiveness, they would be held criminally responsible even in the absence of actual damage, which is in accordance with the principle of proportionality as defined by the ICTY in *Galić*: "[it] does not refer to the actual damage caused or to the military advantage achieved by an attack, but instead uses the words 'expected' and 'anticipated'."[114]

The no-result rule is indeed generally true for all the attack-related war crimes under the Rome Statute.[115] Drawing from the ICC case-law, the Court's rulings in *Katanga* and *Ntaganda* asserted that intentionally directing attacks against civilians pursuant Article 8(2)(b)(i) does not require actual harm.[116] Similarly, in *Abu Garda* Pre-Trial Chamber I interpreted that the crime of directing attacks against a peacekeeping mission does not require any material result pursuant to Article 8(2)(e)(iii).[117] In fact, in *Katanga*'s confirmation of charges, ICC Pre-Trial Chamber I held that in those attacks launched

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108 Pilloud et al., *supra* n. 42, par. 1454.

109 This is why it has been said that "[it does] not impose any significant limitation on combatants waging conventional warfare". See, C. Thomas, 'Advancing the Legal Protection of the Environment in Relation to Armed Conflict: Protocol I's Threshold of Impermissible Environmental Damage and Alternatives', 82 *Nordic Journal of International Law* (2013) 83–101, at 90 [doi: 10.1163/15718107-08201005].

110 Except for nuclear weapons (see *supra* n. 82), and without prejudice to other crimes based on the prohibition on certain weapons.

111 Bartels, *supra* n. 62, at 300, reflects on this will-would discrepancy.

112 See, e.g., Peterson, *supra* n. 49, at 327; Arnold and Wehrenberg, *supra* n. 27, at 378; Werle and Jeßberger, *supra* n. 27, at 491-492; Gillett, *supra* n. 12, at 99.

113 See, Dörmann, supra n. 40, 162.

114 *Prosecutor v.* Stanislav *Galić*, 'Judgement and Opinion', 5 December 2003, IT-98-29-T, par. 58, footnote 109. However, "expected" was removed from Art. 8(2)(b)(iv) RS for "in the knowledge".

115 Dörmann, *supra* n. 47 *passim*; W. J. Fenrick, 'Crimes in Combat: The Relationship between Crimes Against Humanity and War Crimes', *Guest Lecture Series of the Office of the Prosecutor* (ICC 2004), at 9; G. Corn, 'The Conduct of Hostilities, Attack Effects, and Criminal Accountability', 57 *Israel Law Review* (2024) 354–376, at 361 [doi: 10.1017/S0021223724000050].

116 *Prosecutor v. Germain Katanga*, *supra* n. 31, par. 799; *Prosecutor v. Bosco Ntaganda*, *supra* n. 46, paras. 904 and 1136. Albeit these crimes' primary concern is distinction, whilst Art. 8(2)(b)(iv) is based on proportionality, they all share a common ground: they hinge on attacking decisions taken during the conduct of hostilities. See, Corn, *ibid.*, 356-365.

117 *Prosecutor v. Bahar Idriss Abu Garda*, 'Decision on the Confirmation of Charges', 8 February 2010, ICC-02/05-02/09, par. 65.

at a military target in violation of the proportionality principle, i.e. Article 8(2)(b)(iv), "the attacker [must be] aware that [it] will or *may* cause" the result.[118] Compared against Additional Protocol I, the Rome Statute went a step forward in this regard.[119] In fact, Article 85(3) of the former requires the causation of "death or serious injury to body or health" for any violation of distinction and proportionality to be considered a grave breach, and thus a potential war crime.[120] Moreover, the breach of the provisions against environmental damage was not listed as grave under any circumstances.

(d) Prohibited Threshold

Regardless of whether actual damage occurs, the focal point of the crime is that the alleged perpetrator knew (expected) it would happen. However, Fenrick cautions that "in most cases a charge would not be brought unless there was actual loss".[121] Bearing in mind the OTP's criteria to assess the gravity threshold of Article 17(1)(d) RS, which limits the ICC jurisdiction in terms of admissibility to the most serious crimes, and its evidence-driven approach, any attack not meeting the damage threshold materially would indeed hardly trigger the jurisdiction of the Court.[122] As the OTP remarks in its new Draft Policy, it "will charge violations of article 8(2)(b)(iv) […] when determining whether environmental damage caused by an attack qualifies as 'widespread', 'long-term,' and 'severe'".[123] It is yet to see whether this new focus will encourage the prosecution of such a problematic crime.

The lack of a definition for each of these elements — widespread, long-term and severe — in Article 8(2)(b)(iv) RS, as well as the vagueness in its predecessors of Article 1(1) of the 1976 UN Convention on the Prohibition of Military or Any Other Hostile use of Environmental Modification Techniques (ENMOD Convention),[124] and Articles 35(3)

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118 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* n. 60, emphasis added. Even though the phrasing of the Chamber seems a bit odd, opposing Art. 8(2)(b)(i) RS as a crime of mere action to Art. 8(2)(b)(iv), it should be read as follows: the latter may or may not result in harmful consequences, what it is actually required is awareness about the virtual certain likelihood of such consequences.

119 Bothe, *supra* n. 27, at 398. Although the inclusion of an environmental war crime in the RS may be considered progress in this sense, the overall wording of Art. 8(2)(b)(iv) "clearly constitutes a setback", according to Ambos, *supra* n. 27, at 176.

120 For this reason, the ICTY's finding in *Kordić* that such an attack would be "clearly unlawful even without causing serious harm," subsequently followed in *Gotovina*, was criticised in the latter's appeal. See Moneta, *supra* n. 61, at 278.

121 Fenrick, *supra* n. 115. See also, Moneta, *supra* n. 61, at 285-286. In any event, assessing environmental harm requires that the damage had actually materialised. See, Koppe, *supra* n. 92, at 78.

122 ICC, Regulations of the Office of the Prosecutor, 2009, ICC-BD/05-01-09, Regulation 29. On the gravity threshold see, e.g., M. M. DeGuzman, 'The International Criminal Court's Gravity Jurisprudence at Ten', 12 *Washington University Global Studies Law Review* 12 (2013) 475 486; W. A. Schabas, 'Selecting Situations and Cases', in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, Oxford, 2015) 365 [doi: 10.1093/law/9780198705161.003.0016]. On the OTP's policy see, e.g., F. Guariglia and E. Rogier, 'The Selection of Situations and Cases by the OTP of the ICC,' in *ibid.*, 350 [doi: 10.1093/law/9780198705161.003.0015].

123 OTP, *supra* n. 13, par. 42.

124 Convention on the prohibition of military or any other hostile use of environmental modification techniques (adopted 10 December 1976, entered into force 5 October 1978), 1108 *UNTS* 151.

and 55(1) of Additional Protocol I, have been the object of wide scholarly writings.[125] Suffice to note here that, on the one hand, the ENMOD Convention's *Understandings* speak of "several hundred square kilometres"; "a period of months, or approximately a season"; and "serious or significant disruption or harm to human life, natural and economic resources or other assets" for each element respectively.[126] On the other hand, under Additional Protocol I the issue is less straightforward. Regarding the temporal scope, the *Commentary* underscores how some delegations, thinking in ecological terms, considered it should encompass "one or more decades".[127] Instead, the only specific mention to the geographical extension is to "vast stretches of land".[128] Be that as it may, the *travaux préparatoires* made clear that there was consensus on applying a higher standard than of ENMOD's, which would be a minimum.[129] Some commentators even speak of "tens of thousands of square kilometres".[130]

As to severity, the *Commentary* offers poor guidance yet again, except for a few references to the health of ecosystems and civilian population.[131] What the *travaux préparatoires* seem to indicate as a minimum, according to Hulme, is that "severe" involves "changes at the ecosystem level [i.e. affecting its viability] having further repercussions on the health or survival of the human [and non-human] population".[132] Notwithstanding that Additional Protocol I's drafters did not consider incidental damage to ordinary warfare as being severe, unless it were "likely to prejudice, over a long term, the continued survival of the civilian population or would risk causing it major health problems",[133] the Rome Statue provides for its own general standard of gravity in Article 17(1)(d). Although the aim of the rule is to exclude the admissibility of minor cases even where all the elements have been fulfilled,[134] the meaning of gravity therein could be applied to Article 8(2)(b)(iv) *mutatis mutandis*. Accordingly, gravity must be assessed through the lens of both quantitative and qualitative criteria such as, *inter alia*, the extent of the damage, the means employed, the nature and number of victims, or the particular cruelty of the act.[135] Similarly, in *Boškoski*, the ICTY held that the requirement of "large scale" destruction is met when a considerable number of objects are damaged or destroyed, or when the value of a single object is sufficiently great.[136] As seen, these criteria do not differ substantially from the previous. Therefore, in this case, the scale of the damage and the number of victims

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125 To our knowledge, the most deep and comprehensive study on the matter is that of Hulme, *supra* n. 69. See also, Thomas, *supra* n. 109.

126 UNGA 31st session Official Records, 1 *Report of the Conference of the Committee on Disarmament*, 1976, UN Doc. A/31/27, at 91.

127 Pilloud et al., *supra* n. 42, paras.1454 and 1462.

128 *Ibid.*

129 Hulme, *supra* n. 69, 92-93. On the contrary, Antoine posited that "is generally understood that 'widespread' implies an area of less than several hundred square kilometres", i.e., a maximum rather than a minimum. See, P. Antoine, 'International Humanitarian Law and the Protection of the Environment in Time of Armed Conflict', 32 *International Review of the Red Cross* (1992) 517 537, at 526.

130 Wyatt, *supra* n. 96, at 623.

131 Pilloud et al., *supra* n. 42, paras. 1454, 1462 and 2131.

132 Hulme, *supra* n. 69, at 97-98.

133 Pilloud et al., *supra* n. 42, par. 1454.

134 *Prosecutor v. Al Hassan*, "Judgment on the appeal of Mr. Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'", 7 June 2020, ICC-01/12-01/18-601-Red, par. 53.

135 *Ibid*., par. 89.

136 *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, 'Judgement', 10 July 2008, IT-04-82-T, par. 352.

would refer to both biotic and abiotic elements of the natural environment per se, and the impacts on humans could serve to magnify the severity of the crime in accordance with the Court's case law.

Acknowledging the need for clearer definitions, back in 2009 UNEP offered a conciliatory proposal as a starting point for new developments, suggesting that the ENMOD Convention's precedent should indeed serve as the minimum basis.[137] Unfortunately, the ILC's Draft Principles have missed the opportunity to offer such a progress yet again.[138] This is a pitiful situation given that the *chapeau* of Article 8(2)(b), coupled with Articles 21 and 22(2) RS, serves to limit the interpretation of the crimes thereof to established law,[139] which could had been clarified in the former. Specially bearing in mind that, in order to prevent progressive interpretations, additional built-in limitations were incorporated in the Rome Statute for offences such as Article 8(2)(b)(iv).[140] The good news is that despite this "attempted corseting of the [judicial] interpretative freedom", the Court's case law has so far proved that the judges are willing to depart from these restraints in case of need.[141] Therefore, in a hypothetical future ruling on the present case, the Court could define the threshold of environmental damage through a broader approach, guided by the Rome Statue's purpose of ending impunity. The former, advocated by Gillett, would allow for a more relaxed, context-related interpretation to ensuring effectiveness: for instance, "widespread" could be defined "according to the size of the territory [where] the damage occurs".[142]

(e) Knowledge of the damage and its excessiveness

As shown before, to comply with the balancing exercise embedded in the proportionally test, a military commander or decision-maker must determine first the extent of the foreseen collateral damage of an attack, to then ascribe it a certain value compared against military interests. As to Article 8(2)(b)(iv), second alternative, the crime is constructed to require the alleged perpetrator to conduct personally such an evaluation and conclude (know) specifically that the environmental damage would be widespread, long-term and severe, and clearly excessive in relation to the direct and overall military advantage anticipated. That is to say, "the awareness of the perpetrator of the consequences of the attack is an objective element of the crime", as the ICC Pre-Trial Chamber confirmed in *Katanga*.[143] Which means that this is not solely a term complementing or specifying the necessary mental state for ascribing criminal responsibility, but a requirement for the

137 M. Mrema, Bruch, and Diamond (UNEP), "Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law", at 5, § 1 recommendation.

138 Draft Principles, *supra* n. 91, at 140.

139 M. Cottier, 'Article 8 Para. 2 Lit b: Other Serious Violations of the Laws and Customs Applicable in International Armed Conflicts. Preliminary Remarks', in O. Triffterer and K. Ambos (eds) *supra* n. 27, 354.

140 Bassiouni and Schabas, *supra* n. 28, at 175.

141 J. Powderly, 'The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on Sources of Law and Interpretative Technique', in Carsten Stahn (ed) *supra* n. 133, 444, at 497.

142 Gillett, *supra* n. 52, 79-80. On the contrary, Peterson argues that due precisely to those differences on the size of States, the criterion should be "absolute rather than relative", see *supra* n.49, at 331.

143 See, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* n. 60.

very commission of the crime. This was somehow recognised in *Ntaganda*, where ICC Trial Chamber VI observed that the causation of incidental damage — albeit speaking of civilian objects — "not *expected* [i.e. not known] to be excessive" would not amount to a war crime.[144]

Consequently, the ex-post assessment by the ICC judges would focus on whether the accused held the required knowledge ex ante, which, following the EoC, would be done through an evaluation of the alleged perpetrator's value judgment, based on the available information to them at the time.[145] It bears noting, however, that while during the drafting of the EoC some delegations supported the former view, also known as the Rendulic Rule or no-second-guessing rule,[146] others claimed that such an evaluation pertained to the alleged perpetrator only, and that the Court should refrain from it.[147] This latter option appears to be the more unlikely, bearing in mind the final agreement reached to nuance the subjectivity of the provision: the perpetrator should not be acquitted where the required evaluation on the excessiveness of the expected damage was either absent or blithely presumed. In particular, "a reckless perpetrator who knows perfectly well the anticipated military advantage and the expected incidental damage or injury, but gives no thought to evaluating the possible excessiveness" should not be exonerated.[148] In the absence of that evaluation, the Court would be entitled to assess the damage itself and the perpetrator would be guilty were the damage found to be excessive, provided the remaining elements are met.[149] Moreover, an unreasonable assessment in cases of clearly excessive damage would not be credible, allowing the Court to infer the accused's knowledge.[150]

Ultimately, both Article 8(2)(b)(iv) RS and the EoC remain silent about the scope of that knowledge. As a means of comparison, Cassese argued that in the particular context of the grave breach provided for in Article 85(3)(b) of Additional Protocol I, from which Article 8(2)(b)(iv) RS is partially borrowed, "knowledge" thereto must be interpreted as "predictability of the likely consequences of the action (recklessness or *dolus eventualis*)".[151] However, this seems to overlook the statement contained in the *Commentary* of 1987 which explicitly ruled out the applicability of recklessness to the grave breach of launching a disproportionate attack.[152] Accepting the previous interpretation would mean deviating from the general mental standard established in Article 30 of the Rome Statute. Consequently, given the substantial overlap between the former and the element of "knowledge" pursuant to Article 8(2)(b)(iv), the specific meaning of the term will be addressed in the subsequent section.

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144 *Prosecutor v. Bosco Ntaganda*, *supra* n. 46, par. 1166. Emphasis added.

145 Elements of Crimes, *supra* n. 18, at 13, footnote 37.

146 On the Rendulic Rule see, generally, B. J. Bill, "The Rendulic 'Rule': Military Necessity, Commander's Knowledge, and Methods of Warfare", 12 *Yearbook of International Humanitarian Law* (2009): 119–155 [doi: 10.1017/S1389135909000051].

147 Dörmann, *supra* n. 40, at 165.

148 *Ibid*. In fact, this rule derives from the requisites of proportionality under IHL, where the attacker must not "simply turn a blind eye on the facts of the situation". See Dinstein, *supra* n. 77, at 122, citing Kalshoven.

149 Dörmann, *supra* n. 40, at 165.

150 *Ibid*.

151 Cassese *et al*., *supra* n. 37, at 76. Also, Bothe, *supra* n. 27, at 400. Koppe also speaks of the "foreseeability of possible damage" regarding Additional Protocol I's prohibition, see *supra* n. 92, at 78.

152 Pilloud et al., *supra* n. 42, par. 3479.

(3) Mental Element

Pursuant to Article 30(1) RS, a person shall be criminally responsible for a crime only if it was committed with intent and knowledge, unless otherwise provided. That is to say, this is the default rule applying in general to every crime under the jurisdiction of the ICC, admitting only specific deviations.[153] Insofar as, for a disproportionate attack to occur such as that covered by Article 8(2)(b)(iv), the attacker must foresee as a possibility a consequence other than the desired one, it would seem plausible that the applicable fault standard for these crimes were *dolus eventualis*. Hence, the question facing here is whether Article 8(2)(b)(iv) provides for a different standard.

Article 30(2) and (3) RS indicates the relevant mental state for each type of material element (i.e. conduct, consequence and circumstance), where paragraph (2) refers to intent, both in relation to conduct and consequence, and paragraph (3) to knowledge regarding a circumstance or a consequence. Certainly, it is not required that every material element be committed with both intent and knowledge, but rather the crime taken as a whole.[154] Thus, is the damage foreseen in Article 8(2)(b)(iv) an intended consequence pursuant to Article 30(2)(b) or a circumstantial one under paragraph (3) thereof? This issue is all the more complex bearing in mind that Article 30(2)(b) equals intent in relation to a consequence with awareness of its occurrence, tantamount to knowledge.[155] As Dörmann documented, whereas the term "intentionally" was removed from the EoC of Article 8(2)(b)(iv) for being a "mere surplusage with no additional meaning", where Article 30(2)(a) would apply automatically, they kept "knowledge" as an element stemming from the statutory definition of the crime.[156] The use of "knowledge", which overlaps with the wording of Article 30(3), therefore seems to explicitly refer to the former.[157] Just as with other attack-related war crimes assessed by the ICC, the necessary causal link between the alleged perpetrator's actions and the resulting intended consequence refers to the attack itself.[158] Here, the damage to the natural environment is circumstantial, a secondary result. There is no purpose but awareness of that harm, which may even not materialise, in the same way that for the similar war crimes of attacking civilians or civilian objects intent only "requires to engage in the attack (purposive intent attached to conduct)".[159] The main difference is that while the

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153 See, generally, D. K. Pigaroff and D. Robinson, 'Article 30. Mental Element', in O. Triffterer and K. Ambos (eds.), *supra* n. 27, 111 1124.

154 *Ibid*., at 1117.

155 Article 30(2)(b) reads as follows: "In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events." On the confusing wording of Article 30 RS, which overlaps concepts from different legal cultures, see K. Ambos, *Treatise on International Criminal Law : Volume I: Foundations and General Part* (Oxford University Press, Oxford, 2013), at 267-291 [doi: 10.1093/law/9780199657926.001.0001].

156 Dörmann, *supra* n. 40, at 166.

157 Similarly, in *Katanga* the Court observed that the third element of Article 8(2)(e)(i) RS as provided in the EoC, "prescribes a subjective element [which] is, in fact, a repetition of Article 30(2)(a)". See, *Prosecutor v. Germain Katanga*, *supra* n. 31, par. 806. One could argue the same with respect to the third element of Article 8(2)(b)(iv) and Article 30(3).

158 *Prosecutor v. Bahar Idriss Abu Garda*, *supra* n. 117, par. 66, on the war crime of directing attacks against peacekeeping missions.

159 Dannenbaum and Dill, *supra* n. 2, at 663.

latter "hinge on knowledge of the target's status and not the consequences (sought, foreseen or realized)", a disproportionate attack focuses precisely on the awareness of the foreseen consequences, i.e. excessive incidental damage.[160] A priori, a more fitting standard would be indeed that of *dolus eventualis*.

However, this argument may not stand a second reading. First of all, the meaning of "knowledge" in relation to a consequence under Article 30(3) as awareness that it will occur in the ordinary course of events, as opposed to "might occur", apparently excludes the notion of probability embedded in *dolus eventualis*.[161] As a matter of fact, this category, along with recklessness, has been rejected from the Rome Statute's general rule by the ICC case-law so far.[162] On this point, the Court has understood "knowledge" therein as requiring the higher criterion of virtual certainty.[163] In other words, actual knowledge as opposed to constructive knowledge.[164] In this sense, it is also understood that the jurisprudence of the ICTY, despite its confusing reasoning of "knowledge of circumstances giving rise to the expectation of [the result]", set the *mens rea* bar for disproportionate attacks at actual knowledge rather than mere recklessness.[165]

Another alternative is that Article 8(2)(b)(iv) would be providing for a different meaning of "knowledge", effectively modifying the applicable mental element. Albeit, as previously stated, a definition is not provided. In this respect, some authors argue that the general rule applies, i.e. *dolus directus*; whilst others consider that the provision may be indicating either the former or constructive intent (*dolus eventualis*).[166] View, the latter, which was shared in the ICTY Report on the NATO bombing campaign.[167] As a matter of fact, following the Court's own reasoning it is not inconceivable to interpret Article 8(2)(b(iv) this way, given that in *Lubanga* the Appeals Chamber upheld the exclusion of *dolus eventualis* and recklessness from the Rome Statute's standard on the basis of the particular use of the modal verb "will", which implies certainty, in contrast to "may" or "could" which implies possibility.[168] Consequently, the use of "knew that the attack *would*

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160 *Ibid*., at 664.

161 Albeit not without debate. See, e.g., J. D. Van der Vyver, 'The International Criminal Court and the Concept of Mens Rea in International Criminal Law', 12 *University of Miami International and Comparative Law Review* (2004) 57–149; M. E. Badar, 'Dolus Eventualis and the Rome Statute Without It?', 12 *New Criminal Law Review* (2009) 433–467 [doi:10.1525/nclr.2009.12.3.433]; and S. Finnin, 'Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis,' 61 *International and Comparative Law Quarterly* (2012) 325–359 [doi: 10.1017/S0020589312000152].

162 In *Bemba*, Pre-Trial Chamber II, after analysing the *travaux préparatoires* of the Rome Statute, concluded that both concepts were "not meant to be captured by article 30 of the Statute". See, *Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo', 15 June 2009, ICC-01/05-01/08, par. 367. The same view was held by the Appeals Chamber in *Prosecutor v. Thomas Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06 A 5, par. 449.

163 *Prosecutor v. Thomas Lubanga*, *ibid*., par. 447.

164 Finnin, *supra* n. 161, at 350.

165 See, Moneta, *supra* n. 61, at 271-279; J. Dill, "Do Attackers Have a Legal Duty of Care? Limits to the 'Individualization of War'", 11 *International Theory* (2019) 1–25, at 15-19 [doi: 10.1017/S1752971918000222].

166 On the former see, Werle and Jeßberger, *supra* n. 27, at 494; Freeland, *supra* n. 9, at 211. On the latter, Arnold and Wehrenberg, *supra* n. 27, at 380.

167 ICTY Committee, *supra* n. 56, par. 23.

168 *Prosecutor v. Thomas Lubanga*, *supra* n. 162, paras. 447-450.

cause" in the EoC for Article 8(2)(b)(iv) may well allow for the latter interpretation.[169] Drawing a line with other attack-related war crimes within the Rome Statute, in the *Situation of the Republic of Korea* the Prosecutor pleaded that "[a]n argument could be made that a pattern of indifference and recklessness with respect to civilian life and property should eventually satisfy the intent requirements of Articles 30 and 8(2)(b)(i) and (ii)".[170] This could apply to the crime at hand *mutatis mutandis* as well.

A final possibility, perhaps less controversial, would be to interpret that intent is required for the causation of the proscribed damage to the natural environment. In that case, the second alternative of Article 30(2)(b) would apply inasmuch is akin to knowledge, i.e. knowledge-based intent, oblique intent or *dolus directus* of the second degree.[171] Indeed, the ICC has confirmed the inclusion of this type of intent in Article 30 RS, where the cognitive element overrides the volitional element as to require the alleged perpetrator to be aware about the almost inevitable outcome of their acts or omissions.[172] Merely anticipate that possibility would not be enough.[173] Given that in Article 8(2)(b)(iv) the cognitive element appears to outweigh the volitional element as well, in the sense that launching an attack not knowing the causation of the damage would not be criminal, this mental element would be plausibly applicable so long as "knowledge" was understood as "virtual certainty" consistent with the Court case-law.

Be that as it may, the main issue with the *mens rea* is that it is purely subjective.[174] As it has been explained hereinbefore, the elements of this crime encompass a normative aspect, a value judgement which ought not to be personally conducted by the accused. If this were the case the mental element should only relate to the possibility of damage, and excessiveness would be a matter of legal subsumption.[175] Otherwise, scholars generally agree that the mischaracterisation of the damage would constitute a mistake of law.[176] Usually, these mistakes are not a valid ground for excluding criminal responsibility. However, since Article 8(2)(b)(iv) precisely requires that the alleged perpetrator makes the correct value judgement, such an error would negate the mental element and could allow the defence of mistake pursuant to Article 32 RS.[177] That is to say, the alleged perpetrator would be "judge of their own case".[178]

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169 On whether the EoC may introduce deviations to the general rule, see D. K. Pigaroff and D. Robinson, *supra* n. 151, at 1118.

170 ICC, OTP, *Situation in the Republic of Korea: Article 5 Report*, June 2014, par. 65.

171 M. E. Badar, *supra* n. 161, at 439-440.

172 *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, 'Judgment pursuant to Article 74 of the Statute', 19 October 2016, ICC-01/05-01/13, par. 29. See also, *Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Confirmation of Charges', 07 February 2007, ICC-01/04-01/06-803, par. 352.

173 G. Werle and F. Jeßberger, '"Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law', 3 *Journal of International Criminal Justice* (2005) 35 55, at 41 [doi:10.1093/jicj/3.1.35].

174 J. C. Lawrence and K. J. Heller, 'The Limits of Article 8(2)(b)(Iv) of the Rome Statute, the First Ecocentric Environmental War Crime', 20 *Georgetown International Environmental Law Review* (2007) 61 95 (1-40), at 78 (20).

175 Bothe, *supra* n. 27, at 400.

176 *Ibid.*; Ambos, *supra* n. 27, at 177; Lawrence and Heller, *supra* n. 174, at 79-80 (21-22).

177 *Ibid.*

178 Bothe, *supra* n. 27, at 400.

(a) Proof of knowledge

Considering the difficulties often arising in a war crimes context to demonstrate the alleged perpetrator's awareness of certain circumstances, some remarks in this respect are worthwhile.[179] On the one hand, the Court could rely on an ex-post analysis of the damage as an indicator of knowledge, given that "proof of loss is usually very helpful in proving the mental element".[180] While an account of the damage would be direct evidence of the attack's capacity to cause it (second element of the offence as per the EoC), it would be of an indirect nature (indicia or circumstantial evidence) regarding the accused's *mens rea*. Indeed, if "knowledge" means awareness that a consequence will occur in the ordinary course of events pursuant to Article 30(3) RS, where such a result has occurred as a necessary consequence of the attack(s) it could be inferred that the alleged perpetrator knew it. However, notwithstanding that the ICC generally admits this type of evidence, relying on it alone would not reach the standard of beyond reasonable doubt set in Article 66 RS unless it were the "only reasonable finding to be made" from that fact.[181] A possibility in that regard would be an attack that "could not cause anything but 'widespread, long-term and severe' damage to the environment", such as using a nuclear weapon or an equivalent on scale.[182]

On the other hand, it has been mentioned above that during the negotiations of the EoC it was understood that an unreasonable value judgement conducted by a reckless military commander would not be credible, allowing the Court to infer their knowledge. That is to say, the criminal act prohibited by Article 8(2)(b)(iv) RS apparently encloses a degree of reasonable anticipation, meaning that a "commander who launches an attack based on a reasonable assessment that it *will not* result in clearly excessive [damage] has not violated this proscription".[183] For instance, in *Gotovina* the ICTY ruled that the disproportion of the attack under consideration was proven in view of the "little or no regard" paid to the risk of civilians casualties and damage to civilian objects by the Croatian Army.[184] In support of this view, the ICTY Report had priorly suggested that, concerning proportionality, "the determination of relative values must be that of the reasonable military commander".[185] Likewise, in *Galić* the ICTY upheld that

> [i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual

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179 See, e.g., S. Wilkinson, 'The Challenges of Establishing the Facts in Relation to "Hague Law" Violations', in F. Pocar, M. Pedrazzi and M. Frulli (eds.), *War Crimes and the Conduct of Hostilities. Challenges to Adjudication and Investigation*, ed. (Edward Elgar, Cheltenham, 2013), 313–330.

180 Fenrick, *supra* n. 115.

181 *Prosecutor v. Germain Katanga*, *supra* n. 31, par. 109; *Prosecutor v. Bosco Ntaganda*, *supra* n. 46, par. 111. Specifically, the Appeals Chamber in *Prosecutor v. Omar Hassan Ahmad Al Bashir*, 'Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"', 3 February 2010, ICC-02/05-01/09-OA, par. 33, laid down the possibility of proving intent through indirect evidence. Similarly, *Prosecutor v. Mitar Vasiljević*, 'Judgement', Appeals Chamber, 25 February 2004, IT-98-32-A, par. 120.

182 J. C. Lawrence and K. J. Heller, *supra* n. 174, at 80 (22).

183 Corn, *supra* n. 115, at 363.

184 *Prosecutor v. Gotovina et al.*, IT-06-90-T, 'Judgement', 15 April 2011, IT-06-90-T, par. 1910.

185 ICTY Committee, *supra* n. 56, par. 50.

> perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.[186]

As to the ICC, Trial Chamber II in *Katanga*, referring to proportionality in passing, recalled the importance of assessing a military advantage from the "attacker's perspective".[187] Although the Court stopped there and did not delve further into the notion, in *Ntaganda* Trial Chamber VI used the "reasonable person" standard in its analysis of the war crimes of attacking civilians and civilian objects.[188] This so-called reasonable commander test[189] was indeed originally conceived as a response to unjustified, disproportionate attacks in order to counterbalance the subjectivity of military decisions.[190] Therefore, under IHL deciding upon the necessity and proportionality of an attack must generally reflect reasonableness.[191] Military commanders have a positive obligation to both make a reasonable use of all the available information and to take all the feasible precautionary measures before launching an attack.[192] In the absence of those reasonable precautions or where certain information has purposedly been omitted, their "knowledge" could thus still be construed.[193]

Two issues arise here. First, whereas the appropriateness of drawing on this test to interpret Article 8(2)(b)(iv) was indeed debated during the drafting of the EoC, in the end was supposedly dropped via footnote 37.[194] As to the literature, some commentators support this view meaning that the Court should assess the case from the alleged perpetrator's subjective perspective , while others hold that this is the basis for the assessment of the Court.[195] Taking a middle ground, Naqvi considers that the reasonable commander test, as an stablished principle of IHL, should be generally applied at the ICC in accordance with Article 21(1)(b) RS.[196] Otherwise, the assessment of the accused's value judgment solely on the basis of the available information to them at the time i.e. the aforementioned Rendulic Rule in cases of mistake of fact, without the counterbalance of honesty and reasonableness, would dilute IHL rules related to precaution.[197] Secondly, as above stated, the Rome Statute's general standard demands actual knowledge, as opposed to constructive. However, the reasonable commander test merely "describes the standard against which a decision on proportionality is to be made or judged", in other words, whether the military commander's assessment is justified.[198] It does not modify the required mental state but may be used to either equate or prove actual knowledge

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186 *Prosecutor v.* Stanislav *Galić*, *supra* n. 114, par. 58.
187 *Prosecutor v. Germain Katanga*, *supra* n. 31, par. 893.
188 *Prosecutor v. Bosco Ntaganda*, *supra* n. 46, paras. 921 and 1162.
189 Note, however, that some authors remark the differences between a "reasonable person" and a "reasonable commander". See, Henderson and Reece, *supra* n. 103, at 841-842.
190 Y. Naqvi, 'The Limits of Honest Judgment: The Reasonable Commander Test and Mistake of Fact', in N. Hayashi and C. Lingaas (eds), *Honest Errors? Combat Decision-Making 75 Years After the Hostage Case* (Asser Press and Springer, The Hague, 2024) 177, at 192.
191 Gasser, *supra* n. 77, at 249; Freeland, *supra* n. 9, at 136-137; Corn, *supra* n. 115, at 364.
192 Dill, *supra* n. 165, at 11.
193 Moneta, *supra* n. 61, at 287-289; Naqvi, *supra* n. 190, at 192-194.
194 Dörmann, *supra* n. 40, at 164-165.
195 Lawrence and Heller, *supra* n. 174, at 83 (25); Arnold and Wehrenberg, *supra* n. 27, at 377.
196 Naqvi, *supra* n. 190, at 202.
197 *Ibid*., at 211.
198 Henderson and Reece, *supra* n. 103, at 840.

in instances of wilful blindness, for consciously turning a blind eye on the facts would not be reasonable.[199]

On this point, the situation described previously, where the drafters of the EoC believed that an accused who gives no thought to evaluating the possible excessiveness of the anticipated damage ought not be exonerated, seems to entail that the alleged perpetrator either consciously decided not to engage in the evaluation or carelessly underestimated it. That is, wilful blindness. According to Finnin, where the accused is aware of the high probability of a circumstance or a consequence "but purposely refrained from obtaining the final confirmation […], Article 30(3) [i.e. knowledge] should be interpreted as allowing proof by at least a limited form of wilful blindness".[200] As a matter of fact, the introduction of this term was discussed during the *travaux préparatoires* to the Rome Statute as a means to improve Article 30's knowledge definition and limit the mistake of fact defence.[201] Although ultimately dropped from general application, with exceptions,[202] we argue that the "blithely presumption" argument which was considered for Article 8(2)(b)(iv) during the drafting of the EoC refers precisely to wilful blindness.

In conclusion, the unreasonableness of the decision based on wilful blindness, where applicable, is a necessary but insufficient basis for proving guilt.[203] In addition, the excessive incidental damage "needs to be a highly probable consequence of the attack known as such to the attacker and not just a potential outcome or a mere risk", in line with the Court's standard of virtual certainty.[204]

(C) RELEVANT FINDINGS OF FACT

Despite the immense amount of data about the Israeli campaign on Gaza and the destruction brought upon it, the environmental reports consulted so far assess the damage to the Gazan natural environment from the perspective of the conflict as a whole, not regarding specific attacks. Bearing this in mind, and the initial stage of the investigations on environmental harm (uncertain until work in the field is allowed), this section analyses the findings on the prohibited conduct launching an attack and expected consequence widespread, long-term and severe environmental damage separately, in a more generic fashion.

(1) Israeli Attacks on the Gaza Strip. Justified Military Advantage?

The numerous bombardments and strikes on, as well as the ground invasion of, the Gaza Strip by the Israeli military during the so-called Swords of Iron War[205] are

199 Moneta, *supra* n. 61, at 287-289; Naqvi, *supra* n. 190, at 192-194 and 202-204.

200 Finnin, *supra* n. 161, at 350-351, citing Badar. On this doctrine see, e.g., G. M. Gilchrist, 'Willful Blindness as Mere Evidence', 54 *Loyola Los Angeles Law Review* (2021) 405 453.

201 Naqvi, *supra* n. 190, at 202-203.

202 In instances of command responsibility, this doctrine is "particularly pertinent to the military commander who creates his own absence of knowledge through culpable disregard". See, D. Robinson, 'A Justification of Command Responsibility', 28 *Criminal Law Forum* (2017) 633 668, at 658[doi: 10.1007/s10609-017-9323-x].

203 Corn, *supra* n. 115, at 364.

204 Moneta, *supra* n. 61, at 289.

205 The Knesset, 'Swords of Iron War', accessed March 2025.

undoubtedly attacks in the sense explained in Section (B)(2)(a).[206] Bearing in mind that the Gaza Strip, one of the most densely populated territories in the world, is (or was) a highly urbanised region, it should come as no surprise that most of the combat action has taken part in densely populated urban areas. In such scenario where compliance with the fundamental principles of IHL is critical, Israel has instead persisted in using weapons with wide-area effects, causing "[h]igh civilian casualties […] accompanied by widespread destruction of and damage to civilian objects".[207] While this is of the utmost concern, it would be wise to recall that IHL rules on the protection of the environment do not decay during "urban warfare", which may lead to a wide range of environmental impacts.[208]

As it has been touched upon, an attack or military operation in the narrow sense may encompass different actions and extend both geographically and temporally. For instance, the first day of the ground invasion of the Gaza Strip by the Israeli forces on 27 October 2023 consisted of several incursions from different points backed up with intense bombardments, all events arguably falling under the same attack even if continued days after.[209] However, every different assault on the towns across Gaza would most likely be considered different attacks. To mention but one precedent, in *Ntaganda* the ICC had to adjudicate on several different crimes which had been committed through two different military operations, the *First Attack* and the *Second Attack* in the language of Pre-Trial Chamber II, which consisted of several assaults on different towns and villages.[210] Upon analysing the commission of the war crime of attacking protected objects, the Court regarded each single assault as different attacks.[211]

Assuming that the total siege of the Gaza Strip as declared by the Israeli authorities was the overall military operation,[212] from the beginning of the ground invasion until the warrants of arrest for Mr. Netanyahu and Mr. Gallant issued on 21 November 2024 there took place a high number of attacks.[213] If, as it has been argued, Article 8(2)(b)(iv) does not contemplate the accumulation of different attacks, it would be virtual impossible that a single attack met the threshold of widespread, long-term and severe damage, just as

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206 According to the Armed Conflict Location & Event Data (ACLED), between the scalation of hostilities on 8 October 2023 after the Hamas' mass attacks and the issuing of the arrest warrants on 21 November 2024, the Israeli forces carried out 7,041 airstrikes, 4,826 bombings, and 1,344 on-ground battles. See ACLED, 'Gaza Monitor: 7 October 2023 to Present', accessed March 2025.

207 UN High Commissioner for Human Rights (UNHCHR), 'Report on the Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, and the obligation to ensure accountability and justice', 13 February 2025, UN Doc. A/HRC/58/28, par. 14.

208 See Massingham, Almila, and Piret, *supra* n. 108.

209 Following ACLED's data there were 33 airstrikes, 7 bombings, and 5 ground incursions from the Rafah's coastline, the Al Burayj area and eastern borders, and the Beit Hanoun town and northern borders. See *supra* n. 206, filtering results by date and source.

210 *Prosecutor v. Bosco Ntaganda*, 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda', 9 June 2014. ICC-01/04-02/06, par. 29.

211 *Prosecutor v. Bosco Ntaganda*, *supra* n. 46, paras. 1138-1144.

212 E. Fabian, "Defense Minister Announces 'Complete Siege' of Gaza: No Power, Food or Fuel", *The Times of Israel*, 9 October 2023.

213 For specifics see, e.g., UNHCHR, *supra* n. 207, paras. 10-28; Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel (IICI hereinafter), 'Detailed findings on the military operations and attacks carried out in the Occupied Palestinian Territory from 7 October to 31 December 2023', 10 June 2024, UN Doc. A/HRC/56/CRP.4, § F.

difficult as it would be to determine specifically which attack. For instance, between 42.6% and 70% of the Gaza Strip's agricultural land has been destroyed, together with 83% of plant life.[214] However, this damage was inflicted during different stages of the campaign, namely the initial bombardments of October 2023 and the subsequent ground invasion, which in turn was developed through several phases every of which was followed by backup strikes and artillery bombardments.[215] One may consider some of those stages as a single attack concerning the erasing of the agricultural land, although ultimately the decision would rely upon the adjudicator's stance on the concept of attack and its scope, and the precedent set in *Ntaganda* counters this interpretation. Moreover, the damage on agricultural land do not represent the total harm inflicted to the Gazan natural environment caused throughout the conflict.

It has been posited as well that only nuclear weapons would be capable of delivering such destruction in a single attack. One could argue that the use of an amount of conventional explosives equivalent to two nuclear bombs in the Gaza Strip not only would meet the prohibited threshold, in case that cumulative effects were accounted for, but should be regarded as clearly excessive.[216] Nevertheless, as Schmitt remarked "it is not the degree of collateral damage that the rule of proportionality is meant to address, but rather the relationship between [it] and military advantage".[217] That is to say, the criterion here is the value subjectively ascribed to the latter which, were considered essential, could outweigh any kind of environmental damage except for the most egregious.[218] Concerning the events over the conflict in Gaza, the ultimate goal according to Israel's government was to "destroy Hamas's military capabilities and topple its regime in the Gaza Strip".[219] Therefore, any attack launched within the whole military operation or campaign under scrutiny must be analysed against this backdrop, in the sense of whether it offers a military advantage to achieve that goal.

Bearing this in mind, the invasion arguably offers a definite, substantial military advantage since the gaining of enemy's ground may serve the ultimate purpose of destroying Hamas' military capabilities. Against this backdrop, the damages on the Gazan agricultural land and flora considered in isolation would rarely be labelled as excessive. If as the ICTY Report noted "the targeting by NATO of Serbian petrochemical industries may well have served a clear and important military purpose", what are the odds of (allegedly) targeting an enemy leader not conferring a very substantial military advantage?[220] To illustrate this, on 13 July 2024 Hamas' military commanders Mohammed "Deif" and Rafe Salamah were killed by an airstrike in the area of Al-Mawasi, west of Khan Younis, a coastal region filled with displaced and refugee camps which Israel had designated "safe zone".[221] According to ACLED the attack, using indiscriminate

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214 See *infra* n. 253 and 281.

215 Forensic Architecture, *A Spatial Analysis of the Israeli Military's Conduct in Gaza since October 2023* (Goldsmiths, London, 2024), at 248-249.

216 See *infra* n. 282.

217 Schmitt, *supra* n. 43, at 154.

218 Lawrence and Heller, *supra* n. 174, at 73-74 (15-16), citing Schmitt.

219 See *supra* n. 205.

220 ICTY Committee, *supra* n. 56, par. 22.

221 L. Clarke-Billings, 'IDF Says Senior Hamas Commander Killed in Israeli Air Strike', *BBC News*, 14 July 2024; T. Ambrose, K. McEwen, and H. Livingstone, 'Middle East Crisis: Israel Confirms Death of Hamas

means, killed 90 civilians and injured 300.[222] A total of eight 2,000-pound bombs was dropped.[223] Although this event consisted of a single strike, the area of Al-Mawasi had been attacked both before and after 13 July 2024, killing more civilians while allegedly targeting "senior Hamas members" even when both Deif and Salamah were deceased, raising "serious concerns about compliance with […] proportionality".[224] Here we confront two obstacles that govern great part of the conflict: (1) misgivings about the legitimacy of the objective, which could impede the enforcement of Article 8(2)(b)(iv);[225] (2) although surely contributing to the collapsing of sewage networks and debris accumulation of an already environmentally insalubrious, overcrowded area,[226] this single attack could hardly be considered excessive compared against the military advantage obtained from killing important enemy military commanders. At least for what regards Article 8(2)(b)(iv), second alternative, given the poor value historically attributed to the environment during armed conflicts,[227] for claims about proportionality regarding the first alternative i.e. civilian casualties or injuries would be harder to uphold.[228]

In line with the precautionary duties of a military commander, one of the key points while reviewing a disproportionate attack is whether there were another means to minimise collateral damage and still achieve the same military advantage.[229] Particularly, the objective circumstances post-attack, such as the analysis of the debris of the bomb, may be an important indication of "the means and methods used in the course of the attack and [on] whether the attacker complied or attempted to comply with the precautionary requirements".[230] The figures on the quantity of explosives and associated debris shown in the next section would thus be useful in that regard. Similarly, in *Katanga* ICC Trial Chamber II observed that military necessity demands that only imperative reasons where the attacker had no other choice "could justify acts of destruction which would otherwise be proscribed".[231] That is to say, albeit collateral damage may be lawful under certain circumstances, this fact alone does not suppress the obligation to select means

Military Chief Who Masterminded 7 October Attack as It Happened', *The Guardian*, 1 August 2024.

222 See *supra* n. 206, filtering results by date and source.

223 D. Lieber, F. Abdul-Karim, and L. Seligman, 'To Target a Top Militant, Israel Rained Down Eight Tons of Bombs', *The Wall Street Journal*, 16 July 2024.

224 UNHCHR, *supra* n. 207, paras. 16 and 18. See also IICI, *supra* n.213, paras. 120 ff.

225 As Dannenbaum and Dill argues in *supra* n. 2, at 664, the mere presence of the targeted Hamas personnel should not render their personal homes legitimate military objectives automatically.

226 Z. Dardona et al., 'Health and Environmental Impacts of Gaza Conflict (2023-2024): A Review', *One Health Bulletin* (2025) 1–12 [doi: 10.4103/ohbl.ohbl_42_24].

227 See, e.g., N. P. Gleditsch, 'Armed Conflict and The Environment: A Critique of the Literature', 35 *Journal of Peace Research* (1998) 381–400 [doi: 10.1007/978-94-015-8947-5]; B. Sjöstedt and K. Hulme, 'Re-Evaluating International Humanitarian Law in a Triple Planetary Crisis: New Challenges, New Tools', 105 *International Review of the Red Cross* (2023) 1238–1266 [doi: 10.1017/S1816383123000449].

228 Office of the High Commissioner for Human Rights (OHCHR), 'Thematic Report: Indiscriminate and Disproportionate Attacks during the Conflict in Gaza (October–December 2023)', 19 June 2024, at 13. In *Gotovina*, the ICTY ruled that targeting an apartment block located in a civilian residential area where it was believed to be the enemy's leader offered a definite military advantage, but the risk of a high number of civilian casualties and injuries was excessive, and the attack was thus disproportionate. See *Prosecutor v. Gotovina et al.*, *supra* n. 184, par. 1910.

229 Moneta, *supra* n. 61, at 293.

230 *Ibid.*, at 274.

231 *Prosecutor v. Germain Katanga*, *supra* n. 31, par. 894.

and methods of warfare that minimise or avoid both harm whether to civilian, civilian objects or the environment. The use of highly explosive weapons to take down single individuals or wiping out the Gaza Strip to take over Hamas, while aware of the obvious, large-scale damage these attacks will bring with them, is particularly disturbing bearing in mind the proven ability of the IDF to launch precise strikes.[232] The indiscriminate nature of the campaign is all the more serious considering the use by the Israeli military of artificial intelligence-assisted targeting systems, apparently lowering selection criteria while increasing accepted collateral damage.[233]

With regard to the red lines presented in the former example, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese, has warned that Israel is turning the whole Gaza Strip into a military objective, abolishing *de facto* the due distinction required for civilian objects.[234] They have also expanded unlawfully the notion of proportionate collateral damage in order to cover alleged indiscriminate attacks; and, above everything, "their proportionality assessments have flouted legal requirements by defining military advantage, in each attack, in relation to the destruction of the whole Hamas organization both politically and militarily".[235] In the words of the Special Rapporteur, taking the overall political purpose of war as the value against which measure incidental harm is not only manifestly illegal but offers an argument through which the destruction of civilian objects including the environment will always be proportionate in the eyes of the attacker.[236] To be sure, both military and civil Israeli authorities have often claimed to be attacking Hamas' positions when damaging or destroying civilian infrastructure.[237] As far as we know, whereas this may be true in some cases, in others such those occurred in areas already under Israeli control such claims are doubtful.[238] In yet other cases, no claim about the military nature of the target was made at all.[239]

Finally, despite the military advantage anticipated from a single attack may be assessed in the context of the campaign's overall objective, the attack still must serve a specific purpose in advancing towards the final goal. In our view, if each attack is claimed to offer the same military advantage or this merely refers to the conflict's general purpose, that advantage must be considered vague or indeterminate. Consequently, the collateral damage arising from an attack the military advantage of which turns out to be invalid

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232 OHCHR, *supra* n. 228, at 11.

233 As the Independent Task Force reported, "[s]trikes against [IA-identified] targets are often authorized without further oversight". See, N. Erakat and J. Paul, 'Report of the Independent Task Force on the Application of National Security Memorandum-20 to Israel', 2024, at 28. See also, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories* (Report of the Special Committee hereinafter), 20 September 2024, UN Doc. A/79/363, par. 11, which speaks of targeting thousands of objectives at once.

234 F. Albanese, *Anatomy of a Genocide*, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, 1 July 2024, UN Doc. A/HRC/55/73, paras. 63-68.

235 *Ibid*., paras. 69-75. On the seemingly *contra legem* expansion of proportionality to justify unlawful attacks appearing in both recent legal and military narratives, see Daniele *supra* n. 61.

236 *Ibid*., par. 74.

237 UNHCHR, *supra* n. 207, paras. 15-16.

238 On the former, IICI, *supra* n. 213, paras. 90-91. On the latter, Human Rights Watch, '*Extermination and Acts of Genocide. Israel Deliberately Depriving Palestinians in Gaza of Water*' (New York, 2024), at 63.

239 OHCHR, *supra* n. 228.

should be automatically unlawful and render the attack disproportionate. Even in those blurred cases where the target is accepted as a military objective and the advantage offered by its destruction seems legitimate, as with the Hamas' tunnels constructed underneath civilian buildings, proportionality and precaution concerns arise regarding the widespread bombing of the surface rather than choosing more precise and less destructive means available.[240] Method which would be later replaced by the flooding of the tunnels, creating in turn serious risks of contamination and irreversible damage to groundwater sources.[241] In this regard it must be recalled that the military advantage sought does not automatically justify attacking a civilian object as a means to neutralise a distinct military objective. As Dannenbaum and Dill put it, "seeking lawful consequences cannot legitimate the use of unlawful means".[242]

(2) Damage Inflicted to the Natural Environment

The documented Israeli military's total disregard for both the target selection and the scope of the damage suggests that the commander who ordered the attack or attacks did not take all feasible and reasonable precautions before launching it, and that the assessment concerning excessiveness was either absent or blithely presumed. Israel's official position on the protection of the environment under IHL is compelling in that regard. As per their comments on the ILC's Draft Principles, Israel considers that elements of the natural environment which are neither civilian objects nor military objectives are not protected under customary international law and thus should not be incorporated into proportionality assessments.[243] Assuming that the Israeli military have stuck to these guidelines during their campaign in Gaza would be merely speculative, although it may help to shade light on the logics by which the IDF operate.

To conduct their hostilities, the IDF have relied mainly on "conventional" means of warfare consisting of ground forces backed with intense artillery fire and bombardments from land, air, and sea.[244] These attacks, as will be more detailed in the following paragraphs, have resulted largely in immediate physical damage to the environment directly caused by battlefield impacts, such as bomb craters and soil removal, as well as infrastructure destruction and the consequent debris. As to indirect damage, "[t]he unprecedented scale of destruction has dramatically affected water, sanitation, and hygiene [WASH] systems, leading to widespread contamination of soil, beaches, coastal waters and freshwater sources, with immediate and long-term risks to public health, marine life, arable land and access to clean water".[245]

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240 *Ibid*., at 15. See, also, Dannenbaum and Dill, *supra* n. 2, at 665.

241 D. Gayle and N. Lakhani, "Flooding Hamas Tunnels with Seawater Risks 'Ruining Basic Life in Gaza', Says Expert" *The Guardian*, 23 December 2023; R. Bergman, 'Israeli Military Confirms It Has Begun Flooding Hamas Tunnels', *The New York Times*, 30 January 2024; UNEP, Environmental Impact of the Conflict in Gaza: Preliminary Assessment of Environmental Impacts (Nairobi, 2024), at 42.

242 Dannenbaum and Dill, *supra* n. 2, at 666.

243 ILC, 'Protection of the environment in relation to armed conflicts. Comments and observations received from Governments, international organizations and others', UN Doc. A/CN.4/749, 17-18 (17 January 2022).

244 Office for the Coordination of Humanitarian Affairs (OCHA), 'Hostilities in the Gaza Strip and Israel, Flash Update #104', 28 January 2024.

245 Report of the Special Committee, supra n. 233, par. 35.

Following the day of the invasion, the evidence shows a direct correlation between, *inter alia*, the clearing and destruction of the Gaza Strip's agricultural land and vegetation cover and the actions of the IDF, as well as affecting other life-supporting infrastructure such as water wells.[246] While Amnesty International declares that they "cannot establish the circumstances and lawfulness of damage and destruction of agricultural land in all cases", they nonetheless assert that such destruction was "part of its operations to significantly expand a 'buffer zone'".[247] Which means that, at least in some cases, the harm thereto was not incidental to direct combat action but intentional. Nevertheless, the intentional physical destruction of, say, an orchard could still cause collateral damage, such as the contamination of the surrounding soil. On WASH infrastructure, according to Human Rights Watch such destruction was deliberate in many cases, while in others it could be a collateral consequence of targeting other military objectives.[248] For instance, by 12 October 2023, only five days after the beginning of the escalation of hostilities, six water wells, three water pumping stations, one water reservoir stations and a desalination plant had been damaged as result of the conflict.[249] Overall, Forensic Architecture notes that the repeated and cumulative patterns of destruction "suggests that it is not incidental to operational contingency".[250] Therefore, whether this conduct falls under the scope of Article 8(2)(b)(iv) of the Rome Statute will depend on the categorisation of (1) the targets as military objectives, and (2) the resulting collateral damage as unintentional but excessive. It must be highlighted in this regard that the current conflict has only worsened the already fragile state of the Gazan environment,[251] reason whereby the exact contribution of the Israeli attack(s) as to the extent of the damage will prove even harder to determine.

(a) Widespread

A narrow understanding of "widespread" applied to the *Situation in the State of Palestine* would be problematic from the beginning since the total extension of the Gaza Strip is of approximately 360 square kilometres — barely the several hundred square kilometres required in the context of Additional Protocol I. Such a view would entail impunity for the destruction of the entire natural environment of States falling short of that size.[252] Focusing on the terrestrial environment only, at the time of writing between 42.6% and 70% of the Gaza Strip's agricultural land, amounting up to 104 square kilometres, has

246 Forensic Architecture, *supra* n. 215, at 242 ff. and 507 ff.; Amnesty International, *'You Feel Like You Are Subhuman'. Israel's Genocide Against Palestinians in Gaza* (London, 2024), at 126.

247 Amnesty International, *ibid*, at 127-128.

248 Human Rights Watch, *supra* n. 238, at 63.

249 IICI, *supra* n. 213, par. 222.

250 Forensic Architecture, *supra n.* 215, at 300.

251 UNEP, *supra* n. 241, at 12-17.

252 A similar concern was expressed in the first revision of the ENMOD Convention in 1984, where the delegate of Sweeden highlighted the possibility for States territorially smaller than "several hundred square kilometres" to be rendered legally defenceless. See, First Review Conference of the Parties to the Convention on the Prohibition of Military or Any Other Use of Environmental Modification Techniques, 'Summary Record of the 7th Meeting', 17 September 1984, UN Doc. ENMOD/CONF.I/SR.7, at 3, par. 3.

been destroyed.[253] Adding the destruction of between 25% and 50% of the Wadi Gaza Nature Reserve, this represents approximately 19% of all Gazan land at best, and 29% at worst.[254] Damages accounting for almost a third of a territory would seem widespread using a relative standard. To compare it with the figures of the Vietnam War, 3.250 square kilometres of South Vietnamese forests were cleared, accounting for approximately 1,87% of the country's surface.[255] At the same time, more than 20.000 square kilometres were sprayed with herbicides,[256] representing an estimated 14% of the total extent of the territory's woody vegetation.[257]

As of January 2024, more than 60% of all Gazan infrastructure has been either damaged or destroyed.[258] This destructive pattern, which furthermore is a source of environmental contamination and risks to human health,[259] has spread "across almost the entire territory of the Gaza Strip", thus increasing the extension of the damage to that of several hundred square kilometres.[260] The obliteration of Gaza as a whole becomes apparent in the United Nations Satellite Centre's (UNOSAT) analysis of the satellite imagery captured by Sentinel-2.[261] Moreover, the possible geographical spread of the contamination beyond the area initially expected is relevant in assessing the extent of the damage.[262] In Gaza, the destruction of the wastewater, solid waste and fuel-related infrastructure has led to the contamination of the sea, the soil and the groundwater.[263] "Airborne particulate pollution laden with hazardous compounds as dust/air pollution" additionally contaminates these environments as well as crops and food supplies.[264] Finally, the war-related GHG emissions estimates as to March 2024 alone may amount to more than the annual emissions of 26 States,[265] indicator which may serve to illustrate both the "widespread" and "long-term" elements of the environmental impact, bearing in mind the distribution and persistence patterns of GHG.

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253 For the figures see, respectively, UNEP, *supra* n. 241, at 32, citing the analysis of the UN Food and Agriculture Organisation (FAO); Forensic Architecture, *supra* n. 215, at 242; *supra* n. 246, at 126-128. The differences on the figures may be attributed to several factors, such as the temporal scope of the data.

254 According to UNESCO, The Wadi Gaza Nature Reserve covers the 7 kilometres-long and 100 meters-wide route of the Wadi along the Gaza Strip. See, State of Palestine, 'Wadi Gaza Coastal Wetlands', 2 April 2012.

255 Westing, as cited in Eliana Cusato, 'From Ecocide to Voluntary Remediation Projects : Legal Responses to Environmental Warfare in Vietnam and the Spectre of Colonialism', 19 *Melbourne Journal of International Law* (2018), at 6.

256 J. M. Stellman et al., 'The Extent and Patterns of Usage of Agent Orange and Other Herbicides in Vietnam', 422 *Nature* (2003) 681 687, at 5, Table 2 [doi: 10.1038/nature01537].

257 A. L. Young, 'Agent Orange: A Controversy without End', 3 *Environmental Pollution and Protection* (2018) 100 108, at 101 [doi: 10.22606/epp.2018.34002].

258 World Bank, supra n. 5, at 10.

259 Mainly through unexploded ordinance and other hazardous substances such as asbestos. See UNEP, *supra* n. 241, at 23-27.

260 *Ibid*., 23.

261 See, UNOSAT, 'Gaza Strip Comprehensive Damage Assessment', published 13 December 2024, accessed July 2025; UNOSAT-FAO, 'Gaza Strip Cropland Damage Assessment', published 30 January 2025, accessed July 2025; UNOSAT-FAO, 'Gaza Strip Greenhouse Comprehensive Damage Assessment', published 30 January 2025, accessed July 2025.

262 ICRC, *supra* n. 54, par. 57.

263 See, UNEP, *supra* n. 241, at 19-31.

264 *Ibid*., 37.

265 Of which, the estimate emissions from Israeli bombs and artillery alone amount to 78.236 tons of CO_2. See, B. Neimark et al., 'A Multitemporal Snapshot of Greenhouse Gas Emissions from the Israel-Gaza Conflict', *SSRN Electronic Journal* (2024), at 11.

(b) Long-term

This element is probably the most troublesome altogether, bearing in mind that "it is impracticable to calculate in advance the likely durability of environmental damage".[266] Even a scientific assessment conducted ex post as UNEP's is still preliminary and thus inconclusive. However, consistent with the no-result rule, no proof is needed albeit helpful about the actual time scale of the damage. What matters is whether the alleged perpetrator expected it to be long-term. Otherwise, no prosecution could be brought until years, perhaps decades, after the end of the conflict.

Be that as it may, heavy metal contamination deriving from the weaponry used in the conflict by the Israeli military so far has been recorded.[267] These hazardous materials, which cause direct and immediate toxicity to flora and fauna and enter the human body through food webs, can last for decades.[268] Even though the latter is rather a general estimation than a conclusive evaluation on the timescale of the effects of this particular conflict, the risk of long-term ecological impacts deriving from different sources of conflict-related contamination is extensively informed in UNEP's report. Risks that will persist "long after the hostilities have ended".[269] Another possible indicator of this element is the time that will take to clean-up the disaster, given that both infrastructure debris and ammunition debris contains hazardous substances that may continue to contaminate the environment and harm people while not removed. According to estimates, cleaning all the debris may take up to 15 years, and around 45 years to recycle half of it.[270]

In the NATO bombing case, the ICTY Committee was of the opinion that the environmental damage caused by the airstrikes of fuel stores and other industries, which released toxic chemicals into the environment, did not reach the threshold of Additional Protocol I, based as well on a UNEP's study.[271] Nevertheless, it highlighted that due to the temporal closeness with the end of the conflict, the study "[could] not be a reliable indicator of the long-term environmental consequences" and that an accurate assessment on the matter could not yet be practicable.[272] Therefore, the dismissal to initiate an investigation was based on a lack of reliable information, rather than on the preliminary evidence against the long-term environmental impacts of the attacks.[273]

Considering the uncertainty surrounding the temporal impact of the environmental devastation caused in Gaza, more studies will indeed be necessary. Regardless, it seems acceptable to affirm that the damage has been at the very least sustained for several

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266 Y. Dinstein, 'Protection of the Environment in International Armed Conflict', in 5 *Max Planck Yearbook of United Nations Law* (2001) 523–549, at 543 [doi: 10.1163/18757410 1X00141].

267 UNEP, *supra* n. 241, at 40.

268 *Ibid*.

269 UN Development Program, *Gaza war: Expected socioeconomic impacts on the State of Palestine*, 22 October 2024, UN Doc. E/ESCWA/UNDP/2024/Policy brief.2, at 7.

270 UNEP, *supra* n. 241, at 27.

271 ICTY Committee, *supra* n. 56, par. 17.

272 *Ibid*.

273 *Ibid*., paras. 24-25.

months so far.[274] In light of the ENMOD Convention, this element of the threshold would thus be met. Finally, were the Court to depart from both interpretations, one possible approach would be that of equating "long-term" to irreversibility.[275] In this respect, both the Gaza aquifer and the Wadi Reserve are at high risk of irreversible damage as a consequence of the conflict;[276] there are claims of the once at least 250 bird species inhabiting Gaza going nearly extinct;[277] and the UN High Commissioner for Human Rights (UNHCHR) informed of entire areas of land rendering unhabitable due to intense Israeli bombing.[278] These concerns were mirrored in a report taken to the UN General Assembly warming that "the collapse of water and sanitation services [is] risking 'irreversible damage' to natural ecosystems and causing dire health impacts for Gazans".[279]

(c) Severe

As it has been argued, one of the factors to assess severity may be linked to the viability of ecosystems. In that case, the risk of irreversible harm outlined above, meaning permanent loss of ecosystem services or its quality, could as well be considered here. Specially for what regards the Wadi Gaza Nature Reserve by virtue of its condition as a singularly valuable site.[280] Other factors are the extent or scale of the damage, the number of victims and the methods employed. Whereas there is no definite data on the number of non-human casualties and how exactly the viability of the ecosystems in and surrounding Gaza will be affected, the destruction of 83% of all plant life in Gaza will definitely affect terrestrial biodiversity and food systems, undermining ecosystem health.[281] On the other hand, we do have figures reflecting the large-scale of the attack(s) and the destruction brought. Namely, only between October 2023 and February-July 2024 an estimate of more than 25,000 tons of explosives, equivalent to two nuclear bombs, were deployed.[282] And by May 2024 the amount of destruction-related debris was of over 39 million tons,

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274 As UNEP reports, "one indicator of the [environmental] impacts is the increasing rates of communicable disease in Gaza", where only in the three months following October the WHO reported, for instance, 179,000 cases of acute respiratory infection and 136,400 cases of diarrhoea among children under five due to air and water pollution respectively. See, UNEP, *supra* n. 241, at 18.

275 The term generally reflects the idea of permanent loss, or which cannot be restored in a human timescale, of ecosystem services and/or quality. See, generally, L. Buhr et al., 'The Concepts of Irreversibility and Reversibility in Research on Anthropogenic Environmental Changes', 4 *PNAS Nexus* (2024) 13 [doi: 10.1093/pnasnexus/pgae577]. This interpretation has been indeed proposed in the context of ecocide by Stop Ecocide Foundation's Panel. See, *supra* n. 10.

276 See, UNEP, *supra* n. 241, at 21; M. Abd El Hay, *The Environmental-Humanitarian Impacts of the Israel-Hamas War in Gaza* (Arava Institute for Environmental Studies, Ketura, 2024), at 21.

277 All official reports on Palestinian biodiversity, at least from the Palestine National Clearing-House Mechanism Website are prior to 2023. This statement, attributed to the Director of Monitoring and Inspection at the Palestinian Environmental Quality Authority by an Egyptian digital media, is thus less reliable. See, 'Israeli Occupation Destroys Gaza's Biodiveristy', *Egypt Today*, 15 August 2024.

278 UNHCHR, *supra* n. 207, par. 17.

279 Report of the Special Committee, *supra* n. 233, par. 33.

280 C. R. Payne, 'Protection of the Natural Environment', in B. Saul and D. Akande (eds), *The Oxford Guide to International Humanitarian Law* (Oxford University Press, Oxford, 2020), 205, at 212-124.

281 Forensic Architecture, *supra* n. 215, at 250.

282 UNEP, *supra* n. 241, at 38; Forensic Architecture, *ibid.*, at 510.

"equivalent to ten Pyramids of Giza".[283] As to water contamination, by March 2024 an estimate of 60,000 cubic metres of wastewater and sewage were being released per day to the Mediterranean Sea.[284] Figure which may as well inform the geographical and temporal elements.

Considering the effects on human health derived from the conflict-related environmental degradation as a subsidiary indicator of the severity of the attacks, the following must be taken into account. In addition to the direct exposure to ammunition-related chemicals through inhalation, these hazardous substances enter the soil and leaches into groundwater, which is absorbed by crops, contaminating the food chain and then indirectly affecting human health.[285] People is being equally impaired due to the insalubrious conditions created by their forced displacement to highly dense areas and the destruction of WASH infrastructure.[286] Specifically, as of January 2024 nearly 65% of these facilities were damaged or destroyed,[287] whilst by April 83% of groundwater wells and all wastewater treatment plants were not operational, not only affecting the environment due to the insalubrious conditions but depriving people access to clean water, consequently impairing their health.[288] Moreover, according to the Integrated Food Security Phase Classification, by November 2024 the entire Gaza Strip was in acute food insecurity due to the collapse of food systems. The whole territory is indeed risking famine, "with 344,800 people at risk of experiencing [the highest] catastrophic levels of hunger (P5)".[289] These is significantly relevant for appears to point to the intentional starvation of Palestinians in Gaza through denying them access to objects indispensable to their survival, which involves the destruction of natural resources and environmental infrastructure such as food systems.

Last but not least, regarding the methods employed, even if neither Depleted Uranium (DU) nor white phosphorus ammunitions and weapons are straightforwardly banned in war, their use — which has been criticised for a while — must comply with the general principles of IHL.[290] Both white phosphorus and DU are known to be toxic for the environment.[291] Regarding human health, the long-term effects of the former are contentious, although it is accepted that the exposure to it should be low to prevent risks.[292] On the other hand, the direct burning-effects of the latter are well known and its use in densely populated areas should be avoided to prevent unnecessary suffering.[293] Given the uncertainties and the dangers surrounding this weaponry, its use — especially

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283 UNEP, *ibid.*, at 23-24.

284 *Ibid.*, at 21.

285 *Ibid.*, at 37.

286 *Ibid.*, at 19-23. For more data about the outbreak of diseases in Gaza and other health issues related to insalubrity see the WHO's Emergency Situation Reports.

287 IICI, *supra* n. 213, par. 222.

288 *Ibid.*, par. 223. Although subsequently it is stated that by April this figure was of 57%.

289 OCHA, 'Flash Appeal. Occupied Palestinian Territory', December 2024, at 7-10.

290 K. Sypott, 'The Legality of Depleted Uranium Munition under International Humanitarian Law,' 5 *Victoria University Law and Justice Journal* (2015) 51–62 [doi: 10.15209/vulj.v5i1.725]; S. N. Christensen, *Regulation of White Phosphorus Weapons in International Law*, (Torkel Opsahl Academic Epublisher, Brussels, 2016) 63.

291 Qumsiyeh, *supra* n. 7, at 7.

292 Y. Ran et al., 'A Review of Biological Effects and Treatments of Inhaled Depleted Uranium Aerosol', 222 *Journal of Environmental Radioactivity* (2020) 106357 [doi: 10.1016/j.jenvrad.2020.106357].

293 WHO, 'White Phosphorus', published 15 January 2024, accessed May 2025; Christensen, *supra* n. 290, at 41.

when indiscriminate could add additional layers of severity to an attack. There are claims about the Israeli Military having allegedly used both in the Gaza Strip repeatedly.[294] Finally, the indiscriminate use of explosive weapons in populated areas, such as GBU munitions, have caused a high number of civilian casualties and contributed to the negative effects on the environment e.g., by the creation of debris.[295]

Regardless of how despicable the inhumane living conditions forced on Palestinians are, they should not impede to recognise the importance of the environmental consequences of war. Rather, they contribute to worsen these conditions in the present and for future generations.[296] Sure, "these consequences are less urgent than the human suffering in the current Gaza conflict, but they constitute serious violations of international law and may be irreversible".[297] Notwithstanding its limitations, Article 8(2)(b)(iv) RS, second alternative, provides the ICC with an avenue to prosecute the unlawful environmental consequences of war along with, but independent from, civilian casualties.

(D) CRIMINAL RESPONSIBILITY

Considering all the facts presented herein, we agree with the OHCHR that there are "strong indications" that the incidental loss of civilian life, injury to civilians and damage to civilian objects to which we add the natural environment in Gaza is excessive, and thus violating proportionality.[298] Qualifier which "would have been apparent in the damage assessments undertaken by the IDF… given [their] experience of prior escalations".[299] Likewise, the report of the UNHCHR of February 2025 finds that the "broader targeting practices of Israel evidence a lack of compliance with fundamental principles of international humanitarian law, including […] proportionality and precautions in attack", which "may amount to war crimes".[300] Echoing the words of the Office for the Coordination of Humanitarian Affairs, the

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294 OHCHR, 'Six-Month Update Report on the Human Rights Situation in Gaza: 1 November 2023 to 30 April 2024', 8 November 2024, at 16.; International Coalition to Ban Uranium Weapons, 'Allegations of Depleted Uranium Use in Gaza', *ICBUW Blog Posts*, published 4 September 2024, accessed July 2024. With respect of DU, there is no direct evidence of their use in the present so far, although recent analyses have shown Uranium residues in Gaza from past conflicts. See, M. M. Abd Elkader, T. Shinonaga, and M. M. Sherif, 'Radiological Hazard Assessments of Radionuclides in Building Materials, Soils and Sands from the Gaza Strip and the North of Sinai Peninsula', 11 *Scientific Reports* (2021) 23251 [doi: 10.1038/s41598-021-02559-7].

295 OHCHR, *supra* n. 228, at 11-12; Report of the Special Committee, *supra* n. 233, par. 34.

296 See, e.g., P. Vesco et al., 'The Impacts of Armed Conflict on Human Development: A Review of the Literature,' 187 *World Development* (2025) 106806, [doi: 10.1016/j.worlddev.2024.106806].

297 C. Ahlborn and I. Mammadli, 'Protecting Gaza's Marine Environment in Armed Conflict: Shared or Exclusive International Responsibility?', Ejil:Talk!, published 30 June 2025, accessed July 2025.

298 OHCHR, *supra* n. 228, 14.

299 *Ibid*., at 13. In particular, the Goldstone Report concluded regarding the Israel's military operations in the Gaza Strip during 2008 and 2009 that the use of area weapons to "attempt to kill a small number of specified individuals" in an environment with large number of civilians, "cannot meet the test of what a reasonable commander would have determined to be acceptable […] for the military advantage sought". See, *supra* n. 100, par. 703. Moreover, as noted in Zwijnenburg, *supra* n.116, the "scope and severity of environmental damage resulting from attacks is more foreseeable than ever before".

300 UNHCHR, *supra* n. 207, par. 12. See also, Albanese, *supra* n. 234, par. 72.

> [c]onditions of life across Gaza are unfit for human survival. […] Most of Gaza is now a wasteland of rubble. Violence has destroyed homes, decimated livelihoods, crippled food systems, and resulted in the collapse of health services and water, sanitation and hygiene (WASH) systems. […] This has led to increasing hunger, starvation and now potentially famine.[301]

Up to now we have discussed the elements of Article 8(2)(b)(iv) RS as applied to direct perpetrators. However, the standard of fault and the specific evidence needed to prove the crime may vary depending on the form of participation or mode of liability the accused are charged with.[302] To analyse the issue of individual criminal responsibility we devote the following pages.

(1) Applicable law

Article 25(3) RS regulates the applicable modes of liability to hold individuals criminal responsible, distinguishing between principals in paragraph (a) direct perpetration, co-perpetration, and both indirect perpetration and co-perpetration and accessories or other forms of participation in paragraphs (b), (c) and (d).[303] According to the Court itself, criminal responsibility is to be determined through the "control over the crime" approach, as per which principals must show some type of control over the commission of the crime, whether physically or remotely ("mastermind"), as opposed to accessories.[304] Or even control over an organised and hierarchical apparatus of power, from which the crime is committed through the leader's direction and planning.[305]

Following the above approach, a direct perpetrator, whoever commits the crime individually pursuant to Article 25(3)(a) RS, first alternative, is the one who "physically carries out the objective elements of the offence".[306] In this regard, those responsible for attacks under IHL are those who "plan or decide" upon them (Article 57(2) of Additional Protocol I), i.e. military commanders or decision-makers. Hence, determining the appropriate mode of liability for those who plan or decide to launch an attack will depend on the exact meaning of "launching". It results that attack-related crimes are materially committed by the mere launching of the attack, even those consisting in directing an attack.[307] Put it differently, launching encompasses directing. Bearing in mind that in *Ntaganda* the Court defined directing an attack as "selecting the intended target and deciding on the attack", it may be inferred that directing focuses on the decision-making process before the attack, whereas launching refers to its execution.[308] Therefore, the main difference between these offences is that attacking or directing attacks against

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301 OCHA, *supra* n. 289, at 10.

302 On this matter see, generally, Jérôme de Hemptinne et al. (eds.), *Modes of Liability in International Criminal Law* (Cambridge University Press, Cambridge, 2019).

303 *Prosecutor v. Bahar Idriss Abu Garda*, *supra* n. 117, paras. 152-157; *Prosecutor v. Germain Katanga*, *supra* n. 31, par. 1396; *Prosecutor v. Bosco Ntaganda*, *supra* n. 46, paras. 69-70.

304 *Prosecutor v. Bahar Idriss Abu Garda*, *ibid*., par. 152.

305 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* n. 60, paras. 500-518.

306 *Prosecutor v. Bahar Idriss Abu Garda*, *supra* n. 117, par. 153.

307 *Prosecutor v. Germain Katanga*, *supra* n. 31, par. 799; *Prosecutor v. Bosco Ntaganda*, *supra* n. 46, paras. 904 and 1136.

308 *Ibid.*, paras. 744 and 917.

civilians or civilian objects focuses on the specific object of the attack, which must be intended to be any of the former.[309] Conversely, launching a disproportionate attack refers to its execution in the knowledge of the likely excessive, collateral damage that will result from it, rather than intending to target specific objectives.[310] As a consequence of sharing the same objective element, the direct perpetrator of attack-related war crimes, including Article 8(2)(b)(iv), will normally be the person who ordered the attack, "as opposed to the person who operated the weapon system".[311]

Nevertheless, acknowledging the intricate chain of command within military hierarchies and the involvement of different-level officials — even government authorities — in the decision-making process implies that, depending on the particular individual accused's rank or position, the act of ordering may well fit with any of the principal perpetrator's categories of Article 25(3)(a) RS. Even that of indirect co-perpetration.[312] The accessorial form of participation "ordering" of Article 25(3)(b), first alternative, would be as well possible given the superior-subordinate relationship necessary for this liability, intrinsic to top-down military orders — e.g., a superior official orders the attack to an inferior official, who launches it, i.e. orders its execution.[313] As a matter of fact, in cases of launching unlawful attacks the ICC have often charged the defendant(s) who ordered them as either direct perpetrators, co-perpetrators or indirect perpetrators (through another person); otherwise, command or superior responsibility may be applied as an alternative pursuant to Article 28 RS. [314]

From our position, we are unable to stablish a clear causal link between any specific attack and the allegedly excessive damage caused to the natural environment, which in turn precludes the identification of the possible direct perpetrator(s). In fact, it is not unusual that the reconstruction of the decision-making process underpinning unlawful attacks faces such hurdles for accessing to direct evidence, which is especially relevant in this investigation considering the previously proven unwillingness of Israel to cooperate with international authorities on the exchange of information.[315] This is why international criminal tribunals, including the ICC, have often resort to circumstantial evidence to reproduce the criminal context of war crimes.[316] That notwithstanding, as stated in the introduction, the scope of this work is limited *ratione personae* to the

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309 *Prosecutor v. Ahmad Al Faqi Al Mahdi*, 'Judgement and Sentence', 27 September 2016, ICC-01/12-01/15, par. 48.

310 Corn, *supra* n. 115, at 364-365.

311 Borrowing the interpretation of a direct perpetrator of attacking civilians, applying to "any use of artillery", as adjudicated in *Ntaganda*. See, *Prosecutor v. Bosco Ntaganda*, *supra* n. 46, ¶ 744, footnote 2300.

312 For instance, in *Ntaganda* the Court considered that the accused didn't order the attack in the sense of direct perpetration but as indirect co-perpetration because, even though he gave the orders, he wasn't present at the front and this formed part of his overall contribution to the commission of a broader set of crimes committed through a common plan. *Ibid*., paras. 743-744

313 *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, *supra* n. 172, par. 77, where an order "reflects the strongest form of influence over another".

314 J. P. Pérez-León-Acevedo, 'The Challenging Prosecution of Unlawful Attacks as War Crimes at International Criminal Tribunals,' 26 *Michigan State International Law Review* (2018) 407–444, at 436 [doi: 10.17613/c5wme-jnm33].

315 *Ibid*., at 433-435.

316 *Ibid*., at 436; M. Klamberg, *Evidence in International Criminal Trials* (Brill Nijhoff, Leiden, 2013), at 408-409 [doi: 10.1163/9789004236523]. As previously noted, the evidentiary value of indicia will depend on whether the criminality of the act or omission was the only reasonable finding to be made from the facts. See *supra* n. 181.

warrants of arrest for Mr. Netanyahu and Mr. Gallant. Hence, it is not a matter of finding who may be considered direct perpetrator(s) but to assess the specific mode of liability applying to both accused. As to the only attack-related war crime for which both accused have been charged in this case, namely intentionally directing attacks against the civilian population, Pre-Trial Chamber I has found reasonable grounds to believe that they bear criminal responsibility as civilian superiors.[317] Despite every crime should be assessed separately in this regard, considering the similarities among attack-related war crimes, we will follow Pre-Trial Chamber I's view and analyse the accused's criminal responsibility in the same way. This does not mean that what has been so far addressed is pointless, since the base crime must have been committed by subordinates under their authority and control in any event, or attempted at the very least.[318]

Pursuant to Article 28(2) RS, three elements must be met in order to hold a non-military superior criminally responsible: (a) the superior either knew, or consciously disregarded information clearly indicating the commission of the crime; (b) the crime concerned activities that were within the effective responsibility and control of the superior; and (c) the superior failed to take all necessary and reasonable measures within their power to prevent or repress the crime. All three elements are informed by the superior-subordinate relationship enounced in the provision's *chapeau* and must be a consequence of the superior's failure to exercise control properly, which means that it is not enough to have a formal or *de jure* hierarchical relationship. It is needed that the superior had the material or *de facto* ability to exercise their authority over the subordinates, what is known as the effective control test.[319]

Regarding the first (a) element, the applying standard of fault for civilian superiors is either actual knowledge or the recklessness-based "consciously disregard", rather than the negligence-based "should have known" criterion for military or quasi-military commanders under Article 28(1) RS.[320] While the meaning of "knowledge" is the same as under Article 30(3), consciously disregarding something implies an active conduct to ignore it. In other words, the accused must have "chose[n] not to consider or act upon" the information which would have clearly put them on notice of the crimes.[321] In essence, to held a civilian superior criminally responsible for consciously disregarding information about the crimes of their subordinates it is in necessary that: (1) information clearly indicating a significant risk that the crime was being committed or about to be committed existed; (2) it was available to the superior; and (3) while aware of that

317 See *supra* n. 2.

318 V. Nerlich, 'Superior Responsibility under Article 28 ICC Statute: For What Exactly Is the Superior Held Responsible?', 5 *Journal of International Criminal Justice* (2007), 665–682, at 669 [doi: 10.1093/jicj/mqm033].

319 K. Ambos, 'Superior Responsibility,' in A. Cassese, P. Gaeta, and J. R.W.D. Jones(eds.), supra n. 27, 823; O. Triffterer and R. Arnold, 'Article 28. Responsibility of Commanders and Other Superiors', in O. Triffterer and K. Ambos (eds.), *supra* n. 27, 1056.

320 Ambos, *ibid.* at 870.

321 J. A. Williamson, 'Some Considerations on Command Responsibility and Criminal Liability', 90 *International Review of the Red Cross* (2008), 303–317, at 308 [doi: 10.1017/S1816383108000349]. As Vetter observed, this results in an easier defence for the accused and a higher burden of proof for the prosecution compared against military commanders' responsibility. See, G. R. Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court', 25 *The Yale Journal of International Law* (2000): 89–143, at 124.

information, they actively ignored it.[322] Although in both cases knowledge and conscious disregard the *mens rea* must not be presumed, it may be established through circumstantial evidence as well.[323] Furthermore, it is not required that the superior be aware of the exact details of the base crime.[324] For instance, in *Bemba*, ICC Trial Chamber III considered, among other factors, the notoriety of the illegal acts and whether they were covered by the media as possible indicia of the superior's knowledge. Nevertheless, they must be personally aware of that notoriety, which cannot be inferred from the general public's knowledge, and they must have taken "some kind of action" concerning that information.[325]

According to the second (b) element, the effective authority of the superior must govern not only the relationship with their subordinates but their activities as well. In the absence of any pronouncement on this matter at the ICC, the literature understands that these activities are deemed to be under the control of the superior only when they are undertaken at work or during other work-related duties.[326]

Finally, the third (c) element shares with military commanders' responsibility pursuant to Article 28(1)(b) RS the failure to "take all necessary and reasonable measures". Which means that as long as they acted reasonably, the conduct will not be criminal.[327] This element stems from the duty of any superior, whether military or non-military, to ensure the lawfulness of their subordinates' conduct under customary international law.[328] While the case law of the different international criminal tribunals has confirmed that the measures at stake must be analysed on a case-by-case basis, depending on the powers of the superior and the specific circumstances of the situation, it is generally agreed that they must be feasible and practical, i.e. within their power and truly helping the purpose to prevent or repress.[329] According to Triffterer and Arnold, among the reasonable measures that can be expected from civilian superiors to prevent or repress the misconduct of their subordinates, a first step is the dismissal of the agent involved or requiring the competent authority to do so.[330]

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322 Ambos, *supra* n. 319, at 870; Triffterer and Arnold, *supra* n. 319, at 1102-1103.

323 *Prosecutor v. Zejnil Delalić et al.*, 'Judgement', 16 November 1998, IT-96-21-T, par. 386. See also, Ambos, *ibid.*, at 863 and 870; Triffterer and Arnold, *ibid*, at 1083.

324 Nerlich, *supra* n. 318, at 672.

325 *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, *supra* n. 172, paras. 192-194.

326 Ambos, *supra* n. 319, at 858; Triffterer and Arnold, supra n. 319, at 1103.

327 D. Robinson, 'A Justification of Command Responsibility', 28 *Criminal Law Forum* (2017), 633-668, *passim* [doi: 10.1007/s10609-017-9323-x].

328 Amnesty International, 'Amicus Curiae Observations on Superior Responsibility Submitted pursuant to Rule 103 of the Rules of Procedure and Evidence', in *Prosecutor v. Jean-Pierre Bemba Gombo*, 20 April 2009, ICC-01/05-01/08, par. 18.

329 M. M. Bradley and A. de Beer, '"All Necessary and Reasonable Measures" The Bemba Case and the Threshold for Command Responsibility', 20 *International Criminal Law Review* (April 23 2020), 163 213, at 212 [doi: 10.1163/15718123-02002004]; Williamson, *supra* n. 314, at 309-311. As a matter of fact, the ICC Appeals Chamber in Bemba reversed the trial judgement based on a re-evaluation of what, in that case, were considered necessary and reasonable measures, which ouch to obey to "the operational realities on the ground at the time". See, *Prosecutor v. Jean-Pierre Bemba Gombo,* 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"', 8 June 2018, ICC-01/05-01/08 A, par. 170.

330 Triffterer and Arnold, supra n. 312, at 1103.

(2) Evidence

(a) Superior-subordinate relationship

On this preliminary matter, Article 2 of the Israeli Basic-law on the Military of 1976, stablishes that the Minister of Defence Mr. Gallant at the time of the events occurred will be in charge of the army on behalf of the government, the head of which is Mr. Netanyahu at the time of writing.[331] In turn, Article 3 provides that the supreme commander of the armed forces (the Chief of Staff), who will be appointed by the Government under recommendation of the Minister of Defence, will be subject to the authority of the former and subordinate to the latter. In light of the former, the formal strand of the Netanyahu-Gallant relationship with the military becomes apparent.

Concerning the material authority of the superiors to exercise effective control, both the ICTY and the ICC have affirmed that it may be derived from their capacity to issue orders and instructions.[332] In this regard, it may be helpful to recall that Mr. Gallant ordered the siege of Gaza with the approval of the government, as well as other instructions such as the implementation of the Hannibal Directive.[333] In turn, Mr. Gallant was removed from his charge as Minister of Defence by Prime Minister Netanyahu, demonstrating his actual authority over the former.[334] Moreover, a recent letter addressed to Mr. Netanyahu himself, and both the current Minister of Defence and head of the military, signed by members of the IDF, denounces that "the government is issuing 'clearly illegal' orders".[335] This does not serve merely to indicate their overall control over the IDF but may point to their acquaintance about the criminal nature of their orders.

(b) The superior either knew, or consciously disregarded information which clearly indicated such crimes

On the notoriety of the crimes as possible indicia of the accused's knowledge, back in December 2023, UN General Assembly already expressed grave concern about the extensive destruction by Israel of agricultural land and vital infrastructure such as water wells in the Gaza Strip, as well as their negative impact on the environment. Accordingly, it demanded and called upon Israel to cease the exploitation of the Palestinian natural resources and to halt every action damaging both the environment

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331 Originally passed by the Knesset on the 29th Adar Bet, 5736 (31 March 1976) and published in Sefer Ha-Chukkim No. 806 of the 9th Nisan, 5736 (9 April 1976), p. 154. Unofficial English version as amended in 2022 available here.

332 *Prosecutor v. Bosco Ntaganda*, *supra* n. 46, par. 120; *Prosecutor v. Dario Kordić and Mario Čerkez*, 'Judgement', 26 February 2001, IT-95-14/2-T, par. 421; Prosecutor v. Blaškić, 'Judgement', 3 March 2000, IT-95-14-T, Judgement, par. 302.

333 'Former Israel Defence Minister Admits Issuing Orders to Attack Gaza, Kills Israeli Captives', *Middle East Monitor*, published 8 February 2025, accessed July 2025.

334 B. McKernan, "Benjamin Netanyahu Fires Defence Minister Yoav Gallant, Triggering Protests Across Israel," *The Guardian*, published 6 November 2024, accessed July 2025.

335 Harry Davies and Yuval Abraham, 'Israeli Army Officers Refuse to Serve in "Unnecessary, Eternal War" in Gaza', *The Guardian*, published 11 June 2025, accessed July 2025.

and vital infrastructure.[336] Echoing the former Resolution, and in view of the information analysed, the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories considers Israeli authorities "to have been aware of the war's impact on Palestinians' right to a clean, healthy and sustainable environment", which is being impaired through, *inter alia*, the "immediate as well as the lasting and widespread impact of this [explosives-related] contamination".[337] The Committee concludes that "Israeli authorities did not use all means at their disposal to avoid […] causing significant environmental harm".[338]

On the other hand, there are numerous public declarations made by Israeli officials and authorities that call for the total erasing of the land, to destroy everything, and to private Gaza of life-supporting resources and infrastructure.[339] Along with the Israeli military's patterns of total disregard for both the scale and the scope of the attacks, these statements acknowledge at least implicitly the inevitable, underlying environmental destruction to be expected. Since the superiors need not to master every detail of the base crime, it would thus suffice to prove that they were aware of the likely excessive result. In this sense the scorched-earth-related statements below become especially relevant as it was with the *Al Bashir* case,[340] where among the evidence presented the Prosecutor referred to the accused's statement publicly commanding to "didn't want any villages or prisoners, only scorched earth".[341] Given that a scorched-earth policy is the military tactic consisting in destroying everything, specially environmental objects, within a given territory in order to deny the enemy any possible advantage, we consider that such declarations could indicate either knowledge or conscious disregard about the scale of the environmental damage that could be expected from the attacks, if not intent.[342]

Namely, on 4 November 2023, Israeli Brigadier General and former Deputy Head of the Coordinator of Government Activities in the Territories (COGAT), Yogev Bar-Sehshet, declared that "whoever returns here [the Gaza Strip] […] will find scorched earth. No houses, no agriculture, no nothing".[343] And on 7 April 2024, Sergeant Major of the 84th (Givati) Brigade, Rabbi Avrahim Zarbiv, noted that "wherever the IDF soldiers

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336 UNGA Res. 78/180, 21 December 2023, UN Doc. A/RES/78/170.

337 Report of the Special Committee, *supra* n. 233, paras. 33-39.

338 *Ibid.*, par. 39.

339 Many of these statements are collected in the Appendix of Forensic Architecture, *supra* n. 215, at 820-829. For other similar declarations may be useful to consult the Application instituting proceedings containing a request for provisional measures in *Application of the Convention on the prevention and punishment of the crime of genocide in the Gaza Strip (South Africa v. Israel)*, Application instituting proceedings, ICJ (2023), paras. 101-109.

340 Despite the differences on the charges, this case is relevant because the indictment was based on, similarly to the present, destroying the means of survival of the population, "including food, shelter, crops, livestock and, in particular wells and water pumps", which were contaminated. See, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', 4 March 2009, ICC-02/05-01/09-3. par. 91.

341 *Situation in Darfur*, *supra* n. 39, par. 53.

342 See, e.g., K. Hulme, 'Armed Conflict, Wanton Ecological Devastation and Scorched Earth Policies: How the 1990-91 Gulf Conflict Revealed the Inadequacies of the Current Laws to Ensure Effective Protection and Preservation of the Natural Environment', 2 *Journal of Conflict and Security Law* (1997) 45 81 [doi: 10.1093/jcsl/2.1.45].

343 Forensic Architecture, *supra* n. 215, at 824.

passed through, the earth was left scorched".[344] Among other relevant declarations, on 8 October 2023, the IDF spokesperson Daniel Hagari stated that "while balancing accuracy with the scope of damage, right now we're focused on what causes maximum damage".[345]

Furthermore, the accused themselves have made several declarations exhorting for the total destruction of Gaza, pointing not only to their disregard about the scale of the inflicted damage – be it to civilians, civilian objects or the environment – but to their knowledge of the circumstances. Mr. Netanyahu has repeatedly urged the Israeli to remember the Old Testament's passage on Amalek, that is: "…totally destroy all that belongs to them. Do not spare them…". Moreover, on 8 October 2023, at the beginning of the military offensive, he announced that "[it] will continue with neither limitations nor respite until the objectives are achieved".[346] In turn, Mr. Gallant was even clearer when on 10 October 2023 announced that "there will be no electricity, no food, no water, no fuel, everything is closed". Addressing the IDF that same day, he added that "Gaza won't return to what it was before. We will eliminate everything". Similarly, on 13 December 2023 he highlighted "the work in the north of the Strip, with all its cost and pain, is of the kind that crushes the surrounding infrastructure […], it's all been erased".[347]

(c) The superior failed to take all necessary and reasonable measures… to prevent or repress… or to submit the matter to the competent authorities

The dismissal of Mr. Gallant by Mr. Netanyahu should not be considered neither a preventive nor a repressive measure for several reasons. Firstly, no criminal procedure has followed Mr. Gallant's dismissal, which appears to be a necessary step.[348] Secondly, despite being Netanyahu's subordinate, he was not the subordinate committing the crime but rather a superior having himself control over the military who allegedly did it. Thirdly, according to Mr. Netanyahu's own words, he was fired for other reasons, namely mistrust issues between them; and the crimes have allegedly continued after the appointment of the new Minister.[349] Furthermore, the recent change of the military Chief of Staff has been a consequence of the former chief's resignation rather than a disciplinary measure.[350]

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344 The Israeli Information Centre for Human Rights in the Occupied Territories, B'Tselem, believe this statement to be "evidence that forces on the ground are aware of the widespread destruction of objects necessary for survival". See, B'tselem, *Manufacturing Famine: Israel Is Commiting the War Crime of Starvation in the Gaza Strip* (2024), at 10.

345 B. McKernan and Q. Kierszenbaum, "'We're Focused on Maximum Damage': Ground Offensive into Gaza Seems Imminent", *The Guardian*, published 10 October 2023, accessed July 2025.

346 See, respectively, *South Africa v. Israel*, *supra* n. 339, at 142, par. 101; Forensic Architecture, *supra* n. 215, at 820.

347 See, respectively, Fabian, supra n. 212; *South Africa v. Israel*, *ibid.*; Forensic Architecture, *ibid.*, at 825.

348 Ambos, *supra* n. 319, at 862-863.

349 McKernan, *supra* n. 334.

350 E. Fabian, 'IDF Chief Halevi Announces He Will Resign on March 6, Cites "My Responsibility for the Failure of the IDF on October 7"', *The Times of Israel*, published 21 January 2025, accessed July 2025. Whether voluntary or forced, the resignation was in any case due to the IDF failure to prevent the 7 October Hamas' attack, not for the alleged commission of any crime by his subordinates.

On a different note, according to Israel's Military Advocate General (MAG)[351] since the beginning of the conflict in October 2023 there have been initiated "74 criminal investigations regarding incidents that raised suspicion of criminal misconduct" among IDF personnel.[352] However, accountability for these incidents are rear, exculpatory explanations too vague, and only a few privates (foot soldiers) have been dismissed by June 2024.[353] In fact, Israeli Military's system of justice has repeatedly been accused in the past of lack of transparency, impartiality and adherence to international law standards. Its focus on low-ranking soldiers and its preference for disciplinary measures rather than criminal prosecution helps to perpetuate impunity rather than fight it.[354] It is reasonable to believe that if these investigations were any serious, Israel would have challenged the admissibility of the case pursuant to Articles 17(1)(a) and 18(2) RS. Conversely, showing the apparent connivance between the different powers of the State and its government, represented by the accused Prime Minister Mr. Netanyahu, they have limited themselves to challenge the jurisdiction of the Court pursuant to Article 19(2), and to request an Article 18(1) notice on the investigation.[355]

Meanwhile, in the domestic sphere the Knesset is debating a bill to criminalise any cooperation with the ICC, while defeating another seeking to establish a commission of inquiry into the 7th October.[356] This ban joins the veto already in place against any UN or international independent commission, which the Human Rights Council had demanded to cease.[357] Consequently, it may be affirmed not only that no reasonable measures have been taken to prevent the alleged commission of crimes by their subordinates, but that formal efforts are being put in place to hinder information disclosure. The alleged processes of inquiry opened by the MAG to repress and/or punish the alleged crimes are both insufficient and unreliable at best.

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351 The MAG is appointed by the Minister of Defence upon recommendation of the military Chief of Staff. Militarily, MAG is subordinate in rank to the latter, and civilly or professionally to the Attorney-General, the head of the legal system of the executive branch of the Israeli government. See, J. Turkel et al. (Turkel Commission), 'Israel's Mechanism for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflicts According to International Law. Second Report', 2013, at 281, par. 18.

352 MAG's Corps, 'Addressing Alleged Misconduct in the Context of the War in Gaza', published 24 February 2024, accessed July 2025.

353 J. Frankel and J. Jeffery, 'The Israeli Army Says It Investigates Itself. Where Do Those Investigations Stand?', *Associated Press*, published 3 June 2024, accessed July 2025.

354 See, e.g., B'tselem, *The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism* (2016); International Commission of Jurists, *Perpetuating Impunity: Israel's Failure to Ensure Accountability for Violations of International Law in the Occupied Palestinian Territory* (2022).

355 Note that, after the Appeals' Chamber partial revision of Pre-Trial Chamber I's decision on the jurisdictional challenge, Israel has requested to withdraw, vacate or declare the warrants of no force or effect, and to suspend the investigation. However, Pre-Trial Chamber I has ruled that the request of Israel to suspend the investigation based on Article 19(7) RS has no grounds inasmuch this can only result from a challenge on admissibility, which Israel has not issued. See, *Situation in the State of Palestine*, 'Decision on the State of Israel's request to have arrest warrants withdrawn, vacated, or declared of no force or effect and to suspend the Prosecutor's investigation', 16 July 2025, ICC-01/18-457, paras. 31-33.

356 See, respectively, The Knesset, 'Approved in Preliminary Reading: Prohibition on Public Authorities and Bodies, Israeli Citizens and Residents, to Cooperate with the International Criminal Court in The Hague,' published 19 February 2025, accessed March 2025; S. Sokol, 'Coalition Defeats Bill Seeking to Form State Inquiry into Oct. 7 Failures', *The Times of Israel*, published 19 March 2025, accessed same day

357 HRC Res. 55/28, 16 April 2024, UN Doc. A/HRC/RES/55/28, paras. 15-16.

All things considered, it may be affirmed that there are reasonable grounds to believe that the accused, while exercising civilian control both *de facto* and *de jure* over the Israeli military scheme, were aware about the alleged commission of this and other crimes or, at the very least, consciously turned a blind eye on them and took no reasonable measures to either prevent, repress or punish them.

(E) CONCLUSIONS

In this paper we have analysed the elements of the war crime of excessive environmental damage through a thorough revision of the relevant literature and both ICTY and ICC case-law. The commentaries on Article 8(2)(b)(iv), second alternative, of the Rome Statute normally highlight the hurdles represented by the high, uncertain threshold of damage imposed and the difficulties of proving the *mens rea*. Indeed, not only the damage whether materialised or not must be widespread, long-term and severe but it has to be known ex ante by the alleged perpetrator, who additionally needs to conclude it to be clearly excessive in relation to the direct and overall military advantage anticipated. However, they usually overlook the fact that, as demanded by proportionality, the damage must be incidental, which means that the criminality of the act will depend on the target and the purpose of the attack. Hence, attacking a non-military environmental objective directly or attacking a non-environmental military objective with the intent to inflict environmental damage, even if secondary, would not, a priori, fall within the scope of Article 8(2)(b)(iv). We believe that this requirement, together with the definitional constraints of an attack, represent key challenges for prosecuting the crime that should not be overlooked. Fortunately, ICC judges are granted with different tools to overcome them.

First, although they may and most probably would do so rely on Additional Protocol I as a source of interpretation, they are not bound by it. In this regard, whereas the ICC have already adhered to the concept of attack thereto, it has not yet decided upon any case of widespread, long-term and severe environmental damage, which thus leaves room for a different, less stringent understanding of these terms. Second, the Martens Clause or the so-called "principle of ambituity" may allow the Court to take into account the cumulative effects of different attacks where individual ones do not reach the prohibited threshold in otherwise clearly unlawful cases. Third, the subjectiveness of the mental element is narrowed in instances where the alleged perpetrator's proportionality assessment is either unreasonable or absent in cases of clearly excessive damage, allowing the Court to infer "knowledge" from it. Moreover, the Court could embrace a more up-to-date environmental approach in balancing military interests against environmental values.

As it has been acknowledged, the acts of the Israeli military could be constitutive of several different crimes, or risk to be so at the very least. In fact, much of the evidence presented herein may well serve to point to the commission of, e.g., the war crimes of attacking civilians and/or civilian objects, and of starvation. However, this does not automatically exclude collateral environmental damage from the equation. It becomes clear from the evidence analysed that massive environmental damage has been inflicted upon the Palestinian people of Gaza, regardless of its qualification as incidental or intentional. Even though environmental damage could be punished as a means in other

crimes such as starvation, this would dilute the intrinsic value supposedly granted to the natural environment in Articles 35(3) and 55(1) of Additional Protocol I, and Article 8(2)(b)(iv), second alternative, of the Rome Statute, implying that any harm thereto not serving other criminal purpose would be held unpunished.

We may conclude that there are reasonable grounds to believe that, during the relevant time, the Israeli forces launched several disproportionate attacks in the knowledge that they would cause serious collateral environmental damage. Whereas it is doubtful that any of the attacks individually considered could meet the threshold of widespread, long-term and severe damage unless taken as a whole, there are reasonable grounds to believe that, considering the full military campaign, Israel's military either consciously disregarded its possible excessiveness or not even weighed it against the expected military advantage, which in most cases has turned to be vague and undefined. There are also reasonable grounds to believe that both accused, Mr. Netanyahu and Mr. Gallant, were either aware of the circumstances and the facts or consciously disregarded them, and that they did not took any reasonable measure to either prevent, repress or punish the commission of crimes by their subordinates. Despite few prospects for a successful prosecution, there are enough evidence to trigger an indictment on this count, which would enable the Court to engage directly with Article 8(2)(b)(iv) for the first time and clarify many of the uncertainties surrounding it, even if at the pre-trial stage. For the sake of legal certainty and symbolic justice at least. Finally, the impossibility to determine all the elements of the crime beyond any reasonable doubt is due more to the imprecision of the provision rather than to the facts themselves, which reveals the inadequacy of the current framework of environmental protection under international criminal law, specifically the Rome Statute. Reason why a reform, perhaps through the standalone criminalisation of ecocide, is necessary still.

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A Tale of Two Nationalities: Dual Nationality and Jurisdiction *Ratione Personae* in Investment Treaty Arbitration

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Abstract: Dual nationality poses complex challenges in public international law, particularly in international investment law. In this context, nationality plays a key role: serving as a determining factor to establish who qualifies for protection under a treaty regime and acting as a *ratione personae* criterion to establish jurisdiction in dispute resolution forums. This study provides a doctrinal and policy-oriented analysis to understand how international investment tribunals approach the issue of dual nationality when determining the jurisdiction *ratione personae* and what interpretative trends emerge across different arbitration frameworks. The analysis introduces a threefold typology of interpretative approaches and is tested against the case Alicia Grace v. Mexico, which illustrates how recent tribunals navigate and balance the existent tensions. By examining the treatment of dual nationality across the ICSID and non-ICSID awards and analyzing the interpretative methodologies employed in addressing treaty silence, the study identifies an emerging pattern of convergence across different arbitration fora: in recent awards, tribunals apply functionalist tools when faced with treaty silence which leads to restrictive outcomes, i.e., excluding dual nationals from access to arbitration. This ultimately signals increasing sensitivity to the integrity of the arbitration system against abuse, such as treaty shopping or strategic structuring of nationality.

Keywords: international investment arbitration dual nationality nationality jurisdiction investor-state dispute settlement

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(A) INTRODUCTION

"It was the best of times, it was the worst of times". This opening line written by Charles Dickens can reflect the nature of dual nationality in international investment arbitration, where the coexistence of multiple national identities presents both opportunities and challenges for an international investor. While dual nationality may give the investor access to protections under different treaties, it may also operate as a jurisdictional barrier for arbitration or may trigger complex questions of nationality determination and the legitimacy of treaty access.[1] Dual nationality particularly presents a significant challenge to the jurisdictional framework of international investment arbitration in cases where the investor also holds the nationality of the host-state.[2] This subject and its implications become increasingly complex in today's globalized landscape due to, for instance, the proliferation of investment migration schemes, known as Citizenship or Residency by

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1 J. García Olmedo, 'Dual Nationals in Investment Arbitration: an Emerging Field of inconsistent Decisions', *EJIL: Talk!*, published on 27 July 2023, accessed 28 May 2025.

2 P. Spiro, 'Multiple Nationality', *Max Planck Encyclopedia of Public International Law,* published on 2018, accessed 2 April 2025.

https://doi.org/10.36151/SYBIL.29.06

Investment Programs.[3] These activities, which allow individuals to obtain citizenship or residency in exchange for financial investment, depart from the traditional criteria for the attribution of nationality or residency on the basis non-transferrable attributes, such as ties to the jurisdiction in relation to descent or in relation to factual connection, which typically refer to the culture, language, or longstanding connections with the country.[4] As such, these schemes create a unique and challenging environment and with the increase in popularity of investment migration schemes, also augment the risk of abuse or misuse.[5] Moreover, in the context of investor-state dispute settlement (ISDS), nationality can become a controversial issue when it is classified as "of convenience", the risk resulting from a practice called "treaty shopping" or "treaty abuse", which allows the investor to channel their investment in a way that, by means of a nationality of convenience, they attain access to the treaty protection of a third-state.[6] Although it is true that international investment agreements (IIAs) both define the scope of investment protections and serve as a source of consent to arbitration between investors and states, jurisdiction is ultimately shaped by a combination of the treaty provisions and the applicable arbitration rules, which may impose additional procedural criteria.[7] Particularly, this raises significant challenges for the assessment of *ratione personae* jurisdiction, which results in tasking investment tribunals with determining whether such individuals fall within the scope of the applicable treaty and arbitration rules.[8]

This article examines why investment tribunals adopted particular interpretations in key cases which represent some of the most prominent awards in which tribunals directly addressed the treatment of claimants holding dual or multiple nationalities. The analysis considers the cases *Luis García Armas*, *Serafín García Armas*, *Saba Fakes*, *Champion Trading*, *Manuel García Armas*, and *Santamarta* to highlight contrasting approaches in interpreting nationality in investment arbitration with the purpose of uncovering the reasoning underlying their decisions. Section (B) firstly provides a three-fold classification of interpretative approaches and analyzes how different tribunals construe the concept of nationality, which is done through a comparative analysis of the key decisions. In Section (C), the article further explores whether the identified approaches can be applicable in other cases, taking as a case study the decision of the arbitral tribunal in *Alicia Grace and Others v. Mexico*. Finally, Section (D) considers the broader implications of the interpretative approaches from a normative, more systemic perspective to determine whether the practical implications of the interpretative approaches in the current investment arbitration practice aims to strike a balance between ensuring investor protection while curbing manipulation and maintaining the legitimacy of the dispute resolution systems. The section also explores

3 Financial Action Task Force and OECD, 'Misuse of Citizenship and Residency by Investment Programmes', *FAFT*, published in 2023, accessed 22 May 2025, at 5-11.

4 More on the methods of nationality attribution in I. Brownlie, 'The relations of nationality in public international law' *British Yearbook of International Law* (1964) 284-364, at 302 ff and; R. Donner, *The Regulation of Nationality in International Law* (Finnish Societas Scientiarum Fennica, 1983), at 44-45.

5 Financial Action Task Force and OECD, *supra* n. 3.

6 M. Casas, 'Nationalities of Convenience, Personal Jurisdiction, and Access to Investor-State Dispute Settlement' 49 *NYU Journal of International Law and Politics* (2016) 63-127, at 66-67.

7 I. Bantekas, *An Introduction to International Arbitration* (Cambridge University Press, 2015), at ch 4, 151 [doi: 10.1017/CBO9781316275696].

8 ibid, Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) ch 3, at 149-150 [doi: 10.1017/CBO9780511581137].

whether investment arbitration is evolving toward a coherent approach to dual nationality. The aim of this article is to analyze the key awards' interpretative choices to argue that they are not solely technical jurisdictional matters but that rather express normative implications that are deeply connected to questions of fairness and the legitimacy of the ISDS regime as a whole.

(B) DOCTRINAL APPROACHES IN INVESTMENT ARBITRATION PRACTICE: CASE-SPECIFIC INTERPRETATIONS OF NATIONALITY

This section gives particular attention to how tribunals construe the concept of nationality, specifically, their methods of nationality determination based on either formal documents or functional ties, with particular attention to their underlying interpretative choice, that is, whether tribunals opt for a strictly literal reading of treaty provisions or incorporate broader legal doctrines. The purpose is therefore to contribute to the understanding of the evolving case law in investment arbitration law by systematically analyzing key cases and identifying patterns in the tribunals' interpretative approaches. This will help to better understand the analytical and normative discussions in the subsequent sections. The proposed threefold typology distinguishes the tribunals' determination of jurisdiction *ratione personae* according to (i) a formalist interpretation grounded in strict textual analysis; (ii) a flexible, functionally oriented analysis reflecting openness to genuine connections; or (iii) restrictive functionalism, where reliance on doctrinal principles ultimately curtails access to arbitration for dual nationals. The aim of this classification is to bringing clarity to a complex and fragmented case law by organizing and systematizing the interpretative methods into coherent categories.

The aim of this section is to evaluate whether the interpretative choices made by tribunals in key cases reflect broader trends in arbitral reasoning, in other words, the rationale behind the decisions. This legal-doctrinal focus aims to examine whether tribunals' reasoning i.e., their choice to apply treaty terms strictly and in accordance with their literal and ordinary meaning or introduction of legal doctrine aligns with a strict, formalist interpretation of nationality, or a more flexible approach, which reflects the functional realities of the investor. While a limited number of cases have directly engaged with customary international law, those that did so illustrated the tension between treaty-based formality and the more functional approach of customary international law in establishing jurisdiction *ratione personae* approaches before tribunals in ICSID and non-ICSID arbitration contexts. Here it is worth mentioning that the presence of multiple jurisdictional frameworks could explain the resulting divergence in approaches. On the one hand, the ICSID Convention contains an explicit bar on claims by dual nationals who also hold the nationality of the respondent state by expressly limiting jurisdiction to natural persons who possess the nationality of a Contracting state *other than* the respondent state and who do not hold the nationality of the respondent State at the time of consent and registration of proceedings.[9] On the other

[9] Article 25(2)(a) of the ICSID Convention specifies that the dispute must occur between a Contracting State and a national of another Contracting State but excluding "any person who on either date also had the nationality of the Contracting State party to the dispute"; Bantekas, supra n. 7, at 292.

hand, tribunals following the UNCITRAL Arbitration Rules in particular those under the aegis of the Permanent Court of Arbitration (PCA) or *ad hoc* arbitration tribunals are free from the jurisdictional limitations contained in the ICSID Convention.[10] As the UNCITRAL Arbitration Rules do not explicitly address the issue of dual nationality, they allow for more flexibility for parties and arbitral tribunals to determine the eligibility of individuals with multiple nationalities on a case-by-case basis, considering additional factors such as the dominant or effective nationality of the individual or the connection between the individual's nationalities and the dispute at hand.[11]

(1) A Formalist Interpretation of Nationality: Strict Textual Interpretation and Reliance on Domestic Status

Under this approach, when determining the classification of dual nationals, tribunals give primacy to the BIT text, which, in turn, refers to the domestic attribution of the status of nationality, that is, they focus on domestic law. This section evaluates the practical implications of formalism in individual cases, therefore focusing on examining how tribunals conceive nationality when assessing investor standing. In line with the concept that nationality is primarily determined by the state that grants it, tribunals that apply a formalist interpretation typically do not give weight to competing factual connections unless the domestic law provided so, for instance, by establishing that the acquisition of the new nationality was subject to the renunciation or invalidation of the previous one.[12]

(a) ICSID Tribunals' Reliance on Formal Nationality Evidence

Firstly, while the ICSID Convention's text does not provide for requirements for proof of nationality, its *travaux préparatoires* indicate the intention to favor the formal approach to nationality, placing the evidentiary presumption in favor of official documentation issued by the state and therefore primarily relying on the domestic laws regulating nationality. The practice of the ICSID has accordingly, consistently upheld the principle that the legal relationship between the Contracting State and its own nationals is a matter for regulation by that state alone and when the tribunals have to assess nationality, they do so on the basis of the domestic laws, with tribunals deferring to the sovereign authority of states. Even if a BIT does not exclude dual nationals from making a claim, the ICSID Convention itself prohibits jurisdiction over those claims, which leads to narrower interpretations of BIT investor definitions for the purposes of establishing what investors can bring a claim, as tribunals must read those in a manner consistent with the Conventions' restrictions. Nonetheless, ICSID tribunals retain discretion to assess the validity of a claimant's nationality in light of domestic and international law.[13]

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10 ibid.

11 D. Karkason, 'Dual Nationality in Arbitration: ICSID vs. UNCITRAL Rules' *Transnational Matters*, published on 10 May 2024, accessed 24 May 2025.

12 A. Mezgravis, 'The Arbitrary Deprivation of Dual Nationality' (2023) 39(4) *Arbitration International* 549-570, at 554 [doi: 10.1093/arbint/aiad044].

13 'Chairman's Report on Issues Raised and Suggestions Made With Respect to the Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States'

Secondly, this formal approach is supported by the treaty-based nature of investment arbitration, as a consequence, ICSID tribunals have consistently adopted a formal and evidence-based approach when determining the nationality of claimants. This was illustrated in the case *Olguín v. Paraguay*, a case which did not involve a claimant holding the nationality of the respondent state at the time of the claim. This is therefore not part of the main analysis objective of this section but serves a framing function by illustrating the ICSID tribunals' approach to establishing an investor's nationality.

The award *Olguín v. Paraguay* (1998) illustrates the ICSID's approach to relevant rules of international law in interpreting nationality issues and reflects the ICSID's general preference for a formal and evidence-based assessment of nationality which is shaped by domestic law and guided by documentary proof.[14] In its assessment, the tribunal determined that: "[w]hat is important in this case in order to determine whether the Claimant has access to the arbitral jurisdiction based on the BIT, is only whether he has Peruvian nationality and if that nationality is effective". The tribunal further held that, it was "satisfied with the effectiveness of his Peruvian nationality to judge that he cannot be excluded from the regime of protection of the BIT".[15] Consequently, it considered sufficient that the claimant held Peruvian nationality under Peruvian law regardless of his ability to exercise full political rights in that country which underscores the distinction between the concept of nationality as a legal status in international law and that found in domestic instruments, with the latter prescribing the duties and obligations attached to it internally.[16]

Additionally, in its analysis, the Tribunal followed the general position of ICSID tribunals in that the principle of effective nationality cannot be invoked where the relevant nationality under domestic law is clear and undisputed to deny an investor of the rights provided by a given BIT.[17] The Tribunal's assessment reaffirms the ICSID Convention's strict requirements regarding nationality to establish jurisdiction and serves to illustrate the tribunal's reluctance to invoke broader customary international law where domestic law nationality determination rules suffice. Moreover, it reflects the broader evidentiary trend in ICSID practice: a formal, documentary-based assessment of nationality for establishing *ratione personae* jurisdiction, which is rooted in domestic

(1964) in International Centre for Settlement of Investment Disputes, *History of the ICSID Convention* (1968) vol II, part I, at 579-580.

14 International Centre for Settlement of Investment Disputes, *supra* n. 13 vol II, part I, 122; S.W Schill, C. Schreuer, and A. Sinclair, 'Article 25' in S. Schill *et al*. (eds), *Schreuer's Commentary on the ICSID Convention* (Cambridge University Press, 2022) 438, at para 1127 ff [doi: 10.1017/9781316516584].

15 *Eudoro Armando Olguín* v. *Republic of Paraguay* (Award) [2001] ICSID Case No ARB/98/5, at para 61.

16 ibid; here, the Tribunal held that "[w]hat is important in this case in order to determine whether the Claimant has access to the arbitral jurisdiction based on the BIT, is only whether he has Peruvian nationality and if that nationality is effective. There is no doubt on this point". On the one hand, nationality in the international law context serves the main purpose of attributing individuals and populations to states, with nationality as the formal link. On the other hand, citizenship is the subject of internal politics and denotes the individual's possession of full political and civil rights within a given state; see P. Weis, *Nationality and statelessness in international law* (Stevens, London, 1956), at ch 1, 4-7.

17 H. Haeri and D. Walker, '"And you are . . .?" Dual Nationals in Investment Treaty Arbitration' 3(2) *BCDR International Arbitration Review* (2016) 153-180, at 175 [doi: 10.54648/BCDR2016024]; M. Palacios La Manna, 'La situación de los inversores doble nacionales y criterios para determinar la nacionalidad efectiva' 2 *Boletín Iberoamericano de Arbitraje y Mediación* (2022) 39-49, at 45.

law and is typically supported by official evidence such as passports, certificates or registration records. This is in line with the preparatory documents which indicate that the ICSID Convention is based on the principle that the legal relationship of nationality between the Contracting States and the investors is a matter for regulation by the state, as part of their *domaine réservé*.[18] This trend can be observed throughout ICSID cases dealing with dual nationality.[19]

A similar approach was taken by the Tribunal in the *Luis García Armas* case, which albeit outside the ICSID Convention arbitration framework, i.e., under the ICSID Additional Facility Rules, nevertheless adheres to the ICSID tribunals' predominant trend toward deference to formal nationality status, as established by domestic, internal rules. In this case, the Tribunal took into account that the investor had registered himself as Venezuelan "national investor" in the SIEX, the agency that regulates and controls foreign investment.[20] In doing so, the Tribunal examined the principle of *ratione voluntatis* and concluded that renunciation of a nationality must be carried out through an express and formal act. It therefore rejected Venezuela's argument that the investor had "implicitly renounced" to their Spanish nationality.[21] Here, it is evident that the Tribunal placed emphasis on objective indicators, such as the registration and the date of registration. This emphasis is further underscored by the language used by the Tribunal, who referred to the claimant as "Spanish national" without entertaining other factors such as the residence or factual links. Notably, the Tribunal, when applying the Vienna Convention on the Law of Treaties (VCLT) interpretation rule, placed more emphasis on the object and purpose of the BIT and therefore also dismissed the applicability of *Nottebohm*'s genuine and effective link, a principle of general international law.[22]

Venezuela additionally put forward that "allowing the domestic investor to raise a claim against their own state would constitute an abuse of the investment arbitration system".[23] However, the Tribunal did not consider this to be a case of abuse of process but rather one of inexistence of *ratione personae* as a result of the terms of the BIT in conformity with the interpretation rules set out by Article 31 of the VCLT: "Sin embargo,

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18 'Chairman's Report on Issues Raised and Suggestions Made With Respect to the Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (1964) in International Centre for Settlement of Investment Disputes, *History of the ICSID Convention* (1968) vol II, part I, 579-580; International Centre for Settlement of Investment Disputes, History of the ICSID Convention (1968) vol II, part I, 122; S.W Schill, C. Schreuer, and A. Sinclair, 'Article 25' in Schill *et al*. *supra* n. 14, 438, at para 1127 ff; see *Nationality Decrees Issued in Tunis and Morocco (Great Britain* v. *France)* (Advisory Opinion) [1923] PCIJ Rep Series B no 4; K. Ziegler, 'Domaine Réservé', *Max Planck Encyclopedia of Public International Law*, published in 2013, accessed 27 February 2025.

19 The tribunals in *Saba Fakes* and *Champion Trading*, while operating under the ICSID system and applying the ICSID Convention, follow this general approach. However, for the purposes of this classification, they are discussed in detail under the second category, to highlight important nuances.

20 *Luis García Armas* v. *The Bolivarian Republic of Venezuela* (Award) [2024] ICSID Case No RB(AF)/16/1, at para 213; A. Pellet, 'Additional Expert Report: Dual or Plural Nationality In a BIT Context' for *Manuel García Armas and others* v. *The Bolivarian Republic of Venezuela* and *Luis García Armas* v. *The Bolivarian Republic of Venezuela*, at para 38.

21 ibid, Luis García Award, at para 224.

22 ibid, at para 212 ff.

23 C. Schreuer, 'Legal Opinion: Questions of Jurisdiction relating to Nationality' (2017) for *Manuel García Armas and others* v. *The Bolivarian Republic of Venezuela* and *Luis García Armas* v. *The Bolivarian Republic of Venezuela*, at para 156 ff.

en el presente caso no estamos ante un mero abuso de derecho sino ante una inexistencia objetiva de jurisdicción *ratione personae* como resultado de la interpretación de las disposiciones pertinentes del TBI, de conformidad con la regla general de interpretación del artículo 31 de la Convención de CVDT".[24] In taking this position, the Tribunal implied that, even if it could establish jurisdiction *ratione personae*, the claimant's acquisition of his Spanish nationality could have still been considered as strategically motivated, which would amount to an abuse of the treaty. The Tribunal thereby reaffirmed that the object and purpose of investment treaties is that they are designed to protect bona fide investments made by foreign investors, and do not allow for the investor to modify their status only to accede to arbitration.

(b) Non-ICSID Tribunals' Reliance on Formal Nationality Evidence

Building on the discussion of ICSID tribunals' reliance on formal nationality evidence, the case *Serafín García Armas* also confirms this approach by affirming the Tribunal's jurisdiction ratione personae over claims brought by Spanish-Venezuelan dual nationals. The Tribunal interpreted the Spain-Venezuela BIT as allowing such claims in the absence of an explicit exclusion, even where the dual national held also the nationality of the host state. In doing so, the Tribunal did not allow to subject the definition to the added condition of the nationality's effectiveness or dominance.[25] This case represents an important instance of tribunal reasoning grounded in the treaty's *lex specialis* nature and displays a formalist approach that largely sidelines customary international law. Even though the outcome was permissive i.e., the Tribunal established jurisdiction ratione personae over dual nationals with the nationality of the respondent state in the absence of bar over dual nationals claims the determination of nationality itself was firmly grounded in a formalist approach.[26]

On its part, Venezuela tried to invoke the customary international law principle of 'effective and dominant' nationality to argue that the claimants could not invoke their Spanish nationality against it under the BIT, because that nationality was merely formalistic, in contrast with their deeper actual ties to Venezuela.[27] The Tribunal however, held that BITs constitute *lex specialis* between the contracting parties and, as the textual interpretation of the provisions does not result in an ambiguous interpretation, they are not "subject to the application of customary international law".[28] As such, the tribunal deemed unnecessary to inquire into the claimants' effective or dominant nationality, accepted the Spanish nationality as sufficient for the purposes of the BIT,[29] and rejected the objection of the respondent state. In doing so, the Tribunal gave decisive weight to

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24 Luis García Award, *supra* n. 20, at para 251-252.

25 This is explained further in Schreuer *supra* n. 23, at para 155.

26 E. Nana Adjei, 'Arbitration Involving Dual Nationals Under Investment Treaties: A New Area Of Conflicting Rulings In International Law' 11(11) *Journal of Law and Sustainable Development* (2023) 1-9, at 3 ff [doi: 10.55908/sdgs.v11i11.1961].

27 C. Trevino, 'Treaty Claims by Dual Nationals: A New Frontier?', *Kluwer Arbitration Blog*, published on 8 October 2015, accessed 29 April 2025.

28 *Serafín García Armas and Karina García Gruber* v. *The Bolivarian Republic of Venezuela* (Decision on Jurisdiction) [2014] PCA Case No 2013-3, at para 158, 159-166, 174-175.

29 ibid, at para 200-206.

the formal criterion of nationality as recognized by domestic law. Thus, even if the claim was brought against Venezuela, a nationality possessed by the claimants, emphasizing the absence of dual nationality bar in Spain-Venezuela BIT, the Tribunal found jurisdiction *ratione personae*. This decision illustrates how tribunals operating outside the ICSID framework may also rely solely on the formal legal status rather than functional or contextual nationality tests when the treaty provides no reference to the effective and dominant test.

(2) Emerging Flexibility: Theoretical Openness to Functionalist Interpretation

Under this approach, tribunals continue to ground their reasoning in the treaty text and formal indicators of nationality, similarly to those following a formalist approach. However, they have also acknowledged the relevance of principles of general international law, without applying them to the case at hand, therefore reflecting a "theoretical openness" to consider the substantial ties of the individual with the state by incorporating the dominant and effective nationality doctrine. Although this interpretative approach does not mark a full shift, it suggests growing willingness to move beyond formalities when determining nationality for the purposes of establishing arbitration jurisdiction and more flexibility and sensitivity to the realities of the dual nationality investors.

Similarly to *Olguín v. Paraguay*, *Micula v. Romania*, a single nationality case, illustrates the ICSID tribunals' approach, which, albeit cautiously suggests a potential openness to functional interpretation in specific contexts.[30] In this case, the claimants submitted certificates of naturalization to prove their Swedish nationality and, by extension, the protection under the relevant BIT as well as the Tribunal's jurisdiction *ratione personae*. The Tribunal accepted these documents as sufficient and affirmed that there "exists a presumption in favor for the validity of a State's conferment of nationality. The threshold to overcome this presumption is high".[31] Although in its reasoning, the Tribunal stressed the relevant role that the BIT pointing to the national Swedish law, this decision is in line with the ICSID's formalist approach, which generally treats certificates as conclusive evidence.[32] In line with the ICSID's formalist approach, the Tribunal assessed the applicable Swedish law, which required three prerequisites for naturalization that were met in this case: the alien "must have been at least 18 years old, he must have lived in Sweeden for at least five years, or three years if married to a Swedish national, and must have led a respectable life". Subsequently, the Tribunal observed that once naturalized, the claimants had no need to demonstrate closer links to Sweden.[33]

Importantly, the Tribunal noted that it would be inappropriate to consider the claimants' nationality to be Swedish for the purpose of the ICSID Convention and the BIT if it were shown that they had obtained it in a manner inconsistent with

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30 The claimants had possessed Romanian nationality in the past but had renounced to it and only possessed Swedish nationality at the relevant times.

31 *Ioan Micula and others* v. *Romania* (Decision on Jurisdiction and Admissibility) [2008] ICSID Case No ARB/05/20 24, at para. 87.

32 Ursula Kriebaum, 'Article 42' in Schill *et al. supra* n. 14, 438, at para 1127.

33 *Micula and others* Award, *supra* n. 31, at para 102.

international law, for instance, through fraud or material error.[34] In this respect, as the respondent state did not submit any evidence to indicate this, the Tribunal considered that the respondent state did not meet the burden of proof to establish grounds for the Tribunal to question the nationality of the claimants.[35] In pointing out the absence of fraud or bad faith of the claimants in acquiring Swedish nationality, the Tribunal noted a major distinction between the present case and the *Nottebohm* case. In this case, Romania had agreed to the claimants' Swedish nationality when they accepted their renunciation of Romanian nationality. This case, while still remaining anchored in the formalist evidentiary framework of the ICSID relying on the domestic classification of the claimants as nationals it can be considered a slight shift from a hardline formalist approach. The Tribunal's willingness to acknowledge the relevance of good faith and the absence of fraud as relevant considerations influencing the assessment of nationality suggests the possibility to take factors, other than official documentation, into account, albeit, in the very narrow situation of fraud or legal error. In this instance, however, the Tribunal did not find any indication that the links of the claimants were of such nature as to warrant the Tribunal's questioning the effectiveness of their Swedish nationality.[36]

Following the ICSID tribunal's still cautious approach but hinting at a limited openness to functional interpretation in certain contexts, the *Saba Fakes* award acknowledges the possibility of interpreting jurisdictional rules beyond a purely formalistic approach but still reinforces the strict wording of Article 25(2)(a) of the ICSID Convention. The Tribunal noted that the article "expressly excludes from the Centre's jurisdiction any natural person who holds the nationality of a Contracting State to the dispute".[37] Moreover, it observed that this jurisdictional bar was the only one envisioned by the drafters of the Convention and that it was not subject to the test of effectiveness of the host state's nationality. Additionally, as the BIT did not leave room as to the question of whether the Parties intended for the effectiveness test to apply, the Tribunal concluded that the doctrine was not applicable in the present case. As a consequence, the effectiveness of the Claimant's Dutch nationality was considered irrelevant for determining the Tribunal's jurisdiction and in its analysis, the Tribunal relied on formal, documentary evidence of nationality. The result is that this decision reaffirmed the primacy of domestic determination of nationality over broader substantive or functional tests to determine jurisdiction *ratione personae* in ICSID arbitration.[38]

In reaching this conclusion, the Tribunal found support in the fact that Mr. Fakes' Dutch nationality is demonstrated by the fact that both of his parents held Dutch nationality as well as his wife and three children. This determination of nationality by the domestic legislation follows the reasoning *ius sanguinis*. And the fact that he holds a Dutch passport and driver's license, all formal and official documents issued by The Netherlands. This was further supported by the fact that he spent a significant part of his childhood and early adulthood in the Netherlands and that he studied there too,

34 ibid, at para 91, 95.
35 ibid, at para 95-96.
36 ibid, at para 104.
37 *Saba Fakes* v. *Republic of Turkey* (Award) [2010] ICSID Case No ARB/07/20, at para 59
38 ibid, at para 79.

so the Tribunal found the links to be genuine and effective.[39] The Tribunal additionally noted that this nationality could not be considered to be acquired involuntarily or to have been acquired out of *convenience*.[40] Here, it is worth noting the Tribunal's mention of the exceptional circumstances in which the claimant could not satisfy the nationality requirements of ta BIT and Article 25(2)(a): when acquiring the disputed nationality involuntarily or by convenience.[41]

Even earlier, in 2003, the Tribunal in *Champion Trading* had followed a similar approach when determining that the claimants had Egyptian nationality, regardless of the weak links they maintained with that country, consequently barring the claims of the dual nationals, as they held the nationality of the respondent state from ICSID arbitration. In its assessment, the Tribunal relied on Egyptian domestic law, which provided that the sons of Egyptian nationals retain nationality for one hundred generations, regardless of where they are born and where they live.[42] In doing so, the Tribunal confirmed the ICSID's Convention formalistic approach to nationality, emphasizing legal status over factual connection. Additionally, this case further reinforces the broader ICSID approach that rejects the applicability of the *Nottebohm* doctrine in the context of ICSID investment arbitration where the Convention provides a clear rule for dual nationals possessing the nationality of the Sate party to the dispute..

In its assessment, the Tribunal acknowledged the concern that the application of *ius sanguinis* principle over multiple generations, as provided by Egyptian domestic law, might raise the question about the general appropriateness of the blanket exclusion in Article 25(2)(a).[43] However, it found that the present case did not give rise to such question and therefore it did not need to be answered.[44] This consideration was nevertheless significant as, in fact, the respondent state in *Saba Fakes* later referred to this judgment when it tried to construe this Tribunal's decision as it "does not in any way exclude the application of the effective nationality test set forth in *Nottebohm* or in *Decision A/18* in general. Rather, it merely concludes that these decisions "find no application in the present case, namely in the presence of dual nationals having the nationality of the Host State (Egypt and the United States) subject to the Article 25(2)(a) exception."[45] Moreover, this case presents one of the envisioned situations later mentioned by the Tribunal in *Saba Fakes* in 2010, where nationality acquired involuntarily *could* or *should* be disregarded.[46]

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39 ibid, at para 80.

40 ibid, at para 77-78; in cases where the nationality was acquired out of convenience, the Tribunal could, in principle, ignore the state's rules on nationality for the purposes of the award on the grounds that the nationality was conferred in the absence of any effective link between the state conferring the nationality and the individual; L.P. MacDonald and R. O'Reilly, 'Investment Treaty Arbitration: Covered Investors' in 'In-Depth: Investment Treaty Arbitration', *Lexology*, published in 2024, accessed 24 May 2025.

41 ibid.

42 R. Wisner and N. Gallus, 'Nationality Requirements in Investor State Arbitration' 5 *Journal of World Investment & Trade* (2004) 927-944, at 929.

43 ibid; *Champion Trading Company, Ameritrade International, Inc* v. *Arab Republic of Egypt* (Decision on Jurisdiction) [2003] ICSID Case No ARB/02/9 16-17.

44 ibid.

45 *Saba Fakes* Award, *supra* n. 37, at para 75.

46 ibid, at para 77-78.

Continuing this approach to carefully balance between formalism and interpretative flexibility, in 2017, the Tribunal of *Bahgat v. Egypt* applying UNCITRAL Rules, firstly recalled the well-established principle that, "as a matter of international law, it is the law of the state whose nationality is claimed that will govern whether an individual is a national of that state". The Tribunal then affirmed its authority to examine issues of nationality for the purposes of international law despite the existence of this general principle, which was concretely reflected in the two BITs relevant for the present case.[47] Crucially, in its award on jurisdiction, the Tribunal recognized that while general international law principles may play a role in the analysis on dual nationality, they do not override treaty-specific provisions. Here, both the Egypt-Finland and Egypt-UAE BITs were silent on the exclusion of dual nationalities.

It is worth noting that the Tribunal acknowledged that, while domestic determinations constitute *prima facie* evidence, they only create a presumption of nationality that may be rebutted.[48] Further, as the Tribunal concluded that "general international law principles concerning the consequences of dual nationality in respect of jurisdiction *ratione personae* do not trump the explicit language of the BITs", it turned to the BIT provisions, which in this case referred to the domestic law.[49] Accordingly, the Tribunal accepted that the claimant's Finnish nationality was correctly determined pursuant to Finnish law by the Finnish Court.[50] Here, although domestic law prevailed the *Bahgat* Tribunal shows greater flexibility when approaching claims by dual nationals, making their acceptance dependent on how the BIT is drafted. As in Egypt-Finland BIT, dual nationality is not expressly barred, the Tribunal successfully established *ratione personae* jurisdiction based on the claimant's Finnish nationality even for a claim against Egypt, the other state of nationality.[51]

(a) Theoretical Openness: a Minimal Departure from Hardline Formalism

The ICSID Tribunals' reasoning is firmly grounded in the formalist evidentiary approach, relying on the domestic classification. However, the cases *Micula v. Romania*, *Saba Fakes*, and *Champion Trading* reflect a marginal, largely theoretical shift from strict formalism that might contribute to prevent abuse of treaty protections. This seems to offer a narrow, conceptual opening to consider factors beyond formal documentation. However this openness is still confined to exceptional circumstances and found no practical effects in neither of the cases: as in each case, the Tribunals ultimately did not find it necessary to question the validity or effectiveness of the nationality as established by the domestic laws. Similarly, under the aegis of the PCA and following UNCITRAL rules, Tribunals have demonstrated a still cautious but more perceptible openness to functionalist approaches in determining the investor's nationality. The *Bahgat* award illustrates how some tribunals navigate a formalist approach yet increasingly sensitive

47 *Mohamed Abdel Raouf Bahgat* v. *Arab Republic of Egypt* (Decision on Jurisdiction) [2017] Case PCA No 2012-7, at para 156-164.
48 ibid, at para 156, 164.
49 ibid, at para 231-232.
50 ibid, at para 156-159, 185 ff.
51 ibid, at para 231-233.

to functionalist reasoning. This approach remains formalist at its core but open to functional interpretations however it calls for a more nuanced assessment of nationality, often importing concepts from general international law, such as effective nationality, especially in dual nationality scenarios. Although this interpretative approach may not yet represent a full doctrinal shift, it signals to emerging openness that, in the context of ICSID arbitration, was considered only theoretical earlier in this section.

In the cases categorized under this section, tribunals generally evaluated nationality through a combination of formal documentation and domestic determinations of nationality of the state whose nationality was at stake. Here, while formal nationality still remains central, some tribunals have entertained functional or factual considerations when establishing their jurisdiction *ratione personae*, especially in the absence of express treaty provisions governing dual nationality. This, albeit theoretical, evidentiary and interpretive flexibility stands in contrast to ICSID's generally formalistic stance and marks the importance of treaty text in determining whether dual nationals can access investment arbitration forums. Even though Tribunals still rely on the traditional, formal conception of nationality grounded in treaty-defined criteria and evidenced through domestic issued legal documentation, similar to the ICSID Convention's approach these decisions reveal openness to functionalist reasoning. This shows more sensitivity to functional realities that investors face, in particularly, in cases involving dual nationals but also considerations of treaty abuse. As such, these cases show the interplay growing tension underlying the formal approach in tribunals' reasoning.

(3) Restrictive Functionalism: When Reliance on Doctrinal Principles Denies Access to Arbitration

Recent developments in international arbitration case law reveal a growing tension with the formalist and functionalist approaches adopted by tribunals to determine the investor's nationality vis-à-vis dual nationals. A functional approach emphasizing factual and contextual ties such as residence, economic and family ties was invoked in the aforementioned awards to support a broader interpretation of the conditions necessary to establish the nationality of the investor and thereby grant access to arbitration. This stands in contrast with the formalist approach, which solely relies on objective legal status as conferred by domestic law. In previous cases, parties had invoked the doctrine of dominant and effective nationality from customary international law to favor a more expansive reading and allow claimants to qualify as investors and therefore grant the access to arbitration.[52] However, a new trend seems to have emerged, in which a functionalist approach is adopted not to broaden the *ratione personae* jurisdiction requirement and consequently extend protection to dual home-host state nationals, but to restrict access to dual nationals.[53] This shift reflects what may be termed as "restrictive functionalism". Tribunals adopting this approach, such as those in *Manuel García Armas* and *Santamarta v. Venezuela*, have interpreted the silence or ambiguity of the investment

[52] P. Mori Bregante, 'The Passports' Game: Chronicle Of A Foretold Death For Dual Nationals' Claims', *Kluwer Arbitration Blog*, published on 20 January 2020, accessed 20 May 2025.

[53] J. García Olmedo, 'Recalibrating The International Investment Regime Through Narrowed Jurisdiction' 69(2) *International and Comparative Law Quarterly* (2020) 301-334, at 311-312 [doi:10.1017/S0020589320000044].

treaty terms as a gateway to incorporate broader doctrines from general international law, notably the dominant and effective nationality test to limit claims by dual nationals with stronger ties with the respondent state.

(a) Doctrinal Principles and the Exclusion of Dual Nationals

In contrast to previous awards, where tribunals considered that rules of international law from the field of diplomatic protection were not applicable to the interpretation of investment treaties, both the *Manuel García Armas* and *Santamarta* Tribunals considered the principle of dominant and effective nationality, borrowed from diplomatic protection, as important in the field of investment arbitration. As a consequence, where the relevant BIT is silent on the issue of dual nationals, tribunals following this approach do not preclude dual nationals but require the dual national claimants to prove that their dominant and effective nationality is not that of the host state; otherwise, their claims will be dismissed based on lack of *ratione personae* jurisdiction.[54] What is particularly significant in this shift is the way in which tribunals have applied the concept despite the fact that neither the domestic law in these cases, which was contemplated as applicable by the BIT, nor the applicable *lex speialis* constituted by the applicable BIT. The domestic law on nationality did not foresee the possibility of disregarding one of the claimant's nationalities, the result reached through the application of dominant and effective nationality.[55] The reliance of the principle of dominant and effective nationality in these cases thus reflects a shift in interpretative approaches, where tribunals incorporate functional criteria, even in the absence of an explicit treaty basis for such assessment. This emerging approach, where functional tools are used to restrict access, is further exemplified in a more recent decision rendered in 2024, *Alicia Grace and others v. Mexico*, which is analyzed in detail in the next section.

In *Manuel García Armas*, the Tribunal took a distinctively restrictive stance toward the dual national claimant seeking protection under the Spain-Venezuela BIT, which departs notably from the broader, more permissive approach, adopted in *Serafín García Armas* which had allowed access to the dual nationals only a few years earlier in a closely related case.[56] In its reasoning, the Tribunal rejected the idea that dual nationals could bring claims against one of their state of nationality without limits.[57] The Tribunal then admitted that although "[l]a cuestión de si una persona posee o no la nacionalidad de un determinado Estado corresponde al derecho doméstico del Estado en cuestión […], los efectos de dicha nacionalidad en el plano internacional es un asunto que compete al derecho internacional".[58] In doing so, the Tribunal reaffirmed the role of the BIT as *lex specialis* while maintaining the relevance of functionalist considerations, as required by general international law.[59]

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54 C. McLachlan, L. Shore, and M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2017) ch 5, at 182-185 [doi: 10.1093/law/9780199676798.001.0001]; Mori Bregante, *supra* n. 52.

55 Mezgravis, *supra* n 12, at 549 567.

56 *Manuel García Armas and others* v. *Bolivarian Republic of Venezuela* (Decision on Jurisdiction) [2019] PCA Case No 2016-08, at para 729.

57 ibid, at para 705.

58 ibid, at para 707.

59 ibid, at para 644-645.

In its assessment of nationality, the Tribunal held that "[l]os Demandantes en ningún momento han alegado que su nacionalidad dominante sea la española. De hecho, simplemente se han limitado a afirmar que su nacionalidad española 'no es puramente formal', y el Tribunal concuerda con ellos en ese sentido". As such, the Tribunal adopted the *Nottebohm* effective nationality test and took into account that Venezuela was the country were the claimants had lived for decades, had established family ties, where they exercised political rights and where the center of their economic activity lied.[60] In the end, the Tribunal concluded that the claimant's possession of Venezuelan nationality barred them from bringing claims against Venezuela under the BIT, as that was their dominant and effective nationality, despite their simultaneous possession of Spanish nationality. As such, the *Manuel García Armas* award takes the reasoning that was only considered theoretical and approached with caution in the previous section and takes into account considerations other than the formal nationality when interpreting the nationality of a dual-national claimant with the result of denying jurisdiction *ratione personae*.

More recently, a different Tribunal rendered a decision in jurisdiction in 2023 for the case *Santamarta v. Venezuela*. The respondent state clarified that the application of the principle does not imply questioning the nationality of the person but determine the effects that can be attributed to the nationality at an international level.[61] Moreover, the *Santamarta* Tribunal rejected the application of broader principles such as sovereign equality and no-responsibility as relevant in determining whether dual nationals are protected by the BIT.[62]

With regard to the principle of dominant and effective nationality, the Tribunal found it to be applicable to the case at hand, as the principle governs the resolution of nationality claims involving dual nationals even in the context of investment arbitration since, although the BIT constitutes a *lex specialis*, it is not a self-contained regime and is therefore subject to other rules of customary international law.[63] Consequently, the Tribunal considered other factors such as habitual residence, center of personal, family, and social life, or the fact that he exercised full political rights in Venezuela. Interestingly, these were not considered relevant for dominant and effective nationality test.[64] However the Tribunal assessed the claimant's center of economic interests, i.e., precisely the fact that he had his investment in the territory of Venezuela, one of the states of his nationalities, which ultimately determined that his dominant and effective nationality was Venezuela. Despite, the claimant's own declaration regarding his close links with Spain and concluded that the ties with Spain are insufficient to establish Spanish nationality as dominant, therefore deciding that the claimant's dominant nationality was Venezuelan, therefore excluding him from the protection of the BIT.[65]

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60 ibid, at para 734-737.

61 *Raimundo J Santamarta Devis* v. *Bolivarian Republic of Venezuela* (Award on Jurisdiction *Ratione Personae*) [2023] PCA Case No 2020-56, at para 247.

62 ibid, at para 458-459; 464-465.

63 J. Torrealba and A. Gallotti, 'A Never-ending Story? Dual Nationals in Investment Arbitration: A Commentary on Santamarta v. Venezuela', *Kluwer Arbitration Blog*, published on 29 November 2023, accessed 29 April 2025.

64 ibid; *Manuel García Armas* Award, *supra* n. 56, at para 505.

65 ibid, at para 503-518, emphasis on 510-511.

(C) CASE STUDY: ALICIA GRACE AND OTHERS V. MEXICO

This section brings attention to a case study, an award delivered in August 2024, to assess whether and how the Tribunal of *Alicia Grace and others v. Mexico* confirms, challenges, or departs from existing approaches to dual nationality in investment arbitration and what this means for the evolving treatment of dual nationals in investment arbitration. In other words, this award is used as a representative case study to test the classification of interpretative approaches developed in Section (B). This is a particularly significant case, as it directly engages with the interpretation and application of dual nationality rules in international investment arbitration, within the framework of the ICSID Convention and interpreting the NAFTA, and deals with its intersection with treaty interpretation principles and customary international law. Importantly, this case serves as a bridge between doctrinal classification, explained in the previous section, and normative stakes, which will be explored in the Section (D), offering a detailed practical example of evolving doctrine and jurisdictional reasoning.

This section gives particular attention to the tribunal's interpretative method and how this shapes the outcome of its analysis. This section, after giving a brief background and context, offers both doctrinal insight, i.e., a recent application of the functional but restrictive approach, and an illustration of the broader legal and policy dilemmas surrounding *ratione personae* jurisdiction in the presence of dual nationality. Although this award is relatively recent and temporally close to other decisions within the "restrictive functionalism" category, i.e., *Manuel García Armas* and *Santamarta*, it offers a clear and deliberate application of functional reasoning that ultimately narrows jurisdiction *ratione personae* and consequently restricts access to investor-state arbitration, therefore reflecting the third trend identified in this study.

(1) Background and context of the dispute

In *Alicia Grace and Others v. Mexico*, a group of U.S. investors brought claims under the North American Free Trade Agreement (NAFTA)[66] against Mexico, which allegedly caused substantial losses caused through government actions to their oil-related investments. The case involved 27 investors including two Mexican U.S. dual citizens who collectively held 43% holdings of Integradora Oro Negro, a Mexican company operating offshore platforms via Singaporean subsidiaries contracted to provide services to Mexico's state-owned oil company, PEMEX.[67] In this analysis, only the nationality issues arising in relation to two claimants, Mr. Carlos Williamson-Nasi and Mr. José Antonio Cañedo White, two natural persons, will be discussed. In relation to these two claimants, Mexico objected to the jurisdiction *ratione personae* on the basis that the claimants' dominant and effective nationality being Mexican precluded them from bringing a claim against that

[66] North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (NAFTA), now replaced by the United States, Mexico and Canada Agreement (UMSCA).

[67] V. Dritsa, 'Tribunal in oil platform dispute applies dominant and effective nationality test to conclude that claimants lacked standing for reflective losses claims under NAFTA', *Investment Treaty News*, published on 27 January 2025, accessed 31 May 2025.

state.[68]With regard to the procedural framework, the decision, although formally titled "award", it deals exclusively with jurisdictional issues and the case was administered under UNCITRAL Arbitration Rules by the ICSID, therefore the exclusionary rule contained in Article 25(2)(a) of the ICSID Convention for dual nationals bringing claims against their own state does not apply. Here, it is worth noting that Mexico is not a party to the ICSID Convention, therefore NAFTA cases involving Mexico proceeded either under the Additional Facility Rules or the UNCITRAL Rules.[69] The absence of a textual prohibition of dual nationals, similar to the case of *Luis García Armas* allows the tribunals more flexibility when interpreting nationality issues. For this reason, a more functionalist approach, such as that seen in *Manuel García Armas* and *Santamarta*, which relies on customary international law borrowed from diplomatic protection, concretely the dominant and effective nationality doctrine.

Mexico's jurisdictional objection raised to the Tribunal's jurisdiction *ratione personae* was in relation to Messrs. Williamson-Nasi and Cañedo White and in relation to requirements in NAFTA's Articles 1116 and 1117.[70] The respondent state argues that Messrs. Williamson-Nasi and Cañedo White are Mexican nationals, for which reason they would not qualify as protected investors under the terms of the NAFTA.[71] Moreover, the respondent state argued that, as nothing in NAFTA provided that dual nationals (or permanent residents)[72] of two NAFTA Contracting States should be permitted to bring claim against either party, the rule of customary international law that a national may not bring claims at the international level against his or her own state, i.e., non-responsibility, should prevail.[73] Furthermore, Mexico contended that, even if claims by dual nationals were, in principle, permitted under the NAFTA, arbitral tribunals should apply the well-established customary rule of dominant and effective nationality.[74] On the other hand, the two claimants contended that, in the absence of a textual bar, they should be allowed to proceed and they pointed out their deliberate choice to submit the claim under the UNCITRAL Rules. Since Article 1120 of the NAFTA provided the option to initiate proceedings under either the ICSID Convention, the ICSID Additional Facility Rules, or UNCITRAL Rules, the claimants argued that their choice of UNCITRAL Rules excludes any potential restriction on dual nationality arising out of the ICSID regime.[75]

From the perspective of the treaty framework, the context of NAFTA's Chapter XI is critical to understand the scope of investor protection and access to arbitration. Under Chapter XI of NAFTA, investors had a direct right of access to various arbitration

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68 *Alicia Grace and others* v. *Mexico* (Final Award) [2024] ICSID Case No UNCT/18/4, at para 240, 445 ff.

69 D.A.R. Williams, 'Jurisdiction and Admissibility' in P. Muchlinski, F. Ortino, and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) ch 22, at 907. [doi: 10.1093/oxfordhb/9780199231386.001.0001].

70 *Alicia Grace and others* Award, *supra* n. 68, at para 435.

71 ibid, at para 455.

72 Article 201 of the NAFTA; ibid, while Mr. Williamson-Nasi held both U.S. and Mexican nationality (at para 479), Mr. Cañedo White was a Mexican citizen and a permanent resident of the U.S., which, for the purposes of the arbitration under NAFTA, was analogous to that of a dual national holding both Mexican and U.S. citizenship (at para 459).

73 *Alicia Grace and others* Award, *supra* n. 68, at para 241.

74 ibid, at para 40-42, 242.

75 ibid, at para 175.

rules the ICSID Convention, the ICSID Additional Facility Rules, and the UNCITRAL Rules [76] which could be invoked against the state parties for alleged breaches of the treaty. Specifically, Article 1101 of NAFTA defines the scope of Chapter XI and provides:

> "1. This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party existing at the date of entry into force of this Agreement as well as to investments made or acquired thereafter by such investors; and (c) with respect to Article 1106 [Performance Requirements], all investments in the territory of the Party existing at the date of entry into force of this Agreement as well as to investments made or acquired thereafter".

Additionally, Article 1116 on the entitlement of an investor to bring claims on their own behalf provides that: "[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation […]". While Article 1117 permits the investor to bring a claim on behalf of the enterprise that they own or control. These provisions delineate both the substantive scope and jurisdictional threshold for arbitration however they fail to address interpretative questions where dual nationals are concerned, regarding who qualifies as an "investor of another party" in the absence of explicit exclusionary language.[77]

(2) The Tribunal's Analysis on Jurisdiction

This section analyzes how the Tribunal in *Alicia Grace v. Mexico* addressed jurisdiction *ratione personae* with particular focus on the issue of dual nationality and the interpretative approach adopted in its reasoning. The key question arises: *can the dual nationals bring a claim against one of their own states of nationality under NAFTA?* When evaluating the jurisdictional objections raised by the respondent state on dual nationality, the Tribunal first considered whether the claimants qualified as protected investors under the NAFTA and consequently whether they could bring claims on their own behalf under Article 1116 of NAFTA or on behalf of an enterprise under Article 1117.[78] Unlike some investment treaties which explicitly address investor nationality for arbitration eligibility, NAFTA was silent on the issue. This silence gave rise to ambiguity which the Tribunal had to address to determine whether, in the absence of a textual prohibition, customary international law or other interpretative principles might preclude such a claim.[79] As such, the Tribunal, being aware of the broad terms of the NAFTA's definitions of investors and protected investments, conducted its jurisdictional analysis by taking into account principles from international law as interpretative principles as interpretative tools to address the treaty's silence.[80]

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76 Article 1120 of NAFTA.

77 Williams, *supra* n. 69, ch 22, at 908-909.

78 *Alicia Grace and others* Award, *supra* n. 68, at para 440, 446.

79 D. Charlotin, 'Analysis: UNCITRAL tribunal hearing oil rig dispute with Mexico adopts dominant and effective nationality test, and finds that claimants cannot pursue reflective losses under NAFTA Article 1116', *Investment Arbitration Reporter*, published on 19 September 2024, accessed 10 June 2025.

80 *Alicia Grace and others* Award, *supra* n. 68, at para 436.

(a) The Role of CIL in Shaping or Limiting the Definition of Nationality

When addressing the issue of dual nationality, the Tribunal of *Alicia Grace* first acknowledged that NAFTA's Article 1120 provides a deliberate choice to investors allowing them to submit their claims under the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Rules. By choosing arbitration proceedings administered by ICSID but under non-ICSID rules like UNCITRAL, the bar of ICSID Convention Article 25(2)(a) for dual nationals bringing claims against their own state, as it is specific to ICSID Convention arbitrations, would not apply. In this regard, while the UNCITRAL Rules do not contain any restriction on claims submitted by dual nationals, which stands in contrast to the approach of the ICSID Convention, the Tribunal was cautious not to read such silence as dispositive. Firstly, it noted that the UNCITRAL Rules were adopted in the context of international commercial arbitration, which could potentially explain why it did not address matters pertaining to dual nationality.[81]

Article 1101(1) of the treaty establishes the scope of application of the treaty by defining who qualifies as an "investor", which extends to "(a) investors of another Party" and "(b) investments of investors of another Party in the territory of the Party", which suggests "diversity of nationality" between the investor and the respondent state, NAFTA recognizes claims of foreign investors only and does not allow claims against a state by its own nationals.[82] Thus, while the NAFTA did not expressly address dual nationality in its definition of an investor, nationality remains central to determine its jurisdictional framework since the treaty itself, along with the rules of international law, govern the resolution of disputes brought under Article 1116 or 1117.[83] Within this framework, the Tribunal had to consider how to interpret this issue in light of the VCLT rules, to which the NAFTA was subject and which are binding on investment tribunals.[84] As such, the Tribunal relied on Article 31(3)(c) of the VCLT which included principles of general international law and, as such, incorporated the doctrine of dominant and effective nationality.[85]

The Tribunal observed that the Non-Disputing Parties shared the view that "a dual national may bring a claim under the NAFTA to the extent that such a claim is presented against a NAFTA Party other than that of their dominant and effective nationality".[86] It further considered the relevance of subsequent practice in related cases,[87] which generally requires that the claimant does not hold the state's nationality. Here, it is

81 ibid, at para 468.

82 ibid, at para 469; C. Vijayvergia, 'Dual Nationality of a Private Investor in Investment Treaty Arbitration: A Potential Barrier to the Exercise of Jurisdiction Ratione Personae?' 36(1) *ICSID Review-Foreign Investment Law Journal* (2021) 150-170, at 157-158 [doi: 10.1093/icsidreview/siaa054].

83 Y. Banifatemi, 'The law applicable in Investment Treaty Arbitration' in K. Yannaca-Small (ed), *Arbitration under International Investment Agreements A Guide to the Key Issues* (Oxford University Press, 2010), at ch 9, 204 [doi: 10.1093/law/9780198758082.001.0001].

84 *Alicia Grace and others* Award, *supra* n. 68, at para 430-433, 471.

85 ibid; V. Dritsa, 'Tribunal in oil platform dispute applies dominant and effective nationality test to conclude that claimants lacked standing for reflective losses claims under NAFTA', *Investment Treaty News*, published on 27 January 2025, accessed 31 May 2025.

86 *Alicia Grace and others* Award, *supra* n. 68, at para 471.

87 Following Article 31(3)(b) of the VCLT.

worth noting that the practice of tribunals' exercise of jurisdiction *ratione personae* from disputes arising out of the NAFTA was primarily developed through cases pertaining to claims of corporate entities. In that context, tribunals have held that the aim of the NAFTA is to protect foreign investors from the host state's actions and not to provide extra privileges to that state's own nationals.[88] For instance, in *Waste Management v. Mexico*, the arbitral tribunal rejected arguments that implied that the NAFTA did not protect investments held indirectly through a national of a third state, i.e., it found that it was impermissible to imply additional requirements not provided, either explicitly or implicitly, in the treaty's text.[89] Although, the application of the dominant and effective nationality of an investor in cases involving natural persons remains unsettled in the context of international arbitration of disputes arising out of the NAFTA, tribunals have generally agreed that a dual national would not be allowed to raise claims against one of the states of its nationality.[90]

Since *Alicia Grace* involved natural persons instead of legal persons, the Tribunal determined whether dual nationals could bring a claim against one of their states of nationality under NAFTA in light of the dominant and effective nationality doctrine. In this context, the Tribunal held that, as the NAFTA parties expressed agreement regarding the appropriateness of the dominant and effective nationality as a test to address matters of dual nationality, a standard that has also gained traction in arbitral practice.[91] To support its reasoning, the Tribunal considered conflicting precedents to address this "controversial and delicate" matter, such as *Manuel García Armas* and *Serafín García Armas*.[92] Therefore, contrary to what the claimants argued that in the absence of an explicit prohibition on claims by dual nationals in NAFTA or the UNCITRAL Rules, the Tribunal could not infer additional jurisdiction restrictions, the Tribunal opted for a more nuanced approach, i.e., that the "dual nationals [could] bring investment claims as long as they prove that their dominant and effective nationality is different from that of the Respondent State".[93] Accordingly, when addressing the claimants' standing, the Tribunal required that their dominant and effective nationality must be different from that of Mexico and that they had to prove that their dominant and effective nationality was that of the U.S.[94]

The Tribunal therefore took a nuanced functional approach to interpret nationality, moving beyond a purely formalistic approach and taking into account the claimants' connections to the relevant states by considering a range of factors indicative of their genuine connection with Mexico. These included the claimants' personal and family ties, continued residence, and the center of gravity of their economic affairs. On these bases, the Tribunal found that both claimants showed deeper, more substantial ties with Mexico than those entertained with the U.S. Consequently, the Tribunal held that it lacked jurisdiction *ratione personae* to hear the claims brought by these two claimants, as their

88 Vijayvergia, *supra* n. 82, at 157-158.
89 Schreuer *supra* n. 23, at para 103
90 Vijayvergia, *supra* n. 82, at 157-158.
91 *Alicia Grace and others* Award, *supra* n. 68, at para 471-473.
92 ibid, at para 463-465; V. Dritsa, 'Tribunal in oil platform dispute applies dominant and effective nationality test to conclude that claimants lacked standing for reflective losses claims under NAFTA', *Investment Treaty News*, published on 27 January 2025, accessed 31 May 2025.
93 *Alicia Grace and others* Award, *supra* n. 68, at para 467, 475.
94 ibid.

effective and dominant nationality was that of the respondent state.[95] In reaching this conclusion, the Tribunal clarified that it did so, not based on abstract and generalizable precedent, but rather as a matter of the NAFTA provisions interpretation in light of the VCLT, and in coordination with the UNCITRAL Rules.[96]

(3) Takeaway: Broader Implications of Alicia Grace and Others for Dual Nationals in Investment Arbitration

This section examines the doctrinal and practical implications of *Alicia Grace and Others v. Mexico* by focusing on the Tribunal's interpretative approach to determine its place within the typology developed in this study. The decision highlights the challenges that dual nationality poses to the investment arbitration framework, particularly in the absence of specific treaty provisions on claims by dual nationals. In this light, the tribunals must navigate the silence with a strict formalist approach, broader functional considerations or a mix of both. As such, *Alicia Grace* illustrates how these interpretative tensions continue to evolve in arbitral practice, which Section (D) will explore in more abstract and normative terms.

(a) Doctrinal significance of the case and placement within interpretative categories

The *Alicia Grace* award illustrates the Tribunal's nuanced assessment of nationality requirements in the context of a claim brought by a dual nationality, as it did not consider formal criteria sufficient and required with more substantial factors to determine which nationality should prevail for the purposes of arbitration. The Tribunal did not rely solely on the formal status of Mr. Williamson-Nasi who held both U.S. and Mexican nationality, according to which it could have potentially established jurisdiction merely on the basis of the possession of U.S. nationality or the equivalent (under the NAFTA) permanent residence status.[97] However, the Tribunal expressed concern over potentially strategic distancing from his Mexican nationality based on "pragmatic considerations" given his recent relocation to the U.S. a year after the arbitration was initiated and the lack of evidence demonstrating that his investment portfolio was oriented toward non-Mexican investments.[98] For Mr. Cañedo White, on the other hand, who was a permanent resident of the U.S. alongside his nationality in Mexico, which, for the purposes of the arbitration under NAFTA, was a situation analogous to that of a dual national holding both Mexican and U.S. citizenship.[99] In this light, the Tribunal noted how recent his move to the U.S. was, which it considered as insufficient to show detachment from his Mexican ties. This indicates some caution from the Tribunal in accepting a purely formalistic approach and its preference for a fact-based, functional assessment of the claimants' genuine link to the respondent state. The tribunal found further support in the fact that, by extending its protection to permanent residents, NAFTA reflects the idea of "capturing factual realities

95 ibid, at para 479 ff, 492 ff.
96 ibid, at para 463.
97 ibid, at para 479.
98 ibid, at para 485-487.
99 ibid, at para 459.

beyond formal titles. Hence facts must take precedence over formal qualifications".[100] This reasoning ultimately led the Tribunal to apply the dominant and effective test.

For these reasons, the *Alicia Grace* award can be understood as an instance of restrictive functionalism within the typology developed in this study. It does not fall within the formalist category, as the Tribunal did not rely solely on domestic definitions but rather took that as a starting point and required a further substantial analysis of the claimants' personal and economic links, which ultimately lead to the exclusion of the dual nationals from the tribunal's jurisdiction. Moreover, the award directly engaged with the doctrine of dominant and effective nationality, therefore not falling within the category of theoretical openness. Instead, the Tribunal's reasoning reflects a restrictive functionalism approach, where the Tribunal assessed the genuine links of the claimants with the respondent state, which ultimately led to the exclusion of the claimants from the Tribunal's jurisdiction. This approach emphasizes substance over form by rejecting a strict reliance on domestic nationality definitions and embracing international law interpretative tools. Concretely, the Tribunal relied on the VCLT treaty interpretation rules, particularly 31(3)(c), which included rules and principles of general international law and, as such, incorporated the doctrine of dominant and effective nationality.[101] As such, the Tribunal's reasoning shows a preference for factual realities and contextual assessments of nationality over formal titles.[102] Although the Tribunal applied these international law standards through the VCLT rules rather than asserting them as self-standing rules of customary law, through its own general nature, this method suggests that the tribunal was willing to apply functional and expansive nationality interpretations to protect the system of international arbitration, as it prevents domestic investors from recharacterizing themselves as foreign claimants.[103]

This award is also consistent with the *Manuel García Armas* and *Santamarta* approaches, where the respective tribunals emphasized the international based definition of "investor" over purely formal domestic labels where the applicable treaty gives rise to ambiguities on nationality interpretation. By affirming this approach, the Tribunal in *Alicia Grace* contribute to the body of awards that reflect this doctrinal evolution. This also shows deeper legitimacy concerns tied to dual nationality and access to ISDS, which will be discussed in detail in the following section from a broader normative and systemic perspective.[104]

(b) Broader Implications and Policy Considerations

The *Alicia Grace* award not only reflects a specific doctrinal approach to dual nationality, it also brings to light several broader policy considerations that underpin investment

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100 D. Charlotin, 'Analysis: UNCITRAL tribunal hearing oil rig dispute with Mexico adopts dominant and effective nationality test, and finds that claimants cannot pursue reflective losses under NAFTA Article 1116', *Investment Arbitration Reporter*, published on 19 September 2024, accessed 10 June 2025; ibid, at para 476.

101 ibid, at para 474.

102 ibid, at para 476.

103 ibid, at para 463.

104 G. Minervini and A.F. Sánchez Miguel Castro, 'Drawing Jurisdictional Limits: Reflective Loss and Dual Nationality in the Alicia Grace v. Mexico Award', *Kluwer Arbitration Blog*, published on 28 August 2025, accessed 8 September 2025.

arbitration. While the Tribunal's reasoning remained doctrinal and did not explicitly include normative or systemic concerns in its reasoning, the case raises important normative questions about the boundaries of investor protection. The Tribunal's reasoning suggests an underlying intention to protect the integrity of the ISDS regime and curb treaty shopping by discouraging both treaty shopping and the strategic structuring of nationality to secure access to arbitration. While these policy considerations are only briefly outlined here, they frame the broader debate on how dual nationality is treated under evolving arbitral case law, which will be explored further in the next section.

A central issue in this context is the doctrine of non-responsibility, that is, the principle that a state cannot be held internationally accountable to its own nationals. Although this principle is not absolute and exceptions exist in various fields of international law,[105] in the context of investment arbitration, I allowing dual nationals to bring claims against one of their states of nationality risks undermining this principle by eroding the distinction between domestic and international legal remedies and may result in affording more procedural advantages to nationals of a state when compared to foreign investors. By upholding Mexico's objection, the Tribunal acknowledged the host states' sovereign right not to be sued by its own nationals, even when presented in a dual-national capacity. This further upholds the reciprocal nature of investment remedies, which, as argued by some scholars, is undermined by treaty shopping, as it "undermines principles of good faith and reciprocity, which are aimed to prevent the misuse of the law".[106] In practice, many states have raised concerns that such practices abuse their consent and violates the principle of reciprocity.[107] Accordingly, the Tribunal in *Alicia Grace* declined to extend protection to individuals who, in law or in fact, maintained ties with the respondent state, thus preserving the host state's sovereign prerogatives and aligning with the principle of non-responsibility, a consideration that carries particular weight in procedural contexts. At the same time, this reasoning also reveals the tension in the current system, where similar claims can often proceed when structured through foreign-incorporated entities.[108] This award nevertheless reflects an effort to uphold the legitimacy and coherence of the investment arbitration regime in the context of dual nationality of natural persons.

The Tribunal's approach furthermore can be reflective of the broader consideration of the procedural purpose of ensuring that investment arbitration is not misused i.e., allowing an investor from one state to bring an arbitral claim against the other state,

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[105] Limitations of this principle exist notably in the field of human rights, where the state can be held responsible towards its own nationals; G. Gaja, 'The Position of Individuals in International Law: An ILC Perspective' 21(1) *European Journal of International Law* (2010) 11-14, at 13 [doi: 10.1093/ejil/chq002].

[106] K. Soloveva, 'Instrumentalising Nationality of Natural Persons: Legitimate Strategic Planning versus Abuse of Procedural Rights' 39(3) *ICSID Review – Foreign Investment Law Journal* (2025) 621-642, at 636 [doi: 10.1093/icsidreview/siae043]; for more information, see A. Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' 56(2) *Harvard International Law Journal* (2015) 383-417.

[107] J. Lee, 'Resolving Concerns of Treaty Shopping in International Investment Arbitration' 6(2) *Journal of International Dispute Settlement* (2015) 355-379, at 357-360 [doi: 10.1093/jnlids/idv011].

[108] Although the restructuring of legal entities to obtain foreign nationality is not acceptable in all circumstances to establish jurisdiction, this highlights the inconsistency in how nationality is treated differently between individuals and legal entities, which further raises questions about coherence and legitimacy in the investment arbitration regime; McLachlan, Shore, and Weiniger, *supra* n. 54, at 189, 204 ff; see Casas, *supra* n. 6, at 66.

the host State they do not permit investors to sue their own home state. Concretely, as mentioned earlier, the aim of the NAFTA the applicable treaty to this dispute is to protect foreign investors from the host state's actions but it does not intend to provide extra privileges to that state's own nationals.[109] Although the Tribunal did not specify this in its analysis, the Tribunal's avoidance of this situation could indicate sensitivity towards the concerns that underpin the formalist approach, i.e., the potential abuse of nationality through the structuring of investments to fabricate a foreign status. Allowing the claimants to bring a claim against one of their states of nationality, Mexico, have breached this principle and could have given rise to an alleged/disputed instance of abuse of process. The Tribunal thus maintains the balance struck by NAFTA: that is, offering protections to foreign investors while avoiding the risk of allowing nationals to disguise themselves as foreign claimants. Although the doctrine of abuse of process has been mostly considered relevant and developed in the context of corporate investors [110] who fall outside the scope of this study it provides a useful point of comparison. In several cases involving corporate investors, tribunals acknowledged that where restructuring of the legal entities was made strategically and in bad faith e.g., it took place after the dispute arose and for the purpose of taking advantage of access to arbitration such actions may amount to potential abuse of rights and thus serve as grounds for declining jurisdiction.[111] Although the Tribunal in *Alicia Grace* did not reflect on the abuse of process principle in such a way, it seems to present a comparable concern that underpins the Tribunal's reasoning, specifically noting the weak links of the claimants to their formal nationality or permanent residence status to the U.S and therefore suggesting a functional assessment aimed at preventing opportunistic or insubstantial claims.[112]

Fundamentally, this case invites to reflect on how tribunals balance the rights of investors against the interest of state sovereignty of the respondent in cases involving dual nationals. The Tribunal's approach in *Alicia Grace* seems to be deeply rooted in a restrictive approach, which ultimately aims at preserving the legitimacy of the arbitration system and avoid risk of treaty shopping or investment migration schemes, which could undermine the former. As a result, *Alicia Grace* confirms a trend of convergence across ICSID and non-ICSID toward restricting access to arbitration to dual nationals by using expansive, functionalist constructions of "nationality" in their reasoning. This seems to be in line with recent attempts at curbing treaty shopping, whereby tribunals introduce restrictions to narrow their *ratione personae* jurisdictions. That is, to avoid taking an overly permissive approach to nationality when interpreting broad treaty definitions of "investors" and thus limiting the number of unqualified investors.[113] Moreover, by

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109 Vijayvergia, *supra* n. 82, at 157-158.

110 For an in-depth discussion on nationality planning of corporations or corporate restructuring, J.D. Branson, 'The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration' 38(2) *Journal of International Arbitration* (2021) 187-214 [doi: 10.54648/JOIA2021011]; E. Gaillard, 'Abuse of Process in International Arbitration' 32(1) *ICSID Review* (2017) 17-37, at 32 [doi: 10.1093/icsidreview/siw036].

111 McLachlan, Shore, and Weiniger, *supra* n. 54, at 204 ff; C. Martinez Lopez, 'Corruption, Fraud and Abuse of Process in Investment Treaty Arbitration', *Lexology*, published on 27 April 2020, accessed 3 June 2025..

112 *Alicia Grace and others* Award, *supra* n. 68, at para 479 ff, 492 ff.

113 García Olmedo, *supra* n. 53, at 334.

applying the functionalist concept of nationality, the Tribunal employs a teleological interpretation with the aim to set limits beyond the treaty, which ultimately seeks to preserve the legitimacy of the system while ensuring investor protection by protecting *bona fide* foreign investors while discouraging misuse of nationality claims.[114]

(D) NORMATIVE IMPLICATIONS OF DUAL NATIONALITY IN ARBITRAL PRACTICE

This section moves beyond the individual case analysis to examine how the tensions surrounding dual nationality issues manifest in arbitral tribunals' reasoning and what this reveals about the evolving framework of international investment arbitration. Specifically, it considers the practical implications of the interpretative approaches adopted by arbitral tribunals, that is, the implications of whether they lean toward expanding investor protection or whether they adopt a more restrictive stance to curb potential abuse of treaty protections by dual national. This section considers why each tribunal has opted for the interpretative approaches introduced in Section (B) when handling with the absence of explicit treaty provisions addressing claims by dual nationals. It argues that the interpretative choices are not purely doctrinal but that they also reflect underlying policy and normative concerns present in the field of international investment law. First, this section reconsiders the underlying purpose of dual nationality exclusion and their role in delimiting access to investment arbitration. Then, it explores the normative tensions between investor protection and abuse prevention as well as broader implications for fairness and sovereign autonomy. Finally, it evaluates whether tribunals' approaches are aligned with the underlying objectives of investment treaties by considering their intrinsic policy objectives. Ultimately, this article demonstrates how tribunals' decisions in the face of treaty silence reveal structural tensions in investment law signal an emerging trend toward greater normative coherence when assessing *ratione personae* jurisdiction for dual nationality claims.

(1) Rethinking the Function of Dual Nationality Rules for *Ratione Personae* Jurisdiction

Where treaty rules do not contain clear rules on dual nationality, tribunals are tasked with interpreting ambiguous or silent provisions. This section examines how tribunals' choice to navigate such interpretative gaps relying on different legal sources, reveals a functional understanding of investor status. By analyzing the practical outcomes that the choice of legal sources render, this discussion determines whether the rules expand or limit access to arbitration to explain the underlying role of nationality rules in practice. This highlights the functional role of dual nationality rules as a jurisdictional safeguard to limit access here, nationality does not serve merely as a legal status but also as a jurisdictional threshold. In practice, both ICSID and non-ICSID tribunals tend to exclude dual nationals who also hold the nationality of the respondent state.

[114] Lee, *supra* n. 107, at 374.

Whether diplomatic protection principles influence investment treaty arbitration, that is, whether they are "relevant" rules of international law for this field, remains contested; while these principles retain some relevance, it is often characterized as limited.[115] Although the interpretation of investment treaties is partly influenced by the rules on dual nationals developed in diplomatic protection and elaborated through the work of the ILC,[116] particularly, in relation to jurisdiction *ratione personae*, a number of investment tribunals have rejected the application of rules relating to diplomatic protection where special agreements are in place.[117] In particular, those tribunals have argued that the principle's application in the field of investment arbitration is flawed as it is merely based on analogy and it risks conflating two conceptually different domains.[118] Despite these doctrinal concerns, the rationale underpinning the effective nationality doctrine has gained relevance in practice due to the increase of international investment and economic activity, which calls for a departure from the traditional rules regarding nationality and dual nationality and the adoption of a framework that adapts to the demands of the new economic realities.[119] From a treaty interpretation perspective, if the dominant and effective nationality doctrine is considered an established part of general international law, it constitutes one of the "relevant rules of international law" referred to by the ICSID Convention and the VCLT interpretation rule. Therefore, the principle of effective nationality whether a general principle of international law or customary law being part of general international law, it is considered a "relevant rule of international law" within the meaning of the VCLT's principles of treaty interpretation for the purposes of ICSID and BITs. However this would not make the principle dispositive, as it would still have to be used and balanced against more weighty principles of interpretation.[120] For instance, where specific provisions of the BIT exist functioning as *lex specialis* they would trump the general principle and take precedence.

Under the ICSID context, Article 25(2)(a) of the ICSID Convention sets a clear jurisdictional bar excluding dual nationals who also possess the nationality of the host or respondent state.[121] In this light, a strict and treaty-based approach has prevailed when assessing dual nationality for jurisdiction purposes. Where the underlying BIT which defines the nationality of the investor is clear, tribunals do not reach for broader norms to supplement the text, which they consider to constitute a strict *lex specialis*. As such, arbitration tribunals established under the ICSID Convention have generally departed from the genuine link principle to give primacy to the domestic legal rules

115 McLachlan, Shore, and Weiniger, *supra* n. 54, at 5, 163-164; Rodrigo Polanco, *The Return of the Home State to Investor-State Disputes Bringing Back Diplomatic Protection?* (CUP 2019) ch 2, 41.

116 Special Rapporteur Roberto Córdova (ILC), 'Report on Multiple Nationality' in *Yearbook of the International Law Commission*, vol II (1954) UN Doc A/CN.4/83, para 16; Draft Articles on Diplomatic Protection 34-35.

117 McLachlan, Shore, and Weiniger, *supra* n. 54, at 166-167.

118 S. Michalopoulos and E. Hicks, 'Dual Nationality Revisited: a Modern Approach to Dual Nationals in Non-ICSID Arbitrations' 35(2) *Arbitration International* (2019) 121-148, 144.

119 ibid 131.

120 ibid; Andreas Kulick and Panos Merkouris, 'Article 31 of the VCLT: General rule of interpretation: General rule of interpretation' 136-140 in Andreas Kulick and Michael Waibel (eds), *General International Law in International Investment Law: A Commentary* (OUP 2024).

121 International Centre for Settlement of Investment Disputes, *History of the ICSID Convention* (1968) vol II, part I, at 162-164; Palacios La Manna, *supra* n. 17, at 43.

governing nationality.[122] In this context, the principle of a genuine link has therefore been somewhat diluted, where the focus is on ensuring that foreign investors can access the protections offered by their home state under investment treaties, even when their connections to that state are minimal and limited to formal nationality.[123] Tribunals in the ICSID context have generally shown limited interest in assessing substantive bonds following *Nottebohm*, often accepting claims based on formal nationality even when the claimant lacks a strong connection to the state in question, reinforcing the focus on the legal framework over substantive ties.[124] This trend appears to echo the ILC's position on prioritizing the domestic legal framework over substantive connections in the context of single nationality. On the other hand, other investment arbitration tribunals have been more willing to set aside states' domestic rules on nationality for the purpose of the award on the grounds that the nationality was conferred in the absence of any effective link between the state conferring the nationality and the individual. This has been particularly predominant in cases where there were doubts about the sincerity of the nationality in question, especially in light of the so-called practice of obtaining 'nationalities of convenience', obtained through mere compliance with specified procedural steps in order to gain access to protections.[125]

In *Micula v. Romania*, the Tribunal noted that the BIT did not impose additional requirements such as genuine link when assessing the nationality of the claimant and that, moreover, the genuine link test could not be considered as a general principle applicable to cases of ICSID proceedings.[126] In *Saba Fakes*, the Tribunal noted that international arbitration against the host state is a separate mechanism as that of diplomatic protection therefore making the rules of customary international law applicable in diplomatic protection inapplicable in this context. However this case did not involve a dual national holding the nationality of the respondent state.[127] Moreover, the Tribunal considered the text of Netherlands-Turkey BIT and moreover noted that the clear language of the treaty which did not leave room for broader doctrines.[128] In *Champion Trading*, which did concern a dual national claimant who held the nationality of the respondent state, the Tribunal ruled that the dominant and effective nationality rule had no application given the clear and specific rule set out in Article 25(2)(a), which established a clear *lex specialis* regime.[129] Even in *Luis García Armas*, in the context of the Additional Facility Rules of the ICSID, the Tribunal determined that the interpretation of the BIT should be in a manner consistent with the VCLT interpretation rules. Under these, the object and purpose of the BIT did not support extending protection to a claimant who was also a national of the respondent state at the time of the investment and registration of the dispute.[130]

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122 P. Spiro, 'Nottebohm and "Genuine Link": Anatomy of a Jurisprudential Illusion' (2019) Investment Migration Working Paper 1/2019, at 14, accessed 18 March 2025 [doi: 10.5040/9781509955251.ch-005].

123 R.D. Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' 50(1) *Harvard International Law Journal* (2009) 1-60, at 37 ff.

124 ibid, at 39.

125 MacDonald and O'Reilly, *supra* n. 40.

126 *Micula and others* Award, *supra* n. 31, at para 99-101.

127 *Saba Fakes* Award, *supra* n. 37, at para 69.

128 ibid, at para 64-66.

129 *Champion Trading Company* Award, *supra* n. 43, at para 16.

130 ibid, at para 212 ff.

Outside the ICSID system, tribunals, also seem to reinforce that treaty text prevails as *lex specialis* despite the developments in customary international law and the absence of a clear framework restriction such as the one in Article 25(2)(a). Under the rules of UNCITRAL, in *Bahgat v. Egypt*, the Tribunal emphasized that any developments in international law must yield to the *lex specialis* established by the applicable investment treaty, thus do not trump the explicit language of the BITs, according to the Tribunal's finding.[131] Similarly, in *Serafín García Armas*, the Tribunal held that the doctrine of effective and dominant nationality was not applicable to investment cases, and that "[e]s necesario recurrir al derecho internacional únicamente cuando la letra del Tratado no es suficientemente clara para su interpretación".[132] Thus giving primacy to treaty text over rules drawn from general international law. That Tribunal moreover held that it is not permissible to add to the BIT a condition that does not exist in it on the nationality of the protected investors under the treaty.[133] For this case, it is worth noting that, as the Spain-Venezuela BIT allows for arbitration under both the ICSID and the UNCITRAL the claimants' choice of UNCITRAL arbitration could be considered a strategic choice that allowed them to surmount the jurisdictional obstacle to claims by dual nationals against their own state of nationality posed by Article 25 of the ICSID.[134]

By contrast other tribunals operating outside the ICSID framework, while also applying UNCITRAL Rules, have approached the issue with greater flexibility and some tribunals have even openly applied the doctrine in cases where the applicable treaty is silent on dual nationality. This was found despite the BITs *lex specialis*, as the tribunals clarified that the latter operate within a broader international law legal framework, therefore making the principle determinative to assess *ratione personae* jurisdiction. The Tribunal in *Manuel García Armas* found that, although BITs do indeed constitute *lex specialis* between the parties however, they are not applied in isolation.[135] And therefore, as established by Article 31(1)(3)(c) of the VCLT, the customary international law or general international law are applicable *unless* the *lex specialis* established by the BIT provides otherwise.[136] Similarly, the Tribunal in *Santamarta* openly departed from the approach of Serafín and held that, when interpreting BITs, in conformity with article 31(3)(c) of the VCLT,[137] before treaty silence, the principle of dominant and effective nationality is relevant to determine the treatment of dual nationals.[138] In a similar fashion, the Tribunal in *Alicia Grace*, despite being within the context of ICSID but applying the UNCITRAL Rules, clarified that it applied the doctrine of dominant and effective nationality to interpret nationality of the claimants not based on abstract and generalizable precedent, but as a matter of the NAFTA provisions interpretation in light of the VCLT.[139]

Together, these cases reveal how the choice of legal sources may be determinative of whether dual nationals gain access to investment arbitration. The analysis shows that

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131 *Bahgat* Award, supra n. 47, at para 231-232; García Olmedo, *supra* n. 1.
132 *Serafín García Armas* Award, *supra* n. 28, at para 154-158, 167 ff.
133 ibid, at para 173
134 Nana Adjei, *supra* n. 26, at 3-4.
135 García Olmedo, *supra* n. 53, at 310-311.
136 *Manuel García Armas* Award, *supra* n. 56, at para 704; Pellet, *supra* n. 20, at para 107.
137 *Santamarta* Award, *supra* n. 61, at para 485.
138 ibid, at para 493-495.
139 *Alicia Grace and others* Award, *supra* n. 68, at para 463.

the doctrine of effective nationality is not necessarily supported by arbitral awards in the context of investment arbitration;[140] its applicability remains heavily dependent on the language of the treaty and even more so on the arbitration forum and tribunals' interpretative approaches. Strict readings emphasizing treaty text and the *lex specialis* character of investment law result in restricting jurisdiction, especially under the ICSID, but this approach is also followed by PCA tribunals. On the other hand, other tribunals under the PCA consider the *lex specialis* of the BIT to still be open to the doctrine of dominant and effective nationality with the effect of also denying jurisdiction. This indicates that, while the doctrine of dominant and effective nationality exists in general international law, and is arguably relevant in investment arbitration, it has not crystallized as a binding rule of customary international law within the investment arbitration context. These divergent approaches have moreover created, what some scholars refer to as "a precarious situation, where the fate of dual nationals' claims uncertain".[141]

Customary international law principles drawn from the field of diplomatic protection – particularly those concerning the technical requirements of double nationality and the general reluctance to allow claims by dual nationals against one of their home states – are typically employed from an interpretative perspective when addressing nationality questions. This implies that they are not applied directly but rather serve to influence the interpretation of treaty rules,[142] which, in turn, seems to suggest that claims by dual nationals can be restricted through the incorporation of the rule of non-responsibility or the rule of dominant and effective nationality in reading BITs.[143] Sloane and García Olmedo offer a compelling reinterpretation, according to which *Nottebohm* should not be seen as enshrining a general rule of effective nationality but as a narrow decision grounded in the principle of abuse of rights.[144] As noted by García Olmedo, "*Nottebohm* may operate in international investment law as a norm of exclusion against the manipulation of nationality by investors with the purpose of gaining access to investment treaties".[145] The policy considerations that led to the application of the abuse of rights principle in *Nottebohm* – to prevent what the Court perceived as a "bad-faith" attempt to manipulate nationality for the purposes of evading responsibilities imposed by the domestic law and accessing diplomatic protection [146] also resemble contemporary arguments surrounding the strategic use of nationality through citizenship by investment schemes. This suggests that the choice of sources

140 Michalopoulos and Hicks, *supra* n. 118, at 146 [doi: 10.1093/arbint/aiz012].

141 M. Krishna, 'French Courts Keeping the Door Open for Dual Nationals' Claims?', *Kluwer Arbitration Blog*, published on 30 December 2023, accessed 30 April 2025; in general, on the goals that consistent investor-State arbitration serves, namely equality, continuity, predictability, and legitimacy see I. Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' 51 *Columbia Journal of Transnational Law* (2013) 418-478, at 448 ff..

142 M. Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' 24(2) *European Journal of International Law* (2013) 617-647 at, 641-642 [doi: 10.1093/ejil/cht025].

143 García Olmedo, *supra* n. 53, at 311-322.

144 Sloane, *supra* n. 123, at 1, 15; J. García Olmedo, 'In Fairness to Nottebohm: Nationality in an Age of Globalization' 15(1) *Asian Journal of International Law* (2025) 76-106, at 86-88 [doi: 10.1017/S2044251324000067].

145 ibid, García Olmedo, at 78, 97ff; J. García Olmedo, 'Nottebohm Under Attack (Again): Is it Time for Reconciliation?', *EJIL: Talk!*, published on 10 December 2021, accessed 6 April 2025..

146 Here, it is important to note the Court's attention to the exceptional speed with which Nottebohm acquired the disputed nationality, as well as the absence of genuine integration into that state; *Nottebohm* (*Liechtenstein v. Guatemala*) (Judgment) [1955] ICJ Rep 4, at 26.

to base treaty interpretation cannot be considered purely technical but as normatively motivated, which will be further explored in the following section.

(2) Doctrinal Approaches in Practice: Balancing Investor Protection and Abuse Prevention

Building on the preceding analysis on how dual nationality rules function as a jurisdictional threshold, this section turns to the normative stakes underpinning the doctrinal approaches identified in Section (B). To that end, the identified approaches are examined in relation to competing normative goals: the prevention of abuse and the preservation of state sovereignty on the one hand, and facilitation of investor access and legal predictability on the other. The aim is to answer the question: *why do these doctrinal approaches matter in practice and what are their implications for investment law and for policy?* After examining how tribunals currently approach dual nationality, it is essential to consider the practical consequences of these choices, particularly, how they affect the policy objectives of investment arbitration. This study proposes that dual nationality is not merely a technical issue, it reflects broader tensions in investment law, notably, the balance between state sovereignty and investor protection. The interpretative approach that a tribunal adopts, whether formalist or functional, can significantly shape outcomes and, in turn, influence the direction of policy and doctrinal development in this field.

This section briefly introduces the main normative tensions surrounding dual nationality in investment arbitration, concretely the tension between investor protection by ensuring access to ISDS to genuine foreign investors while preventing abuse of treaty protections. This issue is gaining urgency as nationality planning which has been a concern for legal persons, could also become a concern for natural persons due to growing number of individuals holding multiple nationalities and the increasing use of citizenship by investment schemes.[147] Although this section does not attempt to provide a comprehensive and detailed assessment, it aims to identify the core normative implications that arise from tribunals' evolving approaches to dual nationality, therefore the following discussion highlights the key policy concerns underpinning the competing approaches.[148] The normative dilemma is relevant to this study as it helps understanding why tribunals adopt certain interpretative approaches and how those choices reflect or respond to competing policy goals is key to evaluating the coherence of the regime.[149]

(a) Dual Nationals' Claims Against their State of Nationality and the Need for Abuse Prevention

"Nationality planning can be defined as the practice whereby investors use a passport or a corporation of convenience to benefit either from an IIA providing for ISDS when

147 R. Polanco, *The Return of the Home State to Investor-State Disputes Bringing Back Diplomatic Protection?* (Cambridge University Press, 2019) ch 2 [doi: 10.1017/9781108628983].

148 For more detailed discussions on normative theories, see Lee, *supra* n. 107 and; Branson, *supra* n. 110.

149 E. de Brabandere, 'Coherence, Consistency, and the Reform of Investment Treaty Arbitration', in R. Buchan, D. Franchini, and N. Tsagourias (eds), *The Changing Character of International Dispute Settlement* (Cambridge University Press, 2023) 249-281, at 270-273 [doi: 10.1017/9781009076296.016].

none would otherwise be available or from an IIA that offers higher levels of protection in procedural and/or substantive terms."[150] Allowing claims of this nature, dual nationals with the nationality of the home state would be placed in a more favorable position compared to domestic investors, who only have access to domestic remedies. In this way, dual nationals could choose among the two nationalities to grant otherwise unqualified investors access to treaty protection or even in a way to allow a claim against either Contracting Party. This could create an incentive to "internationalize" claims through the acquisition of a second passport. This practice is facilitated through the "golden passport" programs,[151] which allow individuals to obtain residency and nationality through investment, therefore circumventing the traditional rules of attribution and acquisition of nationality.[152]

The debate surrounding dual nationality and nationality planning is most notable around corporation restructuring, particularly in the context of treaty shopping, therefore the discussion of dual nationality of individuals closely mirrors that discussion.[153] Despite the similarities, important differences remain: the nationality of natural persons is often tied to identity, culture and belonging, making changes of nationality of natural persons more profound and far reaching, as they are more intimately connected to lived experience than to corporate strategy.[154] Although less notable, the core issue in cases of an individual investor is the strategic manipulation of legal identity to access investment treaty protection.[155] In the ICSID arbitration context, tribunals have been reluctant to dismiss investor state claims solely on the basis of abuse of process, or abuse of right. However this concern has been raised in some awards, such as *Siag v. Egypt*, where the respondent state alleged that the claimant fraudulently obtained a different nationality to manufacture treaty jurisdiction. Given the seriousness of such allegations, the tribunal established a high standard of proof and ultimately rejected the state's allegations of fraud.[156] Still, such instances highlight how nationality planning can undermine the integrity of the system, as it allows investors to "shop" for the most favorable treaties.

To address these concerns and to maintain their sovereignty in deciding foreign investment policy, states attempt to reform and rebalance the investment protection system by placing substantive and jurisdictional limits on corporate nationality planning.[157] However, this solution renders limited practical results as international investment is highly decentralized and highly contextual.[158] In the short term, however, a more deliberate and purposive approach by arbitral tribunals could more effectively curb the most excessive cases of treaty shopping, which could maintain the current

150 García Olmedo, *supra* n. 53, at 307; M. Mazzeschi, 'Abuse of dual nationality: you can't have your cake and eat it too', *Mazzeschi Legal Counsels*, published on 30 June 2020, accessed 3 June 2025.
151 Financial Action Task Force and OECD, *supra* n. 3.
152 García Olmedo, *supra* n. 53, at 303, 312.
153 See, for reference key cases on corporate restructuring, such as *Autopista v. Venezuela and Tokios Tokelés v. Ukraine*; Branson, *supra* n. 110, at 194.
154 Soloveva, *supra* n. 106, at 634.
155 McLachlan, Shore, and Weiniger, *supra* n. 54, at 208.
156 Martinez Lopez, *supra* n. 111.
157 Lee, *supra* n. 107, at 361.
158 ibid 371-372; on the decentralized nature of the international investment law regime, see also Ten Cate, *supra* n. 141, at 424-426.

decentralized nature of the investment protection regime, while at the same time creating a more substantial test in determining whether a tribunal has jurisdiction *ratione personae*. In this sense, mitigating the risk of opportunistic behavior by investors, would depend on harmonizing, to a certain extent, the interpretation of dual nationality with the result of narrowing the personal jurisdiction of arbitral tribunals.[159] While some states have argued for the incorporation of the ICSID as a means of resolving investment disputes, considering the exclusion of dual nationals from the system's protection.[160] Broad definitions of protected investors together with a permissive approach towards nationality planning, have given a very large number of otherwise unqualified investors a remedy to adjudicate investment disputes. This has, in turn, exacerbated the unbalanced relationship between host states and investors.[161]

(b) Underlying Criticism on Nationality Interpretation Methods and Policy Tensions through Key Decisions

According to UNCTAD, there is a growing perception that the ISDS system lacks legitimacy and that, critically, it weakens the links between the host state and the investor, which undermines the very purpose of investment promotion.[162] UNCTAD further suggests, the need to shape the legal framework in a manner that maximizes possible benefits from FDI while also preserving a degree of national sovereignty in the developing and implementing economic policy.[163] Within this context, the choice of doctrinal approaches to nationality by tribunals in investment arbitration seems to be shaped these normative competing commitments regarding the balance between investor protection and state sovereignty.

A *formalist approach* to nationality relies on the legal status of nationality as formally defined in treaties or domestic law. This approach aims to prioritize legal certainty, legitimacy, and doctrinal consistency. However, tribunals following this approach have been criticized for being susceptible to treaty shopping and for failing to reflect genuine links between the investor and the state of nationality, potentially leading to manipulative claims. This approach is often justified as a tool to prevent abuse of process through the strategic acquisition or structuring of nationality to manufacture jurisdiction. However, abuse of rights argument is particularly challenging to raise by the respondent and tribunals generally refrain from discussing the matter or finding the abuse. So, conventionally, the changes in nationality of natural persons are accepted until it is adequately demonstrated that they amount to an abuse of process.[164] This connects to the principle of non-responsibility, which maintains that a state should not

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159 ibid, Ten Cate, at 441-445. Even if this established a consistent line of cases, which arbitrators should follow, they could still depart from it if were are "compelling reasons" to justify departure, for instance, the explicit exclusion of dual nationality or of the principle of dominant and effective nationality in the underlying treaty.

160 Nana Adjei, *supra* n. 26, at 5.

161 García Olmedo, *supra* n. 53, at 334.

162 Polanco, *supra* n. 147, ch 2, at 47.

163 P. Muchlinski, F. Ortino, and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) ch 1, at 15 [doi: 10.1093/oxfordhb/9780199231386.001.0001].

164 Soloveva, *supra* n. 106, at 634-635.

be held internationally accountable to its own nationals, even in dual nationality cases. Furthermore, a central purpose of investment treaties is to provide foreign investors with a fair and predictable legal environment, a purpose that is emphasized by the formalist approach, which prioritizes objective legal criteria and therefore enhances investor confidence and legal protection, i.e., broader objectives of BITs and of the framework of international investment arbitration. Paradoxically, although this approach is designed to promote legal certainty through reliance on clear, objective criteria, a strict formalist approach may fall short by generating uncertainty in the treatment of claimants holding dual nationality by not accounting for their factual circumstances.

Building on the criticism arising from the formalist approach, the *functionalist approach* to nationality shifts the focus toward the substantive relationship between the investor and the state of nationality, which allows tribunals to consider factual connections. Additionally, this approach relies on invoking general principles of international law, which have been, often rejected by tribunals. While this approach may protect states against abusive treaty shopping, it is criticized for its vagueness, reliance on subjective standards, and the uncertainty introduced by factors beyond formal criteria, as well as the additional burden that requires tribunals to assess subjective ties. As noted from commentators, "[f]rom the outset of this expansion of the ISDS, respondent-states have raised abuse of process as a defence to investors' claims by urging tribunals to reject their jurisdiction where investors manipulated, in the host-state's opinion, the object and purpose for which the host-state entered into investment treaties".[165]

Although not all Tribunals addressed these considerations particularly, across the key cases, tribunals reveal some tension between formalist and functionalist approaches, reflecting deeper policy considerations around fairness, abuse prevention and legal certainty.

This section first, established that the tribunals in *Olguín v. Paraguay; Luis García Armas*, and *Serafín García Armas* followed a purely formalist approach when assessing nationality. Further, it revealed that cases such as *Micula v. Romania*, *Saba Fakes*, *Champion Trading*, and *Bahgat v. Egypt* did not yet follow the functionalist approach and adhered to the formalist approach but took into consideration the underpinning policy goals associated with functionalism, demonstrating a theoretical openness without fully departing from the formalist approach. Tribunals in *Micula v. Romania* and *Bahgat v. Egypt* recognize that official nationality documentation constitute *prima facie* evidence and therefore set a high threshold for rebuttal, in narrow situations and based on proof of fraud or legal error.[166] Moreover, the Tribunal in *Champion Trading* introduced the possibility of inadequacy of the domestic law in determining nationality. As mentioned earlier, the Tribunal acknowledged concern over the potential unfair results of the determination of nationality based on the domestic law, in light of the blanket exclusion in Article 25(2)(a).[167] Furthermore, in *Saba Fakes*, the Tribunal took into account that a nationality of convenience, acquired "in exceptional circumstances of speed and accommodation", for the purposes of bringing a claim before the Centre should not

[165] Branson, *supra* n. 110, at 193.
[166] *Micula and others* Award, supra n. 31, at para 104; *Bahgat* Award, *supra* n. 47, at para 162-166.
[167] *Champion Trading Company* Award, *supra* n. 43, at para 16-17.

be considered to satisfy the nationality requirements of a BIT and Article 25(2)(a) of the Convention.[168] Hence creating the possibility that, as a matter of the principle of good faith, inquiring behind an individuals' acquisition of nationality.[169] Although the Tribunal ultimately did not adopt this approach, it would have result in factually setting aside the state's rules on nationality for the purposes of the award on the grounds that the nationality was conferred in the absence of any effective link between the state conferring the nationality and the individual.

On the other hand, fairness and abuse prevention considerations in cases where there is only a minimum, merely formal link between the investor and the state of nationality seem to have motivated the tribunals in *Manuel García Armas*, *Santamarta*, and *Alicia Grace*.[170] While claimants had previously attempted to apply functional and context-sensitive interpretations to broaden access for dual nationals, these recent awards demonstrate that such interpretive tools are increasingly being used to deny jurisdiction. This trend effectively closes the "back door" namely, the absence of an express restriction on dual nationals in the arbitration rules paired with broad treaty definitions of a "qualified investor" thereby limiting the ability of dual nationals to seek protection through more favorable procedural avenues.[171] Since the ICSID Convention clearly forbids dual nationals to sue either of their own states, some investors sought to circumvent this bar by initiating proceedings under alternative procedural regimes, notably UNCITRAL Rules, which would allow them to create standing for dual nationals. However, these awards seem to suggest that this strategy is becoming ess viable, as tribunals applied functional and context-sensitive interpretations to deny jurisdiction. Therefore, no longer allowing dual nationals to exploit procedural differences between arbitration regimes to gain access to ISDS mechanisms.[172] As one scholar wrote in connection with this trend: "What cannot be obtained through the main door (ICSID) cannot be obtained through the back door (UNCITRAL) either", that is, the alternative of submitting a dispute to a non-ICSID arbitration forum is no longer an option for dual nationals.[173]

This development originated from the concerns that underpin the formalist approach, namely, the potential abuse of nationality, such as treaty shopping or the structuring of investments to fabricate foreign status or other forms of abuse of process.[174] These risks have prompted some tribunals across frameworks and international scholars to consider whether a more functional approach should be adopted. At the same time, this approach serves to correct an overly rigid formalist approach by considering factors such as allegiance, residence, or other connections for the purpose of applying international law rules, i.e., the functional approach of nationality aims to determine whether the investor's ties to a particular state are genuine and meaningful. Notably, the three key cases stemming from the dispute between the García Armas family and

168 *Saba Fakes* Award, *supra* n. 37, at para 77-78; MacDonald and O'Reilly, *supra* n. 40.
169 McLachlan, Shore, and Weiniger, *supra* n. 54, at 208.
170 Casas, *supra* n. 6, at 66.
171 Mori Bregante, *supra* n. 52.
172 ibid.
173 ibid.
174 Branson, *supra* n. 110; E. Gaillard, 'Abuse of Process in International Arbitration' 32(1) *ICSID Review* (2017) 17-37 [doi: 10.1093/icsidreview/siw036].

Venezuela highlight the inconsistency of investment arbitration,[175] as well as concerns about treaty shopping and the instrumental use of nationality when dual nationals bring a claim against their own state. Although the tribunals reached different results, they all dealt with similar factual background, the same BIT, and had to deal with similar arguments from Venezuela, which argued that "allowing the domestic investor to raise a claim against their own State would constitute an abuse of the investment arbitration system".[176] Particularly, in *Manuel García Armas*, the Tribunal's decision signals awareness of concerns that favor a functional interpretation, including the potential abuse of rights, a reasoning which seems to be rooted in the broader policy concern proposed by the respondent state: that the instrumental use of formal nationality when unconnected to the reality of the investment may undermine the legitimacy of ISDS.[177] In this sense, the Tribunal's approach ultimately reflects deference to the policy choices of States regarding how access to investment arbitration should be circumscribed.

Considering that an overly flexible interpretations may encourage treaty shopping or strategic nationality acquisition solely to invoke treaty protections and this, in turn, could undermine the legitimacy of ISDS, tribunals may employ teleological interpretations to set limits from beyond the treaty text. Accordingly, an essential preliminary step to redress the imbalanced nature of international investment law should be restricting the range of protected natural and legal persons.[178] As such, the interpretative choices are not neutral, they shape access to ISDS and they reflect broader tensions in the system. Although these awards were decided by different tribunals operating under different systems and applying different procedural rules and BITs, overall, these reflections underscore how they all take into consideration policy objectives, which shape the complex and evolving nature of dual nationality in the context of investment arbitration. This area, in an increasingly globalized landscape offers both expansive access to investor protections and justice, but also increasing constraints of judicial safeguards aimed at preventing abuse. The next and final section of this study will explore whether these tensions are resolving into convergence or fragmentation of the international investment arbitration field.

(3) Fragmentation or Emerging Standard?: The Treatment of Dual Nationals in International Investment Arbitration

Building on the doctrinal analysis in Section (B), which outlined three distinct interpretative approaches adopted by tribunals in investment arbitration, and the case-focused discussions of the previous sub-section, this section steps back to assess whether emerging interpretative patterns in the treatment of dual nationality reflect systemic convergence or ongoing fragmentation in international investment

[175] E. de Brabandere, 'Coherence, Consistency, and the Reform of Investment Treaty Arbitration', in R. Buchan, D. Franchini, and N. Tsagourias (eds), *The Changing Character of International Dispute Settlement* (Cambridge University Press, 2023) 249-281, at 265 ff. [doi: 10.1017/9781009076296.016].

[176] Schreuer *supra* n. 23, at para 156 ff; see also *Serafín García Armas* Award, *supra* n. 28, at para 108; and Pellet, *supra* n. 20, at para 85.

[177] *Manuel García Armas* Award, *supra* n. 56, at para 241, 433, 437 ff; Andres Rigo Sureda, *Investment Treaty Arbitration: Judging under Uncertainty* (Cambridge University Press, 2012) 7-19, at 16.

[178] García Olmedo, supra n. 53, at 303.

arbitration. Specifically, this section examines why tribunals use legal sources and doctrinal approaches to navigate the underpinning tensions. The aim is to determine what the doctrinal choices mean for legitimacy, coherence, and investment arbitration to determine whether the evolving arbitral practice signals an emerging standard, particularly around a more restrictive threshold for *ratione personae*, even under more flexible frameworks. By placing individual tribunal decisions across different tribunal systems and procedural rules as well as their lack of consensus on whether to apply dominant and effective nationality test within the wider landscape of ISDS, this section aims to assess the trajectory of dual nationality standards.

The body of case law demonstrates varying application and interpretation of nationality, based on treaty text or general principles of international law, in particular, the doctrine of dominant and effective nationality, which in turn, is rooted on different doctrinal approaches to the concept of nationality. Therefore dual nationality claims in international investment law gives varying consequences depending on how they are adjudicated. To summarize the previous findings, tribunals have denied jurisdiction to arbitration when applying the ICSID Convention as well as the ICSID Arbitration Facility Rules based on the express exclusion in Article 25(2)(a) of the Convention, while interpreting nationality from a formalist perspective, i.e., relying on the nationality rules provided by domestic law. A similar approach is also taken by PCA tribunals applying UNCITRAL Rules. However there are also notable cases outside of the ICSID context, particularly PCA tribunals applying UNCITRAL Rules, where tribunals have been more open to applying the principle of dominant and effective nationality. The latter tribunals have employed a functional interpretative approach to nationality to reach the same conclusion, that is, deny jurisdiction over dual nationals' claims, even in the absence of a jurisdiction bar. These divergent approaches adopted by tribunals have led to a precarious situation which leaves the fate of dual nationals' claims uncertain.[179] This uncertainty and inconsistency is especially heightened by the lack of uniform thresholds for determining what natural persons qualify as "investors" and are thus entitled to standing before arbitral tribunals.[180] Notably, one award is an outlie and does not fit either of these trends, *Serafín García Armas*, where the absence of express exclusion of dual nationals' claims was interpreted as admissible based on a literal interpretation of the treaty text.[181] This case particularly contributes to this ambiguity, which makes it more challenging for states and investors to establish whether or not they are protected by investment treaties.[182]

Although it is true that tribunals are independent and are not held by *stare decisis*, when tribunals interpret nationality, seemingly there is no consensus on how to qualify an "investor".[183] ICSID tribunals and some of the PCA tribunals give rely on treaty text and give weight to formal declarations. While other tribunals emphasize habitual residence or economic interests to satisfy the test of dominant and effective nationality.

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179 Krishna, *supra* n. 141.

180 On the goals that consistent investor-state arbitration serves, namely equality, continuity, predictability, and legitimacy see Ten Cate, *supra* n. 141, at 448 ff.

181 McLachlan, Shore, and Weiniger, *supra* n. 54, at 184-185.

182 Nana Adjei, *supra* n. 26, at 7.

183 S. Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' 12(5) *German Law Journal* (2011) 1083-1110, at 1093 [doi: 10.1017/S2071832200017235].

The lack of clear standards undermines coherence and predictability or arbitration, particularly in non-ICSID arbitration practice. For instance, In *Alicia Grace*, the Tribunal took these considerations into account when it explained:

> "the Tribunal recalls that in international law there is no doctrine of *stare decisis*. This Tribunal is independent of the tribunals that issued the decisions cited and there is no hierarchical subordination among them that could make the decision of one depend on the decisions adopted by others. Nevertheless, as a general principle, the Tribunal considers it desirable, to the extent that the circumstances of the case under analysis and the treaty at issue allow it, to encourage the development of a *jurisprudence constante* on the basis of previous decisions. This could provide some predictability to the disputing Parties and respond to an ongoing demand for more consistency within the international investment system, a demand rooted in the need to enhance its legitimacy."[184]

A similar reasoning motivated the tribunal in *Manuel García Armas*, as it based its decision to incorporate the treatment of dual nationals by the ICSID system to the relevant BIT to prevent differing definitions of "investor" under the same BIT and dependent on whether the claim is brought under the ICSID Convention or the UNCITRAL Rules.[185] Here, the Tribunal noted that "Otros tribunales se han manifestado de forma similar con relación al término 'inversiones', y la exigencia de mantener inalterable su definición con independencia del foro recurrido".[186]

Convergence, for the purposes of this study, would suggest growing consistency in how tribunals interpret and apply dual nationality rules, regardless of the forum and treaty, reflecting shared doctrinal preferences or policy objectives. The study demonstrates that across both ICSID and non-ICSID contexts, tribunals considered treaty interpretation in light of public international law to be necessary only when there was no treaty or when treaties were proven inoperative or ambiguous.[187] This approach clearly gives primacy to treaty text as a *lex specialis* regime and consequently, tribunals depart from customary law standards in favor of *lex specialis*.[188] At the same time, these tribunals have mostly prioritized formal (legal) nationality as established under domestic law, particularly when the treaty provides clear definitions. However, as shown earlier, multiple tribunals accepted formal nationality as the starting point but showed a theoretical willingness to consider factual ties in order to prevent abuse, suggesting qualified formalism emerging across cases. In recent awards however there is a clear shift, where tribunals have found that although BITs indeed constitute *lex specialis* between the parties, they cannot be applied in isolation.[189] And, as such, have interpreted the VCLT rules, concretely Article 31(3)(c), as incorporating customary international law or general international law unless

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184 *Alicia Grace and others* Award, *supra* n. 68, at para 432

185 *Manuel García Armas* Award, *supra* n. 56, at para 722-723.

186 ibid, at para 722.

187 E.P. Treves, 'Investment Treaty Arbitration: Dual Nationals are Now Welcome: A Way Out of ICSID's Dual Nationality Exclusion' 49 *NYU Journal of International Law and Politics* (2017) 607-618, 612.

188 *Saba Fakes* Award, *supra* n. 37, at para 16; Luis García Award, *supra* n. 20, at para 208-209, 212 ff; *Bahgat* Award, *supra* n. 47, at para 231-232; *Serafín García Armas* Award, *supra* n. 28, at para 173.

189 *Santamarta* Award, *supra* n. 61, at para 480-484; García Olmedo, supra n. 53, at 310-311; Mezgravis, *supra* n 12, at 556.

provided otherwise.[190] With these legal sources, tribunals have been able to depart from a formalistic conception of nationality towards a rather functional one, where factual connections are taken into account.

Section (D)2(b) highlighted that neither the formalist approach nor the functionalist approach fully resolve the normative tensions underlying the issue of dual nationality in investment arbitration. The formalist approach centers on the legal status of nationality as formally defined in treaties or domestic law, thus prioritizing legal certainty and systemic consistency but risking enabling opportunistic nationality planning, as it does not consider genuine links. By contrast, the functionalist approach focuses on the substantive relationship between the investor and the state, which better aligns with broader treaty objectives, such as discouraging opportunistic claims and preserving state sovereignty. However as functionalism explicitly weighs multiple factors beyond formal nationality, this approach can lead to less predictable outcomes. Despite diverging doctrinal approaches and legal sources invoked to assess dual nationals' claims where treaties are silent or ambiguous tribunals highlighting how treaty silence or gaps may be resolved differently the key cases reviewed demonstrate a growing, broader pattern. Tribunals are reaching similar outcomes, namely the exclusion of dual nationals where their ties to the foreign state are so weak that they appear to be strategically constructed or raise concerns of adequacy of the system. This trend does not indicate emerging convergence around a single interpretative method but around the underlying policy concerns: tribunals appear to be guided by the need to prevent treaty abuse by dual nationals and the preservation of investment arbitration. In doing so, tribunals appear to be upholding mechanisms that restrict access for dual nationals in order to preserve the credibility and stability of the investment arbitration regime.

As observed in earlier sections, in recent awards, tribunals appeared increasingly willing to integrate functional reasoning to respond to the risk of abuse, therefore narrowing the *ratione personae* jurisdiction of tribunals. While in previous cases the claimants had proposed the application of dominant and effective nationality to result in the expansion of jurisdiction *ratione personae*, recent cases show how the application of the very same principle has led to the restriction of the jurisdiction *ratione personae*. The trend towards introducing dominant and effective nationality in arbitration awards' analyses (*Manuel García Armas* (2019), *Santamarta* (2023), *Alicia Grace* (2024)) may indicate the idea that tribunals incorporate the rule of dominant and effective nationality claims to restrict claims by dual nationals.[191] Concretely, *Alicia Grace* illustrates a doctrinal and policy convergence: tribunals apply expansive interpretative tools to reinforce restrictive jurisdictional barriers, reinforcing the idea that the "back door", i.e., the absence of dual nationals exclusion by treaties other than the ICSID Convention, is increasingly being closed to dual nationals. Although this approach seems to have received attention in recent cases, it is still early to determine whether it reflects convergence of approaches in investment arbitration.

Whether these developments suggest a gradual shift toward doctrinal balancing where strict reliance on legal status is tempered by broader systemic considerations

[190] *Manuel García Armas* Award, *supra* n. 56, at para 704; *Santamarta* Award, *supra* n. 61, at para 485; *Alicia Grace and others* Award, *supra* n. 68, at para 430-433, 471.

[191] García Olmedo, *supra* n. 53, at 322.

raises the possibility that investment arbitration may be evolving through a converging normative ethos. In any case, the choice of tribunals between formalist and functionalist interpretative approaches, or the increasing mention of normative considerations, for the key awards falling within the type of emerging openness, seems to be grounded on procedural matters, i.e., whether dual nationals are allowed to access international investment arbitration, rather than on the substantive notion of "nationality".[192] Despite these recent developments, the divergent approaches still underscore a lack of consistent approach and of coherent criteria to address jurisdiction *ratione personae*. This, however, could be reconciled by reference to the underlying considerations of international investment law, such as investor protection, preventing treaty abuse, and maintaining the legitimacy of the arbitral system.[193] These tendencies often result in *de facto* convergence in outcomes even when the tribunals' reasoning and approach vary. Growing number of cases rejecting jurisdiction signals a restrictive approach and tribunals are aligning their interpretation with broader considerations, i.e., protection of genuine foreign investors while curbing abuse. This shift seems to reflect growing consent that treaty interpretation cannot be isolated from the functional realities and objectives of the ISDS system. The key cases seem to point toward an informal harmonization, in a way that the distinction between procedural regimes is becoming less determinative on the outcome. This seems to suggest that the way tribunals navigate relevant dual-nationality rules is contributing toward a coherent body of cases i.e., a *jurisprudence constante* that reconciles legal formality with policy objectives, thereby reinforcing the credibility and legitimacy of the investment arbitration regime as a whole.

(E) CONCLUSION

This article offers a systematic analysis of how international investment tribunals approach the nationality of dual nationals, an issue that intersects public international law, treaty interpretation, and procedural justice. To do so, the study provides a doctrinal and policy-oriented analysis to help understand the place of dual nationals in investment arbitration today. Particularly, as nationality functions as a criterion to grant access to investment arbitration, dual nationality raises questions about jurisdiction *ratione personae*, treaty interpretation, and even the legitimacy of investor-state dispute settlement. This study undertakes an analytical inquiry into the interpretative approaches, introducing a threefold typology: a formalist interpretation of nationality, which strictly relies on the domestic status; emerging flexibility, which reflects a theoretical openness to functionalist interpretation; and restrictive functionalism, where tribunals incorporate functionalist interpretations to obtain restrictive outcomes. Moreover, the article tests this classification against the 2024 *Alicia Grace v. Mexico* award, which additionally illustrated how tribunals navigate and balance tensions between access to investment protections and the need to preserve the integrity of the system against abuse, including nationality planning and treaty shopping.

This study illustrates how tribunals utilize legal sources and clarified the underlying purpose of dual nationality exclusion in delimiting access to investment arbitration. Both

[192] Casas, *supra* n. 6, at 97.
[193] Polanco, *supra* n. 147, ch 2.

ICSID and non-ICSID tribunals generally exclude dual nationals who also hold the nationality of the respondent State. In this context, while the status of the principle of dominant and effective nationality as customary international law in the field of investment arbitration is disputed, it is undeniably part of general international law and is therefore is considered a "relevant rule of international law" within the meaning of the Article 31(3)(c) of the VCLT. The application of this principle allows for a functional and substantial interpretation of the nationality of the investor when interpreting IIAs for the purpose of granting access to arbitration however its inclusion does not render it dispositive. Accordingly, where the underlying treaty to the dispute clearly defines "national", tribunals are hesitant to introduce additional standards from general international law. Only when the treaty is silent and there exists ambiguity, are tribunals free to introduce dominant and effective nationality in their analysis; in other words, treaty silence on dual nationality may open the door to customary international law based interpretation. With respect to access to arbitration Article 25(2)(a) of the ICSID Convention expressly bars claims by individuals who possess the nationality of the investor State, as such, ICSID tribunals do not allow dual nationals who also possess the nationality of the respondent State to bring claims before them. By contrast, non-ICSID tribunals, although not bound by the prohibition of the ICSID Convention have increasingly arrived to the same conclusions. This has been achieved either through a narrow interpretation of IIA provisions to exclude dual nationals or by incorporating functional interpretation tools in their analysis that ultimately lead to the same outcome of excluding dual nationals.

By examining the treatment of dual nationality across the awards in the ICSID and non-ICSID frameworks and analyzing the interpretative methodologies applied in the context of treaty silence, this study reveals an emerging pattern of convergence around tribunals employing functionalist tools in response to treaty silence which nevertheless lead to exclusionary outcomes. Notably, this trend does not appear to be grounded on the legal authority of the dominant and effective nationality test as part of general international law which requires a functional and substantive interpretation of the nationality of the investor but reflects the overarching normative concern of protecting the legitimacy and coherence of the ISDS system. While the tribunals carefully weigh the facts and treaty context of each dispute, the decision to exclude dual nationals does not result from a rigid application of the international legal framework but rather from seeking to maintain consistency in arbitral practice. Accordingly, there is an apparent convergence across arbitral fora that steers tribunals toward narrowing the scope of admissibility of dual nationals in investment arbitration. In conclusion, this thesis demonstrates that dual nationality is not solely a technical jurisdictional matter but one that reflects broader tensions in investment law, notably the balance between state sovereignty and investor protection. The incorporation of relevant rules of international law in dual nationality interpretation thus serves to safeguard the protection of genuinely foreign investors and thus prevent manipulation of treaty protections and uphold the legitimacy of ISDS mechanisms. Ultimately, the study concludes that the interpretative choices made by tribunals do not simply determine who can access dispute resolution, i.e., the *ratione personae* jurisdiction, but also reflect the underlying broader policy considerations. This is particularly relevant in light of the increasing concerns over the growing use of citizenship by investment schemes or strategic nationality acquisition by natural persons for the sole purpose of invoking treaty protections.

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The Implications of the Peremptory Prohibition of Slavery and its Accompanying Erga Omnes Obligations

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Abstract: The prohibition of slavery, enshrined in the 1926 Slavery Convention and its 1956 Supplementary Convention, constitutes a fundamental principle of international law with the status of an erga omnes partes obligation. This article examines the prohibition's legal foundation and its recognition as a non-derogable norm essential to protecting human dignity. Utilizing the framework articulated by the International Court of Justice in Belgium v. Senegal, the work establishes that the abolition of slavery aligns with the treaty's object and purpose, reflects a shared interest among states, and is integral to achieving the Convention's aims. As a cornerstone of international human rights law and policy, this prohibition represents an indispensable element of the global legal order, commanding universal adherence. However, widespread evasion of this prohibition, particularly among others in the context of sexual slavery, highlights significant deficiencies in enforcement, political will, and structural reforms. The persistence of such practices undermines the moral authority of international law and perpetuates systemic injustices. The analysis underscores the need for a unified global effort to uphold the prohibition as a universal obligation, advocating for enhanced cooperation, robust accountability mechanisms, and the political commitment necessary to translate the commitments of the 1926 Slavery Convention into effective protections against this grave human rights breach.

Keywords: Slavery slavery convention of 1926 prohibition jus cogens; erga omnes partes obligations ICJ human rights International Criminal Court general international law human dignity

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(A) INTRODUCTION

In the realm of public international law, the prohibition of slavery[1] occupies a central position within the framework of humanitarian and general international law. As a

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[1] Article 1 (1) of the Slavery Convention defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'" See also J. Allain, 'The Definition of Slavery in International Law' (2009) 52 Howard Law Journal, 239-275, stressing that: "the legal definition of slavery, first established in 1926 through the interplay between anti-slavery advocates and members of the League of Nations, was reaffirmed in 1998 with its inclusion in an international legal instrument once again: the Rome Statute of the International Criminal Court."; S. Scarpa, 'Contemporary Forms of Slavery' (European Union 2018), available at: <www.europarl.europa.eu/RegData/etudes/STUD/2018/603470/EXPO_STU(2018)603470_EN.pdf >; C. Espaliu Berdud, 'La definición de esclavitud en el Derecho Internacional a comienzos del siglo XXI' (2014) 28 Revista electrónica de estudios internacionales (REEI); M. Giuliano, 'Schiavitù' (1939) Nuovo Dig. it., Torino, p. 1162 ff; S. Scarpa, 'Conceptual unclarity, human dignity and contemporary forms of slavery: An appraisal and some proposals' (2015) QIL, 2019, available

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grave violation of human rights, slavery embodies the denial of fundamental freedoms and the degradation of human dignity.[2] It is a violation that contravenes the foundations and object of international human rights law in ways that are inimical in particularly egregious, intense, and evident ways. In this regard, one can say that it is a direct affront to the recognition of the unconditional and inherent inestimable *worth* of every human being; that it openly prevents individuals from acting in *autonomous* ways because of the dictates of others they are made subject to; and that it entails a refusal to acknowledge the other human being as *equals* by slavers all of which openly contravenes what has been recognized in case law and elsewhere as foundations and guiding values and principles of human rights law.[3] Moreover, all individuals can expect "in every possible case […] that all rational beings outside [them] recognize [them] as a rational being", as Fichte said, and that they are treated as an end in themselves instead of mostly as means, in Kantian terms.[4] Slavery precisely objectifies and treats individuals as mere objects, thus constituting an undeniable and great affront to human dignity and liberty.[5]

The 1926 Slavery Convention[6] and its Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956,[7] and general human rights treaties' provisions against slavery such as Art. 8 of the International Covenant on Civil and Political Rights and Art. 4 of the Universal Declaration of Human Rights, both of which state that "[n]o one shall be held in slavery", among others, form a *corpus juris* that enshrines the prohibition of slavery in all its forms, including sexual slavery,[8] as a relatively *recent* cornerstone of international legal obligations. This is so because, regretfully, as explored in the first section below, international law actually endorsed slavery practices for some periods of its history, being thus an instrument

at: https://www.qil-qdi.org/conceptual-unclarity-human-dignity-and-contemporary-forms-of-slavery-an-appraisal-and-some-proposals/

2 See P. De Sena, 'Slaveries and New Slaveries: Which Role for Human Dignity' (2019) 64 QIL-Questions Intl L, 7, 10 and 12 See also D. Luban, 'Human Rights Pragmatism and Human Dignity' in R. Cruft, M. Liao, M. Renzo (eds), Philosophical Foundations of Human Rights, Oxford, Clarendon Press, 2015, p. 274 ff.

3 I/A Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, paras. 61, 85-89; I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, paras. 73, 87, 89, 91, 100, 157; Vienna Declaration and Programme of Action, 1993, Preamble.

4 J. G. Fichte, Foundations of Natural Right, Cambridge University Press, 2000, at 43; Immanuel Kant, Toward Perpetual Peace and Other Writings on Politics, Peace, and History, Yale University Press, 2006, pp. 37, 141.

5 Jenny S. Martinez, The Slave Trade and the Origins of International Human Rights Law, Oxford University Press, 2012, at 20.

6 League of Nations, Convention to Suppress the Slave Trade and Slavery, 60 LNTS 253, Registered No. 1414, 25 September 1926, https://www.refworld.org/legal/agreements/lon/1926/en/13684

7 UN Economic and Social Council (ECOSOC), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, https://www.refworld.org/legal/resolution/ecosoc/1956/en/116014

8 See J. Roux, 'L'esclavage sexuel en droit international pénal', available at: https://dumas.ccsd.cnrs.fr/dumas-01523857 See also J. Cockayne, 'The Anti-Slavery Potential of International Criminal Justice' (2016) 14 JICJ, 469-481.

of oppression during them. It is remarkable, however, that slavery came to be treated in terms of an absolute and inexcusable prohibition that admits no exceptions under contemporary international law, which reveals a welcome and dramatic paradigm shift in comparison to bygone times.

The prohibition thus reveals much about some of the important current values and principles underlying international law nowadays. Slavery, defined as the exploitation of individuals in conditions where they are deprived of personal autonomy and subjected to forced servitude, [9] is universally condemned,[10] both when there are "*de jure* situations of legal ownership" and "contemporary situations where a person is held in a *de facto* condition of slavery", in accordance to the 1926 instrument, according to Allain.[11]

That said, in the case law of the European Court of Human Rights a distinction has been made between slavery as entailing a "right of ownership over" a human being, and other violations of human dignity such as servitude, forced, and compulsory labor, which lack such a(n abusive) title but still "reduc[e] [someone] to the status of an "object"".[12] Conversely, the Inter-American Court of Human Rights put forward in its *Hacienda Brasil Verde* an argument with which we agree: that slavery can exist both in *de jure* and *de facto* forms, with a formal document or legal norm referring to 'ownership' over an individual not being necessary to exist for there to be slavery, as in traditional notions of it.[13] In our opinion this latter approach is wiser and permits to identify as such all manners of pretended appropriation of *fellow* human beings, with abusers not being able to claim they are not engaging in slavery due to the absence of a 'formality'. The condemnation of slavery is merited in both situations. The strength of the stigma may spur more action even absent traditional formal ownership. Which, all things being said, reveals how extremely unjust[14] situations and conduct have been endorsed by the law throughout history.

Treaties addressing slavery establish obligations for states to eliminate such practices and ensure accountability for violations. The prohibition of slavery extends beyond treaty law and duties, being also part of customary international law.[15] Custom against

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9 As Nicole Siller aptly observes, the term 'slavery' should be clearly distinguished from 'modern slavery,' particularly within the context of international law. While the term 'slavery' is firmly rooted in legal frameworks such as the 1926 Slavery Convention and enjoys a well-defined status under international law, 'modern slavery' lacks a precise legal definition and carries little to no formal meaning in this context. The ambiguity of the term 'modern slavery' may undermine efforts to address specific practices effectively, as it risks conflating distinct legal concepts and diluting the normative clarity provided by established international instruments on slavery and related practices. Amplius, see N. Siller, "'Modern Slavery': Does International Law Distinguish between Slavery, Enslavement and Trafficking?" (2016) 14 Journal of International Criminal Justice, pp. 405–427.

10 For references, see J. Allain, Slavery in International Law: Of Human Exploitation and Trafficking, Leiden, 2013, p. 9 ff.

11 J. Allain, The Law and Slavery: Prohibiting Human Exploitation, Brill Nijhoff, 2013, at XIII.

12 European Court of Human Rights, Guide on Article 4 of the European Convention on Human Rights: Prohibition of slavery and forced labour, Council of Europe, 2025, at 8.

13 I/A Court H.R., Case of the Hacienda Brasil Verde Workers v. Brazil, op cit., para. 270.

14 Nicolás Carrillo Santarelli, "On the Virtuousness of Certain Refusals to Comply with Legal Demands Prompted by Other Normativities", Díkaion, Vol. 32, 2023.

15 See, for example, Rule 94 of the Rules of Customary International Humanitarian Law identified by the International Committee of the Red Cross ("Slavery and the slave trade in all their forms are prohibited"), available at: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule94>, last visit: 10 February 2025; Sivia

it exists both during armed conflicts, as revealed in Rule 94 of the Rules of Customary International Law identified by the International Committee of the Red Cross, according to which "[s]lavery and the slave trade in all their forms are prohibited";[16] and in the absence of armed conflicts, with it being prohibited under customary human rights law[17] as a peremptory standard, no less.[18] Such a prohibition reflects a broader commitment to fundamental principles of humanity that resonate across the international legal order.[19]

Notably, the prohibition of slavery is recognized as being of a peremptory or *jus cogens* nature in both doctrine and case law; and as imposing obligations *erga omnes*. Peremptory law is that which admits no exceptions and thus demands absolute observance, which is imposed on all States and other subjects of international law. In turn, *erga omnes* obligations are those that are opposable to all members of the international community. Both generally and in the specific case of the law against slavery, it has been recognized that obligations related to peremptory law always have an *erga omnes* character. Because of the nature of those obligations, all States also have a legal interest in the respect of such duties. Additionally, it must be pointed out that enslavement amounts to an international crime, specifically the crime of enslavement.[20] i.e., towards all

This paper seeks to explore the ways in which the prohibition of slavery constitutes an obligation *erga omnes partes*, meaning an obligation that a state party has towards all other state parties to a given instrument, and the reasons why such duties have been adopted and the implications thereto. Drawing on a test articulated by the International Court of Justice (ICJ) in the *Belgium v. Senegal* case, this work examines the object and purpose of instruments as the 1926 Slavery Convention, the common interest of states in compliance with its obligations, and the integral nature of the prohibition of slavery within its normative frameworks.

Scarpa, "Slavery", in: Oxford Bibliographies of International Law, 2014 ("Prohibitions of slavery and the slave trade in times of both peace and war are unanimously considered to be customary rules of international law, and they have attained the level of peremptory norms (jus cogens principles)"), available at: <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0097.xml>, last visit: 10 February 2025.

16 ICRC, Jean-Marie Henckaerts and Louise Doswald-Beck (Eds.), Customary International Humanitarian Law. Volume I : Rules, Cambridge University Press, 2005, at 327.

17 Yasmine Rassam, "International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach", Penn State International Law Review, Vol. 23, 2005, pp. 809-810.

18 Ibid.

19 See M. Erpelding, 'L'esclavage en droit international: aux origines de la relecture actuelle de la définition conventionnelle de 1926' (2015) 17 Journal of the History of International Law / Revue d'histoire du droit international, 17(2), 170-220; F. Marchadier (dir.), La prohibition de l'esclavage et de la traite des êtres humains, Paris, 2022,

20 David Weissbrodt and Anti-Slavery International, "Abolishing Slavery and its Contemporary Forms", HR/PUB/02/4, Office of the United Nations High Commissioner for Human Rights, 2002, paras. 6-7; Art. 7.1.c of the Rome Statute of the International Criminal Court; Antonio Remiro Brotóns et al., Derecho internacional: curso general, Tirant Lo Blanch, 2010, at 231. Article 53 of the 1969 Vienna Convention on the Law of Treaties stipulates that: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

The legal nature of the prohibition of slavery and its accompanying fundamental obligations has further implications in terms of responsibility. the universal responsibility of states to enforce this prohibition and some of the challenges that hinder its effective realization. In this regard, it is necessary to point out that when State agents are involved in acts related to slavery, both their individual responsibility and that of the States they are agents of will be engage, insofar as each subject would have breached duties through conduct attributable to each of them the individuals, by virtue of their acts, and the States that of their agents. This is consistent with individual responsibility, which is not collectivized and takes note of through whom States act.[21] If private parties are the ones involved in acts of slavery, apart from the individual responsibility of human beings, States can also be responsible if they fail to diligently strive to protect human beings from it in accordance to their duty to ensure or protect, which requires preventing and responding to violations, among others to make sure that victims are repaired. A manifestation of the faculties of States to counter slavery is found in the law of the sea. For instance, after prohibiting the transport of slaves under Art. 99 and commanding States to "prevent and punish the transport of slaves in ships authorized to fly [their] flag ", in Art. 110 the United Nations Convention on the Law of the Sea entitles warships to visit and inspect foreign ships when there are reasonable grounds for suspecting that it is engaged in slave trade.

Finally, it must be noted that given the peremptory status of the norm and the seriousness of the breaches against it, oftentimes third States will not only be empowered to resort to the invocation of the responsibility of those responsible for the violations for example, exercising universal jurisdiction , but will also be required to cooperate to peacefully bring an end to the abuses and to not recognize their consequences. This follows from Arts. 40, 41, 48, and 54, of the International Law Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts.

By demonstrating the *erga omnes partes* nature[22] of the prohibition of slavery, this work also underscores the shared obligation of the international community to combat this egregious violation of human rights. It advocates for strengthened mechanisms to hold states accountable,[23] and calls for greater international cooperation to fulfill the promise of the 1926 Slavery Convention and its Supplementary Convention. Only

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21 I/A Court H.R., International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No.14, para. 56.

22 On the subject, see A. Hachem, O. A. Hathaway, J. Cole, 'A New Tool for Enforcing Human Rights: Erga Omnes Partes Standing' (2023) 62 Colum. J. Transnat'l L. 62, p. 259 ff; Pok Yin S. Chow, 'On Obligations Erga Omnes Partes' (2020) 52 Geo. J. Int'l L., p. 469 ff; M. Longobardo, 'The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility regarding Obligations Erga Omnes and Erga Omnes Partes' (2018) 23 Journal of Conflict and Security Law, pp. 383-404.

23 Amplius, see K. Schwarz, Reparations for slavery in international law: transatlantic enslavement, the maangamizi, and the making of international law, New York, NY: Oxford University Press, 2022; N. Boschiero, 'Giustizia e riparazione per le vittime delle contemporanee forme di schiavitù. Una valutazione alla luce del diritto internazionale consuetudinario, del diritto internazionale privato europeo e dell'agenda delle Nazioni Unite 2030' (2021) *Stato, Chiese* e Pluralismo Confessionale, also available at: https://air.unimi.it/retrieve/dfa8b9a6-00ab-748b-e053-3a05fe0a3a96/Boschiero.M_Giustizia_%28parte_prima%29.pdf

through collective efforts can the fundamental prohibition of slavery be fully realized and protect human beings from those who would deny and trample on their dignity.[24]

(B) THE EVOLUTION OF INTERNATIONAL LAW TOWARDS A CONTEMPORARY GENERAL PROHIBITION OF SLAVERY IN ABSOLUTE TERMS BY MEANS OF *ERGA OMNES* DUTIES

Today's absolute framing of the prohibition of slavery echoes the condemnation of it by civil society and the official position of States, that deem it an abhorrent practice. These stances are by no means performative or unnecessary in terms of their being merely condemnations of abuses in times gone by. On the contrary, most regrettably slavery is a persistent phenomenon in different ways, both including a wide array of modern slavery phenomena and dynamics and of traditional ways of slavery in certain social contexts.[25]

It can also be understood that the international legal prohibition of slavery is both a somewhat recent – thus contemporary – historical phenomenon[26] that responds to extra-legal demands. In the nineteenth century, for instance, the United Kingdom displayed a policy seeking to embark Latin American republics in official positions against slavery practices of their own or of third parties.[27] The United States of America likewise engaged in initiatives to make "slave trading punishable as piracy" during that century.[28] As to that period, it is noteworthy that several states agreed to deem slavery as a form of piracy, so as to permit the exercise of criminal jurisdiction against perpetrators beyond the national jurisdictions of victims and offenders, effectively treating slavers as *hostis homani generis* or 'enemies of all humanity'.[29] What is remarkable about these initiatives, which produced a necessary radical change in the legal conscience in relation to practices that had hitherto horrendously been deemed as 'legitimate' in legal terms,

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24 See H. TIgroudja, 'La répression internationale de l'esclavage', in Tanguy Le Marc 'Adour et Manuel Carius (dir.), Esclavage et droit, Paris: Artois Presses Université, 2010, pp. 139-150.

25 See, among others: United Nations Human Rights Office of the High Commissioner, "Libya must end "outrageous" auctions of enslaved people, UN experts insist", Press Releases, 30 November 2017; Human Rights Council, Contemporary forms of slavery as affecting currently and formerly incarcerated people, Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Tomoya Obokata, A/HRC/57/46, 19 July 2024; United Nations Human Rights Office of the High Commissioner, "Libya must end "outrageous" auctions of enslaved people, UN experts insist", Press Releases, 30 November 2017; Human Rights Council, Contemporary forms of slavery, including its causes and consequences, Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Tomoya Obokata, A/78/161, 12 July 2023, paras. 1-10; Human Rights Council, Contemporary forms of slavery affecting persons belonging to ethnic, religious and linguistic minority communities, Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Tomoya Obokata, A/HRC/51/25, 19 July 2022, paras. 38, 51-54.

26 I/A Court H.R., Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, paras. 248-249.

27 Nicolás Carrillo Santarelli, Carolina Olarte Bacarés, "From Swords to Words: the Intersection of Geopolitics and Law, and the Subtle Expansion of International Law in the Consolidation of the Independence of the Latin American Republics", Journal of the History of International Law, Vol. 21, 2019, pp. 5, 16, 18-20.

28 Jenny S. Martinez, The Slave Trade and the Origins of International Human Rights Law, Oxford University Press, 2012, at 123.

29 Ibid., Chapter 6.

was that the condemnation was made towards something that "is not a statist offense, but a human offense".[30]

Furthermore, it is a stain in the history of international law to note that during some periods in its practice standards of its own actually endorsed and promoted slavery. For example, agreements regulated slavery aspects such as quotas, access, etc. , among others,[31] and slavery was deemed consistent with domestic and international norms.[32] Given the contemporary peremptory status of the prohibition, one must recall that there can be supervenient breaches of peremptory law by dispositive law standards which originally were not contrary to the former.[33]

It must be noted that the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery itself noted in Art. 5 that there were countries "where the abolition or abandonment of slavery, or of the institutions or practices mentioned in article 1 of this Convention, [was] not yet complete", evincing how developments as that agreement were stepping stones that, continuing, expanding the reach of, and building on the initiatives of the nineteenth century, *paved the way* towards the full proscription of slavery. Furthermore, this dark episode in the history of international law has been noted by the International Law Commission, which has written about the principle of intertemporality on how States are only responsible for breaches when they contravene an obligation at the time a conduct of theirs takes place, and that therefore:

> "International tribunals have applied the principle stated in article 13 in many cases. An instructive example is provided by the decision of Umpire Bates of the United States-Great Britain Mixed Commission concerning the conduct of British authorities who had seized United States vessels engaged in the slave trade and freed slaves belonging to United States nationals. The incidents referred to the Commission had taken place at different times and the umpire had to determine whether, at the time each inci dent took place, slavery was "contrary to the law of nations". Earlier incidents, dating back to a time when the slave trade was considered lawful, amounted to a breach on the part of the British authorities of the international obligation to respect and protect the property of foreign nationals. The later incidents occurred when the slave trade had been "prohibited by all civilized nations" and did not involve the responsibility of Great Britain."[34]

Without a doubt, nowadays slavery is to be regarded as forbidden under peremptory law. This is so because its prohibition is unconditional and absolute, admitting no exceptions. According to the International Law Commission, the prohibition of slavery

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30 David Luban, "The Enemy of all Humanity", Netherlands Journal of Legal Philosophy, Vol. 47, 2018, at 123.

31 Ralph J. Lowery, "The English Asiento and the Slave Trade", TNH Bulletin, Vol. 23, 1960 one must note how odious the name of the journal itself is, reminding of past racial discriminative speech.

32 Mark D. Welton, "International Law and Slavery", Military Review, 2008.

33 Cf. Art. 64 of the Vienna Convention on the Law of Treaties adopted in 1969; Antonio Gómez Robledo, El ius cogens internacional: estudio histórico-crítico, Universidad Nacional Autónoma de México, 2003, pp. 99-118.

34 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, para. 2 of the commentary to article 13, at 58.

is among "[t]hose peremptory norms that are clearly accepted and recognized".[35] The Inter-American Court of Human Rights has likewise pronounced as to its peremptory nature.[36] Hence, the criticism that some in doctrine have levied against some regional decisions identifying the *erga omnes* status of obligations against slavery that rely, according to it, on misinterpretations of previous case law,[37] ultimately does not disprove or challenge the peremptory nature of the prohibition. And, given its *jus cogens* status, the obligations it generates have an *erga omnes* character.

Additionally, one can look at its international criminalization as further confirmation of the peremptory nature of the prohibition. Authors as Antonio Gómez Robledo have explained how the criminal condemnation of human rights violations by international standards can be seen as evidence of the *jus cogens* status of the prohibition of said abuses.[38] One can argue that, along the same lines, when international standards order states to criminalize a given conduct they confirm the absolute character of its prohibition, and thus of its peremptory status which amounts to admitting no exceptions whatsoever to it.[39] Altogether, these considerations confirm that, by virtue of being forbidden in terms of *peremptory* law, the obligation prohibiting acts of slavery has a general *erga omnes* nature.

This is the conclusion that follows the consideration that the obligations of every peremptory norm can be deemed to be general *erga omnes* duties.[40] It should therefore come as no surprise that the International Law Commission has identified those against slavery as having such a nature.[41] The Commission has said that while it would be "of limited value" or little use that and it was beyond the function of its 2001 articles on the Responsibility of States for Internationally Wrongful Acts to list "those obligations which under existing international law are owed to the international community as a whole […] the principles and rules concerning the basic rights of the human person, including protection from slavery", can clearly be deemed of an *erga omnes* nature.[42] In this regard, one can point to the criminalization of sexual slavery in Arts. 7.1.g, 8.2.b.xxii, and 8.e.vi of the Rome Statute of the International Criminal Court; as well as to Arts. 3, 5, and 6 of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which oblige states parties to it to criminalize and persecute the conveyance of slaves, physical harms caused against slaves, and the acts of enslaving others.

Having addressed the path towards the peremptory and *erga omnes* prohibition of slavery in all its forms and manifestations, one may well pose the question of whether

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35 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, para. 5 of the commentary to article 26, at 85.

36 I/A Court H.R., Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, paras. 249, 342.

37 J. Allain, The Law and Slavery, op. cit., pp. 235, 248.

38 Antonio Gómez Robledo, El ius cogens internacional: estudio histórico-crítico, Universidad Nacional Autónoma de México, 2003, pp. 169-170.

39 Art. 53 of the Vienna Convention on the Law of Treaties adopted in 1969.

40 Antonio Remiro Brotóns et al., op. cit., at 231.

41 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, para. 9 of the commentary to article 48, at 127.

42 Ibid.

further international legal developments are necessary or convenient for the sake of the achievement of its purposes, or whether they end up adding nothing and are mere reminders. Granted, the impunity with which it is sometimes committed, and the perpetration of violations reveal that there is an effectiveness issue. But that is not what we are asking presently. Instead, we wonder what benefits, if any, further or previous regulation by means of *erga omnes partes* and procedural developments could bring to the table. And the answer is that they are many. For the sake of such an analysis, it is important to note that unlike the general ones, *erga omnes partes* obligations "constitute a "smaller circle" with respect to the former category", in the words of Eugenio Carli.[43]

Firstly, as to the road towards the absolute and peremptory prohibition of slavery in all its forms and manifestations, one can say the following. On the one hand, that precedents as those explored herein were stepping stones that ended up forming a regime or *corpus juris* against slavery that has peremptory and *erga omnes* features, as we will further argue in section IV, infra. On the other hand, despite progress, it is important to come up with ways that bring an end to material, procedural and technical loopholes that lower the chances of there being an actual prosecution of abuses against the prohibition and a protection of victims. New *erga omnes partes* obligations can help to achieve this, as we will also say below. Furthermore, specialized standards, be it in general or regional international law, in particular agreements or in custom at different levels of governance, can provide specific instruments and mechanisms that can be resorted to in ways that increase the effectiveness of the norm; tackle specific manifestations of violations that occur frequently or in any other way in a given region or at the world level; and further refine the regime against slavery and fill gaps that are identified in practice in terms of circumvention of the prohibition or repression and protection towards its violation. This can be done by means of clarifying definitions that help to identify certain manifestations of slavery practices; by creating new cooperation or accountability mechanisms, or in other ways. We will now proceed to explore some of these aspects.

(C) THE NECESSITY TO IMPROVE COMPLIANCE WITH THE PROHIBITION OF SLAVERY

The prohibition of slavery is, on moral grounds, as finally recognized in international law in relatively recent times (sadly, too late for too many victims), absolute and fundamental. But despite this, human concupiscence and abuses against fellow human beings have made this central tenet be violated, still in recent times. Apart from direct violations, obligations related to actions against slavery have also been circumvented or breached by action and omission states in recent years.[44] This troubling phenomenon exposes

[43] Eugenio Carli, "Community Interests Above All: The Ongoing Procedural Effects of Erga Omnes Partes Obligations Before the International Court of Justice", EJIL Talk, 29 December 2023.

[44] See Y. Hamuli Kabumba, 'LA RÉPRESSION INTERNATIONALE DE L'ESCLAVAGE: LES LEÇONS DE L'ARRÊT DE LA COUR DE JUSTICE DE LA COMMUNAUTÉ ÉCONOMIQUE DES ÉTATS DE L'AFRIQUE DE L'OUEST DANS L'AFFAIRE HADIJATOU MANI KORAOU c. NIGER (27 octobre 2008)' (2008) 21 Revue québécoise de droit international, available at: https://www.erudit.org/fr/revues/

fundamental deficiencies in political commitment, legal frameworks, and mechanisms of accountability;[45] and makes it necessary to discuss certain issues related to the effectiveness of the primary obligations and standards discussed in this article. While norms are no less legal as a result of their breach, such a breach — especially in serious matters as the one presently discussed — is concerning.

Despite the binding obligations enshrined in instruments such as the Slavery Convention, the Supplementary Convention, and the Rome Statute of the International Criminal Court (ICC),[46] many states have consistently failed to fulfill their duties to prevent, prosecute, and redress acts of slavery,[47] and to criminalize slavery itself in their domestic legislation, despite the existence of international standards requiring this.[48] These failures undermine not only the credibility of international law but also foster a culture of impunity surrounding one of the gravest violations of human rights; and leave human beings unprotected from abuses that undermine their wellbeing in extreme ways

Instances of state evasion are particularly evident in contexts such as those of certain conflict zones in which sexual slavery has been systematically employed as a weapon of war.[49] Armed groups operating in regions such as Syria, Iraq, and the Democratic Republic of Congo have committed widespread acts of sexual slavery.[50] However, states with jurisdiction over such crimes have frequently failed to prosecute perpetrators.[51] This inaction is often attributed to challenges including fragile political transitions, competing military priorities, or, in some cases, overt indifference. In certain contexts, government complicity has also been evident, with state actors either providing material support to groups engaged in sexual slavery or deliberately avoiding accountability measures to preserve political alliances. In other contexts, the nonexistence or fragility of a central government may lead to non-state actors carrying out acts of slavery exploiting the absence of state presence and enforcement.

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rqdi/2008-v21-n2-rqdi05250/1068878ar/; M. Cavallo, 'Formes contemporaines d'esclavage, de servitude et travail forcé. TPIY et la CEDH entre passé et avenir' (2006) 5 Droits fondamentaux, 2006, p. 2.

45 Amplius, see D. Weissbrodt, 'Slavery', Max Planck Encyclopaedia of Public International Law, available at: MPEPIL <http://www.mpepil.com>

46 See e.g. Harmen van der Wilt, 'Slavery prosecutions in international criminal jurisdictions' (2016) 14 Journal of International Criminal Justice, 269-283; M.C. Bassiouni, 'Enslavement as an international crime' (1990) 23 NYUJ Int'l L. & Pol., 445. See also Esteban Juan Pérez Alonso, 'Tratamiento jurídico-penal de las formas contemporáneas de esclavitud' (2019) 23 Revista de Estudos Jurídicos da UNESP, 38 ff.

47 See also R.B. Achour, 'Le cadre juridique international de la prohibition de l'esclavage' (2021) Ordine Internazionale e Diritti Umani, available at: https://www.rivistaoidu.net/wp-content/uploads/2021/12/1_Ben-Achour_2.pdf

48 J. Allain, "Slavery and its Obligations Erga Omnes", Australian Year Book of International Law Online, Vol. 36, 2019.

49 See ex multis US Department of State, 'Modern Slavery as a Tactic in Armed Conflicts', available at: https://2009-2017.state.gov/j/tip/rls/fs/2015/250664.htm; M. Bastick, K. Grimm, R. Kunz, Sexual Violence in Armed Conflict — Global Overview and Implications for the Security Sector, Geneva Centre for the Democratic Control of Armed Forces, Genève, 2007.

50 Amplius, see S. Meger, Rape loot pillage: The political economy of sexual violence in armed conflict, Oxford, 2016.

51 See E.S. Janus, Failure to protect: America's sexual predator laws and the rise of the preventive state, New York, 2006.

Economic exploitation of migrants and rural workers could likewise be carried out in ways that amount to modern slavery.[52]

Altogether, this reveals that evasion of the prohibition is not limited to contexts of armed conflict but extends into peacetime scenarios as well.[53] In various regions, such as Southeast Asia, the Middle East, and parts of Africa, insufficient labor protections and entrenched cultural discrimination have, for example, facilitated the trafficking and exploitation of women and girls under the pretense of domestic servitude or forced marriage.[54] Although international legal instruments unequivocally prohibit these practices, many states have failed to take effective countermeasures against them.[55] Sovereignty and cultural relativism are often invoked as justifications to resist external scrutiny, allowing systemic exploitation to persist unchecked.[56]

The complicity of transnational criminal networks further exacerbates this issue.[57] Human trafficking networks exploit weak border controls and inconsistent law enforcement across jurisdictions, particularly in states with fragile governance structures.[58] States frequently neglect their obligations to combat such networks, failing to align national legislation with international standards or to allocate sufficient resources for the investigation and prosecution of trafficking-related crimes.[59] International frameworks, such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the so called 'Palermo Protocol'),[60] emphasize the necessity of robust counter-trafficking measures. Yet, their implementation remains inconsistent, superficial, and sometimes even subordinated to other policy priorities,[61] in spite of the seriousness of the abuses and the necessity to better tackle them, in order to prevent victims, who are deceived or otherwise abused in their places of origin so as to enslave them, forcing them to provide services that have been considered to be either

52 IOM UN Migration, Migrants and their Vulnerability to Human Trafficking, Modern Slavery and Forced Labour, 2019, pp. 4-5; I/A Court H.R., Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, para. 112.

53 See E.S. Janus, op. ult. cit.

54 See e.g., B. Balos, 'The wrong way to equality: privileging consent in the trafficking of women for sexual exploitation' (2004) 27 Harv. Women's LJ, p. 137 ff; B. Faedi, 'The double weakness of girls: Discrimination and sexual violence in Haiti' (2008) 44 Stan. J. Int'l L., p. 147 ff.

55 Amplius, see C.V. Chitupila, Gold between their legs? Trafficking in women for sexual exploitation: An analysis of the SADC response at national and regional level, MS thesis. University of Pretoria, 2009.

56 See e.g., J. C. Goltzman, 'Cultural Relativism or Cultural Intrusion Female Ritual Slavery in Western Africa and the International Covenant on Civil and Political Rights: Ghana as a Case Study' (1998) 4 New Eng. Int'l & Comp. L. Ann., p. 53 ff.

57 See L. Shelley, Human trafficking as a form of transnational crime, Willan, 2013, pp. 116-137.

58 See N. Avdan, 'Human Trafficking, Organized Crime, and Border Control: Vicious or Virtuous Cycle?', APSA 2011 Annual Meeting Paper.

59 See J. Lindley, 'Policing and prosecution of human trafficking', in Research Handbook on Transnational Crime, London, 2019, pp. 247-260.

60 UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, https://www.refworld.org/legal/agreements/unga/2000/en/23886

61 Amplius, see E. K. Hyland, 'The impact of the protocol to prevent, suppress and punish trafficking in persons, especially women and children' (2001) 8 Human Rights Brief, p. 12 ff.

or almost next to slavery in practice, with distinctions between the concepts being prone to exploitations that can weaken the human rights framework.[62]

Economic and social factors further contribute to the evasion of obligations. Structural gender inequality, systemic poverty, and the normalization of exploitative practices, can render marginalized populations, particularly women and girls and persons in rural areas, disproportionately vulnerable to different forms of slavery — including that of sexual kind.[63] States exacerbate this vulnerability by failing to address these underlying conditions and to adequately respond to the violations — with impunity entrenching the odious practices. Instead of viewing structural inequality as integral to the eradication of sexual slavery, many states prioritize short-term criminal justice measures that inadequately address the root causes of exploitation[64] and fail to systemically and sufficiently tackle it in society. Geopolitical considerations also play a significant role in obstructing accountability.[65] Efforts by international mechanisms — such as the International Criminal Court (ICC) or UN-mandated investigative bodies [66] — to address sexual slavery have often been stymied by states' reluctance to cooperate, with their commitments being but merely of a token nature in practice. Some states have weaponized jurisdictional loopholes to shield perpetrators from prosecution, while others have actively obstructed investigations, particularly when crimes implicate their allies. For example, allegations of states blocking ICC inquiries into acts of sexual slavery committed by aligned parties demonstrate a clear erosion of the universality of the prohibition.[67] Such selective and double standards demonstrate a lack of an actual unconditional commitment to the fight against slavery and the prioritization of strategic foreign relations.

Accordingly, we put forward that general and regional specialized standards of a procedural or substantive nature that address loopholes and tackle specific challenges that contribute to the lack of a fully effective enforcement of anti-slavery provisions must continue to be studied for the sake of eradicating the scourge of slavery. Likewise, case law developments that identify different forms of slavery calling them as such, and hold perpetrators and accomplices alike accountable, are necessary, both by international/regional and by domestic judicial authorities exercising universal and other jurisdictions. The former developments will likely create new *erga omnes* obligations, while the latter — i.e., judicial pronouncements — will enforce them and lead to their effective implementation.

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62 Waldimeiry Correa Da Silva, "La explotación y la trata laboral desde el contexto de la investigación participativa", in: Julio Alberto Rodríguez Vásquez (Ed.), V Congreso Jurídico Internacional sobre formas contemporáneas de esclavitud: Veinte años después del Protocolo de Palermo, Tome II, CICAJ PUCP, 2023, pp. 220, 237.

63 See E. Decaux, Les formes contemporaines de l'esclavage, Leiden/Boston, 2009, pp. 119-134.

64 For references, see e.g., D. Tolbert, L. A. Smith, 'Complementarity and the investigation and prosecution of slavery crimes' (2016) 14 Journal of International Criminal Justice, pp. 429-451.

65 See G. Fitzgerald, 'Putting trafficking on the map: The geography of feminist complicity', in Demanding sex: Critical reflections on the regulation of prostitution, London, 2016, pp. 99-120.

66 See M. O'Brien, 'Sexual exploitation and beyond: Using the Rome Statute of the International Criminal Court to prosecute UN peacekeepers for gender-based crimes' (2011) 11 International Criminal Law Review, pp 803-827; N. Quénivet, 'The Role of the International Criminal Court in the Prosecution of Peacekeepers for Sexual Offenses' (2008) 14 Law enforcement within the framework of peace support operations, pp. 411-412.

67 See N. Quénivet, op. ult. cit., p. 411 ff.

(D) THE PROHIBITION OF SLAVERY AS AN *ERGA OMNES PARTES* PROHIBITION

According to the International Court of Justice (ICJ),a "common interest implies that […] obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties "have a legal interest" in the protection of the rights involved […] These obligations may be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case".[68] Therefore, in other words, *erga omnes partes duties* protect common interests and as a result all other states participating in the regime in which such obligations are present have an interest of a *legal* nature in the integrity of those obligations and compliance with them, having therefore standing to invoke breaches of them. Interestingly, *even* back then, the compromissory clause found in Art. 8 of the 25 September 1926 Slavery Convention indicates that the integrity and respect of a treaty was seen as of legal interest for the parties to it, entitling them to raise disputes related to its interpretation and implementation. It must be said that the League of Nations-era or Inter-war-era judicial institution mentioned in that provision have been superseded by the International Court of Justice, according to Art. V of the 1953 Protocol amending the Slavery Convention signed at Geneva on 25 September 1926.[69] All of this can point towards the identification of (at least some) elements of *erga omnes* obligations before the coining of the expression in the case law of the ICJ and in doctrine being present before such a formal recognition. In the end, the potentialities of the law can exist before their *conscious* and more cohesive identification of them with a given formula.

In turn, the International Law Commission has referred to two elements the concurrent presence of which reveals the existence of an *erga omnes* partes obligation: first, it must be an obligation that is "owed to a group to which the State invoking responsibility belongs; and secondly, the obligation must have been established for the protection of a collective interest". Moreover, the Commission admits that in terms of their sources, such duties can "derive from multilateral treaties or customary international law".[70]

In order to identify *erga omnes partes obligations*, it may be important to examine three key criteria: (1) the object and purpose of a regime e.g., a given treaty , which identifies the overarching goals and intentions underpinning the agreement; (2) the common interest of state parties in ensuring compliance with the treaty's duties and obligations, reflecting a collective commitment to uphold its principles; and (3) whether

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68 International Court of Justice, Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal), Judgment, 20 July 2012, para. 68.

69 The Article of the Protocol reads: "In article 8 "the International Court of Justice" shall be substituted for the "Permanent Court of International Justice", and "the Statute of the International Court of Justice" shall be substituted for "the Protocol of December 16th, 1920, relating to the Permanent Court of International Justice".

70 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, para. 6 of the commentary to article 48, at 126.

the obligation in question is so integral to achieving the treaty's purpose that its fulfillment is indispensable.[71]

Applying this analytical framework to regimes such as that of the prohibition of slavery under the 1926 Slavery Convention clearly supports the assertion of finding the *erga omnes partes* nature of this norm, underscoring its universal significance and the collective responsibility of state parties to enforce and uphold it.[72]

Interestingly, this would imply that there were *erga omnes* obligations before their *eo nomine* identification as such by the International Court of Justice in its famous *obiter dictum* in the Barcelona Traction case. And that is precisely what we argue: this pronouncement consisted in a *recognition* of an existing normative phenomenon, as one can glean from its wording: after all, the Court said then that obligations towards the community of all states in the case of general ones, and to a circle within them in relation to those that are *partes*, we might add "[b]y their very nature *are* the concern of all States [in the respective group, we add]. In view of the importance of the rights involved, all States *can be held to have a legal interest* in their protection; *they are* obligations *erga omnes*" (emphasis added).[73] The Court's use of words such as "are", "can be held to", and alike, suggests that it is merely *acknowledging* a legal reality. And the Latin expression employed is merely a translation of the fact that the obligations in question are relevant 'towards all'. According to Jean Allain, the ICJ "identified protection from slavery as one of two specific examples of obligations erga omnes obligations owed to the international community as a whole arising out of human rights law, as early as 1966", which in his opinion is an important precedent at the world stage on developments against slavery and in relation to its use in the past, alongside compensations.[74]

Moreover, even if there were doubts as to their intertemporal status as such, from a contemporary perspective it is also possible to reach a conclusion in favor of the *erga omnes partes* status of duties found in instruments such as the aforementioned treaty that preceded the consolidation of the doctrinal identification of the obligations by way of example, with the same logic being applicable elsewhere. This can be done easily with a logic that goes from the general to the specific, insofar as if the general prohibition of slavery has been widely accepted to enjoy a (general) *erga omnes* nature. Hence, it stands to reason that specific manifestations of such a prohibition in "smaller

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71 International Court of Justice, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), 18 September 2002, para. 34.

72 In its 2012 judgment in the case of Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), the International Court of Justice (ICJ) determined that Belgium had ius standi to hold Senegal accountable for the alleged violations of its obligations under Articles 6(2) and 7(1) of the Convention Against Torture. and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 The ICJ further declared these claims admissible without requiring Belgium to demonstrate that it was "specially affected" or "injured." This decision was grounded in the concept of "obligations erga omnes partes," which the Court described as obligations for which all states share a "common interest" in ensuring compliance, as is the case with the provisions in question.

73 International Court of Justice, Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, 5 February 1970, para. 33.

74 J. Allain, The Legal Understanding of Slavery: From the Historical to the Contemporary, Oxford University Press, 2012, at 119.

circles" will likewise reflect a collective interest in their respective regimes, entitling its participants to seek their effectiveness, as a manifestation of what they are already entitled to generally.

In any case, what can be considered to be beyond doubt is the fact that developments such as this treaty and others mentioned in section II, *supra*, contributed to the increasing condemnation in absolute terms of slavery, in expanding concentric circles that would eventually reach the world stage beyond the circles of specific regimes. Therefore, the latter, which had duties with features corresponding to what we today call *erga omnes partes* obligations, paved the way towards the general prohibition of slavery practices. This was thanks to the formation of a legal conscience — a sort of what has been called a 'Grotian moment'[75] — openly and unconditionally opposed to slavery, thanks to how the *erga omnes partes* regimes transformed networks of accountability and obligations, conscience and identification of duties, and practices, which ended up compounding with others and consolidating a general international regime of prohibitions.

(1) Object and Purpose of the 1926 Slavery Convention

The Slavery Convention was adopted to suppress and prevent slavery in all its forms, including slavery-like practices such as slavery. Its preamble refers to ongoing efforts towards "securing the complete suppression of slavery in all its forms". Under the 1969 Vienna Convention on the Law of Treaties (VCLT), the preamble and the treaty's text provide key insights into its object and purpose. The aspiration present in the preamble in absolute and unequivocal terms refers to a collective aspiration to completely eradicate all the forms of this grave violation of human dignity.

From a contemporary perspective, it is impossible to underestimate the tremendous importance of the 1926 Convention. It opposed and contributed to countering slavery practices by means of its aim to globally suppress slavery, which has effects that are dehumanizing and brutalizing.[76] Even though the words 'human rights' do not appear therein, which can be explained because the (increasingly) widespread express internationalization of human rights in conscious and literal terms would take place after World War II, the treaty is considered today to be a human rights one, as is revealed in its inclusion as such in the webpage of the Office of the High Commissioner of Human Rights of the United Nations.[77] Developments as the treaty helped to make slavery be recognized not only as a violation of fundamental human rights but as an institution that shocks the conscience of humanity due to its inherent violence and exploitation of individuals. Considering that its Preamble and provisions as Art. 2.b talk of the objective "to bring about […] the complete abolition of slavery in all its forms", we can both consider that it encompasses different manifestations of the odious practice,

75 Michael P. Scharf, "The "Grotian Moment" Concept", *ILSA Quarterly*, Vol. 19, 2011, at 16.

76 Amplius, see C. Gevers, 'Refiguring slavery through international law: The 1926 slavery convention, the 'native labor Code'and racial capitalism' (1922) 25 *Journal of International Economic Law*, 312-333.

77 Source: <https://www.ohchr.org/en/instruments-mechanisms/instruments/slavery-convention>, last visit: 04 February 2025.

including those that existed already and those that could arise with new features. In this context, sexual slavery, as one of the most extreme and devastating forms of slavery, is particularly relevant. It entails the systematic and coercive use of individuals, often women and children, for sexual exploitation, thereby stripping them of their autonomy, dignity, and basic human rights.

Sexual slavery, as an extreme manifestation of slavery, indeed directly aligns with the object and purpose of the 1926 Convention, which sought to eradicate all forms of slavery and servitude. The Convention's overarching goal was to put an end to the commodification of human beings, with the prohibition of sexual slavery being a crucial component of this aim. By recognizing sexual slavery as a severe violation of human dignity, the Convention enshrines the need to take decisive action against such practices, ensuring that they are not only condemned but eradicated globally. Thus, the Convention's central objective to abolish all forms of slavery carries with it a clear and unambiguous prohibition of sexual slavery, as we said above. The inextricable link between the two underscores the importance of addressing the horrific and ongoing issue of sexual slavery within the broader framework of global human rights protections and international law.

(2) Common Interest in Compliance with the 1926 Slavery Convention

A second element that can aid to identify *erga omnes partes* mentioned in the beginning of this section IV worth considering involves determining whether state parties to a particular treaty share a common interest in ensuring compliance with the obligations enshrined within that treaty. This assessment focuses not merely on the bilateral or individual interests of the states involved, but on a broader, collective understanding of the treaty's objectives and the principles it upholds.

In the case of *Belgium* v. *Senegal*, the ICJ underscored the notion that human rights treaties, including the Convention Against Torture (CAT), go beyond the narrow interests of the states that are parties to the treaty.[78] These treaties impose obligations that are not solely dependent on the agreements between the signatories; instead, they establish a collective and universal interest in ensuring that fundamental human rights are respected and upheld. The Court highlighted that the duties enshrined in such treaties, particularly the prohibition of torture, are based on universally recognized principles of humanity and are of such a nature that they bind all parties to act, even in the absence of direct bilateral relationships.[79]

In this context, the ICJ emphasized that the obligations under the Convention Against Torture reflect global consensus on the importance of preventing torture and other forms of ill-treatment, and therefore, states have a shared responsibility to uphold these obligations for the greater good of humanity. This collective interest transcends the individual or regional concerns of the states involved, aligning them

78 See ICJ, Questions Concerning the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment (Jul. 20, 2012)], para. 13. See also ICJ, Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Second Phase, Judgment, 1970 I.C.J. 3, paras. 33 to 35.

79 See ICJ, Questions Concerning the Obligation to Prosecute or Extradite (Belg. v. Sen.) cit.

with the broader international community's commitment to ensuring the protection of human dignity and rights. Thus, the ICJ's ruling in *Belgium* v. *Senegal* reaffirms that human rights treaties such as the Convention Against Torture impose obligations that are inherently linked to global norms and values, compelling states to act not just in their own interest but in the collective interest of preserving and promoting fundamental human rights for all.[80]

Similarly, under the 1926 Slavery Convention, the abolition of all forms of slavery, including sexual slavery, transcends any concept of reciprocal benefit between specific states. The Convention's objective is not confined to the interests of individual signatories but reflects a universal and collective commitment to the fundamental principle of human rights. The abolition of slavery is seen not as a matter of mutual benefit among the parties involved, but as a moral imperative for the international community as a whole. States parties to the 1926 Convention share a common legal duty to ensure that the prohibitions on slavery, including sexual slavery, are respected, and enforced, as any continued existence of slavery in any form serves to undermine the core values and ethical foundation of the international order. This shared legal interest is emphasized by the fact that the obligations enshrined in the 1926 Slavery Convention are owed to all states parties, regardless of whether a direct or bilateral relationship exists between a state and the perpetrator or victim of slavery. In this sense, the obligations are not purely bilateral but extend universally to all members of the international community. This universal framework reflects a global consensus on the abhorrent nature of slavery and underscores that its abolition is a collective responsibility. Just as the ICJ noted with respect to the Convention Against Torture, states do not enforce these prohibitions solely for their own benefit or out of bilateral concerns; rather, they do so in the service of the Convention's broader humanitarian goals.

In this light, states are empowered not only to demand compliance with the Convention from other states parties, but also to hold violators accountable, regardless of whether there is a direct link to the state making the demand. This further reinforces the concept of *erga omnes* obligations that is, obligations owed to the international community as a whole and highlights the fundamental, universal nature of the prohibition against slavery, including sexual slavery. By framing these obligations as binding on all state's parties and beneficial to humanity at large, the 1926 Convention emphasizes that the fight against slavery is not a matter of individual state interests, but a shared commitment to safeguarding human dignity worldwide.

(3) Integral Nature of the Prohibition of Sexual Slavery to the Convention's Purpose

A third criterion involves determining whether the prohibition of slavery is so integral to the purpose of the treaty that it cannot be derogated from. Under the 1926 Slavery

[80] Ibidem, para. 13. See also Manuel J. Ventura,. Victor Baiesu, 'The ICJ's Senegal v. Belgium Judgment and the Obligation to Prosecute or Extradite Alleged Torturers: The Case of Al Bashir and the ICC (June 11, 2019), in Sharon Weill, Kim Thuy Seelinger & Kerstin Bree Carlson (eds), The President on Trial: Prosecuting Hissène Habré, Oxford, 2020, pp. 295-308.

Convention, the eradication of slavery in all its manifestations including sexual slavery is paramount. This is evident in the unequivocal language of the treaty and its supplementary instruments, such as the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, [81] which explicitly address slavery-like practices, including sexual slavery.

No reservations or derogations are permissible under the 1926 Slavery Convention that would undermine the core obligation to abolish slavery and its manifestations, implicitly including sexual slavery which, despite not being mentioned as such in its text, falls within its scope. The absolute nature of this prohibition ensures that no state can justify or condition its compliance with the Convention based on political, cultural, or legal considerations. The abolition of slavery is an imperative that transcends national interests and local contexts; it is a fundamental human right that must be respected without exception. This unqualified commitment ensures that the core purpose of the Convention the eradication of all forms of slavery remains intact, irrespective of any external factors or potential conflicts of interest. In this sense, the prohibition of slavery operates as a non-negotiable standard within international law, reinforcing its fundamental importance within the global legal order. As we demonstrated in section II, the prohibition of slavery is universally recognized as a peremptory norm of customary international law, also known as *jus cogens*. This status grants the prohibition an elevated position in the hierarchy of international legal norms, signifying that it cannot be derogated from under any circumstances. The fact that the prohibition against slavery has attained this elevated status further reinforces its centrality to the 1926 Slavery Convention and to the broader international legal framework. As a norm of customary international law, the prohibition against slavery binds all states, whether they are parties to the specific treaties that address it. This universality underscores the widespread acknowledgment of slavery's extreme inhumanity and the collective global commitment to its abolition. As a cornerstone of the Convention's object and purpose, the prohibition of slavery constitutes a non-derogable obligation. This means that it is an absolute and indivisible duty that all states parties must respect and enforce, without exception, in all circumstances.

The core principle of abolishing slavery is so deeply embedded within the treaty that it cannot be subject to reservations or any form of conditional application. It is an enduring and universal obligation that reflects the commitment of the international community to protect the human dignity and human rights of all individuals, and particularly those vulnerable to exploitation and oppression through slavery. As such, the prohibition against slavery, in all its forms, holds a central and binding place within the structure of general international law, compelling all states parties to uphold and ensure its effective implementation.

[81] See J. A. C. Gutteridge, 'Supplementary Slavery Convention, 1956' (1957) 6 *International & Comparative Law Quarterly*, 449-471.

(E) CHALLENGES TO THE REALIZATION OF *ERGA OMNES* PARTES OBLIGATIONS

Having satisfied the criteria established by the ICJ in *Belgium* v. *Senegal*, the prohibition of slavery under the Slavery Convention constitutes an *erga omnes partes* obligation. The Convention's object and purpose — to eradicate slavery in all its forms — cannot be fulfilled without the absolute prohibition of slavery. State parties share a collective legal interest in ensuring compliance with this prohibition, reflecting its universal significance and the non-reciprocal nature of obligations under the Convention. Finally, the prohibition of sexual slavery is integral to the Convention's purpose and is recognized as a norm of customary international law, further affirming its *erga omnes partes* character. While we have referred to this specific type of slavery, the same considerations are applicable to other ones.

While the prohibition of slavery undoubtedly meets the theoretical criteria for an erga omnes partes norm — meaning it is a rule binding on all states and applicable universally — its practical implementation continues to encounter significant challenges. While the legal framework established by the 1926 Slavery Convention provides a solid foundation for the abolition of slavery in all its forms, in practice, the effective enforcement of this prohibition remains elusive. One of the major obstacles to ensuring compliance is the frequent lack of political will among contracting states. States, particularly those with limited resources or unstable governance structures, may be unable or unwilling to take the necessary steps to combat slavery within their borders. These challenges are compounded by competing national interests, internal political dynamics, and the reluctance of certain governments to confront or address systemic exploitation and human rights abuses. But one cannot ignore that also in those states with greater resources abuses contrary to the prohibition of slavery may be perpetrated with impunity. Transnational networks, criminal practices, and other factors may play a part in this, reminding us about the importance of effectively implementing standards against transnational organized crime — something that is evident in the text of Art. 3.a of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime —, of universal jurisdiction, and the guarantee of judicial cooperation and access to justice, among others provided by contemporary international law.

In addition to political challenges, practical barriers such as insufficient resources and inadequate legal frameworks often undermine efforts to prevent or punish slavery. Many states, especially those with developing economies or fragile institutions, struggle to allocate the necessary resources or establish the infrastructure needed for the effective enforcement of anti-slavery laws. As a result, slavery persists in various forms, including forced labor and sexual slavery, despite its clear prohibition under the Convention. Geopolitical considerations and structural inequalities further complicate the situation, as they frequently inhibit the collective action required to address slavery as an international issue. States may be unwilling to intervene in or criticize the practices of other states due to diplomatic, economic, or strategic concerns. Additionally, powerful countries or those with significant influence may shield or overlook violations committed by their allies or within their spheres of influence in a perverted way that shows how

humanity considerations are still far from being given the priority they deserve. Such political dynamics create a fragmented approach to enforcing the prohibition of slavery, undermining the collective responses and cooperation *on behalf of fellow human beings* that are essential to the *erga omnes* nature of the obligation.

These and other shortcomings underscore the critical need for strengthened international cooperation and the development of more robust enforcement mechanisms. States must renew their commitment to the principles enshrined in the Slavery Convention and take active steps to ensure that slavery, in all its forms, is eradicated. This requires greater accountability, increased support for anti-slavery programs, and the implementation of more effective monitoring and reporting mechanisms. Furthermore, a collective global effort that is victim and human-centered is necessary to address the structural inequalities that allow slavery to persist, with a focus on addressing the root causes of exploitation, such as poverty, discrimination, and conflict. Only through a coordinated and resolute approach can the international community ensure the full realization of the prohibition of slavery as an *erga omnes partes* obligation.

(F) CONCLUDING REMARKS

This article has critically examined the historical and contemporary prohibition of slavery, paying attention to the past and potential contributions and relevance of an *erga omnes partes* obligation developments. The findings of this analysis affirm that the prohibition of slavery in all its forms, such as sexual slavery, holds an *erga omnes* status be it general or *partes*, depending on the level of the 'circle' of the participants. By evaluating the object and purpose of the 1926 Slavery Convention as a way of example, one can identify the shared legal interest of state parties in its enforcement, and the integral nature of the prohibition within the broader framework of the Convention, this prohibition is universally binding upon all states, irrespective of their direct relationship with the violator or victim. Interestingly, that *legal* interest may fail to be corresponded by an actual *political* (cynical) interest of politicians. But its existence itself provides a means to invoke the standards in question, countering wrongful practices and omissions.

The prohibition of slavery, as enshrined in the 1926 Slavery Convention and its Supplementary Convention, reflects a fundamental commitment to human dignity and the protection of human rights and freedoms. As a *jus cogens* norm, the prohibition is absolute, with no derogation allowed. This status highlights the collective responsibility of states to ensure the eradication of all forms of slavery, including the particularly egregious form of sexual slavery. However, while the legal framework is firmly established, its practical realization remains a significant challenge.

Despite the binding nature of the Slavery Convention and its associated instruments, numerous states persistently fail to uphold their obligations. The persistence of slavery in various forms whether in conflict zones, such as the use of sexual slavery as a weapon of war, or in peacetime practices, such as human trafficking demonstrates a troubling lack of political will, inadequate legal structures, and often outright evasion of international duties. In some cases, states' failure to prosecute slavery-related crimes is compounded by

complicity in trafficking or the exploitation of vulnerable populations. This undermines the global actions against slavery that are *possible* under international law and hinders the effective enforcement of international law. That said, as we have argued elsewhere, the existence of *erga omnes* obligations provides *reasons* of moral action, in the following sense. Just as not everything permitted under the law may be morally upright, the opposite can also be true, as is the case here. States authorities and non-state actors alike when empowered to are ethically called to *resort to the possibilities* permitted by the existence of general and *partes erga omnes* obligations, with the omission of doing so being morally wrong and unethical, because they can be the only means available to protect those who have not been protected otherwise. As we then wrote:

"[I]t is also possible to identify a second scenario with circumstances under which failing to dosomething that the law permitsthe moral agent to do will be wrong from the perspective of other normativities […] ust as doing what the law permits is, in some circumstances, contrary to the standards, reasons, and criteria found in other normativities; likewisenot doing what the law permits to do is sometimes contrary to morals and prudence, such as when such failure cannot be expected to become a universal maxim of con-duct; and/or when it fails to take into account virtues such as solidarity which can connect "compassion and justice" in contexts that call for it, from a virtue ethics perspective […] One must thus use what the law allows. The law is, after all, instrumental, and sometimes the possibilities it offers can be the only lifeline for those whose lives and essential wellbeing depend on at least a third party acting on their behalf, interacting with the law by invoking it or otherwise".[82]

Moreover, international efforts to address sexual slavery and other forms of exploitation face significant obstacles, including political and economic considerations, cultural relativism, and the influence of transnational criminal networks. Despite the establishment of frameworks such as the Palermo Protocol and the Rome Statute of the International Criminal Court, state actors have frequently invoked sovereignty or indifference to resist external scrutiny and evade accountability for slavery-related violations. Geopolitical interests also often obstruct the pursuit of justice, as evidenced by instances in which states have shielded perpetrators from prosecution or obstructed investigations into slavery-related crimes.

This study concludes that while the prohibition of slavery under the 1926 Slavery Convention is theoretically an *erga omnes partes* obligation, the gap between legal obligations and actual enforcement remains vast. To realize the full potential of this prohibition, the international community must redouble its efforts to address the root causes of slavery, strengthen enforcement mechanisms, and ensure that accountability mechanisms are robust and universally applied. States must also work to eliminate systemic inequalities that facilitate the exploitation of marginalized groups, particularly women and children, who remain disproportionately vulnerable to sexual slavery and other forms of exploitation.

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[82] Nicolás Carrillo Santarelli, "*Erga omnes* obligations as key pieces to build community and fair relations", *Revista Electrónica de Derecho Internacional Contemporáneo*, Vol. 7, 2024, pp. 7, 9-10.

Considering the significant challenges to the effective implementation of the prohibition of slavery, it is imperative that the international community, both through multilateral organizations and bilateral efforts, commit to a renewed and focused approach to the eradication of slavery in all its manifestations.[83] The persistence of slavery, whether in the form of forced labor, human trafficking, or sexual slavery, as identified in cases such as the one related to crimes perpetrated in Guatemala against persons from Sepur Zarco and neighboring communities,[84] underscores the urgent need for a coordinated global response. It is not enough to rely solely on legal frameworks and conventions; sustained political will, concrete action, and robust enforcement mechanisms are necessary to translate the prohibition of slavery into meaningful protection for all individuals. That said, in addition to make legal practice and legal standards more fully and effectively provide protection to victims in the future, the peremptory or absolute nature of the prohibition of slavery almost permits to rethink responses to past abuses contravening it and identify pending and potential reparations to its victims.

In this regard, after identifying that it admits no exceptions, Kohki Abe persuasively and interestingly argued that the issue of the "comfort women" who were subjected to sexual slavery by Japanese agents during the Second World War cannot be considered to have been fully and finally closed or settled; arguing, persuasively in our opinion, that law is contingent and contested during its different eras by voices that disagree as to their content. Accordingly, past responses to past slavery problems such as the one raised in that author's article might have been flawed or challenged even then, or possible responses to them might have been overlooked. This demands not applying the law retroactively, but to diligently look for all of the possibilities it offers throughout this era. For the future, one might call for progressive development standards and practices that complement and operationalize the core peremptory tenets; but also for the identification of possibilities not yet fully identified or realized. The author's reliance on the notion of trans-temporal justice is quite pertinent, and we cite it here:

"[T]he trans-temporal pursuit of justice is an attempt to refine legal rules so that they may be made relevant in the past that has been revisited from the perspective of the "Other". Put differently, it is an endeavor to respond to the suppressed voices of the past and resuscitate potentialities of law that have been silenced by the dominant master-narrative. It is not a fabrication of the past or a retroactive application of present legal standards; it is a re-acknowledgement of the then-existing legal realities from the perspective of trans-temporal justice. In other words, it is an endeavor to break away the paradigm of presentism that excludes the past from the scope of law, and stretch the reach of justice to the past."[85]

The eradication of slavery requires a multi-faceted approach, which includes stronger legal enforcement, the provision of resources for anti-slavery initiatives, and the strengthening of international cooperation to hold perpetrators accountable. States must

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83 See also N. Siller, "'Modern Slavery' Does International Law Distinguish between Slavery, Enslavement and Trafficking?" *Journal of International Criminal Justice* (2016) 14, pp. 405-427.

84 Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente of Guatemala, Judgment C-01076-2012-00021, Of. 2°, pp. 152, 488.

85 Kohki Abe, "International Law as Memorial Sites: The "Comfort Women" Lawsuits Revisited", *The Korean Journal of International and Comparative Law*, Vol. I, 2013, at 175.

take ownership of their obligations under the 1926 Slavery Convention and demonstrate a genuine commitment to combating modern forms of slavery through domestic legal reforms, effective law enforcement, and the implementation of comprehensive victim support programs. Moreover, international intergovernmental organizations, including the United Nations and regional human rights bodies, must play a more active role in monitoring compliance, providing technical assistance to states in need, and facilitating cross-border collaboration to address transnational slavery networks.

Even though the article has examined in detail State obligations, the multi-dimensional approach referred to in the previous paragraph entails a multi-subject dimension, which can make the fight against slavery more effective. Indeed, the engagement of non-governmental organizations (NGOs) and civil society actors is quite important. They can play a crucial role in raising awareness, providing support to victims, obtaining and providing information, and advocating for policy changes at the national and international levels. These actors, working alongside governments and international organizations, can help ensure that the voices of those affected by slavery are heard and that their rights are upheld. Through sustained cooperation, increased political will, and the establishment of concrete actions, the international community can better fulfill its promise of abolishing slavery and ensuring that its prohibition remains a core and effective principle of general international law.

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Cross-Border Litigation of Trade Secret Misappropriation: a Critical Appraisal of Tort Jurisdiction Under Brussels I Recast

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Abstract: This article tests whether Article 7(2) of the Brussels I Recast Regulation provides predictable jurisdiction for cross-border trade-secret disputes. By mapping unlawful acquisition, disclosure, and use as distinct torts, it shows how the rule's current operation multiplies available fora, fragments claims, and raises uncertainty and costs. It then proposes a calibrated reinterpretation of the *locus damni*, based on treating the holder's establishment as the place of primary damage (loss of control and asset devaluation) across all secrecy offences, thus consolidating jurisdiction and improving foreseeability. The analysis then examines alignment with the Rome II Regulation's scheme and contends it can be preserved by channelling secrecy infringements through Article 6 on unfair competition, which supplies an alternative connecting factor and thereby averts potential consistency issues stemming from the proposed reinterpretation. This approach thus maintains systemic coherence, enhances legal certainty for innovators, and contributes advancing the goals of Directive 2016/943.

Keywords: trade secrets – confidential information Brussels I Recast jurisdiction tort *forum delicti commissi* Rome II interpretative consistency

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(A) INTRODUCTION

1. Trade secrets have become a widely used mechanism for protecting companies' intellectual assets.[1] Their appeal lies in several distinctive advantages: they offer broad, flexible, and time-unlimited protection across sectors, cover diverse types of information (from technical know-how to business strategies), and do so without imposing burdensome formalities. Moreover, trade secrets complement traditional IP rights by safeguarding information during early stages of innovation and may even replace them by protecting assets not eligible for patent or copyright (such as digital data, increasingly critical in the Fourth Industrial Revolution[2]). Recognizing the strategic value of trade secrets, major global economies have introduced

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1 EUIPO, 'Protecting Innovation Through Trade Secrets and Patents: Determinants for European Union Firms' (2018), at 28-30; WIPO, 'WIPO Guide to Trade Secrets and Innovation' (2024), at 12-17.

2 For a deeper discussion on this precise topic, see: A. Radauer *et al.*, 'Study on the Legal Protection of Trade Secrets in the Context of the Data Economy' (2022) [doi: 10.2826/021443]; J. Drexl, 'Data Access and Control in the Era of Connected Devices' (2018), at 92; T. Aplin, 'Trading Data in the Digital Economy: Trade Secrets Perspective', in S. Lohsse, R. Schulze and D. Staudenmayer (eds), *Trading Data in the Digital Economy: Legal Concepts and Tools: Münster Colloquia on EU Law and the Digital Economy III* (Nomos, Baden-Baden, 2017) 59, at 68 [doi: 10.5771/9783845288185]; A. López-Tarruella, *Propiedad Intelectual e Innovación Basada en Datos* (Dykinson, Madrid, 2021), at 67-68; A. Suñol, 'La Protección de los Datos Como Secreto Empresarial en la Era de la Inteligencia Artificial', 41 Actas de Derecho Industrial y Derechos de Autor (2020) 193-220, at 196-198 [doi: 10.2307/j.ctv2zp4xvk]; F. Giordanelli, 'IPRS and Big Data: a Proposal for a

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or revised legislation to strengthen their legal frameworks. This is evident in jurisdictions such as the United States, China, and India, and notably within the European Union, which adopted Directive (EU) 2016/943[3] (from now on, "Trade Secrets Directive" or "TSD"), with the aim to harmonize judicial protection across Member States to ensure the smooth functioning of the internal market.

At the same time, the activities of businesses built on intellectual assets are becoming more international in scope, largely because cross-border collaboration and exchange of information now play a vital role in innovation and strategic advancement. Indeed, global partnerships allow firms to make more efficient use of resources, accelerate the creation of new products and services, expand their reach, and adapt to rapidly evolving market demands. In many cases, such international engagement not only enhances competitiveness but may even play a critical role in ensuring their long-term viability and survival.[4]

2. The convergence of these two trends highlights the need to assess the private international law ("PIL") framework governing cross-border confidentiality infringements. As violations of trade secrets are increasingly likely to involve multiple countries (whether in terms of the actors involved, the conduct at issue, or the effects produced),[5] a robust and predictable PIL regime is essential to ensure effective legal protection and guarantee that trade secret holders have adequate safeguards in place. In fact, such regime becomes relevant even for companies operating solely within national borders, as they may nonetheless be exposed to cross-border risks through digital infrastructures, supply chain dependencies, or cyberattacks enabled by modern digital technologies.[6]

Directive 2016/943, however, remained silent on this matter. This omission may be understandable, since EU directives are usually not the preferred legislative vehicle for laying down conflict-of-law rules. Nonetheless, the European legislator could have taken the opportunity, at least in the preparatory materials,[7] to provide

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Fair Balance between Businesses' Legitimate Interests and Data Sharing in the Light of the EU Data Act', 42 Actas de Derecho Industrial y Derechos de Autor 107-130, at 117-118.

3 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ L157/1).

4 M. d. M. Bustillo, *Protección del Secreto Empresarial en la Directiva (UE) 2016/043 y en la Ley 1/2019* (Marcial Pons, Madrid, 2020), at 15-21.

5 Notably, a study published by EUIPO in 2023 indicates that approximately 9% of analysed legal actions concerning secrets violations involved parties located in different EU Member States. The report also acknowledges a few instances, albeit fewer in number, where a party from outside the Union was implicated [EUIPO, 'Trade Secrets Litigation Trends in the EU' (2023), at 29 [doi: 10.2814/565721]].

6 WIPO, *supra* n. 1, at 142; D. S. Almeling, 'Seven Reasons Why Trade Secrets Are Increasingly Important', 27 *Berkeley Technology Law Journal* 1091-1118, at 1098-1112.

7 In fact, the EU legislator deliberately avoided creating bespoke private international law rules for trade secrets disputes, instead deferring (via Recital 37 TSD) to the general EU PIL framework. This choice diverged from earlier studies and consultation outputs in the legislative process, which highlighted practical enforcement hurdles in cross-border cases and recommended common jurisdictional rules and remedies to streamline and reduce litigation costs [Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, 'Study on Trade Secrets and Confidential Business Information in the Internal Market' (2013), at 7, 42-43, 152; Directorate-General Internal Market and Services, 'Public Consultation on the Protection against Misappropiation of Trade Secrets and Confidential Business Information

some guidance on the application of existing criteria, or to signal a potential future reform through a more appropriate legislative avenue. In the absence of such guidance, stakeholders must turn to the common rules within the EU PIL framework. This, however, prompts a key question: how well do these existing standards accommodate disputes involving the misappropriation of trade secrets? More specifically, do they offer sufficient legal certainty, or do they risk creating ambiguity that could compromise the effective protection of trade secrets across borders, thereby potentially deterring innovation and cross-border cooperation?

3. The purpose of this paper is, precisely, to examine such issue through the lens of international jurisdiction. The analysis proposed will focus on the tortious criteria established under Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Recast Regulation" or "BIRR"),[8] and their applicability to cross-border instances of trade secret misappropriation, with the aim of identifying potential shortcomings that could require amendment for the sake of legal certainty.

   Indeed, a preliminary analysis of these standards makes evident that the adaptation of existing rules to the particularities of trade secrets and the varied forms their misappropriation can take, is neither simple nor universally accepted. On the contrary, significant issues emerge, which may undermine legal certainty and weaken the position of trade secret holders in the international arena. In turn, this might jeopardize the very goals of fostering cross-border innovation and cooperation set out in Directive 2016/943.

   Accordingly, this contribution proceeds in three stages: first, it maps the frictions that art. 7.2 BIRR generates in cross-border secrecy disputes; second, it weighs potential alternatives (broadly, the creation of new fora versus a reinterpretation of existing connecting factors) that could circumvent these issues; and third, it tests the selected solution for coherence within the conflict-of-laws framework to draw out its practical implications.

   This inquiry is particular timely in light of the anticipated reform of the Brussels I Recast Regulation. Indeed, June 2025 marked a turning point with the publication of the European Commission's long-awaited Report on the application of the

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Summary of Responses' (2013), at 4-5.]. Although the Commission's Impact Assessment acknowledged that trade-secret misappropriation often has a cross-border dimension and mapped potential litigation issues, it largely endorsed existing criteria, asserting they facilitate cross-border proceedings, and offered only a cursory review of their application [European Commission, 'Impact Assessment Accompanying the Document: Proposal for a Directive of the European Parliament and of the Council on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) against Their Unlawful Acquisition, Use and Disclosur (2013), at 225]. The Commission's proposal therefore did not revise jurisdiction or conflicts criteria, and the European Parliament maintained that stance, leaving the general regime intact [European Parliament, 'Position Adopted at First Reading on 14 April 2016 with a View to the Adoption of Directive (EU) 2016/... of the European Parliament and of the Council on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) against Their Unlaw, at 22].

8 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) (OJ L 351/1).

Brussels I Recast Regulation,[9] accompanied by a comprehensive Staff Working Document[10] highlighting several areas of concern. Their publication signals the beginning of a structured and consultative reform process, one in which the reflections developed here may provide useful perspectives and contribute to the broader discussion on future developments.

(B) THE INADEQUACY OF EXISTING GROUNDS OF JURISDICTION FOR SOLVING TORTIOUS SECRECY DISPUTES AND POTENTIAL WAYS FORWARD

(1) Ambiguities Inherent in the Current Jurisdictional Scheme

(a) Framing the holder's options: from general grounds to the forum delicti commissi

4. As per today, in cases of cross-border breaches of secrecy, the information holder can invoke several jurisdictional grounds to seek relief. Under the general framework of the Brussels I Recast Regulation, and irrespective of the case's specific facts, the claimant may sue before the courts of the defendant's domicile, rely on a pre-existing choice-of-court agreement, or (once the dispute has arisen) conclude with the defendant a post-dispute agreement conferring jurisdiction on the courts of a designated Member State. The latter option is, however, unlikely in tort settings, where the parties typically have no prior relationship and, after the wrongful act, are disinclined to reach any agreement.

   Although these general provisions are not completely free from interpretative uncertainty and may even prompt questions about their rationale (especially concerning the defendant's domicile forum, which some regard as placing a structural advantage on defendants[11]), their practical applicability is largely uncontested, as acknowledged by the European Commission in the ongoing review of Brussels I Recast.[12] The specific complexities that cross-border trade secret disputes may raise at this level are comparatively limited and, for reasons of economy of exposition, do not warrant detailed examination here.

5. Alongside the general fora, and depending on the specific circumstances of the dispute, recourse may also be had to the special rules of jurisdiction by reason

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9 European Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of 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)' (2025).

10 European Commission, 'Commission Staff Working Document […] Accompanying the document The Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of 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)' (2025).

11 For a critical review of that forum, see: J. Carrascosa, 'Foro del domicilio del demandado y Reglamento Bruselas "I-bis 1215/2012". Análisis crítico de la regla actor sequitur forum rei', 11 *Cuadernos de Derecho Transnacional* 112-138 [doi: 10.20318/cdt.2019.4616].

12 European Commission, *supra* n. 9, at 2.

of subject matter set out in the BIRR, which, *inter alia*, encompass the head of jurisdiction for tortious disputes.

In this regard, it should be acknowledged that there are several instances when a secrecy violation will receive a tortious qualification. This refers, first of all, to those scenarios where there was no previous relationship between the parties to the infringement, which may include cases where a company engages in industrial espionage by hiring hackers to obtain confidential information about a rival firm's business plans, or the marketing of products manufactured using wrongfully acquired confidential information, among others. Indeed, data from EUIPO reveals that roughly 30% of the examined secrecy claims involved parties not bound by contractual ties, underscoring the possibility for such tortious misappropriation to take place.[13] Moreover, it may also occur that a secrecy violation arises within the context of a pre-existing agreement between the parties, yet the holder still opts to pursue a claim based on a non-contractual cause of action.[14]

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13 EUIPO, *supra* n. 5, at 28-29.

14 A significant degree of legal uncertainty, however, continues to surround the delimitation between contractual and non-contractual matters, also in cross-border secrecy disputes. Indeed, this issue remains one of the most controversial and deeply debated topics within the conflict-of-laws realm, persistently giving rise to extensive doctrinal discussions and divergent interpretative approaches. In earlier works [R. Ruiz, 'Aplicación de la jurisprudencia Wikingerhof del TJUE sobre delimitación entre materia contractual y extracontractual a supuestos de infracción del secreto comercial', in A. Fernández (ed) *El Derecho internacional privado ante la(s) crisis de la globalización* (Aranzadi, Navarra, 2023) 183], the present author has analysed the leading case law on this matter and its potential application to breaches of confidentiality. Drawing on the most recent pronouncement of the ECJ, this is, the *Wikingerhof* ruling [Judgment of the CJEU, 24 November 2020, C-59/19, ECLI:EU:C:2020:950], the conclusion reached was that the decision has effectively revived the *causa petendi* test, which requires the classification of the claim to be determined in light of the nature of the claimant's plea, subject always to the court's subsequent examination of the 'indispensability' requirement. It appears reasonable to assume that where the secret holder initiates a contractual action within the framework of a pre-existing agreement, such action will ordinarily be classified as contractual. This outcome, however, rests on a rather flexible interpretation of the indispensability criterion, a requirement which, in any case, ought to be reconsidered and, in the author's view, ultimately removed. At the same time, in the very same factual context, the holder might also be entitled to pursue a tortious action, a classification that could equally be supported under the substantive framework governing trade secrets. In particular, art. 4.2 and 4.3 of the TSD expressly define as unlawful any acquisition (together with any use or disclosure derived from such acquisition) where it results from unauthorised access, misappropriation, or conduct contrary to honest commercial practices, irrespective of whether or not a prior contractual relationship existed between the parties. That being said, such reliance on tortious jurisdictional grounds appears both unlikely and, from a practical perspective, inadvisable, owing to the considerable interpretative difficulties that continue to surround this head of jurisdiction, as will be discussed in detail later in this paper. What remains clear is that the debate is far from settled, and that further jurisprudential clarification would prove invaluable in assisting holders of trade secrets to identify the most appropriate legal avenue and to secure effective redress for the damages suffered. For further analysis on this point, see: L. Lundstedt, *Cross-Border Trade Secret Disputes in the European Union – Jurisdiction and Applicable Law* (Edward Elgar Publishing, Cheltenham/Northampton, 2023), at 141-156; K. Vollmöller, 'Die Kollisionsrechtliche Behandlung von Geheimnisverletzungen in Vertragsverhältnissen' 41 *IPRax: Praxis des Internationalen Privat– und Verfahrensrechts* (2021) 417-424; M. Desantes, 'Indispensabilidad de la interpretación del contrato: la sentencia del Tribunal de Justicia (Gran Sala) de 24 de noviembre de 2020 (C-59/19), Wikingerhof', 41 *Revista Electrónica de Estudios Internacionales* (2021) 2-9 [doi: 10.17103/reei.41.20]; M. Poesen, 'Regressing into the Right Direction: Non-Contractual Claims in Proceedings between Contracting Parties under Article 7 of the Brussels Ia Regulation', 28 *Maastricht Journal of European and Comparative Law* (2021) 390-398; M. Poesen, 'From Mirages to Aspirations. The Periphery of "Matters Relating to a Contract" in the Brussels Ia Regulation', in A. Bonomi and G. P.

Whatever the case may be, within the BIRR framework, art. 7.2 will be the one in charge of dealing with disputes in matters relating to 'tort, delict or quasi-delict'. This concept includes a very complex and heterogeneous set of conducts, ranging from environmental pollution to product liability, infringements of personality rights and acts of unfair competition.[15] Doctrine coincides that instances of secrecy violation are also covered by this provision, even in the absence of a confirmatory pronouncement by the CJEU.[16]

6. Having established this, it should be noted that in accordance with the literal wording of the provision, the courts of the place where the harmful event has occurred or may occur[17] will have jurisdiction. In addition, the case law of the CJEU[18] provides that where the event giving rise to the tort/delict occurred in one Member State and the direct and immediate damage[19] in another, the courts of both places may declare that they have jurisdiction to hear the dispute, based on the so-

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Romano (eds), *Yearbook of Private International Law Vol. XXII – 2020/2021* (Verlag Dr Otto Schmidt, Cologne, 2021) 511.

15 M. Sabido, 'Capítulo II: Sección 2 (Art. 7.2)', in P. Pérez-Llorca and others (eds), *Comentario al Reglamento (UE) no 1215/2012 relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil. Reglamento Bruselas I refundido.* (Aranzadi, Navarra. 2016) 188, at 201-203.

16 A. Ohly, 'Jurisdiction and Choice of Law in Trade Secrets Cases' in S. K. Sandeen and R. Kaplans (eds), *Research Handbook on Information Law and Governance* (Edward Elgar Publishing, Cheltenham/Northampton, 2021) 234, at 237; A. Font, *La protección internacional del secreto empresarial* (EUROLEX, 1999), at 165; Lundstedt, *supra* n. 14, at 169; P. A. de Miguel, *Conflict of Laws and the Internet* (Edward Elgar Publishing, Cheltenham/Northampton, 2020), at 369; C. Wadlow, 'Bugs, Spies and Paparazzi: Jurisdiction over Actions for Breach of Confidence in Private International Law' 30 *European Intellectual Property Review* (2008) 269-279, at 273; A. Espiniella, 'Competencia judicial internacional respecto de actos desleales con los competidores' 10 *Cuadernos de Derecho Transnacional* (2018) 276-305, at 290-291 [doi: 10.20318/cdt.2018.4378]; J. G. Horrach, *Jurisdicción y Ley Aplicable En Materia de Competencia Desleal En El Marco de La Economía de Las Plataformas Virtuales* (Marcial Pons, Madrid, 2022), at 158-161; R. M. Girona, *Las Acciones Civiles En Defensa Del Secreto Empresarial* (Atelier, Barcelona, 2022), at 315-318.

17 The article allows for preventive actions to be brought in cases where the damage has not yet occurred but could occur in the future [M. Bogdan and M. Pertegás, *Concise Introduction to EU Private International Law* (4th ed., Europa Law Publishing, Amsterdam, 2019), at 50].

18 Among many others: Judgment of the CJEU, 30 November 1976, C-21/76, ECLI:EU:C:1976:166, para. 25; Judgment of the CJEU, 7 March 1995, C-68/93, ECLI:EU:C:1995:61, para. 33; Judgment of the CJEU, 22 January 2015, C-441/13, ECLI:EU:C:2015:28, para. 18; Judgment of the CJEU, 17 October 2017, C-194/16, ECLI:EU:C:2017:766, para. 31-33

19 The notion of direct and immediate damage, as opposed to secondary or consequential damages, has its origin in the *Marinari* jurisprudence [Judgment of the CJEU, 19 September 1995, C-364/93, ECLI:EU:C:1995:289, para. 14]. There, the CJEU refused to grant jurisdiction to the courts of those places where secondary financial harm (decrease of a person's assets) had occurred because of the victim's unjustified detention, which was understood as the main damage [A. Briggs, *Civil Jurisdiction and Judgements* (7th edn, Routledge, Oxfordshire, 2021), at 269-272; M. Requejo, E. Wagner and M. Gargantini, 'Article 7' in M. Requejo (ed), *Brussels I bis – A commentary on Regulation (EU) No 1215/2012* (Edward Elgar Publishing, Cheltenham/Northampton, 2022) 88, at 122-123; V. Lazić and P. Mankowski, *The Brussels I-Bis Regulation: Interpretation and Implementation* (Edward Elgar Publishing, Cheltenham/Northampton, 2023), at 145-147]. In this manner, the Court reaches the conclusion that the concept of 'damage' cannot be interpreted in such a broad manner as to include any location where the adverse consequences of an event that has already caused damage elsewhere can be experienced. Such position has been ratified in later judgments like *Kronhofer* [Judgment of the CJEU, 10 June 2004, C-168/02, ECLI:EU:C:2004:364] or *Universal Music international Holding* [Judgment of the CJEU, 16 June 2016, C-12/15, ECLI:EU:C:2016:449, para. 34].

called 'principle of ubiquity'.[20] Furthermore, when the damage is located in several Member States, any one of them will have jurisdiction over the local damage caused within the limits of their territory, while the courts of the place of the harmful act will retain jurisdiction to hear about the global damages, according to the 'mosaic theory'.[21] As usual, all these concepts are autonomous interpretations that do not depend on national law but are adopted for the purposes of avoiding dispersion of criteria among the courts of the Member States and to promote an adequate administration of justice.[22]

The aforementioned criteria broadly delimit the functioning of art. 7.2, but depending on the specific offence, more specialized standards can be found (as is the case, for example, around infringement of personality rights via the internet[23] or IP violations[24]). The CJEU has had the opportunity[25] to confirm that these common tortious criteria also apply to some cases of unfair competition, albeit with minor nuances.[26] However, as discussed above, there is no specialized case law on trade secrets. It will therefore be necessary to look at the general criteria, relying on the doctrinal interpretation of the same regarding cases of secrecy infringements to reach the most likely conclusion. In this respect, it is possible to anticipate that the lack of specific standards within the BIRR and the over-reliance on the complex case law of the CJEU makes the application of the PIL rules to trade secrets misappropriation instances rather difficult[27].

(b) The relevance of the alleged infringement for jurisdictional purposes

7. However, before examining the proper interpretation of this forum in infringement cases, a preliminary clarification is needed. Namely, the secrecy violation invoked must be precisely delimited, since its characterization may condition the interpretation of existing connecting factors and will be pivotal in identifying the relevant court.

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20 A. L. Calvo and J. Carrascosa, 'Obligaciones Extracontractuales' in A. L. Calvo and J. Carrascosa (eds), *Tratado de Derecho Internacional Privado, vol III* (2nd ed, Tirant lo Blanch, Valencia, 2022) 3775, at 3803-3807; J. C. Fernández and S. A. Sánchez, *Derecho Internacional Privado* (12th ed, Thomson Reuters-Aranzadi, Navarra, 2022), at 747-750.

21 M. Lehmann *et al*., '4. Special Jurisdiction' in A. Dickinson and E. Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press, Oxford, 2015) 131, at 169-170; P. Mankowski, 'Art. 7' in P. Mankowski and U. Magnus (eds), *Commentary – Brussels Ibis Regulation, vol I* (2nd ed., Otto Schmidt KG, Cologne, 2023) 108, at 261-263.

22 Sabido, *supra* n. 15, at 206.

23 Judgment of the CJEU, 25 October 2011, C-509/09 and C-161/10, ECLI:EU:C:2011:685, para. 52.

24 See, among others: Judgment of the CJEU, 19 April 2012, C-523/10, ECLI:EU:C:2012:220, para. 39; Judgment of the CJEU, 3 October 2013, C-170/12, ECLI:EU:C:2013:635, para. 47.

25 Judgment of the CJEU, 5 June 2014, C-360/12, ECLI:EU:C:2014:1318, para. 55-56; Judgment of the CJEU, 21 December 2016, C-618/15, ECLI:EU:C:2016:976, para. 30-32; Judgment of the CJEU, 9 July 2020, C-343/19, ECLI:EU:C:2020:534, para. 39;

26 For more details on these particularities, see: de Miguel, *supra* n. 16, at 360-369; Requejo, Wagner and Gargantini, *supra* n. 19, at 128; Lundstedt, *supra* n. 14, at 176-181; Mankowski, *supra* n. 21, at 283-286.

27 Espiniella, *supra* n. 16, at 304-305.

For illustrative purposes, reference shall be made to the Directive 2016/943,[28] which articulates up to three different kinds of illicit behaviours related to secrecy infringements. Indeed, art. 4 TSD covers all forms of illicit conduct for which the holder of confidential information may request the application of the interim or corrective measures outlined in the Directive. This provision is said to create a cascade of infringing acts, distinguishing separate secrecy infringements based on the reach of the misappropriation activity and establishing distinct legal foundations for each of them.[29]

To begin with, the acquisition of a trade secret is considered unlawful if it occurs without the consent of the holder and involves unauthorized access to, appropriation or copying of any documents or materials containing the secret or from which it can be inferred (e.g., hacking into a company's computer system or intercepting telecommunications). The same principle applies to instances where the acquisition contravenes any other honest commercial practice.

Following this, three distinct instances of illicit disclosure or exploitation are outlined. The first pertains to tainted revelations or exploitations, meaning situations where such actions stem from a preceding unauthorized acquisition (e.g., a company that, post hacking a competitor and unlawfully obtaining its confidential data, enhances its product using such information[30] and markets it across multiple states). The subsequent two scenarios involve situations where the alleged infringer had lawful access to the secret but is nonetheless violating a confidentiality agreement, a contractual obligation or any other duty not to disclose or exploit the secret. Take, for instance, a worker who divulges their employer's confidential information to a rival company, contravening the confidentiality terms stipulated in their contract. Here, failure to adhere to such obligations would render their conduct unlawful.[31]

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[28] For an in-depth analysis, see: Bustillo, *supra* n. 4, at 139-320; Lundstedt, *supra* n. 14, at 78-82.

[29] EUIPO, *supra* n. 5, at 72-74; J. Massaguer, 'De nuevo sobre la protección jurídica de los secretos empresariales: a propósito de la Ley 1/2019, de 20 de febrero, de Secretos Empresariales', 51 *Actualidad Jurídica Uría Méndez* (2019) 46-70, at 65-66.

[30] Article 2 TSD defines "infringing products" as items whose design, characteristics, functioning, manufacturing process, or marketing has significantly benefited from trade secrets unlawfully acquired, used, or disclosed.

[31] The last two paragraphs of art. 4 TSD address instances of 'tippee' liability, where a third party (the "tippee") acquires, uses, or discloses a trade secret while either knowing or having reason to know that the confidential information was obtained, directly or indirectly, from another person (the "tipper") who used or disclosed it unlawfully. A typical instance would be a company that hires a competitor's former employee in the expectation that confidential information will be revealed. Paragraph 5 extends this knowledge standard to certain acts involving infringing goods (e.g., their production, import, export, storage, offer, and commercialization) by tying unlawfulness to awareness of the original misuse. Thus, a French company that knowingly imports and sells batteries made with a competitor's misappropriated know-how would be liable; absent such awareness or evidence, its conduct would not be unlawful. In this way, the last two sections of art. 4 TSD introduce a subjective element in assessing the unlawfulness of third-party actions, a consideration absent in direct infringement cases. Importantly, these provisions do not create new forms of unlawful behaviours. Rather, they merely extend liability to third parties and clarify that certain acts (such as exporting, storing, or offering infringing goods) also fall under the category of unlawful exploitation. In other words, the indirect infringement by a third party may not be necessarily rooted in the acquisition of the confidential information itself but may also arise from the acquisition of infringing goods for commercial purposes, such as offering or importation [ICC, 'Protecting Trade Secrets Recent EU and US Reforms' (2019), at 16; J. Schovsbo, 'The Directive on Trade Secrets

8. In this same context, another enquiry tied to identifying the relevant infringement arises, namely, the need for individual or joint consideration of the various offences that may have been committed.

   For instance, if the right holder challenges only an unlawful acquisition, the analysis is relatively straightforward, as a single infringement is at issue. The landscape changes, however, when the acquisition is followed by downstream disclosure or use arising from the initial misappropriation, that is, when the conduct unfolds as a sequence of infringing acts. Should the initial acquisition be subsumed by the subsequent act, or treated as a distinct infringement; and, if distinct, must separate actions be brought for each?

   Although not related to a secrecy violation, reference can be made to the *Hi Hotel HCF* judgment from the CJEU, in which a French company transferred, without the author's consent a series of photographs to a German publishing house, which included them in a book distributed throughout Germany,[32] prompting the photographer to file a claim against the French company. In this case, the Court held that the place of the causal event was the place of the transfer of the photographs to third parties, and that the damage materialized at the place of publication of the photographs.[33]

   Shall a similar reasoning be applied to cases of unlawful disclosure or use of an illegitimately obtained trade secret? Most authors consider that, contrary to the above scenario, in cases of unlawful disclosure or use of trade secrets following an unlawful acquisition, every single one of the acts in the chain of events "*is separately actionable and the damage must be considered separately for each act*",[34] since they constitute distinct and independent offences within the scope of unfair competition law.[35]

   Assuming the majority doctrinal position as the correct one, it is then necessary to analyse what should be understood by 'place of the harmful event' and 'place of the damage' in each of these torts related to trade secrets.

(c) The special tort forum's inadequacy: scope and consequences

9. Building on the foregoing delimitation of confidentiality offences, the proposed analysis of the non-contractual forum in secrecy-infringement cases necessarily entails distinguishing between: (i) unlawful acquisitions; (ii) unlawful disclosures; and (iii) unlawful uses.

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and its Background', in J. Schovsbo, T. Minssen and T. Riis (eds), *The Harmonization and Protection of Trade Secrets in the EU – An appraisal of the EU Directive* (Edward Elgar Publishing, Cheltenham/Northampton, 2020) 7, at 18; Bustillo, *supra* n. 4, at 194; Lundstedt, *supra* n. 14, at 80-81].

32 Calvo and Carrascosa, *supra* n. 20, at 3795.

33 Judgment of the CJEU, 3 April 2014, C-387/12, ECLI:EU:C:2014:215, para. 37.

34 Ohly, *supra* n. 16, at 241.

35 Font, *supra* n. 16, at 187-191; Espiniella, *supra* n. 16, at 290-291; Girona, *supra* n. 16, at 316-317; Wadlow, *supra* n. 16, at 273-274.

These offences may be brought simultaneously before the same court, provided that the rules and criteria set out below point to that particular court in both claims. Nevertheless, it is easy to imagine scenarios in which this may not be the case: for example, an illegal acquisition of the confidential information of a French company that takes place remotely in Spain by a hacker hired by a Belgian business and that is followed by the commercialization of an infringing product in Germany, Italy and Poland. As will be demonstrated below with the analysis of the different connecting factors employed, a case of such characteristics could force the company allegedly affected to divide its claims among an even bigger multitude of courts, making it extremely difficult to protect the holder's interests.

10. For the first category, unlawful acquisitions, the prevailing view is that the conduct injures only the victim's interests and creates no additional locus of impact, since the harm has no external manifestation. Thus, a possible multi-location of the damage in these cases (ergo, the application of the mosaic rule) seems to be ruled out.[36] The place of the harmful event will be the place where the offender has accessed the trade secret (e.g., where the espionage is carried out).[37] On the other hand, the place of central administration of the company or the centre of its professional activity in the case of a physical person should be considered as the place where the main damaging consequence manifests itself,[38] the damage being the devaluation of the value of secrecy and the endangering of the position of the undertaking concerned as an economic player in the market.[39] Here, however, evidentiary issues may arise when the espionage has been carried out remotely by telematic means (e.g., by means of hacking).[40] The CJEU's jurisprudence disregards servers' location for reasons of predictability and identifies the place of the causal event to be the place where the technical activity was initiated,[41] but such location will not always be easy to determine.[42]

11. As per the second one, unlawful disclosures, a minority tendency in the doctrine points out that the same criterion should be applied as for cases of illegitimate acquisition.[43] However, most legal scholars seem to consider such a position as misleading, for there is indeed an external manifestation of the harm in the form of the disclosure of the secret to third parties. Therefore, the place of the causal event

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36 de Miguel, *supra* n. 16, at 369; Lundstedt, *supra* n. 14, at 181-184.

37 Espiniella, *supra* n. 16, at 290-291; Horrach, *supra* n. 16, at 161; A. Font, *supra* n. 16, at 185; Wadlow, *supra* n. 16, at 274; Lundstedt, *supra* n. 14, at 173.

38 Even though he acknowledges that there are some trade secret infringements that are more akin to privacy or personality cases, a contrasting view is offered by Ohly, who rejects such claimant-friendly approach insofar as it lacks the human dignity rationale present in the 'center of the victim' theory developed by the CJEU [Ohly, *supra* n. 16, at 242-243].

39 Font, *supra* n. 16, at 185-186; Lundstedt, *supra* n. 14, at 182; de Miguel, *supra* n. 16, at 369, Horrach, *supra* n. 16, at 160.

40 Ohly, *supra* n. 16, at 242.

41 See, for example, the *Wintersteiger* or *Hejduk* ruling [Judgment of the CJEU, 19 April 2012, C-523/10, ECLI:EU:C:2012:220, para. 34-37; Judgment of the CJEU, 22 January 2015, C-441/13, ECLI:EU:C:2015:28, para. 24-25], which, although addressing IP matters, can be extrapolated analogously to torts in a broader sense [de Miguel, *supra* n. 16, at 362; Mankowski, *supra* n. 21, at 279-280].

42 Lundstedt, *supra* n. 14, at 174-175.

43 Font, *supra* n. 16, at 187-188.

will be the place from where the secret is disclosed (which is likely to coincide with the place of the infringer's establishment[44]), while the harm will be located in all those countries where access[45] to the disclosed secret is possible.[46] Such disclosure can be made in several countries simultaneously, especially when considering the possibility of revealing the secret via the Internet,[47] accessible worldwide. Hence, the application of the mosaic rule[48] cannot be ruled out in these scenarios.[49]

This, as can be imagined, makes litigation more difficult and costly, which can be detrimental particularly in the case of SMEs that have been affected by an unlawful disclosure. In such situations, their options are limited, forcing them to face a lose-lose situation: on the one hand, they will be able to litigate in each of these countries to claim compensation for local damages, although they will not probably have the resources to do so. On the other hand, they will also be able to go to the forum of the causal event (which is likely to be absorbed by the general forum of the defendant's domicile if that location coincides with the place of business of the alleged infringer) which has jurisdiction to hear global damages, but this possibility will nevertheless force them to litigate away from home and could potentially benefit the secrecy violator. Not only that, but it should be noted that only the latter court would have the authority to rule on certain issues such as, for example, the removal of confidential information illegitimately shared on the Internet on a European (or even global[50]) scale, which ultimately further limits the holder's options, for they

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44 Calvo and Carrascosa, *supra* n. 20, at 3837.

45 Regarding the debate about the mere accessibility of Internet content as criterion for locating the damage in tortious scenarios, there appears to be a consensus based on the CJEU case law on the impossibility of applying the targeting criterion, at least for the time being. However, some legal scholars contend that there could be valid grounds to consider this approach, and that it may be particularly useful in instances of IP infringement or unfair competition actions that disrupt the regular operation of the market [de Miguel, *supra* n. 16, at 364-367; Mankowski, *supra* n. 21, at 305-311, 321-324; European Commission, 'Study to support the preparation of a report on the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation) Final report' (2023), at 282-283 [doi: 10.2838/14604]; A. López-Tarruella, 'El Criterio de las Actividades Dirigidas Como Concepto Autonómo de DIPr de la Unión Europea para la Regulación de las Actividades en Internet', 69 *Revista Española de Derecho Internacional* (2017) 223-256, at 236-255 [doi: 10.17103/redi.69.2.2017.1.09]]. That was also the opinion of Advocate General Hogan in the recent *Gtflix* case regarding online defamation [Opinion of Advocate General Hogan, 16 September 2021, Case C-251/20, ECLI:EU:C:2021:745, para. 79-93].

46 de Miguel, *Derecho Privado de Internet* (6th ed., Civitas, Madrid, 2022), at 683; Espiniella, *supra* n. 16, at 290-291; Lundstedt, *supra* n. 14, at 184-185; Horrach, *supra* n. 16, at 160; Girona, *supra* n. 16, at 316-317; Ohly, *supra* n. 16, at 241-242.

47 D. J. B. Svantesson, *Private International Law and the Internet* (4th ed., Wolters Kluwer, The Netherlands, 2021)., at 99-106.

48 As further explored later on this paper, there are certain instances of unlawful disclosure (e.g., that limited to a single competitor) in which there may still be grounds to place the harm at the premises of the information holder. In these scenarios, the revelation also seems not to engender any observable economic impact or hold the potential to impact a given economic area; rather, the damage can still be interpreted as the loss of control over the information by the holder and the prejudice to their commercial interests. Moreover, this approach could potentially prevent the wrongdoer from circumventing the usual legal framework governing their actions by choosing to reveal the secret in a different location.

49 de Miguel, *supra* n. 46, at 683.

50 Indeed, debate is intensifying over how far courts may extend orders to remove unlawful content, whether across the European Union or even globally. The question turns on the territorial scope of jurisdiction, i.e., a court's authority to adjudicate matters beyond its borders, as Advocate General Szpunar noted

will probably feel obliged to turn to said court (again, that of the alleged infringer) to obtain an effective remedy to their situation.

12. Last but not least, reference shall be made to unlawful use scenarios. The approach here should, in principle, resemble that of wrongful disclosures, as there is also an external manifestation occurring beyond the holder's business premises. However, it should be noted that the spectrum of exploitative acts is vaster in comparison to the potential catalogue of wrongful revelations (e.g., the sale of infringing goods, their manufacture, the use of information for decision-making, the discarding of lines of investigation). Therefore, it will be necessary to conduct a nuanced, case-by-case analysis when the time comes to face this question.[51]

Concerning the location of the causal event, it is accepted among most authors that it should typically be situated where the unlawful exploitation of the secret was planned or decided (which, again, will most likely coincide with the place of principal administration of the infringing entity).[52] However, precisely because of the diverse range of exploitative offenses noted, scholars like Font Segura[53] argue that a differentiation should be made when determining the place of action based on the following criteria: if the secret is related to aspects such as clients lists or price policies, then the place of the harmful event will indeed be where the decision to employ the confidential information was taken. On the contrary, in those cases in which the secret refers to a manufacturing or elaboration technique, the harmful event shall be located according to this scholar at the place of production in which such information is effectively employed (e.g., a factory).

While it is accepted that the place of the harmful event may need to be identified case by case, the distinction proposed by the scholar is, in the opinion of this author, not fully convincing. Indeed, in these cases, the fabrication of a marketed

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in his Opinion in Glawischnig-Piesczek [Opinion of Advocate General Szpunar, 4 June 2019, C-18/18, ECLI:EU:C:2019:458]. Under traditional CJEU case law (e.g., *Fiona Shevill*), when unlawful information is distributed in print across the internal market, EU-wide relief is assured either before the courts where the harm occurred or before those of the defendant's domicile [Judgment of the CJEU, 7 March 1995, C-68/93, ECLI:EU:C:1995:61, para. 33]. The internet, however, unsettles that template: *eDate Advertising* acknowledges the web's essentially universal reach and allows the court of the causal event to award compensation for all damage, without stating nonetheless whether that competence ends at the EU's borders [Judgment of the CJEU, 25 October 2011, C-509/09 and C-161/10, ECLI:EU:C:2011:685, para. 46]. Likewise, *Bolagsupplysningen* treats online rectification or removal as a single, indivisible claim to be brought before the court competent for the entirety of damage, resorting to a language that does not expressly confine geographic scope to the internal market and may thus be able to accommodate world-wide takedown orders [Judgment of the CJEU, 17 October 2017, C-194/16, ECLI:EU:C:2017:766, para. 48] Still, absent an explicit ruling to that effect, comity and fundamental rights concerns counsel restraint. For comparison, Australian and Canadian courts have likewise issued worldwide removal orders on reasoning similar to the CJEU's. Notably, however, U.S. courts declined to enforce the Canadian order, underscoring the recognition and public-policy barriers to the extraterritorial reach of such measures [de Miguel, *supra* n. 16, at 387-388].

51 In this same line, it should be recalled that the location of the place of the harmful event is not contingent upon the framework of the applicable substantive law (i.e., it does not depend on the criteria therein employed), but rather, it is an autonomous concept to be determined on a factual basis depending on the circumstances of the case [Lundstedt, *supra* n. 14, at 173; Mankowski, *supra* n. 21, at 263-264].

52 Espiniella, *supra* n. 16, at 290; Horrach, *supra* n. 16, at 160.

53 Font, *supra* n. 16, at 188-190.

product benefiting somehow from secret information should be qualified as a mere preparatory act, which as a rule, is not to be considered for the purposes of determining jurisdiction.[54] Consider, for example, the *Fiona Shevill* judgment, in which when determining the place of the causal event, the Court referred directly and solely to the Member State of the publisher's establishment, ruling out other possibilities such as the place of printing of the magazine containing the defamatory material. An application by analogy of this reasoning to cases of exploitation of trade secrets through the fabrication and marketing of an infringing product seems to confirm as the place of the causal event the location where the decision to use the infringing content is taken (for eventually, it is from such a decision that damage to the holder will materialize) and to rule out the possibility of considering the actual manufacture or development of the infringing product as a causal event[55]. In any case, it is possible that these places (place of decision-making and place of manufacture of the infringing product) coincide, although it will also be common to find cases of outsourcing in which the production is carried out in other countries (which would make the application of the criterion proposed by Font Segura more difficult and could even become problematic if the production is carried out in a third state).

13. As per the place of the damage, here again, it shall be identified according to the unique details of each situation. The most common exploitation scenario will usually imply the distribution of an infringing product. Here, the place of the damage will be the market or markets in which the infringing product is distributed,[56] even if it concerns markets in which the trade secret holder was not active.[57] But one should stop to consider other possibilities, such as that the trade secret is negative information and, therefore, is used for the purpose of ruling out a possible line of investigation or development of products. In this case, could it be possible to argue that the damage is located in the place where the company conducts its investigations? It may also happen that an infringing product does not effectively reach the market, for example, because a legal action has been brought prior to its distribution, which may suggest that damage should be located at the place where the product benefiting from the information was being developed or even manufactured, depending on the specific circumstances.

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54 Calvo and Carrascosa, *supra* n. 20, at 3809, 3921; F. J. Garcimartín, *Derecho Internacional Privado* (7th ed., Civitas, Madrid, 2023), at 118.

55 Mankowski seems to share the idea that, indeed, when speaking about tortious liability, decision-making should matter for the purposes of determining the place of the harmful event. Nevertheless, he takes his reasoning a step further by claiming that both the place of decision-making and the place of production may be considered as different places in which to locate the harmful event, i.e., "*who deliberately splits the conception and the emanation over a border should bear a risk: without his crossing the border, a reduplication of places of activity would be out of the question*" [Mankowski, *supra* n. 21, at 268-270]. This approach, however, may increase the level of legal uncertainty by unnecessarily duplicating the number of places where the tort event can be located. For this reason, the present author advocates adhering to the place of decision-making as the main place of the tortfeasance, since, as Mankowski himself acknowledges, this is "*the starting point, the initiation, the origin of the ensuing evil*".

56 de Miguel, *supra* n. 16, at 369; Lundstedt, *supra* n. 14, at 184-185; Font, *supra* n. 16, at 188-191; Girona, *supra* n. 16, at 316-317; Ohly, *supra* n. 16, at 242-243.

57 Espiniella, *supra* n. 16, at 291; Horrach, *supra* n. 16, at 160.

In any case, the preliminary recognition of the diverse scenarios that may arise in cases of unlawful exploitation already underscores the context-specific nature of these offenses and the challenges posed by applying European PIL instruments to cross-border secrecy disputes. Additionally, most of these exploitation scenarios will encounter challenges akin to those previously outlined, particularly regarding the disproportionate nature of existing criteria and the multitude of available fora, which could hinder the compensation for the harm inflicted.[58] Indeed, it has long been acknowledged in legal doctrine that the criteria for interpreting art. 7.2 BIRR "*are not entirely operative in cases of wide dispersion of the causes and effects of the damage*".[59] This drawback is further exacerbated in the case of smaller entrepreneurs, whose limited resources may hinder their ability to pursue legal action across numerous jurisdictions.

14. The application of art. 7.2 BIRR becomes particularly troublesome when dealing with sequences of infringing acts. Indeed, after pinpointing the place of the action and resulting damage for each instance of secrecy violation, it is evident that aligning these locations within a single Member State presents a significant challenge (especially when the chained offense involves multiple individuals). Returning to the scenario sketched at the beginning of this section, if the French holder wanted to sue both the Spanish and the Belgian infringers for the unlawful acquisition, the French courts could be chosen since the damage would be situated there for both actions. Alternatively, the holder could also pursue legal action in either Spain or Belgium based on the location of the harmful event, though this option seems less likely. When it comes to the wrongful disclosure by the Spanish hacker, jurisdiction may lie with either Spanish or Belgian courts, as the place of the harmful event and of the damage, respectively (in principle, French courts would be excluded, unless it is accepted that in the case of limited revelations, the damage can still be traced back to the holder's location). Lastly, regarding the unlawful exploitation, the holder may bring the claim either before the Belgian courts (where the company decided to exploit the information) or before the German, Italian and Polish ones (where the goods were marketed and therefore the damage produced).

As shown, determining jurisdiction in these settings becomes increasingly complex and does not always yield clear answers. Turning to the courts of the defendant's domicile, or seeking consolidation through a choice-of-court agreement, may appear sensible; yet these avenues can prove ill-suited to safeguarding the holder's interests (e.g., the obligation to litigate away from home, which tends to benefit the alleged infringer, or the practical impossibility of reaching an agreement once the dispute has arisen). Accordingly, any reliance on these fora should be approached with caution and measured against the effective protection of the trade secret holder.

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58 Similar problems emerge in the IP realm, albeit with the particularities arising from the existence of an exclusive forum for the registration or validity of such rights. See, in this respect: P. C. Elmasry and J. S. Bergé, 'Connections, Disconnections and Fragmentation in International Civil Procedure: The Case of Intellectual Property Rights' in L. Carpaneto, S. Dominelli and C. Enrica (eds), *Brussels I bis Regulation and Special Rules: Opportunities to Enhance Judicial Cooperation* (Aracne, Rome, 2021), 175.

59 Sabido, *supra* n. 15, at 190.

(2) Revisiting the Forum Delicti Commissi: Targeted Revisions for Trade Secrets Violations

15. Having identified the difficulties that the Brussels I Recast jurisdictional head for tort presents in trade secret violations, the next step is to consider potential fixes. These may involve refining existing standards or adopting new rules better suited to the shortcomings revealed in applying this ground of jurisdiction. As previously indicated, this inquiry is not merely prescriptive but also timely, given the regime's iterative development and ongoing debate about its adequacy.[60]

Before turning to the proposed revisions, nonetheless, it is important to recall that the tortious forum under art. 7.2 BIRR constitutes a highly complex and controversial head of jurisdiction[61]. As Mantovani's empirical analysis demonstrates[62] (and as the European Commission itself acknowledges in its Report[63]), this provision has been among the most frequent sources of preliminary rulings since the Regulation's adoption. Precisely because of its sensitive nature, however, the reform proposals advanced thus far have remained timid and limited in scope, deliberately steering clear of structural changes or rigid solutions that might unduly restrict judicial discretion and, in turn, risk producing inadequate outcomes in concrete disputes.

For instance, some scholars highlight the difficulties of determining the place of the causal event and the place of the damage, particularly in cases involving non-tangible harm, and argue that art. 7.2 should not apply to instances of pure economic loss situated in a bank account.[64] Another proposal calls for the incorporation of the 'centre of interests' criterion for online defamation claims directly into the text of the Regulation, through the creation of a specific provision on the protection of privacy rights that would displace the mosaic rule in such cases.[65] These

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60 Within the institutional framework of the Brussels reform, the range of proposed solutions is extensive, spanning revisions to the scope of "civil and commercial matters" through to recognition and enforcement. Among the most significant reforms under consideration, which could also affect trade secret violations in general, is the possible extension of the jurisdictional fora provided for in this instrument to defendants domiciled in third States outside the European Union. This issue, long debated, had already been discussed at the time of adopting the 2001 Regulation but was ultimately abandoned due to the difficulties in reaching consensus. This, however, has not prevented the debate over the adequacy of that decision from continuing throughout the intervening years, gaining more and more momentum given the advantages it could bring (for example, elimination of domestic exorbitant grounds of jurisdiction). Another key proposal concerns a potential revision of the default contractual jurisdictional forum contained in art. 7.1.a BIRR. This would entail replacing the so-called *Tessili* formula (which ties jurisdiction to the place of performance of the obligation forming the basis of the claim) with the theory of characteristic performance. Under this approach, jurisdiction would lie with the courts of the State where the party responsible for the characteristic obligation of the contract is domiciled, paralleling the solution adopted in art. 4.2 of the Rome I Regulation for determining the applicable law. For an overview, see: Hess *et al.*, 'The Reform of the Brussels I bis Regulation', 6 *MPILux Working Paper 2022* (2022) 1-35 [doi: 10.2139/ssrn.4278741]; Hess *et al.*, 'The Reform of the Brussels I bis Regulation Academic Position Paper (Version as of 22 May 2024)', *Vienna Research Paper 2024* (2024) 1-48 [doi: 10.2139/ssrn.4853421].

61 C. Esplugues, G. Palao and J. L. Iglesias, *Derecho Internacional Privado* (16th edn, Tirant lo Blanch, Valencia, 2022), at 689-690; Sabido, *supra* n. 15, at 188-191.

62 M. Mantovani, 'EU Private International Law before the ECJ: A Look into Empirical Data', in *EAPIL* (19 September 2022).

63 European Commission, *supra* n. 9, at 6.

64 For an in-depth debate on this latter issue, see: European Commission, *supra* n. 45, at 130-136, 274.

65 Hess *et al.*, 'The Reform...', *supra* n. 60, at 20-21; Hess *et al.*, 'The Reform... Academic Position Paper', *supra* n. 60, at 28-29.

clarifications, also reflected in the Commission's Report, are undoubtedly welcome. Nonetheless, they do not appear to entail significant changes to the functioning of the provision. Rather, they aim to eliminate existing sources of uncertainty or to codify established jurisprudential interpretations at the legislative level, thereby enhancing legal certainty and dispelling doubts as to its scope.

At most, the major improvement proposed[66] could be the clarification of issues related to jurisdiction and the extraterritorial scope of injunctions adopted by Member States' courts. Further explanation on this regard would be appreciated since it is not difficult to imagine the importance that this type of measure could have in the secrecy realm. In a scenario of unlawful disclosure through the Internet, would the courts of a Member State have jurisdiction to order a world-wide removal measure? Or shall the scope of such order be limited to the territory of the internal market?

16. Nevertheless, as outlined in the preceding section, questions concerning secrecy infringements remain that call for further clarification and would continue to go unresolved, even if the aforementioned proposals were ultimately implemented.

Firstly, although the doctrine seems to have clearly delimited what is to be understood as the place of the causal event and the place of the damage for the different offences related to trade secrets, these are theoretical postulates that would appreciate ratification by the courts. Similarly, the problems observed in relation to the multiplicity of fora and the distinction between local and global damages persist, obviously exacerbated by the increasing internationalization and technologization of today's society. Moreover, the doctrine's focus on considering possible trade secret torts separately when they are the result of a chained offence (e.g., a wrongful acquisition followed by an unlawful exploitation) makes it difficult to claim damages before a single court (except for that of the domicile of the alleged infringer) and increases the difficulties for the secret holder to redress their interests.

Thus, given the doctrinal and institutional silence on potential amendments to the Regulation that might support such reform, it becomes necessary to consider whether alternative approaches could help to shed light on, or provide clarification of, these unresolved issues. To that end, three avenues will be examined: (i) a *forum victimae*; (ii) a specific head of jurisdiction for secrecy infringements; and (iii) a calibrated reinterpretation of the connecting factor in art. 7.2 BIRR which, as will be argued, seems to be the preferable option.

(a) The more transformative option: introducing a forum victimae

17. To begin with the proposed analysis, it is worth highlighting the suggestion advanced by Farnoux concerning a possible revision of the forum in tortious matters.[67] Unlike the more cautious proposals usually considered in classic doctrinal and institutional discussions, Farnoux puts forward a more ambitious and decidedly controversial

66 Hess *et al.*, 'The Reform…', *supra* n. 60, at 21; Hess *et al.*, 'The Reform… Academic Position Paper', *supra* n. 60, at 29-30.

67 E. Farnoux, 'Delendum Est Forum Delicti? Towards the Jurisdictional Protection of the Alleged Victim in Cross-Border Torts', in B. Hess and K. Lenaerts, *The 50th Anniversary of the European Law of Civil Procedure* (Nomos, Baden-Baden, 2020) 259.

idea: the elimination of the *forum delicti commissi* and its replacement with a *forum victimae*. Precisely because of its outsider character and the disruptive shift it would entail, this proposal has remained at the margins of mainstream debate, yet it offers an alternative perspective that challenges the traditional approach by proposing a broader reformulation of said provision.

In essence, this author argues that, even though the European lawgiver and judicature have always defended their willingness not to promote a *favor actoris* principle, this ethic already permeates several of the precepts and jurisprudential interpretations of the European PIL system (e.g., the GDPR's heads of jurisdiction). More specifically, in relation to the non-contractual head of jurisdiction, the CJEU's interpretation has often turned it into kind of a *favor actoris* rule favouring the plaintiff, as can be seen in the *Mines de Potasse d'Alsace* case or in the *eDate Advertising* ruling, among others.[68] Even if one were to argue that these interpretations aim to accurately pinpoint the location of the damage, the reality is that determining the location of elements involved in a tort is often somewhat artificial and may have other underlying justifications. Specifically, in the interpretation of art. 7.2 BIRR, there appears to be a significant emphasis on protecting the alleged victim, despite the alleged sacredness of the general principle of protection of the defendant.[69] According to the aforementioned scholar, the reasons are various and encompass, broadly speaking, the remedial function of tort law[70] and its normative or regulatory purpose, i.e., the desire to become a deterrent mechanism that guarantees the protection of the general interest.

For all these reasons, Farnoux proposes that the *forum delicti* be replaced by *forum victimae*, as it would consolidate this trend towards the protection of the alleged injured party, while at the same time solving many of the problems observed in the application of art. 7.2 BIRR (e.g., location of non-material damages, multiplicity of available fora, etc.) and even removing the issue of the delimitation between contractual and non-contractual matters.

18. Of course, the question arises as to how such a *forum victimae* should be articulated.

It seems, first of all, that this new ground of jurisdiction would work as the counterpart of the general forum of the defendant's domicile and would not have an exclusive character neither. The possibility of requiring the demonstration of a reasonable level of success or at a preliminary procedural stage is also highlighted,

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68 This perspective appears to be shared by Calvo and Carrascosa, Mankowski, and Requejo, Wagner, and Gargantini. However, the latter group emphasizes the importance of interpreting CJEU case law in the context of technological advancements to grasp this trend. [Calvo and Carrascosa, *supra* n. 20, at 3821-3822; Mankowski, *supra* n. 21, at 259-260; Requejo, Wagner and Gargantini, *supra* n. 19, at 111-112].

69 Even though the applicability of the tort liability forum is not dependent on the factual role of the plaintiff (i.e., alleged tortfeasor or victim), Farnoux highlights how the CJEU's reasoning in many instances (for example, the *eDate advertising* ruling) seems to lean towards the common consideration of the alleged victim as the plaintiff, to the point that it uses the terms 'defendant' and 'alleged tortfeasor' interchangeably [Farnoux, *supra* n. 67, at 275-277].

70 This reparatory function is also sustained by Mankowski, who claims that even though art. 7.2 is not designed as a forum for protection of the weaker party, its interpretation may be influenced by "*victim protection as a goal of tort law*" [Mankowski, *supra* n. 21, at 246].

to avoid abuses. Likewise, it would be necessary to delimit whether such a forum would be available to any potential victim or only to those who have the status of a weaker party (i.e., those acting outside their professional activity). Although this alternative approach might mitigate concerns regarding potential violations of the defendant's protection principle to some extent, it would also entail the exclusion of certain professionals and SMEs, which one could argue are not undeserving of the protection provided by this hypothetical forum, especially when considering factors such as litigation costs and resource scarcity.

In any case, it should be remembered that this is a mere doctrinal proposal, the ambitious nature of which casts doubt on whether it will eventually materialize in the future reform of the Regulation, especially in the light of the cautious approach adopted by the doctrine, which suggests refraining from major reformulations of this provision[71].

(b) An intermediate path: creating a bespoke forum for secrecy violations

19. Within the scope of this contribution, a further logical alternative suggests itself, one better suited to the pressing needs identified here than the introduction of an expansive *forum victimae*. This is, the creation of a new jurisdictional ground specifically tailored to cases of trade secret infringement. While scholarly discourse has indeed explicitly explored the notion of introducing a dedicated rule for confidentiality infringements within the conflictual sphere,[72] no similar proposal has been noted in legal literature regarding jurisdictional obstacles linked to secrecy violations. Nonetheless, the author believes it is also worth considering this option, given its potential to effectively address the identified deficiencies in a comprehensive manner. Indeed, such a statutory amendment could offer several advantages.

The first of them lies in the eradication of the problem of delimitation between tortious and contractual matters for the purposes of the application of the BIRR. A forum that would be applicable in any instance of secrecy infringement, irrespective of the context in which such infringement materializes, would solve potential issues regarding the characterization of a given dispute as either contractual or tortious, while also facilitating the work of national courts and the proper administration of justice.

In addition, the creation of such a specialised standard would make it possible to rely on more appropriate connecting factors, such as the place of establishment of the company allegedly affected. For instance, although not the primary focus of this contribution, the use of such a criterion could help overcome the obstacles associated with the forum in contractual matters (namely those stemming from the difficulty, or even impossibility, of determining the place of performance of

71 M. Weller, 'Conference Report from Luxemburg: On the Brussels Ibis Reform', in Conflict of Laws (12 September 2022).

72 Ohly, *supra* n. 16, at 252-257.

a confidentiality obligation[73]). But most importantly, it would also provide an opportunity of correcting the exacerbated multiplicity of courts with tortious jurisdiction over local damages arising from the spatial dispersion of the harm, especially in cases of wrongful disclosure over the Internet or of exploitation of the secret in several markets. Not only that, but the use of such a connecting factor would enable the consolidation of all pertinent claims arising from a series of infringing actions (e.g., an exploitation resulting from an unlawful acquisition), before a single court. This approach would avoid the need to ascertain the location of the causal event and the damage for each offence, which would only introduce further ambiguity and greatly impede the protection of right holders' interests. This proposal could also circumvent the evidentiary challenges previously mentioned regarding the accurate determination of where the secret was unlawfully acquired through hacking or where the decision to exploit confidential information was made.

20. It is important to acknowledge that implementing such a rule would also necessitate striking a balance between conflicting principles and interests. The primary concern that may arise pertains to how this new jurisdictional basis could potentially lead to a situation of *favor actoris* or *forum victimae*, which the European legislator typically seeks to minimize to avoid giving undue advantage to one party over the other,[74] especially when the substantive issue and the culpability of either litigant have not yet been proven.

However, as previously emphasized, the covert inclination to safeguard the victim evident in the jurisprudential interpretations of the CJEU,[75] particularly regarding art. 7.2 BIRR, indicates that the outright dismissal of the *favor actoris* principle has gradually waned over time and might indeed be justified in certain circumstances.[76] Considering the vital function trade secrets serve as a safeguard for companies' intangible assets and their growing significance in today's globalized technological landscape, the author believes that opposition to this theoretical regulation could be surmounted in this specific instance and that the implementation of such a forum may thus be adequately justified. This is so, insofar as such claimant-friendly principle would not have a general horizontal nature, but rather be limited only to instances of confidentiality violations. In this same line, the doctrine points out how sometimes the protection of trade secrets can have a rationale similar to that of infringement of personality rights (e.g., disclosure of confidential information affecting the company's reputation or acquisitions through industrial espionage).[77] Following this reasoning, utilizing the proposed new forum would result in a similar outcome to the application of the centre of interest principle as defined in

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73 On this matter, see note 61.

74 Calvo and Carrascosa, *supra* n. 20, at 3791, 3805-3806; Requejo, Wagner and Gargantini, *supra* n. 19, at 111-112; Sabido, *supra* n. 15, at 191-192.

75 Mankowski, *supra* n. 21, at 258-263; Requejo, Wagner and Gargantini, *supra* n. 19, at 111-112.

76 Lehmann *et al.*, supra n. 21, at 140-141.

77 Nevertheless, said doctrine also highlights how other secrecy infringement cases may be more market-oriented, such as the commercialization of infringing products in several Member States, and ends up rejecting the adoption of a claimant-friendly approach because it considers it to be excessive [Ohly, *supra* n. 16, at 242-243].

the *eDate Advertising* case law, thereby mitigating any potential sense of peculiarity or strangeness associated with this theoretical new connecting factor. Last but not least, as proposed by Farnoux,[78] to curb accusations of excessive favouring of the alleged injured party, the use of the *favor victimae* principle could be mitigated through various mechanisms, such as the requirement of proof of a certain likelihood of success of the claim.[79]

21. All in all, the above proposal could enhance legal certainty in international litigation concerning cross-border trade secret disputes. Yet, it also presents certain shortcomings (akin to those identified by Farnoux) and ambiguities that require further clarification by the lawmaker to ensure full compatibility with the fundamental principles of the Brussels I Recast Regulation. A pragmatic reading of the role of PIL rules, combined with the European legislator's cautious approach and limited willingness to innovate, tempers expectations, particularly in light of the European Commission's published report. Ultimately, the practical obstacles to implementing such a forum (such as the need for a high degree of specialization and the legislator's reluctance to endorse an explicit *favor actoris* principle) make its adoption unlikely.

(c) The preferred alternative: a targeted reinterpretation of the locus damni

22. Perhaps a less problematic solution, but one that would bear some similarity to the aforementioned proposals, could be to reinterpret the connecting factors proposed for the application of art. 7.2 BIRR to cases of secrecy infringements in a way that considers the seat of the secret holder affected as the place of materialization of the damage for all offences, whether it is an unlawful acquisition, exploitation or disclosure. Various arguments could lend support to this notion.

Firstly, as mentioned earlier, legal doctrine already suggests that in cases of unlawful acquisition, the harm to the holder stems from the loss of control over the secret and its subsequent devaluation, which eventually designates the holder's establishment as the locus of the damage. This logic may as well be replicated in cases of illicit disclosures and uses. Whether the breach occurs through public disclosure of the secret or its commercialization via an infringing product, the affected company still endures a reduction in the value of the confidential information and a diminishment of control over it. The presence of additional external effects does not necessarily mean they constitute the primary original damage resulting from the unlawful act (which is not to say that they should be completely disregarded neither[80]).

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78 Farnoux, *supra* n. 67, at 282.

79 Another aspect worth contemplating is the potential interaction of this new regulation with the fora outlined in Sections 3 to 5, particularly those concerning individual employment contracts. Presumably, being a special forum by reason of subject matter, this new rule would not hold exclusive status, implying that the special regulations for protecting the weaker party would prevail. This preference is justified by the goal of safeguarding such parties and is even preferred due to the simplicity afforded by the application of this latter group of rules, as previously demonstrated. Such simplicity stems from the broad scope of these jurisdictional grounds (encompassing both contractual and tort-related matters) and the connecting factors utilized (such as the domicile of the employee under art. 22 BIRR).

80 Indeed, those locations can still be considered for local limited jurisdiction, similar to the current practice in online defamation cases following the *eDate Advertising* jurisprudence. However, there are

Following this line of reasoning, the uniform application of this criterion would preserve the existence of a strong connection between the claim and the connecting factor employed, while providing the parties with a higher degree of foreseeability (especially considering that the place of establishment of the holder is easily ascertainable[81]). This stance would also adhere to the ethos of the Rome II Regulation, which seems to perceive most secrecy violations as unfair actions primarily affecting individual competitors rather than directly influencing the market (although specific nuances will be delved into in this discussion later on). Moreover, it would solve most of the problems arising from the current application of art. 7.2 BIRR, i.e., the existence of multiple competent courts, the distinction between global and local damages[82] and, above all, it would allow the grouping before a single court of all claims in those cases where the tort derives from a chained offence (e.g., an unlawful exploitation arising from an unlawful acquisition).[83]

While this interpretation would still leave the problem of distinguishing between contractual and non-contractual matters, it would make it much easier to determine which courts have jurisdiction in cases of tortious breaches of confidential information. As it was the case with previous proposals, the question arises as to whether such an interpretation would not be too beneficial to the secrecy holder. However, as already stated, this criterion would follow the already existing tendency in some cases to favour the alleged victim and, moreover, it would be restricted only to instances of secrecy infringement, which would reduce by itself the allegations about its exorbitantly biased nature.

The Higher Regional Court of Düsseldorf appeared to adopt a similar perspective in its ruling on November 25, 2021, concerning the misappropriation of confidential information and the use of that information to market infringing goods.[84] Although

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voices who, even in such cases, advocate for reducing the number of competent courts by eliminating local jurisdiction (see, for instance, Advocate General Bobek's Opinion in the Bolagsupplysningen case [Opinion of Advocate General Bobek, 13 July 2017, C-194/16, ECLI:EU:C:2017:554, para. 73-90]. In any event, it seems unlikely that the holder would resort to these local courts if they had the option to file a claim at the courts of their own seat to seek global damages.

81 However, there are authors who argue that in the scenarios depicted in art. 4.5 TSD, this is, where the alleged infringer did not have direct access to the secret information and may not be aware of the holder's place of establishment, the attribution of jurisdiction to such courts should be excluded, granting it solely upon the courts of those states where the indirect infringer may have marketed the infringing goods. While this suggestion may find justification in the pursuit of predictability, it is not without its uncertainties, insofar as it introduces a highly context-dependent exception that moreover assumes a level of innocence on the part of the indirect infringer that might not be warranted until a comprehensive assessment of the case's merits is undertaken [Lundstedt, *supra* n. 14, at 185].

82 At the same time, this may also allow the court of the place where the damage is located to adopt measures related to the removal of infringing content (either on a European scale or at a world-wide level). Such possibility gives the holder some additional leeway when deciding where to file a lawsuit, for the territorial scope of the remedies adopted will not depend on the court chosen.

83 Certainly, Lundstedt presents a viewpoint akin to the one expressed here, suggesting that centralized global jurisdiction should be granted to the courts located where the holder is established, particularly in instances of sequences of infringing acts. Nevertheless, she also advocates for retaining jurisdictional attribution to address local damages in the courts of regions where commercial interests might have been affected [Lundstedt, *supra* n. 14, at 184-185].

84 Judgment of the OLG Düsseldorf, 25 November 2021, 15 SA 1/21, ECLI:DE:OLGD:2019:1121.I2U34.19.00, para. 33, 39-40.

it is true that these products were sold in the same market of establishment of the holder, the Court's reasoning aligns with the one proposed here, insofar as it concludes that the damage occurred in Germany, not because it was the location of the sale of the infringing goods, but because the infringement impacted the trade secrets of the owner, who was based and economically active in such country.[85]

23. Certainly, the consideration of the place of the establishment of the holder as the main place of damage for all trade secrets offences may entail a legal fiction. Nevertheless, if the analysis of PIL rules has revealed anything, it is precisely that their application and interpretation are rife with fictional readings adopted for the purposes of achieving the main objectives pursued by said rules, broadly speaking, predictability, the sound administration of justice and facilitating access to the courts. In this way, the proposal seems to be in line with the teleological methodology already employed on several occasions by the national and European judges and it is not to be regarded as an unconventional or unusual technique.

However, betting on this less intrusive option of reinterpreting an existing connecting factor rather than creating a new, overly specific forum for trade secrets would also entail the need to pay attention to a particular issue: the consistency of such a reinterpretation with the prevailing understanding of European rules on applicable law, particularly those laid down in the Rome II Regulation. The next section takes up that inquiry.

(C) THE INTERPRETATIVE CONTINUITY BETWEEN THE BRUSSELS AND THE ROME REGULATIONS AND ITS IMPLICATIONS FOR THE PROPOSED REVISION

24. Indeed, before affirming the adequacy of the proposed reinterpretation of the tortious ground of jurisdiction under the Brussels I Recast Regulation, it is necessary to address a previous question, namely, that of the compatibility of the proposal with the current architecture of EU conflict-of-laws rules, notably the Rome II Regulation on the law applicable to non-contractual obligations.

The particular significance of said issue for the purposes of this contribution lies in the reliance of all these instruments on homogeneous connecting factors. Indeed, it appears that the tortious fora under the BIRR and certain conflict rules in Rome II make use of analogous connecting factors when addressing their respective PIL areas. A closer look at the general rule enshrined in art. 4 of said Regulation reveals that the principal criteria for determining the applicable law in tortious matters is the law of the country where the damage occurs. While disregarding the law of the place where the harmful event originated, this approach confirms (up to some point) the reliance on a homogeneous connecting factor across these European instruments.

[85] For an opposing perspective and a critique of the Düsseldorf court's judgment, see: Judgment of the OLG Karlsruhe, 31 March 2022, 6 W 15/22, ECLI:DE:OLGKARL:2022:0331 6W152200, para. 12.

This overlap prompts the question whether the interpretation of the tort connecting factor advanced at the jurisdictional stage (namely, treating the secret holder's place of business as the *locus damni* for all secrecy violations) should likewise inform the applicable law analysis, or whether extending it to Rome II would encounter objections weighty enough to militate against such transposition, thereby risking inconsistency between the instruments.

(a) The case for systemic consistency and its potential drawbacks

25. Resolving this issue requires, as a preliminary step, an inquiry into whether (and to what extent) any obligation of consistent interpretation might exist between the BIRR and the Rome Regulations[86].

As legal literature points out, all these instruments together constitute the "*internal hermeneutic circle of European private international economic law*",[87] this is, a group of regulations that considered jointly have the capacity to provide a response to almost any private international situation that arises regarding commercial matters.

Following this line of reasoning, the existence of a certain principle of continuity among these instruments is presupposed. This can be seen, for example, in Recital 7 of the Rome I Regulation, which states that:

> *The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)* [BIRR today] *and 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).*[88]

A similar statement is to be found in Recital 7 of the Rome II Regulation, which comes to show the overall willingness of the European Union legislature to ensure that these three regulations are interpreted in a holistic way, reducing the room for divergencies, and ensuring that a uniform understanding is preached all throughout the internal market.[89]

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86 The expression "Rome Regulations" is often taken to include, in addition to the private international law instruments on contractual and non-contractual obligations, Regulation No 1259/2010 on the law applicable to divorce and legal separation (Rome III). In this contribution, Rome III is not considered, as it falls outside the scope of the analysis. Accordingly, references to the "Rome Regulations" are to the Rome I and Rome II instruments only.

87 Garcimartín, *supra* n. 54, at 370; Esplugues, Palao and Iglesias, *supra* n. 61, at 714.

88 Likewise, a similar statement can be found in Recital 7 of the Rome II Regulation.

89 Despite the perceived desire for a common assimilation, the truth is that this statement is not completely free from discussion. The existence of a certain consensus does not prevent the doctrine from pointing out the need to introduce nuances in relation to this alleged consistency for some of the issues covered by these instruments, especially in view of the different objectives pursued by each of them [C. Schmon, *The Interconnection of the EU Regulations Brussels I Recast and Rome I – Jurisdiction and Law* (TMC Asser Press, The Hague, 2020), at 141-142.]. Similarly, the CJEU has acknowledged that although the goal of consistency is laudable and should be promoted as much as possible, it "*cannot, in any event, lead to the provisions of Regulation No 44/2001* [BIRR today] *being interpreted in a manner which is unconnected to the scheme and*

26. On this premise, where two instruments rely on analogous connecting factors, considerations of coherence and consistency seem to militate in favour of a uniform understanding. Indeed, a divergent interpretation may be incongruous: to claim that the damage is located in different places for the purposes of application of the various PIL instruments could undermine any principle of predictability for the parties and increase existing legal uncertainty.

This seems to be the doctrine's approach[90] as well as the jurisprudential understanding. Although no preliminary questions have been raised on this particular issue, the CJEU has had the opportunity to deal with the subject in judgments such as *flyLAL-Lithuanian Airlines,*[91] related to anticompetitive conduct based on the application of predatory prices. When determining what is to be considered the place of the damage of such conduct for the purposes of jurisdiction, the Court bets on the consideration of the specific market(s) affected as such place, arguing in para. 41 that "*determining the place where the damage occurred in such a manner satisfies the requirement of consistency laid down in recital 7* [of Rome II Regulation], *in so far as, under Article 6(3)(a) of that regulation, the law applicable to actions for damages based on an act restricting competition is that of the country where the market is, or is likely to be, affected*." A similar assessment was also conducted by the CJEU in the *Koelzsch*[92] judgment, in relation to the criterion of the country in which the employee "*habitually carries out his work*" to which both art. 21 BIRR and art. 8 Rome I resort to. Hence, there seems, therefore, to be a clear (albeit modest) commitment on the part of the Court to a uniform interpretation in cases where different instruments make use of the same connecting factors.

Based on this premise, if the proposed reinterpretation of the connecting factor in art. 7.2 BIRR were ultimately adopted, it would most likely entail applying, in all secrecy infringements, the law of the right holder's place of business, on the ground that the primary and initial damage is felt there and irrespective of any subsequent harm arising elsewhere.[93]

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objectives pursued by that regulation" [Judgment of the CJEU, 16 January 2014, C-45/13, ECLI:EU:C:2014:7, para 20].

90 See, among others: J. von Hein, 'Article 4 Rome II', in G. P. Calliess and M. Renner (eds), *Rome Regulations – Commentary* (Wolsters Kluwer, The Netherlands, 2020) 532, at 536-537; A. Dickinson, *The Rome II Regulation – The Law Applicable to Non-Contractual Obligations* (Oxford University Press, Oxford, 2008), at 308-309; I. Bach, 'Art. 4', in P. Huber (ed), *Rome II Regulation: pocket commentary* (Sellier European Law Publishers, Munich, 2011) 64, at 72-73.

91 Judgment of the CJEU, 5 July 2018, C-27/17, ECLI:EU:C:2018:533.

92 Judgment of the CJEU, 15 March 2014, C-29/10, ECLI:EU:C:2011:151, para 40-43.

93 Another potential issue of interpretative coherence that may also arise in cases of trade secret infringement (though it falls beyond the scope of this contribution) concerns the classification of the dispute as contractual or non-contractual at the jurisdictional level, and the subsequent transposition of that classification to the conflict-of-laws stage. In the view of the present author, and in line with the principle of interpretative coherence previously advocated, such classification ought to be preserved. Nonetheless, this remains a controversial question, further complicated by the difficulties already noted in categorizing disputes in borderline situations. See, among many others: M. McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press, Oxford, 2015), at 120-123; Dickinson, *supra* n. 90, at 134-135; Lundstedt, *supra* n. 14, at 197-201; Calvo and Carrascosa, *supra* n. 20, at 3861.

27. This solution, however, is not as straightforward as it might initially appear. several commentators contend that secrecy infringements display distinctive characteristics that may eventually call into question the adequacy of a uniform approach.

Indeed, as previously highlighted, confidentiality violations are frequently characterised as a conduct with the potential to confer undue advantages on the infringer, thereby upsetting the competitive balance and undermining the integrity of the competitive process. More specifically, numerous scholars emphasize that such acts can shape market behaviour in ways that destabilise competitive relations or compromise the collective interests of consumers within a given economic order, including by distorting entry, weakening innovation incentives, and impairing efficient allocation of resources. In practical terms, it is easy to envisage how the theft, disclosure, and unlawful use of a company's confidential information can immediately advantage rivals over the victim, disrupting level-playing-field conditions and fostering a climate of mistrust that hinders inter-firm collaboration and voluntary information sharing arrangements, which ultimately may reduce investment in the generation of new, valuable information for fear that it will not be adequately protected. In fact, most of these arguments are those that underpin the protection developed under the 2016 Directive, as can be inferred from reading its recitals.

On this view, it may be justified for each country experiencing the effects of the infringement (such as through the local exploitation of the trade secret) to apply its own law, reflecting its interest in retaining control over its economic area. Following this line of reasoning, one might effectively argue that applying the law of the holder's place risks underappreciating these broader, effect-based concerns and may insufficiently reflect the impact that secrecy infringements produce within the affected market.

(b) Rome II's framework as a solution path

28. However, before drawing any conclusions, it bears recalling that the Rome II Regulation does not rest exclusively on a single general conflict rule.

Indeed, as with many EU instruments, this conflictual framework also provides a suite of specialized criteria that may apply depending on the subject matter of the dispute. In particular, recognition that certain forms of market-disruptive conduct warrant tailored treatment prompted the EU legislature to adopt a specific regime for such scenarios, this is, article 6 of Rome II, devoted to unfair competition behaviours and acts restricting free competition.

Although debate persists on this point,[94] the prevailing view in the legal literature[95] is that trade secret infringements fall within the ambit of this provision. In this sense,

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94 See, for illustrative purposes: Ohly, *supra* n. 16, at 245-252.

95 C. Wadlow, 'Trade Secrets and the Rome II Regulation on the Law Applicable to Non-Contractual Obligations', 30-8 *European Intellectual Property Review* (2008) 309-319, at 310-312; R. C. Dreyfuss and M. van Eechoud, 'Choice of law in EU trade secrey cases', in J. Schovsbo, T. Minssen and T. Riis (eds), *The Harmonization and Protection of Trade Secrets in the EU – An appraisal of the EU Directive* (Edward Elgar Publishing, Cheltenham/Northampton, 2020) 171, at 180-182; J. Drexl, 'Art. 6 Rom II-VO Unlauterer

the preparatory works to the Rome II Regulation expressly identified confidentiality breaches as unfair competition conduct encompassed by the objective scope of Article 6.[96] That conclusion is reinforced by (i) the absence of an exclusive right in confidential information, as recognized in Recital 16 of the Directive and (ii) the overall configuration of secrecy protection under art. 39 TRIPS, which mandates its articulation in the context of the fight against unfair competition by including a direct reference to art. 10*bis* Paris Convention 1883. Taken together, these elements have led the literature to this settled position.[97]

These arguments find resonance in the limited national case law discovered concerning trade secrecy and conflict-of-law issues. For instance, in the *Innovia Films Ltd v Frito-Lay North America Inc.* case[98] from 2012, the English courts highlighted that:

> *It is common ground that claims for breach of an equitable obligation of confidence fall within Article 6 of the Rome II Regulation when read together with Article 39 of Agreement on Trade Related Aspects of Intellectual Property Rights (…) to which the European Union and all its Member States are party. Article 6 of Rome II contains a specific choice of law regime for 'a non-contractual obligation arising out of an act of unfair competition', while Article 39 of TRIPS requires WTO Member States to protect undisclosed information 'in the course of ensuring effective protection against unfair competition*.

Similar motives were brought forward in the *Celgard vs. Senior* case, in which the Courts agreed that "*it is clear from recitals (2), (16), (17) and Article 3(1)(d) that it* [the Trade Secrets Directive] *does not create a species of intellectual property right, but rather forms part of the law of unfair competition*" and that "*it is also common ground that the non-contractual obligation on which the claims are based arises out of an act of unfair competition within the meaning of Article 6 of the Regulation*".[99] Recent Spanish[100] and French[101] jurisprudence seem to go along the same lines.

Wettbewerb Und Den Freien Wettbewerb Einschränkendes Verhalten', in F. J. Säcker *et al.* (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol 8. Auflage* (8th edn, CH Beck, Munich 2021)., para. 184-187; Horrach, *supra* n. 16, at 291-300; Dickinson, *supra* n. 90, at 406-407; J. Carrascosa, 'Propiedad Intelectual' in A. L. Calvo and J. Carrascosa (eds), *Tratado de Derecho Internacional Privado, vol III* (2nd ed, Tirant lo Blanch, Valencia, 2022) 3723, at 3766-3767; Calvo and Carrascosa, *supra* n. 20, at 3921-3925.

96 European Commission, 'Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II)' (2003), at 16.

97 Scholars who have conducted a more thorough examination of the topic have evaluated the advantages and disadvantages of incorporating secrecy infringements not only within the framework of art. 8 or art. 6 but also under art. 4 Rome II. For instance, based on the arguments referred above, Lundstedt positions the majority of secrecy violations within the scope of art. 6.2 Rome II, primarily due to their association with competitive environments. However, she acknowledges that certain infringements unrelated to competition (such as those committed by journalists) could potentially be categorized under art. 4, although this inclusion would lead to the same result, thus making the distinction between these two provisions rather irrelevant [Lundstedt, *supra* n. 14, at 223-232]. Next, Ohly suggests that applying art. 4 is the preferable option for the time being due to the flexibility it provides, although he eventually contends the consideration of trade secrets as a *sui generis* regime warranting a new conflict rule, as will be discussed below [Ohly, *supra* n. 16, at 245-249].

98 Judgment of the EWCH, 30 March 2012, EWHC 790 (Pat), para. 109.

99 Judgment of the EWCA, 9 October 2020, EWCA Civ 1293, para. 26, 51.

100 SAP Madrid 257/2021, 2 July 2021, ECLI:ES:APM:2021:10275.

101 Judgment of the Court de Cassation Civile, 8 November 2017, Arrêt 16-10850, ECLI:FR:CCASS:2017:CO01341.

If that construction is accepted, the anticipated difficulty then may recede: art. 6 Rome II could function as *lex specialis* vis-à-vis the general rule in art. 4 and supply the applicable law for trade secret misappropriation, thereby dispelling the potential for inconsistencies.

29. A collateral debate nevertheless arises as to how different types of secrecy violations may fit within the structure of art. 6 Rome II.

In this regard, it should be recalled that this provision develops a two-track scheme. Paragraph 1 targets market-oriented acts (this is, conducts capable of affecting competitive relations or the collective interests of consumers within a territory) and applies the law of each affected market, while tightly limiting recourse to additional connecting factors such as the common habitual residence of the parties or party autonomy. Paragraph 2, by contrast, captures bilateral unfair acts that harm only a specific competitor and therefore revert to the general *lex loci damni* framework of art. 4, keeping those additional criteria available. Although the two tracks may at times converge in outcome, the choice remains institutionally meaningful: classification under art. 6.1 prioritizes general market interests and narrows alternative connectors, whereas art. 6.2 preserves them.

Set against this background, the further question is whether all secrecy violations engage market effects or whether some remain bilateral and thus return to art. 4, in which case, a residual risk of interpretive divergence could still arise from the homogeneous connecting factors employed across the BIRR and the Rome II Regulation.

30. Within the current scheme of the provision, the present author (in line with much of the literature) considers that the unlawful exploitation of a trade secret (i.e., the use or marketing of an infringing product) shall be best treated as market-oriented under art. 6.1 Rome II, since it distorts the level playing field across one or multiple economic territories. Indeed, exploitation externalises the misappropriation into the marketplace, allowing the infringer to appropriate a rival's competitive advantage and thereby altering the conditions of competition not only vis-à-vis the victim but also other operators.

Unlawful disclosures, by contrast, are a more complex case: while many authors would place it straightforwardly under art. 6.2, the view advanced by a minority of scholars and shared by this author is that at least certain disclosures, and especially public and significant revelations that effectively "democratize" the competitive advantage obtained from the victim, can produce a real and appreciable market effect and therefore shall fall within art. 6.1 of the Regulation. Conversely, limited or minor disclosures (e.g., to a single competitor), where no broader market manifestation can be shown, should remain bilateral. Finally, unlawful acquisitions are widely (and rightly) classified under art. 6.2, because their effects on the market are merely indirect. The immediate harm lies in the loss of control over the information and the impairment of the holder's competitive position, with no necessary diffusion to specific markets at that stage. Consequently, there is no general market disturbance justifying recourse to the special market-oriented rule.[102]

[102] That said, the proposed taxonomy is not settled, however, and further refinements are likely. For further insights into this debate, see: Lundstedt, *supra* n. 14, at 232-239; *Ohly*, supra n. 16, at 246-247.

31. In any case, redirecting these scenarios to the general rule is not especially problematic. Even on that footing, doctrine largely converges on the view that, in cases of unlawful acquisition, the "country in which the damage occurs" under art. 4.1 Rome II is that of the seat of the holder. Indeed, the initial injury consists in the deprivation of control over the information and the resulting hit to the holder's competitive standing, both of which materialise at the holder's business centre and not at the locus of the illicit taking. At the acquisition stage there is typically no identified market impact and no diffusion to specific territories. Thus, the only concrete, predictable connection is to the holder's establishment.

    A different thing, however, is how art. 4.1 should be interpreted in those scenarios where disclosure is limited to a competitor as opposed to the general public, given its inability to impact general or collective interests within a specific economic area. Two possibilities emerge in this context: relying on the place of disclosure of the confidential information (likely the receiver's establishment) or on the location of the secret holder's seat. It appears challenging to argue, in such cases, that the materialization of the damage (again, defined as the loss of control over the secret by the holder and its impact on his competitive position) can be placed at the site of disclosure. A consistent interpretation should lean as well towards applying the law of the seat of the holder in these cases, especially since there are no state interests in overseeing a specific economic territory that could justify displacing such law.

    This reading advances Rome II's aims of predictability and the sound administration of justice, avoids a fragmented "mosaic" of potentially irrelevant laws, and anchors the dispute in the legal order with the closest connection to the claimant's suffered prejudice. But most importantly for the purposes of this contribution, it also preserves coherence with the proposed interpretation of art. 7.2 BIRR in secrecy cases, thereby promoting harmony between jurisdictional and choice-of-law criteria.

32. Accordingly, and contrary to what first impressions might suggest, the interpretative adjustment to the non-contractual forum proposed above generates no meaningful friction with the Rome II conflict-of-laws framework. The real difficulty would arise only if these conducts were governed by the general *lex loci damni rule* in art. 4. In that event, it would be harder to defend a uniform understanding of the "country in which the damage occurred" across both Regulations, because relying on a single law (here, that of the right holder's establishment) would inadequately disregard the interests of states in preserving fair and uniform competitive conditions within their respective markets. Rome II, however, includes a special conflict rule for acts of unfair competition, which avoids this dilemma by subjecting unlawful exploitations and public disclosures to a distinct, self-standing criterion that results in applying the law of all markets affected by the unfair behaviour. Consequently, the autonomous definition of the "place of damage" can be carried over from one instrument to the other without compromising states' concerns.

33. As a final remark, one may notice that in tortious instances of unlawful public disclosure or exploitation, the proposed scheme may yield a somewhat contrasting outcome, i.e., the attribution of global jurisdiction to one single court vs. the concurrent application of multiple laws. This result, however, does not present

significant hurdles; instead, its practicality becomes evident when considering the unique needs arising in each of these PIL domains.

In the jurisdictional realm, it would be significantly more burdensome for a company grappling with a confidentiality infringement to navigate through one (or multiple) foreign courts for the remedy of the inflicted damage, presenting a considerable deterrent that could even lead to the abandonment of legal proceedings. Thus, assigning jurisdiction to the courts of the place of establishment of the holder provides a more appropriate response, equally aligned with the principles of legal certainty and predictability.

Within the applicable law domain, the victim also faces a certain burden in asserting and substantiating the relevant laws identified under the conflict rule of art. 6 Rome II. However, this burden is justified by the need to balance the concerns of countries in structuring their economic territories, considerations that would be overlooked by applying exclusively the law of the holder's seat. Such a need justifies positioning holder's interests as secondary at the conflictual level, unlike at the jurisdictional one (where, in any case, the attribution of jurisdiction to a single court did not displace states' desires to regulate their markets, since this court can continue to apply the law of the relevant affected markets to assess conducts impacting them). Anyhow, it should be borne in mind that invoking different laws will be considerably less burdensome for the holder than forcing it to seek redress in one or more foreign courts for the harm inflicted. The urgency of reducing the number of competent courts and providing an accessible forum for potential victims of confidentiality infringements outweighs the inclination to reduce the number of possible applicable laws in cases of public disclosure and exploitation, where additional interests come into play that need to be duly considered.

(D) CONCLUSIONS

34. As shown throughout the paper, meaningful ambiguities persist in interpreting existing heads of jurisdiction for secrecy infringements, most acutely in the tort context where criteria overlap and thresholds remain unclear. From the need for individual consideration of each potential offence (particularly troublesome in the case of sequences of infringing acts) to evidentiary issues, through the multitude of available fora or disagreement regarding the interpretation of available connecting factors, the fact remains that the holder must confront a particularly pronounced uncertainty. Ultimately, such insecurity could lead them to refrain from initiating legal actions for the protection of their trade secrets, especially in the case of firms with limited organizational capacity and financial resources.

To mitigate these problems, this paper has suggested an interpretative refinement of the "place where the damage occurred" in art. 7.2 BIRR, based on consistently locating the damage at the establishment of the information holder for all types of trade secret infringements (i.e., unlawful acquisitions, disclosures, and exploitations). Indeed, framing the primary harm as the loss of control over the secret and the resulting devaluation of the holder's competitive position delivers benefits akin to those of a dedicated ground for secrecy infringements or a *forum*

victimae, including a narrower set of competent courts and the ability to hear interconnected or chained offences before one single court. At the same time, it is a more measured solution than introducing a new specific criterion, which could be seen as overreaching and would necessarily require legislative amendment (even if such reform may be more attainable at present, given the ongoing review of the Brussels I Recast).

Building on that, the analysis conducted has also shown that the proposed adjustment to the non-contractual forum would align neatly with the Rome II Regulation's scheme. Friction would arise only if secrecy disputes were channelled through the general *lex loci damni* of art. 4, which would strain a uniform understanding of the "place where the damage occurred" across instruments and risk collapsing all cases into a single law (typically the holder's seat), contrary to states' interest in safeguarding fair competition within their own markets. Rome II itself forestalls that result: art. 6 establishes a special regime for unfair competition that routes unlawful exploitations and public disclosures through a distinct test applying the law of each affected market. On that basis, the autonomous notion of "place of damage" can be maintained consistently between the instruments without sacrificing market-regulatory concerns.

Overall, this proposal provides a coherent and practicable path forward. It avoids interpretive inconsistencies between the Brussels I Recast and the Rome II Regulation, strengthens legal certainty for secret holders, and offers a predictable forum logic that can reduce procedural friction and enforcement costs. By reinforcing both the perception and the reality of effective protection, it can prompt earlier enforcement and even encourage cross-border cooperation where appropriate. In this way, the potential outcome of the proposed adjudgments may advance the objectives of the Trade Secrets Directive by supporting innovation, safeguarding fair competition, and fostering a stable environment for the lawful circulation and use of confidential know-how across borders.

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Full recognition of similar personal and family status in the EU: The Mazowiecki Case and the innovative interpretation of national identity*

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Abstract: in the past two years, significant progress has been achieved in the recognition of equivalent personal and family status within the European Union. This development has materialized through their acknowledgment in the context of the exercise of the right to full freedom of movement and residence of Union citizens. Following the initially controversial and inconsistent case law of the Court of Justice in *Coman* and *Pancharevo*, which were practically indistinguishable, the 2023 judgment of the European Court of Human Rights in the *Fedotova* line of cases appears to have prompted a reorientation in the Luxembourg Court's stance. The *Mirin* case and the recent *Mazowiecki* judgment seem to mark a turning point in this respect. In its emerging doctrine, the Court of Justice makes it clear that the invocation of the Member States' national identity cannot serve as a pretext for infringing the fundamental rights to equality and non-discrimination on grounds of sexual orientation. This approach culminates in the effective recognition of analogous personal and family statuses across the Union. Where national legislation must be adapted to ensure such recognition, Member States are under an obligation to undertake the necessary reforms. Although they are not required to introduce or recognize same-sex marriage or filiation per se, they must, while respecting their margin of appreciation, ensure that same-sex families enjoy a comparable set of rights to those accorded to opposite-sex couples in matters of marriage and parenthood. Only such an interpretation secures conformity with the right to family identity enshrined in article 7 and the principle of non-discrimination laid down in article 21 of the Charter of Fundamental Rights of the European Union.

Keywords: freedom of movement in the EU national identity same-sex marriage private and family life national identity.

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(A) THE DEBATE ON FREEDOM OF MOVEMENT IN THE EU AND PERSONAL AND FAMILY STATUS

The debate on achieving full freedom of movement and residence for people with the same personal and family status throughout the territory of the Member States of the European Union has been a long one. It has evolved alongside European society, grounded in the work of social groups most closely linked to the interests of same-sex couples in recent decades. The European Commission has also developed a broad agenda of equal rights[1]. Thus,

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achieving the free movement of people and families[2] while respecting their equal status within the EU[3] has been one of the objectives of this process and this human movement.

This evolution has taken place more through the mutual recognition of judgments, public documents, and legal statuses existing in other States, than through legislative developments. It stems from a clash between two sets of rights and competences with different origins and content. On the one hand, there is the competence of Member States to regulate their domestic family law, and the obligation of the Union to respect the national identity of the Member States. This entails that the Union cannot impose legislative changes on Member States that affect essential principles of their societal structure. On the other hand, stands the right to move and reside freely throughout the European Union, one of the core rights of all Union citizens and a fundamental component of the status of Union citizenship[4]. As a result, legislative amendments have not proved to be the appropriate means for implementing this evolution.

Thus, it was essential that this evolution in the recognition of legal statuses should take place through the case law of the CJEU, whose judgments have progressively shaped the overall legal framework governing the enjoyment of the rights of European citizens[5]. This decades-long development has not been exempted from fluctuations, criticism, or more or less questionable decisions. Nonetheless, it is clear that, in the last two years, the extension of the recognition of personal status beyond the borders of a single Member State has been particularly significant.

In the 2000s, the use of the same name throughout the European Union was recognized as an element of personal identity. This recognition was generally satisfactory. In the 2010s, up until 2021, the freedom of movement of same-sex couples and the parentage arising from same-sex relationships were only partially recognized[6]. From 2023 onwards, with the ECtHR's judgment on marriage equality, the overall understanding of the conflict began to shift towards fuller recognition, a development that has been endorsed by the CJEU's case law over the last two years.

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1 For all these reasons, the latest strategy, that of the European Commission of October 8, 2025, "Free to love, free to be", is included. https://commission.europa.eu/news-and-media/news/free-love-free-be-eus-new-lgbtiq-strategy-2025-10-08_es.

2 Regarding the importance of cross-border mobility and family life, which we will analyze in this paper, P. Jiménez Blanco, "Movilidad transfronteriza de personas, vida familiar y Derecho internacional privado", *REEI*, June 2018, No. 35, pp. 1-49.

3 A very interesting study on the theoretical conditions for this recognition can be found in the paper of S. Gössl and M. Melcher, "Recognition of a status acquired abroad in the EU. A challenge by national laws from evolving traditional methods to new forms of acceptance and bypassing alternatives", in *Cuadernos de Derecho Transnacional* (March 2022), Vol. 14, No. 1, pp. 1012-1043.

4 In the words of the CJEU itself, "the purpose of the status of citizen of the Union is to become the fundamental status of nationals of the Member States." Among many others, the CJEU judgment of 2 October 2003, García Avello, which we will cite below, in paragraph 22.

5 The CJEU and its case law have always played an essential role in shaping the interpretation of European law, in one way or another. In this regard, AL. Calvo Caravaca and J. Carrascosa González, "La jurisprudencia normativa del Tribunal de Justicia de la Unión Europea y el Reglamento Bruselas I-Bis" in AL. Calvo Caravaca and J. Carrascosa González, in *El Tribunal de Justicia de la Unión europea y el Derecho internacional privado*, Aranzadi, Cizur Menor (Navarra), 2021, pp. 31-58.

6 On this recognition in same-sex marriages, M. Requena Casanova, "Libre circulación de los matrimonios del mismo sexo celebrados en el territorio de la Unión Europea: consecuencias del asunto Coman y otros", *Revista de Derecho Comunitario Europeo*, 62, 2019, pp. 41-79.

This paper examines this entire line of case law in order to elucidate the crucial significance of the latest judgment delivered by the CJEU, which may constitute a decisive step towards securing the recognition of a similar personal and family status throughout the European Union. It focuses on the judgment of 25 November 2025 in *Mazowiecki*[7]. Such recognition of a personal and family status endowed with analogous rights across the Union is likewise essential for the full exercise of freedom of movement within the European Union. It enables individuals who enjoy a particular personal identity, and couples who enjoy a particular family status in one Member State to move freely within the territory of the twenty-seven Member States, with a similar bundle of essential rights being acknowledged, regardless of whether they are Union citizens or not.

(B) RIGHTS AT STAKE: FIRST-CLASSS AND SECOND-CLASS FREEDOM OF MOVEMENT VERSUS NATIONAL IDENTITY

(1) Freedom of movement and personal and family status

Freedom of movement and residence is regulated by article 21.1 of the TFEU and article 45 of the Charter of Fundamental Rights of the European Union and was further developed by Directive 2004/38/EC of 29 April 2004[8]. It is defined as the right to move freely throughout the territory of the Union, to live and work in any of its Member States[9], and is recognized for EU citizens and their immediate non-EU family members.[10] The Directive conceived this right as a citizens' right, without a specific economic component, but following the CJEU's judgment in *Grzelczyk* of 20 September 2001[11] and the subsequent adoption of the Directive, the exercise of this right became conditional upon not placing an unreasonable burden on the social welfare system of the host State[12]. Once this condition is fulfilled, the right entails equal treatment and equal rights with

7 In case C 713/23, ECLI:EU:C:2025:917.

8 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. OJ L 158, 30.4.2004, p. 77.

9 P. Jiménez Blanco, "Las libertades de circulación y de residencia de los miembros de la familia de los ciudadanos de la Unión Europea", *Diario La Ley*, No. 5771, Sección Unión Europea, April 30, 2003, Year XXIV, Ref. D-103, Editorial LA LEY (LA LEY 693/2003); A. Elvira Perales, *Libertad de circulación de personas en la Unión Europea*, Centro de Estudios Políticos y Constitucionales, Madrid, 2017, pp. 19-35.

10 On this freedom as applied to same-sex couples before the *Coman* judgment, M. Soto Moya, "Free movement within the territory of the European Union of same-sex marriages celebrated in Spain", *Centro de Estudios Políticos y Constitucionales*, No. 43, September December 2012, pp. 807-847. And on its application to non-EU family members by the CJEU before the *Coman* judgment, J.M. Velasco Retamosa, "Libre circulación de personas en la Unión Europea: los nacionales de terceros Estados como beneficiarios de esta libertad", *International Law: Revista Colombiana de Derecho Internacional,* No. 22, 2013, pp. 51-85, pp. 65-71.

11 In case C-184/99, ECLI:EU:C:2001:458.

12 The 2008 economic crisis may have had much to do with this economic configuration of law. MILLENIUM, "Is the EU's freedom of movement a full right? Comentario Millennium DIPr" available at https://www.millenniumdipr.com/n-119-es-la-libertad-de-circulacion-de-la-ue-un-derecho-pleno-comentario-millennium-dipr.

nationals of the host State, together with a prohibition of discrimination on grounds of nationality[13], which Member States are not permitted to restrict.

The CJEU has carried out extensive interpretative work to delineate the contours of this right, the most notable examples of which are the judgments examined in the following sections of this paper. Freedom encompasses all areas of law[14] and is conceived as an essential element in shaping the personal status of all European citizens[15].

Although, as noted in the introduction, EU law does not govern the rules on the establishment of a person's civil status, marital rights, or parentage — matters falling within the exclusive competence of the Member States[16] — the domestic law of those States may not obstruct the exercise of the rights and freedoms guaranteed by the Treaties, including freedom of movement. Any restriction must be justified on grounds of national public policy, may not amount to a genuine impediment, and cannot give rise to discrimination on the basis of nationality[17].

Thus, as regards the recognition of personal and family status, freedom of movement merely enables citizens travelling within the EU to change their place of residence. It does not in itself guarantee the preservation of the rights they enjoyed in their State of origin.

It is the development of case law, from the right to a name through to the *Mazowiecki* judgment, that has progressively shaped this dimension of the right, in direct connection with the entry into force in 2009 of the Charter of Fundamental Rights of the European Union. The Charter secures the enjoyment of fundamental rights by European citizens throughout the Union and informs the entire EU legal order. Among these fundamental rights, the rights to respect for private and family life and to non-discrimination on any ground are essential. The case law has consistently turned on the question whether these rights have been infringed, and it appears that, by 2025, a respectful interpretation has finally been reached[18].

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13 According to the CJEU's case law, this obligation is of a family nature, not a personal one. D. Córdoba Castroverde, "El derecho de circulación y residencia de los padres de ciudadanos de la Unión Europea", *Elderecho.com*, 9-8-2017, in https://elderecho.com/el-derecho-de-circulacion-y-residencia-de-los-padres-de-ciudadanos-de-la-union-europea.

14 MC. Chéliz Inglés, "Restricción a la libre circulación de ciudadanos de la UE, en el contexto de la sustracción internacional de menores (Sentencia del Tribunal de Justicia de 19 noviembre 2020, Asunto C-454/19)", *Ley Unión Europea*, No. 88, January 2021, pp. 111-121.

15 This is what the CJEU has repeatedly stated in numerous cases. Paragraph 22 of the judgment in the García Avello case (analyzed later) points out that "the purpose of the status of citizen of the Union is to become the fundamental status of nationals of the Member States".

16 ECJ judgment of 7 July 1992, case C-369/90, Micheletti and Others, EU:C:1992:295; ECJ judgment of 2 March 2010, case C-135/08, Rottmann, EU:C:2010:104; ECJ judgment of 12 March 2019, case C-221/17, Tjebbes and Others, EU:C:2019:189.

17 A. Durán Ayago, "El TJUE y el nombre de las personas físicas principio de reconocimiento mutuo, derecho a la identidad y libre circulación de personas en la Unión Europea El TJUE y el nombre de las personas física", in A. L. Calvo Caravaca y J. Carrascosa González (dir.), *El Tribunal de Justicia de la Unión Europea… op. cit.*, pp. 515-543, p. 542.

18 J. Sarrión Esteve, "Nuevas reflexiones sobre la libre circulación de personas y el derecho de residencia como derechos fundamentales en la UE. Un estudio de su origen, titularidad, ámbito de aplicación y la más reciente jurisprudencia", *Revista Parlamentaria de la Asamblea de Madrid*, No. 46, 2024, pp. 175-202.

(2) National identity

National identity is the right of Member States that comes into tension with the full exercise of the right to freedom of movement and with the recognition of the same personal and family status throughout the EU. The coexistence within the Union of civil-law regimes recognizing different forms of marriage and parentage naturally gives rise to this conflict. This provision arose during the negotiations of the Maastricht Treaty on the concept of European citizenship. Confronted with this catalogue of rights, which includes freedom of movement, the Member States agreed to establish this right as a kind of safeguard for their fundamental principles as society[19]. Ultimately, it gives concrete expression to the Union's motto "United in Diversity", in that it respects the distinctive characteristics of each Member State[20].

Article 4.2 of the TEU establishes that "The Union shall respect the equality of Member States before the Treaties and their national identity inherent in their fundamental political and constitutional structures, including with regard to local and regional autonomy". This right to respect for national identity preserves the notion that the European Union is founded on an international treaty concluded by sovereign States, from which it follows that the EU continues to operate as an organization of States, even though it has established a form of citizenship common to all their nationals. The collective European demos at this stage of the creation of the EU still belong to each of the member states, and not to the collectivity as such[21].

National identity, although intrinsically connected to the State, cannot be invoked to exempt a State from complying with the essential principles of EU law. It does not confer a principle of non-interference shielding the State's internal affairs from the application of Union law in areas falling within the Union's competences. The principle of competence and supremacy means that national law must adapt to European regulations in the area of EU competences. Nor is national identity an abstract notion: its content depends, first, on how the Member States rely on it in practice and, secondly,

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19 A kind of intergovernmental control of European integration is established to safeguard the principle of state sovereignty. A. Mangas Martín, "Comentario al artículo 24 de la Carta de los Derechos Fundamentales de la UE", in A. Mangas Martín. (directora), Carta de los Derechos fundamentales de la UE, comentario artículo por artículo, Madrid, Fundación BBVA, 2008, pp. 442 453, p. 451; or P. Cruz Mantilla de los Ríos, *La identidad nacional de los Estados miembros en el derecho de la Unión Europea*, Aranzadi, Thomson Reuters, Cizur Menor, 2021.

20 Regarding this conflict in a cross-cutting manner that encompasses both general aspects, such as marriage, civil partnerships, transnational family crises and even immigration, M.V. Cuartero Rubio and J.M. Velasco Retamosa (dirs.), *La vida familiar internacional en una Europa compleja: cuestiones abiertas y problemas de la práctica*, Tirant lo Blanch, Valencia, 2021.

21 And it is embodied in the rights that constitute the fundamental political and constitutional structures of each State, which may differ. These include the form of the State, nationality, the means of acquiring national citizenship, territory, the statutes of churches, defense and armed forces, the protection of language, aspects of family law, culture, education, and the electoral procedure. F. Rubio Llorente, "Derechos Fundamentales, principios estructurales y respeto por la identidad nacional de los Estados miembros de la Unión Europea", *AFDUAM*, No. 17, 2013, pp. 515 527; or P. Cruz Villalón, "La identidad constitucional de los Estados miembros: dos relatos europeos", *AFDUAM*, No. 17, 2013, pp. 501-514, p. 503.

on how it is modulated, in the event of conflict, by the CJEU in light of its extensive case law on the matter[22].

To conclude this explanation of the configuration of this right, in relation to the European rights with which it coexists, it is worth recalling the CJEU's ruling on the free movement of same-sex married couples, in which the Court held that reliance on national identity is not independent of the duty of legal cooperation in fulfilling treaty obligations and cannot be invoked to limit the autonomous concept of "spouse" in the Directive by excluding same-sex marriage from its scope[23]. In the field of parentage, Advocate General Kokott[24], who refers to the term national identity 64 times, emphasizes that the Lisbon Treaty evolves from the concept of "conflict of competences" to that of "distribution of competences". Within distribution, national identity cannot prevent a Bulgarian citizen from exercising the right to move freely throughout the territory of the Union with the two women registered as their mothers in a Member State, as this would contravene the exercise of this freedom. However, it may still result in the non-recognition of her filial relationship, because parentage falls within the exclusive jurisdiction of the State. This understanding has been further refined in the *Mazowiecki* judgment, due to its connection with names and surnames[25], or its connection with fundamental human rights[26].

(C) HISTORY OF AN INCOMPLETE EVOLUTION

(1) The precedent, the right to a name

The debate on the full freedom of movement of persons and its tension with national law began in the 2000s with the right to a name in the *García Avello*[27] and *Grunkin-Paul* judgments[28]. Given that these are early precedents that have evolved substantially over time with respect to the current situation regarding personal status, we will briefly note that the CJEU stated that the right to a name forms part of the personal status protected by the free movement and citizenship of the Union. Member States are therefore required to accept the entry in their public registers of the forenames and surnames of dual nationals in the form already registered and recognized in another Member State, even where that manner of attributing surnames (essentially, one or two surnames following the forename) diverges from that regulated by their own national

22 M. Azpitarte Sánchez, "Identidad nacional y legitimidad del Tribunal de Justicia", *Teoría y realidad constitucional*, No. 39, 2017, pp. 413-448.

23 Conclusions of Advocate General Wathelet of 11 January 2018, ECLI:EU:C:2018:2, subsequently followed by the decision.

24 Conclusions of 15 April 2021, ECLI:UE:C:2021:296.

25 MD. Ortiz Vidal, "El caso Grunkin-Paul: notas a la STJUE de 14 de octubre de 2008", *Cuadernos de Derecho Transnacional*, March, No. 1, 2009, pp. 143-151.

26 We have already expressed our critical opinion on this matter previously, and for this reason we cite it in L.A. Pérez Martín, "Doctrina del TJUE en Pancharevo y Rzeczhnik: un paso atrás en el ejercicio de los derechos europeos", *Anuario Español de Derecho Internacional Privado*, Vol. XXII, 2022, pp. 483-514.

27 CJEU 2 October 2003, case C-148/02, *García Avello*, ECLI:EU:C:2003:539.

28 CJEU 14 October 2008, case C-353/06, *Grunkin-Paul* case, ECLI:EU:C:2008:559.

law[29]. A Member State may not automatically impose its national rules on the attribution of surnames on dual nationals whose name is already recognized differently in another State where this would create serious difficulties in their private life and infringe the principle of non-discrimination enshrined in the Charter.

To understand when national identity can or cannot limit the application of European law, the foregoing case law must be contrasted with that of the *Sayn-Wittgenstein*[30] and Von *Wolffersdorff*[31] judgments. These cases resolve the situations of two citizens whose surnames included noble titles not recognized in the Member States concerned. In both cases, the Constitution prohibited noble titles for historical reasons and on the principle of equality, and in both instances the CJEU acknowledged that the refusal constituted a restriction on free movement justified and proportionate on grounds of constitutional public policy, given that the abolition of nobility forms part of the constitutional identity of those States and may prevail over the continuity of the name[32].

(2) Limited rights of marital freedom of movement

The debate gained greater prominence and significance when the Court first addressed the application of freedom of movement to same-sex marriages in the *Coman* case[33]. The basic facts of the *Coman* case are well known[34]. Relu Adrian Coman, a Romanian national employed as a parliamentary assistant in the European Parliament, married Robert Hamilton, a United States citizen, in Brussels in 2010. At that time, Hamilton was living in New York and, consequently, after the marriage the couple never established a common habitual residence in Brussels. When Hamilton's employment with the European Parliament came to an end, the couple sought to begin a new life together in Romania in 2012[35]. Romania granted Mr. Hamilton only a three-month residence permit because, as Romanian law did not recognize same-sex marriage, the authorities refused to regard him as Mr Coman's spouse. Following a series of appeals, the Romanian courts referred a request for a preliminary ruling to the Court of Justice, asking whether this position was contrary to freedom of movement.

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29 These resolutions and a very complete work on the recognition of legal situations linked to Human Rights, and specifically those related to the Right to a name, can be studied in the monograph by A. Durán Ayago , *Derechos Humanos y método de reconocimiento de situaciones jurídicas hacia la libre circulación de personas y familias, Aranzadi*, Cizur Menor, 2023, pp. 97 to 121.

30 CJEU 14 October 2010, case C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:608.

31 CJEU 11 January 2016, case C-438/14, *Wolffersdorff*, ECLI:EU:C:2016:11.

32 A detailed study of all the resolutions in A. Durán Ayago, "El TJUE y el nombre de las personas físicas…", *op. cit.*, pp. 515-543. On the consequences of the judgment and the resolution of the DGRN of 24-2-2010 issued after it, C. Esplugues Mota, G. Palao Moreno and J.L. Iglesias Buhigues, *Derecho Internacional Privado*, Tirant lo Blanch, Valencia, 18th edition, 2025, p. 391.

33 CJEU 5 June 2018, case C-673/16, *Coman-Hamilton*, ECLI:EU:C:2018:385.

34 S. Álvarez González, "¿Matrimonio de personas del mismo sexo para toda la UE? A propósito de las conclusiones del Abogado General en el Asunto Coman", *La Ley Digital*, No. 56, February 2018.

35 The publicly available accounts of the events are not always entirely accurate. For previous papers, we had the opportunity to contact Adrián Coman, who very kindly agreed to clarify certain aspects of both the events themselves and the subsequent legal proceedings following the CJEU ruling. We are extremely grateful for Mr. Coman's generosity in clarifying these points.

In its judgment, the Court essentially establishes[36] that the concept of "spouse" in Directive 2004/38 is gender-neutral from the moment one Member State recognizes it as such, even if another Member State does not. Personal status recognized in one State must be accepted as such in all Member States for the exercise of the right to freedom of movement and residence. This status may be relied upon even where the right to freedom of movement has never been exercised in that State and must, therefore, be applicable at any point in a person's life. The conclusion is that, regardless of the domestic law of the Member States, all of them must recognize family situations created and established in another Member State, at least for the purposes of exercising the European right to freedom of movement[37].

This recognition does not affect national identity since Romanian law remains unchanged, and Romania may continue, through its own legislature, to prohibit same-sex marriage. It merely requires the recognition of this status, already recognized in the European Union by another Member State, solely for the purpose of granting residence permits to family members of a Union citizen[38]. This is a key aspect of the *Coman* ruling, which is subsequently reflected in decisions concerning minors and which the Court fortunately abandons in the *Mazowiecki* case. Recognition of the concept of spouse is only permitted for the purposes of freedom of movement, entry into the country, and cohabitation. However, within the country, they will not be considered spouses under civil law, as the Court argues that such recognition would be contrary to Romanian public policy.

Some legal scholar shave argued that the judgment recognizes the right to same-sex marriage throughout the European Union with a broad scope[39]. Others criticized the fact that it only allows freedom of movement for same-sex couples, without any further implications[40]. Yet others, on a closer reading of the ruling, have maintained that it recognizes only the freedom of movement of individuals, and not that of same-sex couples as such. In any event, it is clear that the CJEU allows a non-EU national married to a Union citizen of the same sex to move within the EU in a capacity analogous to that

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36 For more details, S. Romboli, "El conflicto entre identidad nacional y derecho de la Unión Europea en el caso Coman: el Tribunal de Justicia añade otra pieza fundamental para la protección de las parejas homosexuales frente a la discriminación", *Revista de Derecho Constitucional Europeo*, 2020, No. 33, January-June 2019, pp. 75-93; or A. Rivas Vaño, "Matrimonio y orientación sexual: la fuerza expansiva del derecho a la no discriminación. Comentario de las sentencias Taddeucci y Coman", *Lex Social*, Vol. 9, No. 1, 2019, pp. 136-161.

37 In a matter that cannot be explained in this paper due to space constraints, Mr. Coman has not yet been able to reside in Romania. In this regard, L.A. Pérez Martín, "El caso Coman entre el TJUE y el TEDH: la identidad nacional como límite ¿ilícito? A la práctica de la libertad de circulación", in P. Jiménez Blanco e I. Rodríguez Uría-Suárez, *Obstáculos de género a la movilidad transfronteriza de personas y familia*, Colex, A Coruña, 2024, pp. 260-290, pp. 264-267. This paper examines the case in much greater detail.

38 This must be the case because public order and national identity allow states to regulate their own civil status, but not to impede the exercise of the European right to free movement among the 27 Member states without limitation. To avoid violating its public order, the state is not obliged to recognize marriage with full constitutive and civil effects, but it must recognize it for the purpose of exercising the right to free movement in this specific case. This argument is developed primarily in paragraphs 39 to 45 of the resolution.

39 S. Romboli, "El conflicto entre identidad nacional…", *op. cit.*, p. 91.

40 M. Requena Casanova, "Libre circulación de los matrimonios…", *op. cit.* p. 77.

of a spouse, while nevertheless withholding that formal status[41]. It is likewise clear that the Court confines itself to applying the Directive, without addressing the necessary linkage with the rights to respect for private and family life under article 7 of the Charter of Fundamental Rights of the European Union and the right to non-discrimination under article 21. In *Coman*, the Court begins to create a two-tiered system of freedom of movement. Adrian Coman and Clai Hamilton are considered spouses in the Member States that recognize this type of marriage, and as persons with the right to cohabit, but without this status, in the States that do not. In the latter States, they therefore do not enjoy the rights inherent in that status. They are residents, but they do not enjoy the same family privacy as in Belgium. This shows that their fundamental rights relating to family life are being infringed, or at the very least placed in doubt[42].

(3) Conditional freedom of movement for children

The evolution of this debate led to the recognition of same-sex parentage. In the *Pancharevo*[43] and *Rzeczhnik* cases[44] the CJEU was called upon to examine the recognition, in Member States that do not provide for it in their domestic law, of a situation of joint motherhood between two women that was fully recognized in Spain[45].

In both instances, the mothers sought registration of their children, but the authorities in Bulgaria and Poland refused. Following the *Pancharevo* judgment, and in view of the close similarity of the facts in *Rzeczhnik*, the Court, relying on article 99 of its Rules of Procedure[46], disposed of the latter case by way of an order reproducing the same reasoning.

In both cases, the Court adopted an approach very similar to that in *Coman*. It first authorized the registration of the child, it allowed the registration of the child to establish her nationality of an EU Member State, in order to safeguard her best interests. However, as regards freedom of movement, the three women were permitted to travel within the EU, but could not circulate in Bulgaria and Poland in the capacity of two mothers of a minor. The issue of enjoying family status within the European Union thus

41 J. Carrascosa González, Libre circulación de personas, matrimonios entre personas del mismo sexo y la sentencia del TJUE de 5 junio 2018 en el asunto Coman-Hamilton, in *ACCURSIO DIP,* blog, http://accursio.com/blog/?p=851.

42 E. Del Rocío Rodríguez-Salcedo and S. Pazmay-Pazmay, "La familia y los derechos humanos", *Dominio de las ciencias*, Vol. 7, 2021, pp. 612-622; M. López Serna and J. Kala, "Derecho a la identidad personal como resultado del libre desarrollo de la personalidad", *Ciencia Jurídica*, No. 14, 2018, pp. 65-76.

43 CJEU December 14, 2021, case C-490/20, *Pancharevo*, ECLI:EU:C:2021:1008.

44 CJEU Order 24 June 2022, case C 2/21, Rzeczhnik, ECLI:EU:C:2022:502.

45 In both cases, the European mothers (Bulgarian and Polish) who had a daughter with a non-EU woman in one case and an EU woman in the other (United Kingdom and Ireland), and who were recognized as such in Spain, requested their countries of origin to recognize the daughters by registering them in their national registries. The national registries only accepted registration as the daughter of the EU woman, not the non-EU woman, and only if they proved that the daughter was their biological child. If this proof was not provided, the minors were not registered. Following subsequent appeals, the courts of those countries referred a preliminary question to the Supreme Court, asking whether this refusal was contrary to European law.

46 Rules of Procedure of the Court of Justice. OJ L 265, 29-9-2012, p. 1.

resurfaces here, with the particular feature that the rights at stake are those of minors, who are in greater need of protection[47].

Without going into the details of the rulings, the CJEU resolved both cases by imposing two obligations on the Member States. First, they are required to identify the minors so as to confer on them the nationality of a Member State and, consequently, Union citizenship, thereby safeguarding their best interests. Second, they must recognize the Spanish document in order to enable the three persons concerned the mothers and their daughters to travel together within the Union. However, the obligation is to recognize the Spanish document for the purpose of travel, not to register it: whether the State proceeds to register it is immaterial from the perspective of European Union law. The Court requires the recognition of the parentage of one of the mothers. Furthermore, the Court does not oblige the State to recognize the girls as the daughters of the non-national woman of the Eastern Member State in each case. In other words, as in *Coman*, the document is recognized solely for the purpose of exercising freedom of movement, not for establishing parentage. While the resolutions refer to the women as the girls' mothers, the ruling states that the document must allow the minors to exercise their right to travel 'with each of those two people' not with their mothers, since it does not obligate the Eastern European country to recognize them as such. Therefore, the Court does not recognize the right to same-sex parenting throughout the EU[48].

Thus, the *Pancharevo* doctrine consolidates a two-tier system of freedom of movement and the non-recognition of the family status claimed by the women concerned. When confronted with the requirement to issue a document attesting to the child's nationality, national law gives way and no breach of public policy may be relied upon. It likewise gives way to the recognition of the Spanish document for the purpose of enabling the two women to move freely. However, it does not in any respect yield to recognition, in Spain, of one woman's status as mother: only one of them is acknowledged as such.

This continuation of the existing approach must be regarded as clearly unsatisfactory. How can the two women reside in Bulgaria and Poland with their daughter if only one of them is recognized as her mother? Family life, the right to privacy, the right to responsible parenthood and the right to take decisions in relation to the child are all plainly undermined by this solution. The fundamental rights of those concerned are once again infringed, entrenching a two-tier system of freedom of movement. The European Commission itself has acknowledged, in its proposal for a Regulation on parentage, that this unsatisfactory case law was one of the catalysts for its initiative[49].

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47 R. Arenas García, "El reconocimiento de las situaciones familiares en la Unión Europea", in M.V. Cuartero Rubio, J. M. Velasco Retamosa, *La vida familiar internacional en una Europa compleja… op. cit.,* pp. 47-78; G. Palao Moreno, "Los Reglamentos europeos en materia de familia: cuestiones abiertas y problemas prácticos", in M.V. Cuartero Rubio, J.M. Velasco Retamosa, *La vida familiar internacional en una Europa compleja… op. cit.,* pp. 23-46.

48 As S. Álvarez González finally stated, "La Justicia europea no reconoce el derecho de los hijos de parejas LGTBI en toda la UE (o la Justicia europea no obliga a los Estados miembros a reconocer la homoparentalidad)", *LA LEY Unión Europea,* No. 102, April 2022, pp. 1-18, p. 5.

49 As highlighted in the line of achieving a great advance after the resolutions *Pancharevo* and *Rzeczhnik*, B. Campuzano Díaz, "Reflexiones sobre el certificado de nacimiento a propósito de los casos Pancharevo y Rzeczhnik", *Cuadernos de Derecho Transnacional* (October 2024), Vol. 16, No. 2, pp. 241-256, p. 256.

(D) AND FULL FREEDOM OF MOVEMENT ARRIVED

(1) The rights of same-sex couples in the ECHR doctrine

The first steps towards remedying this highly unsatisfactory situation did not come from the CJEU, but from the ECtHR. They arose from the persistent failure to recognize the right of same-sex couples to be treated as such, a right that was perceived as conflicting with the national identity of Member States and is, in this respect, analogous to the national-identity clause of the TEU[50]. Article 8 of the ECHR protects the right to respect for private and family life, as well as the inviolability of the home and correspondence, mirroring article 7 of the Charter of Fundamental Rights of the European Union. Article 12 guarantees the right to marry, corresponding to article 9 of the Charter. Finally, article 14 enshrines the prohibition of discrimination, comparable to article 21 of the Charter of Fundamental Rights of the European Union. In 2023, the ECtHR delivered a series of judgments on the recognition of the rights of same-sex couples which prepared the ground for the subsequent case law of the CJEU, a challenge that the latter, it should be stressed, has been quick to take up.

In 2023, in deciding these cases, the ECtHR departed from its earlier case law.[51] The most extensive and significant judgment, which set the tone as the first, was *Fedotova and others v. Russia*, delivered on 17th January 2023[52].

This ruling will serve as the primary point of reference, since the subsequent judgments largely reiterate its reasoning, although it should be noted that those later decisions concerned situations arising in Member States[53]. The ECtHR held that States enjoy a certain margin of appreciation as regards the legal status conferred by the chosen form of recognition and the rights and obligations attached to relationships between same-sex couples, whether they regulate them as marriage or as another form of registered partnership. Accordingly, States are not required to introduce same-sex marriage into their domestic legal systems.

However, the right to marry, regulated in article 12 of the ECHR, is distinct from the recognition of the rights of same-sex couples and their families, regulated in article 8[54]. The legal recognition and essential protection of the applicants as same-sex couples is a

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50 We cannot dwell on the debate regarding the relationship between the national identity defended by States in the application of the ECHR and the national identity of the TEU. In this regard, P. Cruz Mantilla de los Ríos, "Identidad nacional y sistema del CEDH: una dudosa analogía", *Anales del Derecho*, 2020: Special Issue AdD : The ECHR on its Sixtieth Anniversary, pp. 1-28.

51 Regarding the previous case law of the ECtHR regulating the general recognition of the rights of same-sex persons, I. Manzano Barragán, "La jurisprudencia del Tribunal Europeo de Derechos Humanos sobre orientación sexual e identidad de género", *Revista Española de Derecho Internacional*, Vol. LXIV (2012), 2, pp. 49-78.

52 ECHR, *Fedotova and Others v. Russia.* case judgment (Grand Chamber) of 17 January 2023. Applications nos. 40792/10, 30538/14 and 43439/14. Art. 8: Right to respect for private and family life.

53 Specifically those of the alleged *Pancharevo* and *Rzeczhnik,* Bulgaria and Poland.

54 The Court has a well-established body of case law on the application of Article 8 of the ECHR and the positive obligations of States, which we cannot discuss here. In this regard, L. Redondo Saceda, "El papel del artículo 8 CED en la construcción del margen de apreciación nacional y la doctrina de las obligaciones positivas del Estado", *Anales del Derecho*, 2020: Special Issue AdD: The ECHR on its sixtieth anniversary, pp. 1-28.

crucial aspect of their identity, and the State should have a reduced margin of regulatory power in this regard.

Failure to recognize rights analogous to those of heterosexual couples leaves same-sex couples in a legal vacuum, preventing them from benefiting from legal protection and exposing them to significant difficulties in their everyday lives. In particular, they are prevented from enjoying the same rights as different-sex couples in respect of property, inheritance, insurance, parentage and giving evidence in civil or criminal proceedings, as well as access to medically assisted reproduction. Although States retain a "choice of means" to secure these rights, the creation of a "specific legal framework" is mandatory. States that do not regulate these rights are in breach of their obligations under the ECHR.

Following its initial ruling concerning Russia, the ECtHR has issued two more recent judgments on similar claims involving Member States of the European Union. The first is the judgment of 5th September 2023, in the case of *Koilova and Babulkova v. Bulgaria*[55]. The second ECtHR judgment concerning an EU Member State is that of 12 December 2023, in the case of *Przybyszewska and others v. Poland*[56]. In both cases, the Court, applying the *Fedotova* doctrine, held that considerations of national interest cannot justify the present autonomous evolution of domestic regulation among the States Parties to the ECHR. The positive obligation to legislate, as established in *Fedotova*, exists, and without compliance, the effective protection of the private and family life of homosexual persons is not guaranteed. Without the recognition of these family rights, the values of a democratic society, which the Convention requires, such as pluralism, tolerance, and openness, are not respected. This recognition affects particularly essential aspects of personal and social identity and allows for inclusion in society regardless of sexual orientation. In deciding how to regulate these matters, the margin of appreciation accorded to States is wider as regards same-sex marriage but is substantially narrower as regards the recognition of family rights. What must be guaranteed are concrete and effective rights, not theoretical or illusory ones. These include both material rights (maintenance, taxation and inheritance) and moral rights (rights and duties of mutual support) specific to the life of a couple, which are best secured within a legal framework that is open to same-sex couples[57].

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55 ECHR, *Koilova and Babulkova v. Bulgaria*, No. 40209/20, judgment of 5 September 2023. Art. 8: Right to respect for private and family life.

56 ECHR, *Przybyszewska and Others v. Poland*, No. 11454/17, judgment of 12 December 2023. Art. 8: Right to respect for private and family life.

57 Even the ECHR points out that, without a societal commitment to the recognition of these rights, a supposedly negative, or even hostile, attitude on the part of the heterosexual majority cannot override the applicants' interest in having their respective relationships adequately recognized and protected by law. The protection of the family in the traditional sense is, in principle, a legitimate reason that could justify differential treatment based on sexual orientation, but this objective is quite abstract, and a wide variety of concrete measures can be used to implement it. This national interest cannot currently evolve autonomously in each State, because guaranteeing the rights of same-sex couples does not in itself imply weakening the rights guaranteed to other individuals or other couples. There is no basis for considering that granting legal recognition and protection to same-sex couples in a stable and committed relationship could, in itself, harm traditionally constituted families or compromise their future or integrity.

The ECtHR's case law does not address the right to freedom of movement, but rather the rights to family life and privacy of same-sex couples in the signatory States, and it is very clear in its ultimate meaning. Even though the Convention permits States not to recognize same-sex marriage as such, those couples must be afforded a set of rights that establishes two equivalent regimes of personal and family status, thereby ensuring comparable family privacy and excluding discrimination on grounds of sexual orientation.

(2) The *Mirin* case: personal identity over national identity

The *Mirin* case is the most recent precedent in which the CJEU issued a ruling prior to the *Mazowiecki*. In that case, the judgment of 4th of October 2024[58] resolved an issue related to personal identity[59]. The Court examined the refusal of the Romanian authorities to record the change of gender of a Romanian national who had been registered as female at birth in the civil register, had transitioned in the United Kingdom, and had been registered there as male[60]. In this case, the rights at stake were not those of freedom of movement and residence under article 21 TFEU, since the person concerned was a Romanian national. The case concerned the individual's identity and the manner in which that identity is recognized throughout the Union. Refusing to acknowledge an identity already recognized in a Member State affects aspects closely linked to the free development of the person's personality and engages human dignity as an inherent right protected in all human-rights instruments.

This case addressed the identity of the person and how that identity is recognized throughout the Union. Not recognizing the identity that a person already enjoys in a Member State involves aspects closely linked to the free development of their personality, connecting with the dignity of the person as an inherent right recognized by all human rights protection treaties[61].

In *Mirin*, the Court begins by analyzing the case in order to show how the non-recognition of a person's legal status can obstruct the exercise of their freedom of movement. It concludes that the refusal to record the change will create two distinct legal realities: on the one hand, a person with one name and gender in a Member State no longer corresponding to their actual situation who will, however, be recognized

58 CJEU of October 4, 2024, case C-4/23, *Mirin*, ECLI:EU:C:2024:845.

59 For a detailed study of the current configuration of the right to identity of the person in Spanish Private International Law, P. Blanco-Morales Limones, "Derecho de la persona y la familia", *Cuadernos de Derecho Transnacional* (March 2025), Vol. 5, No. 1, pp. 955-985, specifically pp. 966-973, in which he makes several of the resolutions analyzed here.

60 M.-A. A. is a Romanian citizen who was registered as female at birth in the Cluj Civil Registry in 1992, reflecting his biological sex at the time. After moving to the United Kingdom in 2008 and acquiring British nationality in 2016, in 2017 he followed the legal process recognized under British law to change his name and began using the corresponding gender marker, transitioning from female to male. All his British documents bear this name and male gender. In 2020, he obtained definitive British documentation, which he attempted to register in the Cluj Registry in 2021. The Romanian authorities refused this registration, as Romanian law stipulates that a change of gender identity can only be recorded on a birth certificate once approved by a final court ruling. Upon appeal against this refusal, alleging a violation of European Union law and the case law of the ECHR on the matter, the Romanian court initiated preliminary proceedings.

61 G. Esteban de la Rosa, "Método y función del Derecho Internacional Privado", *REEI*, No. 40, December 2020, pp. 1-58, p. 44.

as such in those Member States that accept the change; and, on the other, a person with a different identity and gender in the State of their other nationality and origin. This is the same outcome that underpinned the Court's earlier judgments in *Coman*, *Pancharevo* and *Rzeczhnik*. This situation will clearly and decisively impede the exercise of freedom of movement and may cause problems in everyday life, both in the public and private spheres. Therefore, this lack of registration is contrary to European Union law[62].

A reading of the first part of the judgment gives grounds for pessimism as to any genuine development in the CJEU's interpretative approach, since, as noted above, it adheres to the *Coman* and *Pancharevo* line of reasoning, focusing essentially on the obstacles which the refusal would create for the freedom of movement and residence, rather than on other rights[63]. In fact, it might have been significant that the ruling refers to article 7 of the Charter of Fundamental Rights of the European Union, which regulates family privacy, but the freedom expressly mentioned in the ruling is only that of freedom of movement and residence, and the violation of family privacy is not expressly mentioned, even though the right to identity is expressly mentioned.

However, even at that time, a shift was already taking shape within the Court, which has materialized in *Mazowiecki*. In paragraphs 63 to 68 of its judgment, the Court develops a comprehensive defense of the application of the recognition of public documents in light of Article 7 of the Charter of Fundamental Rights of the European Union and article 8 of the European Convention on Human Rights emphasizing the protection of private life and its link to a person's gender identity[64]. The focus is no longer solely on freedom of movement, but on the enjoyment of personal and family privacy. The reason is clear: the Romanian national could perfectly well reside in Romania and his freedom of movement was not affected. His violated rights were those of personal and family privacy. If these were not respected by Romania, he would have a two-tiered freedom of movement: one as a man in the Member States that legally recognized gender reassignment, and another as a woman in Romania. What was permitted in *Coman*, *Pancharevo* and *Rzeczhnik* is thus no longer acceptable in *Mirin*, marking a clear step forward in the CJEU's protection of the fundamental rights of EU citizens compared with its earlier case law.

Because when a national legal system fails to recognize personal attributes such as name, gender, parentage or marital status, it not only violates the right to free movement but also clearly discriminates against individuals in the enjoyment of their right to private and family life and, in the case of minors, in the protection of their best

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62 A detailed study on gender identity in Spanish Private International Law, therefore, from an internal perspective, can be found in P. Orejudo Prieto de los Mozos, "La identidad de género en el derecho internacional privado español", *REDI*, Vol. 75, 2023, 2, pp. 343-366.

63 Let us remember that Romania did not recognize the registration of the change of name and gender identity, and referred the Romanian citizen to a new procedure, of a jurisdictional type, for change of gender identity in that first Member State, which disregarded the change already legally acquired in the other Member State.

64 We believe this fact is not trivial. The fact that CJEU judgments do not include dissenting opinions and must all be reached by consensus means that, in the judges' agreements within the chambers, some aspects of the more advanced reasoning of the judgment may not appear in the final ruling, perhaps as a balancing act between the drafter's opinion and the final agreement of the entire chamber. Regarding the procedure before the CJEU, C.F. Molina del Pozo, *El tribunal de Justicia de la Unión Europea: procedimiento y recursos*, Aranzadi, Cizur Menor (Navarra), 2023.

interests[65]. Therefore, the right to identity must therefore be interpreted in light of the national identity, which is required to give way where the two conflict. For this reason, the judgment provides a solid point for the full recognition of personal identity and other family rights throughout the European Union[66]. Mutual recognition within the EU has an evident and direct impact in this field: mere differences in the domestic rules of the Member States cannot be allowed to obstruct the free movement of persons in relation to their identifying characteristics, including both sex and name. For all the reasons set out above, the fact that the right at issue in these proceedings concerned personal identity has, in our view, been decisive in shaping this outcome[67]. In this case, civil registry certificates and related administrative documentation are inseparable[68].

(3) The *Mazowiecki* case, the end of the road?

Building on all of this evolution, the *Mazowiecki* judgment reshapes the analytical framework used thus far in the study of freedom of movement and residence. When the case reached the European legal stage, it seemed as if the stars had aligned to make possible the development that ultimately took place. Unlike the rather cautious responses in *Coman* and *Pancharevo* which have already been criticized, the evolution of the doctrine with the F*edotova* saga followed the initial revolution of the *Mirin* judgment, in which the CJEU clearly positioned itself on the path of recognizing the need for dialogue between courts and ensuring that national identity does not limit the enjoyment of fundamental rights by all citizens of the Union. In *Mazowiecki*, the Court is no longer dealing with an EU citizen and a third-country spouse, as in *Coman*, but with two Polish nationals seeking recognition in Poland of a marriage concluded in Germany. It addresses the recognition of the rights of same-sex couples, regardless of the exercise of this freedom, which more directly examines the core of the issue and places the ECtHR's doctrine on the matter in the foreground[69].

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65 Professor Durán shares this view in her recent paper on the ruling, A. Durán Ayago, "De la identidad de género a la libre circulación en la Unión Europea. Un paso más en la buena dirección al albur de la STJUE de 4 de octubre de 2024, C-4/23, Mirin", *Cuadernos de Derecho Transnacional*, March 2025, Vol. 17, No. 1, pp. 1260-1269, p. 1268. In it, Professor Durán, a true expert on the subject, points out that, "Having already taken this step in the judgment we are discussing, the CJEU consolidates its jurisprudence regarding the principle of mutual recognition, giving it new material impetus based on the fundamental rights contained in the Charter of Fundamental Rights of the European Union, pending the eventual incorporation of this progress into European legislation".

66 For this purpose, the method of recognition is adopted, which dispenses with the conflict rule to accept the change of gender as P. Blanco-Morales Limones points in "Derecho de la persona…" *op. cit.,* p. 973.

67 D. Menicini shares the same opinion, "Identidad de género y libre circulación en la UE: el alcance garantista de la sentencia Mirin del TJUE", *Revista de Jurisprudencia de Derecho Internacional Privado* (RJDipr), No. 2, 1st semester 2025, pp. 87-95, p. 94. Regarding the Mirin case, see also A. Lara Aguado, *La identidad de las personas transgénero, transexuales e intersex en situaciones de movilidad internacional*, Aranzadi, Pamplona, 2025, pp. 90-100.

68 P. Jiménez Blanco, "La identidad de género en la movilidad transfronteriza: vertientes personal y familiar", *Cuadernos de Derecho Transnacional* (October 2024), Vol. 16, No. 2, pp. 985-999, p. 999.

69 Regarding the facts, Mr. Jakub Cupriak-Trojan, who holds dual Polish and German nationality, and Mr. Mateusz Trojan, a Polish national, married in Berlin, Germany, on June 6, 2018. The court notes that the referral order indicates that, at the time the request for a preliminary ruling was submitted, they were residing in Germany but intended to move to Poland and reside there as a married couple. After their marriage, Mr. Cupriak-Trojan added his husband's surname to his own, in accordance with German

Before turning to the next section of the analysis of the judgment as a whole, we will initially examine the Advocate General's conclusions published on April 3rd of 2025[70]. That Opinion reflects the CJEU case law discussed in this article, which recognizes marriages and parent-child relationships only for the purposes of freedom of movement, while reserving full protection for the right to identity in all other contexts, thereby confirming that the Court's current jurisprudence affords lesser recognition to marriage than to personal identity.

Having acknowledged this state of affairs, the Advocate General goes a step further when, in paragraph 36, after referring to the ECtHR's case law in *Fedotova* and other cases, he observes that, within the Union, it is for Member States which do not provide for, or even prohibit, same-sex marriage in their national law to establish appropriate procedures for the recognition of unions contracted as such in another Member State. He recalls that the Court of Justice has already held that such an obligation of recognition does not encroach upon national identity or undermine the public policy of the Member State concerned. In this way, the Opinion was already laying the foundations for the judgment ultimately delivered on 25 November and for the development in the law that it represents.

Polish national identity cannot be invoked to deny recognition of the rights to personal and family privacy already enjoyed by these Union citizens in Germany. If national identity limits these rights, it must evolve and be modified in its practical interpretation. With this position, the Advocate General had already invited the Court of Justice to require Member States to recognize the legal effects of same-sex marriages, even if they do not recognize the institution of marriage itself, and even if such recognition requires legislative evolution. Regarding this potential obligation of legislative evolution, if their national identity conflicted with European law, the Advocate General considered the means available to Poland to prove the identity of the spouses and their marital status. Since the Polish government itself stated that the only way to do so was by registering the marriage, he proposed that the Court do

law. Following the decision of the Kierownik Urzędu Stanu The Civil Registry Office of Warsaw, Poland, adopted at the request of Mr. Cupriak-Trojan, whose surname was changed upon marriage, is the same in Poland. Thus, in his civil registry entry, his surnames already reflect those of a person married to someone of the same sex. Both requested that their German marriage certificate be transcribed in the Polish civil registry, and by decision of August 8, 2019, the Civil Registry Office of Warsaw, where the birth certificates of Mr. Cupriak-Trojan and Mr. Trojan are held, denied the request. He considered that transcribing this certificate would be contrary to the fundamental principles of the Polish legal system. This decision was subsequently upheld by higher courts. The Voivode of Mazovia argued that Polish law did not permit same-sex marriage, and the registry had two fields, one for male and one for female. The appeal against this decision was dismissed by the Warsaw Voivodeship Administrative Court in a judgment dated July 1, 2020, which stated that neither the Polish Constitution nor Polish law allows for the coexistence of same-sex and opposite-sex marriages within the national public order. The court in question also held that refusing to transcribe the marriage certificate did not infringe Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (hereinafter referred to as 'ECHR'), in conjunction with Article 12 of that Convention, nor Article 21(1) TFEU, since the main proceedings concerned a matter of civil status unrelated to the right to move and reside within a Member State. In response to the new appeal, the Polish Supreme Court referred a question for a preliminary ruling, citing the possible infringement of Article 20 TFEU, as well as Articles 7 and 21 of the Charter of Fundamental Rights of the European Union.

70 Conclusions of Advocate General De la Tour of 3 April 2025, ECLI:EU:C:2025:235.

what it ultimately did: impose this registration obligation on Poland[71]. Thus, in his conclusions, Advocate General De la Tour did evolve from the CJEU's position in the *Coman* judgment regarding the effects of these marriages, and he paved the way for the Court when he stated that the Member State of origin of a Union citizen should recognize the legal effects of a marriage celebrated by that citizen in another Member State with a person of the same sex, even if the purpose is not to obtain a derivative right of residence, an identity document, or a passport from the first Member State. Each Member State remains free to determine the procedures through which same-sex couples are granted official recognition, thereby securing their social existence and legitimacy, but those rights must, in any event, be guaranteed.

(E) CITIZENS' RIGHTS RECOGNIZED IN THE EU AFTER THE *MAZOWIECKI* RULING

The *Mazowiecki* case arose from the desire of two Polish citizens married in Germany to enjoy in Poland the same set of rights they had in Germany should they establish their residence there in the future[72]. Although the case has its origin in freedom of movement and residence, its core complaint concerns the lack of recognition of family rights under the CJEU's earlier approach in *Coman*. The two Polish citizens could live without problems in Poland, as they were Polish nationals, but their personal status as spouses was not acknowledged there. Accordingly, any analysis of the *Mazowiecki* judgment should focus not only on freedom of movement, but on the rights that must accompany that freedom if articles 7 and 21 of the Charter of Fundamental Rights of the European Union are not to be violated. This is precisely the debate we have highlighted throughout this paper. This is why the analysis must first examine the rights that should be recognized for nationals of Member States who have already formed a family outside their country. Following this, we will reflect on the progress that this recognition represents in the exercise of the right to freedom of movement in the EU and will conclude by reflecting on how this affects national identity.

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71 If there were another way to prove it, this obligation would not be imposed, since they could assert their rights in another way. Paragraph 45 states that, "Since there are no alternative solutions in Poland, such as the submission of any other official document (58) that can be recognized by the Polish administrative services, the obligation to transcribe the foreign marriage certificate in a Civil Registry is imposed on that Member State". It follows, paragraph 46, that the obligation to register a marriage certificate issued in one Member State in a Civil Registry cannot, in my opinion, be imposed on any other Member State if the marriage is effective without the need to carry out this formality".

72 Paragraph 50 of the ruling states that "the referring court has doubts about the consequences that such a refusal may have on the spouses' ability to continue in Poland the family life developed or established in Germany through their marriage". This is because the spouses have already raised this point in the proceedings. "On this matter, and without prejudice to the findings of that court, the spouses have pointed out, in their observations submitted to the Court of Justice, that, for a period of time while Mr. Trojan lived and worked in Poland, Mr. Cupriak-Trojan was unemployed and lacked public health insurance coverage, which he would have had had the effects of his marriage been recognized in Poland". On the other hand, "another application linked to rights obtained through marriage, such as the application to update Mr. Cupriak-Trojan 's surname in the Property Registry, was accepted by a Polish court for one of his properties, but was denied by another Polish court for another property, on the grounds that such an application could not be based on a same-sex marriage certificate".

(1) Recognized rights

In its request for a preliminary ruling, the Polish court itself stated that it might be justified to interpret articles 20.2.a) and 21.1 TFEU as meaning that a refusal of transcription similar to that at issue in the main proceedings constitutes an infringement, by the Member State concerned, of the right of Union citizens whose marriage is registered in the civil registry of another Member State to lead a family life as married persons and is indicative of discrimination on grounds of sex and sexual orientation[73]. It would follow that such a refusal would prevent those people from fully exercising their right to move and reside freely in that Member State (paragraph 34), and it was in this context that the court referred the question for a preliminary ruling[74]. As is apparent, the Polish court did not regard the *Coman* doctrine as sufficient to satisfy the requirements of article 7, on the right to respect for private and family life, and article 21, on non-discrimination, of the Charter of Fundamental Rights of the European Union[75].

It is at this point that, in order to move beyond its own *Coman* and *Pancharevo* case law, the CJEU turns to the ECtHR's reasoning in *Fedotova* to interpret a request made by two individuals who do not require the procedure in order to exercise their freedom of movement, giving concrete expression to its commitment to judicial dialogue between the two courts[76]. This allows a standard of protection that differs from that set out in the Charter of Fundamental Rights of the European Union only insofar as the application of the right does not fall below the level of protection guaranteed by the Charter. However, it does not authorize the creation of a dual standard of protection where common guarantees already exist within the Union. This constitutes a double standard of protection when common guarantees already exist within the Union. In the present case, we are dealing with related rights: personal and family privacy (article 8 of the ECHR and article 7 of the Charter of Fundamental Rights of the European Union) and non-discrimination (article 14 of the ECHR and article 21 of the Charter of Fundamental Rights of the European Union)[77].

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73 Paragraphs 16 and 17 of the appeal document, cited in paragraph 34 of the judgment.

74 The question was as follows: Should Articles 20(2)(a) and 21(1) TFEU, in conjunction with Articles 7 and 21(1) of the Charter and Article 2(2) of Directive 2004/38, be interpreted as not allowing the competent authorities of a Member State to refuse to recognize and record in the national civil status register a marriage certificate entered into between a national of that State and another Union citizen (of the same sex) in another Member State under the law of the latter, thereby preventing these two persons from residing in the first Member State with that civil status and with the same surname, because the law of the host State does not recognize same-sex marriages?

75 The Polish Supreme Court itself stated in its brief requesting a preliminary ruling that the national courts have not yet carried out an in-depth examination of these questions in the context of freedom of movement and residence in light of the fundamental rights enshrined in Articles 7 and 21(1) of the Charter (paragraphs 12 to 15 of the brief, cited in paragraph 32 of the judgment).

76 G. Esteban de la Rosa, "Diálogo entre tribunales y protección de los derechos fundamentales en el ámbito europeo", *RGDE*, Vol. 31, 2013, pp. 1-35, p. 34.

77 Paragraph 64 of the judgment, in which it defends the existence of the same threshold of protection for the rights it cites as the *Mirin* judgment: "In this respect, with regard to respect for private and family life guaranteed in Article 7 of the Charter, it is clear from the Explanations on the Charter of Fundamental Rights (OJ 2007, C 303, p. 17) that, in accordance with Article 52(3) of the Charter, the rights guaranteed by Article 7 thereof have the same meaning and scope as those guaranteed by Article 8 of the ECHR, the

From this, he derives an argument that goes beyond the *Coman* doctrine, notwithstanding its citation in paragraph 65, by emphasizing that the case law of the ECHR confirms that the relationship between a same-sex couple falls within the notions of "private life" and "family life" in the same way as that of a different-sex couple in an equivalent situation. Consequently, since the ECtHR has imposed on all States Parties to the Convention, including Poland, a positive obligation to establish a legal framework for the recognition and protection of same-sex couples.

It clearly states that, if this is not respected, the affected individuals are unable to organize fundamental aspects of their private and family life, violating article 7 of the Chapter of Fundamental Rights of the European Union. The legal framework in question has been devised to govern the situation of those who have lawfully married abroad and wish to have that marriage recognized in Poland. As can be seen, this represents a departure from the *Coman* doctrine. The solution is, in fact, straightforward and had already been advocated in the legal doctrine[78]. Freedom of movement cannot be granted in addition to any other rights. The State is required to acknowledge the catalogue of rights identified by the ECHR, failing which same-sex couples are left without protection and subject to discrimination[79].

This form of recognition of rights achieves an assimilation of family law, which seeks the enjoyment of these rights, although it allows States, as we will see later, a certain margin of discretion. It has been argued that the distinction between the possible forms of recognition is ambiguous and, to some extent, inconsistent. Since matters relating to identity (such as name or gender reassignment) and to family status (such as marriage and parentage) both fall within Member State competence, failure to accord recognition to either in a manner equivalent to that in other States may place Union citizens at a serious disadvantage, potentially infringing their rights under article 21 TFEU[80]. In any case, this form of recognition is regarded here as compatible with the national identity, a point that will be examined in section 3.

(2) Full freedom of movement

This approach enables spouses to move freely within their State of origin while retaining their acquired rights. At the same time, it should be stressed that a consistent

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latter being the minimum threshold of protection (to that effect, the judgment of 4 October 2024, *Mirin*, C 4/23, EU:C:2024:845, paragraph 63 and the case law cited therein)".

78 A. Durán Ayago, *Derechos Humanos y método de reconocimiento de situaciones jurídicas hacia la libre circulación de personas y familias*, Aranzadi, Cizur Menor, 2023.

79 Paragraph 66 of the judgment: "The Court also noted that, by refusing to register such marriages in any way, the Polish authorities have left these individuals in a legal limbo and have failed to meet the fundamental needs for recognition and protection of same-sex couples in stable relationships. Consequently, the Court held that none of the grounds of public interest invoked by the Polish Government outweigh the interest of these individuals in having their relationships duly recognized and protected by law. It concludes by stating in paragraph 67 that this failure to recognize such relationships is contrary to Article 7 of the Charter of Fundamental Rights of the European Union".

80 L. Helga, "Skirting the Fault Line? AG Richard de la Tour's Opinion in the Wojewoda *Mazowiecki* case: EU law requires registration of same sex marriages only when no alternatives exist", published in EU Law Analysis on April 30, 2025, following the Advocate General's conclusions. https://eulawanalysis.blogspot.com/2025/04/skirting-fault-line-ag-richard-de-la.html.

application of this approach to all family situations ought, in the future, to secure the full enjoyment of freedom of movement throughout the Union. This would not necessarily require identical legal institutions, but it would demand equivalence in substantive rights. Logically, this should be extended to other family structures.

If the law of the Member States must recognize an equivalent family status for spouses in same-sex couples, then, by applying this doctrine together with the *Mirin* case law to future situations involving children in circumstances akin to *Pancharevo*, it follows that children must likewise be guaranteed that freedom of movement will, in the future, be genuinely complete[81]. The Court cites this very clearly in the *Mazowiecki* judgment, definitively abandoning the *Coman* doctrine, when it emphasizes that "the practical effect of the rights conferred on the Union citizen concerned by article 21.1 TFEU requires that the family life that this citizen has maintained in that Member State can continue upon his return to the Member State of which he is a National"[82].

And recognition is complete because the Court requires that this freedom be exercised in a manner that respects freedom of movement and residence without giving rise to serious administrative, professional or private difficulties[83]. That is to say, it insists on the recognition of the family rights that make such freedom effective. In fact, the Court seems to be referring to Coman and Hamilton when it points out that not recognizing these rights forces them to live as single people upon returning to their Member State of origin[84], which is precisely what would have occurred had they been able to resettle in Romania. The debate that follows this recognition concerns the means of securing such full freedom of movement, and the answer lies in the adaptation of national legislation and, therefore, of the national identity to this requirement.

(3) Adapting the national identity?

Once the Court accepts that the *Coman* doctrine on respect for national identity and the application of the public policy of the Member State is insufficient to avoid violating articles 7 and 21 of the Charter of Fundamental Rights of the European Union, it addresses how full freedom of movement should be achieved. To balance this with national identity, the Court agrees with the ECHR that national identity protects the State's right to shape or not shape the formation of an institutionalized family by regulating marriage. Accordingly, the Court makes clear that it cannot require a Member State to introduce same-sex marriage as such, since this would infringe that State's

81 Let us remember the fact that Coman has not yet been able to reside in Romania and that Pancharevo will reside in Bulgaria with a mother and another "ancestor".

82 "The practical effect of the rights conferred on those citizens by article 21.1 TFEU requires, all the more so, that those citizens be able to continue in the Member State of their origin the family life they have developed or consolidated in the host Member State, in particular through marriage". Paragraphs 44 to 46 of the judgment.

83 And to that end he cites the *Mirin* ruling, not the Coman case.

84 Paragraph 55: "Thus, the lack of recognition of such a marriage in the Member State of origin entails a concrete risk that the organization of family life of those same citizens will be seriously hampered when they return to their Member State of origin, since, in numerous actions of daily life, in both the public and private spheres, it will be impossible for them to assert their marital status, which, however, has been legally established in the host Member State".

exclusive competence in this field. It also makes clear, however, that a Member State is not at liberty to determine, as it sees fit, how the TFEU provisions on freedom of movement and residence apply within its territory when it comes to recognizing, as noted above, the essential family privacy rights flowing from a person's civil status and already enjoyed in another Member State.

To this end, the Court holds, in line with the ECtHR's case law, that the State enjoys a margin of appreciation and freedom as to the means by which, in its domestic legal order, it gives effect to the core legal consequences of a marriage concluded in another Member State. The crucial point, however, is that those rights must indeed be recognized. A Member State that does not itself provide for same-sex marriage is therefore required to establish suitable procedures for recognizing such a marriage when it has been entered into by two Union citizens exercising their freedom of movement and residence under the law of the host Member State[85]. These rights, specifically, include taxation, property, labor rights, healthcare and inheritance rights. Only in this way can a strict conception of national public policy be given practical effect, since public policy can only be invoked in the event of a real and sufficiently serious threat affecting a fundamental interest of society[86]. Such public policy may in no case infringe upon the essential rights of European integration, as appears to have occurred thus far in the *Coman* case[87].

The Court states that, because Poland itself admitted that the only way to secure these rights is to register the marriage in the Polish civil register, Poland must carry out that registration[88]. This requirement already operates, in practice, as a condition for same-sex couples. At the same time, the Court clarifies an important point: although Member States have some discretion in deciding how to recognize the rights arising from such marriages, if changing national law becomes necessary to make that recognition effective, they are obliged to do so. Protecting the fundamental rights guaranteed by the Charter therefore requires adjusting the national identity, even by amending domestic legislation, without this implying a general duty to introduce marriage as an institution in every situation[89].

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85 Paragraph 69 of the judgment: "In this respect, it should be noted that the choice of means of recognizing marriages entered into by Union citizens in the exercise of their freedom of movement and residence in another Member State falls within the margin of appreciation available to Member States in the exercise of their competence, referred to in paragraph 47 of this judgment, concerning rules relating to marriage. In this respect, the transcription of marriage certificates in the Civil Registry of Member States is merely one means among others to allow such recognition. However, it is necessary that these means not render impossible or excessively difficult the application of the rights conferred by article 21 TFEU".

86 S. Álvarez González, "¿Matrimonio de personas del mismo sexo…", *op. cit.*, p. 3.

87 On the *Coman* case and Romanian public policy in matters of family relations, N. Anitei, "El orden público en el derecho internacional privado rumano en materia de relaciones familiares", *Cuadernos de Derecho Transnacional* (March 2022), Vol. 14, No. 1, pp. 956-976.

88 Paragraph 71. To this end, it argued that "although, in principle, marriage certificates issued abroad may produce probative effects equivalent to Polish marriage certificates, in practice, it is excessively difficult, if not impossible, for such certificates to confer rights, given that, if such certificates are not transcribed in the Polish Civil Registry, their recognition is subject to the discretion of the administrative authorities and, consequently, may be subject to divergent decisions by those authorities".

89 Paragraph 76. In important textual content: "Finally, it should be pointed out that both articles 20 TFEU and 21.1 TFEU, as well as Articles 7 and 21.1 of the Charter, are sufficient in themselves and do not need to be supplemented by provisions of Union or national law to confer on individuals rights enforceable as such. Consequently, if the referring court were to conclude that it is not possible to interpret its national

Despite uncertainties about how the *Mazowiecki* doctrine relates to the national identity, the latter does not extend to regulating marriage itself, but it does require recognizing all rights flowing from marriage, including for same-sex couples. A line of scholarship, which this article follows, maintains that this freedom as to means reflects a balance between the division of competences between the EU and the Member States, while also safeguarding the fundamental rights of same-sex couples[90]. Another line of scholarship finds this reasoning unpersuasive, since it is hard in practice to draw a clear line between the transcription of changes in personal identity and those concerning civil status. In both situations, serious drawbacks can arise. Family ties are closely connected to the applicants' personal and social identity as homosexual individuals who seek to have their relationships recognized and protected by law. The solution adopted by the Court overlooks the problematic practical effects of mere recognition without transcription[91]. In any case, the Polish government itself reacted after the conclusions of the General Assembly and before knowing the sentence, and in October 2025 presented in Parliament a proposed law to approve a law on civil unions. Although it does not seem to respond to all the rights included in the *Mazowiecki* ruling, is a first step in the right direction[92].

As Professor Espiniella Menéndez so aptly pointed out before even knowing the Advocate General's conclusions, anticipating the current situation, "it seems necessary that States opposed to same-sex marriage must mitigate their public policy: either through the transposition of institutions and assimilation of marriage to a de facto union that must be protected in the host State; or through the recognition of minimum effects that allow the exercise of the fundamental freedom of movement. One can even imagine a future judgment by the CJEU in the JC-T and MT case concluding that the portability of the civil status of same-sex marriage is directly linked to the free movement of people"[93].

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law in conformity with Union law, it would be obliged to ensure, within the scope of its powers, the legal protection for individuals that derives from those provisions and to act to ensure their full effectiveness by, where necessary, not applying the relevant national provisions (to that effect, the judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraphs 78 and 79, and of June 3, 2025, *Kinsa*, C 460/23, EU:C:2025:392, paragraph 72)".

90 M. Pascua, "AG De La Tour's Opinion in Wojewoda Mazowiecki on Poland's Refusal to Transcribe a Same Sex Marriage Certificate", published in EAPIL on April 22, 2025, following the AG's conclusions. https://eapil.org/2025/04/22/ag-de-la-tours-opinion-in-wojewoda-mazowiecki-on-polands-refusal-to-transcribe-a-same-sex-marriage-certificate/ .

91 F. Rusticia, "One Step Ahead and Two Sideways in AG de la Tour's Opinion in Wojewoda Mazowiecki", published in EAPIL on April 25, 2025, following the conclusions of the AG. Available at https://verfassungsblog.de/c-713-23-wojewoda-mazowiecki/.

92 October 18, 2025, The Polish government presents a law regulating civil partnerships with many limitations https://www.swissinfo.ch/spa/gobierno-polaco-presenta-una-ley-que-regula-las-parejas-de-hecho-con-muchas-limitaciones/90183734.

93 And he concluded by noting that "The weakening of public policy allows for the construction of feasible solutions from the perspective of private law. Today, the progress in the free movement of decisions regarding marital crises and their economic effects is surprising, especially compared to the lack of concern regarding the free movement of marriages as part of the portability of civil status". A. Espiniella Menéndez, "El matrimonio igualitario desde las lógicas del Derecho internacional privado", *Cuadernos de Derecho Transnacional* (October 2024), Vol. 16, No. 2, pp. 617-632, p. 632.

(F) CONCLUSIONS

The debate between the exercise of the European right to freedom of movement and residence for all persons wishing to maintain their family status in all Member States and the national identity of countries that do not recognize same-sex marriage or parentage has been a long one. The first precedent dates back to the 2000s, when the CJEU affirmed that national law must yield to the different regulations governing the right to a name, given its implications for respecting identity in situations of international mobility. National law only prevailed when the name had noble connotations, as this affected the constitutional rights of countries that prohibited any reference to nobility.

Throughout the 2010s and up to 2022, this line of case law was extended to same-sex marriages and same-sex parentage. Member States that did not recognize these institutions were nonetheless required by the CJEU to acknowledge them, but only for the limited purpose of allowing the exercise of freedom of movement. Under this approach, however, once a family moved to a Member State that did not recognize that relationship, their marital or parental status could again be denied. For around a decade this produced a two-tier system of free movement: people could, in theory, move freely across the EU, yet their family status was accepted in some States and rejected in others. This doctrine undermined the right to privacy and family life in article 7 and the prohibition of discrimination in article 21 of the Charter of Fundamental Rights of the European Union.

In 2023 and 2024, this doctrine started to shift. From that date onward, the ECtHR required States to recognize the same-sex couples' rights as those of heterosexual couples. While not related to freedom of movement, which is not protected by the ECHR, the Court affirmed that States signatory to the Convention are obliged to recognize a similar set of family, property, social, and employment rights for heterosexual marriages and same-sex couples. Within the margin of appreciation for States, the manner of recognition is open and does not require the recognition of same-sex marriage. However, the family status they enjoy must be similar. In this context, the CJEU required a Member State that did not recognize gender transition in its domestic law to register a person who had undergone gender transition in another Member State, even if it had to amend its own law to do so. This is the only way to respect their right to their own identity.

Following this entire process, the *Mazowiecki* judgment of 25 November 2025 consolidates these two doctrines. It requires Member States that do not recognize same-sex marriage to respect the essential family rights of these families that they have already enjoyed in another Member State. These rights are similar to those protected by the ECHR, including family, property, social, and employment rights. If adapting their domestic law to achieve this requires them to do so, they are obliged to do so. And if the only way to do so is by registering the marriage celebrated in a third State, they must transcribe the marriage certificate from that third State into their national registers. This is the only way for same-sex couples to exercise their freedom of movement and their rights to privacy and family life and non-discrimination under the Chapter of Fundamental Rights of the European Union.

While the *Mazowiecki* is framed around the full enjoyment of the right to freedom of movement and residence, its potential far-reaching effects is clear. If the law of a Member

State is required to recognize the family rights of rainbow families already fully enjoyed in another Member State, it is reasonable to expect that, in time, these rights will have to be extended to the wider population. Otherwise, the State would fail to respect the right to non-discrimination of those residents who have not exercised their free-movement rights. Member States will not be compelled to regulate marriage or full parentage, but they should establish legal institutions that grant a similar set of rights, and therefore family status, in these cases. This will be the moment when European law, defending identity, personal and family privacy, diversity and freedom, and non-discrimination on any grounds, will arrive like a breath of fresh air in the national law of all Member States.

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Specific features of the Immunity from Jurisdiction and from Execution of International Organizations

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Abstract: The paper examines the rules on jurisdictional and enforcement immunity of international organizations and warns against the frequent practice, in both national and European courts, of transposing to them the doctrine developed for State immunity. Although both regimes share a functional dimension, State immunity is grounded in sovereignty and the equality of States, whereas the immunity of international organizations derives solely from their constitutive treaties or headquarters agreements, with no basis in customary international law and no link to the exercise of sovereign powers. For this reason, distinctions such as *iure imperii/iure gestionis* are meaningless in the context of international organizations. The paper also analyses the possibility of waiving immunity, which exists but is limited by the relevant conventional provisions, and emphasises that ensuring compatibility between immunity and the right to effective judicial protection requires the existence of alternative dispute-resolution mechanisms, in line with the ECtHR's *Waite and Kennedy* doctrine and with Organic Law 16/2015 when it applies subsidiarily. The central difficulty arises when an international agreement grants full immunity without providing such mechanisms: in these cases, the paper argues that, from the perspective of the domestic judge, the applicability of the agreement should be interpreted in conformity with the Constitution and the ECHR.

Keywords: International organizations, Jurisdictional immunity and immunity from execution, Effective judicial protection.

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(A) INTRODUCTION

Jurisdictional and enforcement immunities are one of the areas in which Professor Concepción Escobar's work has been most successful[1], particularly her reports on the immunities of State officials submitted to the International Law Commission between 2012 and 2019[2]. In this contribution, I offer some reflections on the application of jurisdictional and enforcement immunities to international organizations. This subject has generated significant case law in recent years; for example, STC 120/2021 31 May 2021[3] and the *Supreme Site Services and Others* judgment of the Court of Justice of the European Union[4]. Both decisions share a common feature: they transpose the rules governing State immunity to international organizations. Given the broader practice

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1 See C. Escobar Hernández, "Las inmunidades de los Jefes de Estado, Jefes de Gobierno y Ministros de Asuntos Exteriores", in J. Martín y Pérez de Nanclares (dir.), *La Ley Orgánica 16/2015 sobre Privilegios e Inmunidades: Gestación y Contenido*, *Cuadernos de la Escuela Diplomática*, 2016, núm. 55, pp. 307-324.

2 Report of the International Law Commission (A/74/10, 2019), Chapter VIII, p. 310.

3 *BOE*, 7 July 2021, https://www.boe.es/boe/dias/2021/07/07/pdfs/BOE-A-2021-11302.pdf, accessed 30 November 2025.

4 Judgment of 3 September 2020, *Supreme Site Services and Ohters*, C-186/19, EU:C:2020:638.

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regarding State immunity and the greater familiarity of legal practitioners with it, the temptation to rely on those rules when an international organization claims immunity is understandable. However, as we shall see, the use of principles developed for State immunity would require careful justification, because there are profound differences between the rationale and structure of State immunity and that of international organizations.

This tendency to apply the regime of State immunity when the beneficiary is an international organization is not new, nor is the criticism it has attracted[5]. Nonetheless, it is useful to highlight the factors that distinguish these two types of immunity, as they stem not only from the differing nature of States and international organizations, but also from the implications that immunities have for the protection of fundamental rights[6].

(B) SIMILARITIES AND DIFFERENCES BETWEEN STATE IMMUNITIES AND THE IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

Starting with what State immunities and the immunities of international organizations have in common, it is important to emphasise that both are necessary to facilitate international relations. Allowing the courts of one State to adjudicate claims against another international actor whether a State or an international organization or to adopt enforcement measures against its property would likely have diplomatic repercussions, or, more broadly, consequences for international relations. This consideration also operates as the functional justification for immunities: they are necessary for international organizations to carry out their functions[7]. In the case of States, although their immunities are grounded in sovereignty and the equality of States, they also possess a functional dimension, insofar as immunity facilitates the ability of States (and their representatives) to act in foreign States an activity that would be significantly hindered without rules shielding them from judicial proceedings abroad[8]. This functional dimension is particularly evident in immunities that are not strictly State immunities, but rather derive from them, such as those protecting heads of State or other high-ranking officials[9].

From another perspective no longer that of the State benefiting from immunity but that of the forum State immunity is also linked to the separation of powers, insofar as bringing a foreign State or another beneficiary of immunity before domestic courts

5 See P. Andrés Sáenz de Santa María, in J. Martín y Pérez de Nanclares (dir.), *supra* n. 1, "Las inmunidades de las organizaciones internacionales: perspectiva general y española", pp. 205-231, pp. 223-224. In earlier approaches, however, the analysis begins by assuming an initial equivalence between State immunities and the immunities of international organizations, and then proceeds to highlight the differences between them, see D.W. Bowett, *The Law of International Institutions*, Londres, Stevens & Sons, 1982, p. 345.

6 Andrés Sáenz de Santa María, *supra* n. 5, pp. 225 y 231.

7 Andrés Sáenz de Santa María, *supra* n. 5, p. 208.

8 See M.N. Shaw, *International Law*, Cambridge, Cambridge University Press, 9th ed., 2021, p. 1162.

9 Using a graphic metaphor, they are figures projected onto different mirrors from a single underlying object, L.I. Sánchez Rodríguez, *Las Inmunidades de los Estados Extranjeros ante los Tribunales Españoles*, Madrid, Civitas, 1990, p. 29.

would constitute interference with the executive branch[10]. This line of reasoning may likewise be projected onto the immunities of international organizations.

The similarities, however, end there. As noted above, State immunities are rooted in the principle of sovereignty and the equality of States, which prevents one State from exercising a sovereign function namely, adjudicating disputes and enforcing judgments over another State (*par in parem non habet imperium*, which also implies a lack of "*jurisdiction*" over an equal). This principle does not apply to international organizations, which, although subjects of international law, are not States and do not possess the nature of States.

Moreover, international organizations are relatively recent institutions[11], and the regime governing their immunities is not customary in nature; rather, it is based on the treaties by which they are established and on the agreements concluded to regulate their presence in the territories of various States[12]. Consequently, the immunities of international organizations do not stem from structural principles of international law but instead arise from specific agreements between the States that create them and those with which they interact.

In the context of State immunity, the distinction between acts *iure imperii* and *iure gestionis* is of great significance, given that the doctrine of absolute immunity has largely been abandoned in favour of the doctrine of restrictive immunity. For international organizations, however, this distinction is meaningless, since they do not exercise sovereign functions[13]. One may instead differentiate between activities that are necessary for the organization to fulfil its functions[14]. This distinction is reflected even in conventional instruments dealing with the immunities of international organizations[15]. Nevertheless, because the regulation of such immunities is treaty-based, a categorisation that cannot ultimately be grounded in the relevant texts has limited relevance (as will be seen). In the case of States, differentiating between acts *iure imperii* and *iure gestionis* is useful, as it serves to interpret the applicable treaties and rules of customary international law. By contrast, for international organizations we must adhere strictly to the treaty provisions and determine, on that basis, whether the immunity granted is "total" (a more appropriate term than "absolute," given that the distinction between sovereign and non-sovereign acts is inapplicable) or limited.

The distinction between jurisdictional immunity and immunity from execution is indeed relevant. If jurisdictional immunity is total, there is no need to consider

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10 See R. Arenas García, *El control de oficio de la competencia judicial internacional*, Madrid, Eurolex, 1996, pp. 54-55 and the references contained therein.

11 Shaw, *supra* n. 8, pp. 1133-1135; C.F. Amerasinghe, *Principles of the institutional law of international organizations*, Cambridge, Cambridge University Press, 2nd ed. 2005, p. 315; see also Bowett, *supra* n. 5, pp. 1-10.

12 Andrés Sáenz de Santa María, *supra* n. 5, pp. 206-207.

13 See S. El Sawah, *Les immunités des états et des organisations internationals. Immunités et procès equitable*, Bruselas, Bruylant, 2012, pp. 701-702.

14 Amerasinghe, *supra* n. 11, p. 316.

15 Art. 105 of the United Nations Charter; although the Convention on the Privileges and Immunities of the United Nations subsequently transformed this immunity into a "total" one (rather than using the term "absolute," which would correspond more closely to the absolute/relative immunity dichotomy linked to the distinction between acts *iure imperii* and acts *iure gestionis* a distinction which, as we have seen, is not appropriate in the context of international organizations).

immunity from execution, since no judgment could ever be rendered against the international organization — just as, during the period in which States enjoyed absolute jurisdictional immunity, discussing immunity from execution was unnecessary[16]. However, if jurisdictional immunity is not total, it becomes necessary to determine which assets may be subject to enforcement. In general, immunity from execution is broader than immunity from jurisdiction; thus, even if a judgment is issued against an international organization, it may not be enforceable if the organization's assets benefit from execution immunity. In this regard, it is noteworthy that the Convention on the Privileges and Immunities of the United Nations expressly provides that a waiver of immunity by the organization does not apply to enforcement measures[17]. In the case of the European Union, although jurisdictional immunity is not provided for[18], the Union's assets are protected against any enforcement measures, which may only be authorised by the Court of Justice[19].

Finally, international organizations are not States; this means that they generally lack their own judicial system. This point is significant because, in the case of States, the fact that they cannot be sued before the courts of another country does not prevent proceedings from being brought before the courts of the State benefiting from immunity. This consideration matters: in many cases, the impossibility of obtaining a decision on the merits is not absolute, since the claimant who is adversely affected by the invocation of immunity may be referred to the courts of the defendant State[20]. For international organizations, however, this is not possible in most situations. The exception is the European Union, which has its own judicial system and whose courts have jurisdiction to hear actions brought against the institutions of the organization[21]. Moreover, the EU courts are composed of judges who enjoy the same guarantees of independence as their national counterparts: they are not subject to instructions in the exercise of their functions, cannot be arbitrarily removed from office, and benefit from clear financial autonomy. Other international organizations, by contrast, lack equivalent mechanisms, meaning that whatever dispute-resolution procedures they may have cannot be compared to national judicial systems.

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16 See R. Higgins, "Execution of State Property in English Law", in P. Bourel *et al.*, *L'inmmunité d'éxecution de l'État étranger*, París, 1990, pp. 101-109, p. 101; R. Frank, "L'immunité d'éxecution de l'État et des autres collectivités publiques en droit allemand", in R. Frank *et al.*, "L'immunité d'éxecution de l'État et des autres collectivités publiques", in *Immunité d'exécution, extradition et responsabilité des parents*, Bruselas, Bruylant, 1990, pp. 3-32, p. 14.

17 Art. 2.

18 Art. 274 del TFEU.

19 Art. 1 of the Protocol on the Privileges and Immunities of the European Union.

20 See the case of the Italian diplomat, tenant of a dwelling in Madrid, who was sued by its owner. Once the diplomat's jurisdictional immunity was upheld — based in this case on the 1961 Vienna Convention on Diplomatic Relations — the matter ultimately reached the Spanish Constitutional Court (Judgment 140/1995 of 28 September). The Court held that the diplomat's immunity was compatible with the right to effective judicial protection enshrined in Article 24 of the Constitution, and stated that the claimant could bring her claim before the Italian courts (Legal Ground 10). It should be noted, however, that in the case at hand — namely the lease of immovable property located in Spain — the Italian courts would lack jurisdiction, since jurisdiction would lie exclusively with the Spanish courts pursuant to Article 16 of the Brussels Convention of 27 September 1968, the instrument applicable *ratione temporis* to any action brought in Italy after the Spanish courts had upheld the diplomat's jurisdictional immunity.

21 Arts. 263.4, 265.3, 268, 270, 272 of the TFEU.

(C) THE IMMUNITIES OF INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS

There is a certain amount of case law concerning the immunities of international organizations before national courts. Most cases in which immunity has had to be addressed involve employment disputes[22], although commercial disputes also exist[23]. In such cases, both the functional scope of immunity and the possibilities of waiving it have been examined. We will return shortly to the first issue (the functional scope of immunity), but for now we shall focus on the second, since the waiver of immunity by an organization is, in principle, possible, although it has given rise to considerable difficulties.

Thus, on the one hand, there may be situations in which waiver is not possible, cannot be made in advance, or cannot extend to immunity from execution[24]. On the other hand, however, there are cases in which the possibility of waiving immunity has been interpreted broadly, including instances of implicit waivers derived from choice-of-court or choice-of-law clauses[25]. The case of arbitration clauses also warrants specific attention. On the one hand, as we will examine later, ensuring compatibility between immunity and the requirements of effective judicial protection demands that individuals who enter into relations with an international organization have access to some means of dispute resolution outside the courts; in this sense, the inclusion of an arbitration clause in agreements between the organization and third parties may satisfy this requirement. From that point, however, if the arbitration clause does not also entail the possibility of recourse to the courts, it will not be possible to seek judicial assistance in support of the arbitration, to challenge the award, or to request its recognition or enforcement; this would limit the effectiveness of the protection that arbitration could provide[26]. This objection is nonetheless a limited one, since, as noted earlier, a waiver of jurisdictional immunity does not imply a waiver of immunity from execution; consequently, the effectiveness of any remedy obtained will in any event depend on the will of the international organization.

On the other hand, it has been argued that agreeing to arbitration also entails a waiver of immunity before national courts[27], which would allow the arbitral proceedings

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22 Andrés Sáenz de Santa María, *supra* n. 5, p. 222. The already-cited Constitutional Court Judgment 120/2021 also dealt with an employment matter.

23 See J. Klabbers, *An Introduction to International Organizations Law*, Cambridge, Cambridge University Press, 3rd edition, 2015, pp. 133-135. See also A. Reinisch, *International Organizations Before National Courts*, Cambridge, Cambridge University Press, 2000, pp. 35-229, which examines a large number of cases, from various jurisdictions, brought before national courts concerning the immunities of international organizations.

24 See, for example, Art. II of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946: "The United Nations, its property and assets wherever located and by whomsoever held shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution". On *ad hoc* waiver clauses, Reinisch, *supra* n. 23, pp. 218-219.

25 Reinisch, *supra* n. 23, pp. 222-226.

26 Reinisch, *supra* n. 23, p. 265.

27 Reinisch, *supra* n. 23, pp. 226-229.

to unfold in a "normal" manner — something that, as is well known, often presupposes judicial support[28]. However, whether such a waiver exists will always depend on the conventional instrument governing the immunity, since, as noted, this immunity derives from an international treaty; unlike State immunity, there is no relevant international custom nor any structural principle of international law from which it may arise.

Courts nevertheless tend — just as previously mentioned — to overlook the essential differences between State immunity and the immunity of international organizations, projecting onto the latter reasoning that properly belongs to the former. As already discussed, the distinction between absolute and relative immunity characteristic of State immunity, which relies on differentiating between acts *iure imperii* and *iure gestionis*, is meaningless for international organizations, which, not being States, do not exercise sovereign functions. For international organizations, the relevant (though not equivalent) distinction would instead concern acts necessary for the functioning of the organization versus those unrelated to its purposes — a functional approach[29]. This functional approach, however, is frequently "contaminated" by the transposition of principles and rules specific to State immunity. This occurred, for example, in Spanish Constitutional Court judgment 120/2021[30] and, in a certain sense, in the *Supreme Site Services and Others* case before the Court of Justice of the European Union[31], and it remains a common practice among national courts[32].

This approach is probably mistaken. It would be advisable to draw a clear distinction between State immunity and the immunity of international organizations. For the latter, the applicable regime is defined by the international agreements that establish the organization or by the headquarters agreements concluded with States. Thus, for example, in the case decided by Spanish Constitutional Court judgment 120/2021, Article 11 of the Headquarters Agreement between Spain and the International Commission for the Conservation of Atlantic Tunas of 29 March 1971 (*BOE*, 17 November 1971) should have been applied. That provision grants the organization full immunity, except where waived, in line with Article II of the Convention on the Privileges and Immunities of the United Nations. The distinction between acts *iure imperii* and *iure gestionis* has no support in the text of the Agreement and therefore should not have been taken into account by the Spanish courts, although they did so. Moreover, although the rationale for the immunity of international organizations is the proper performance of their functions,

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28 See J.C. Fernández Rozas, "Arbitraje y jurisdicción: una interacción necesaria para la realización de la justicia", *Derecho Privado y Constitución*, 2005, año 13, núm. 19, pp. 55-91, esp. pp. 67-70; *id.*, "Arbitraje comercial internacional", in J.C. Fernández Rozas *et al.*, *Derecho de los Negocios Internacionales*, Madrid, Iustel, 7th ed., 2024, pp. 689-808, pp. 767-804.

29 On the case law of domestic courts on this issue, Klabbers, *supra* n. 23, pp. 131-136; Reinisch, *supra* n. 23, pp. 205-214.

30 *Supra* n. 3. For a critique of the use of criteria derived from State immunity in this context, vid. R. Arenas García, "Inmunidad de jurisdicción de las organizaciones internacionales y distinción entre actos *iure imperio* y *iure gestionis* [A propósito de la STC 120/2021 (Sala Segunda), de 31 de mayo], *REEI*, 2021, nº 42, DOI:10.17103/reei.42.18, pp. 7-15, pp. 11-12.

31 *Supra* n. 4. See R. Arenas García, "Inmunidad de ejecución, materia civil o mercantil y competencias exclusivas [A propósito de la STJ (Sala Primera) de 3 de septiembre de 2020, As. C-186/19, *Supreme Site Services GmbH y otros c. Supreme Headquarters Allied Powers Europe*]", *REEI*, 2020, nº 40, DOI:10.17103/reei.40.16, pp. 34-41.

32 Reinisch, *supra* n. 23., pp. 258-261.

that principle cannot operate as a limitation on immunity unless it is expressly reflected in the conventional instrument governing it.

The problem with this interpretation is that it is hardly compatible with access to effective judicial protection if no alternative dispute-resolution mechanism exists; this would run counter to the requirements of the right to effective judicial protection under both domestic constitutional orders and Article 6 of the European Convention on Human Rights. This follows from the doctrine laid down by the ECtHR in its judgment of 18 February 1999, *Waite and Kennedy v. Germany* (Application 26083/94), where, faced with an alleged incompatibility between the jurisdictional immunity of the European Space Agency (ESA) and Article 6 ECHR, the Court held that no such incompatibility existed because dispute-resolution mechanisms were available within the ESA[33]. Thus, the existence of alternative mechanisms to judicial proceedings, even within the organization itself, provided that they operate independently[34], is sufficient to justify immunity. This same principle is now reflected in Article 35(1), second subparagraph, of Organic Law 16/2015[35], which, in private-law or employment disputes involving staff of an international organization, requires, for immunity to be upheld, proof that there is "an alternative mechanism for resolving the dispute, whether provided for in the constituent treaty, the statutes, the internal regulations or any other applicable instrument of the international organization."

This exception, however, only applies where there is no conventional regulation of immunity. Organic Law 16/2015 envisages the existence of international agreements governing immunity [Article 35(1)] and, in their absence, grants immunity to international organizations on a functional basis, that is, "in respect of any conduct linked to the performance of their functions." It is this immunity conferred by Spanish domestic law which is qualified by the requirement of an alternative dispute-resolution mechanism, meaning that the regime laid down by the Organic Law is not a minimum standard, but a subsidiary one[36]. As a result, the problem persists in relation to those immunities that are recognised in treaties to which Spain is a party and which do not provide for such mechanisms. To uphold jurisdictional immunity in these cases would entail a breach of Article 6 ECHR; yet refusing to do so would mean infringing the international instrument that establishes the immunity. The most reasonable course would be to revise those international instruments so as to introduce an explicit reference to an alternative dispute-resolution mechanism. Until such revision takes place, however, they should be interpreted in conformity with the Constitution, making full use of any interpretative possibilities in the text either to narrow the scope of immunity or to make it conditional on the existence of a dispute-resolution mechanism in line with the requirements of the ECtHR.

If, despite all the above, it proves impossible to reconcile the requirements of the treaty with the demands of the right of defence, we would face a conflict that is difficult

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33 See n. 68 of the Judgment: "For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention".

34 See n. 69 of the Judgment *Waite and Kennedy v. Germany*.

35 LO 16/2015, de 27 de octubre, sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en España y las Conferencias y Reuniones internacionales celebradas en España, *BOE*, 28-X-2015.

36 On this distinction, Andrés Sáenz de Santa María, *supra* n. 5, pp. 228-230.

to resolve: from the standpoint of international law, the international organization could insist on the application of the treaty establishing the immunity, and neither the Spanish Constitution nor the European Convention on Human Rights would constitute an obstacle to this. This primacy of the treaty is also reflected in the Constitution, since Article 96 provides that international treaties validly concluded and published in Spain may only be repealed, amended, or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law.

Even so, I believe we should distinguish between the effectiveness of the international treaty and its applicability[37]. From the perspective of the domestic judge, the treaty with the international organization, the Spanish Constitution, and the ECHR are all norms forming part of the legal order that must be applied, and when irreconcilable contradictions arise among them, the judge must identify a way to resolve them. From this perspective – that of applicability – priority should be given to constitutional obligations, particularly where the treaty conferring immunity predates the Constitution itself (as in the case examined in the aforementioned Constitutional Court judgment 120/2021), even if doing so entails Spain's breach of an international obligation. After all, upholding immunity in such cases would likewise entail a breach of an international obligation, namely Spain's obligations towards the States parties to the ECHR. It is the responsibility of the executive – and, insofar as it is competent, the legislature – to ensure that Spain does not assume mutually incompatible international obligations.

(D) CONCLUSION

The immunities of international organizations and those of States are fundamentally different. Nonetheless, domestic practice has tended to transpose onto the former the well-established doctrine developed in relation to the latter. This is an error that ought to be corrected.

For the immunities of international organizations, the starting point is the conventional law contained in their constitutive treaties and headquarters agreements. Strictly speaking, nothing need be added to this conventional framework: without a treaty-based provision granting it, an international organization would enjoy no immunity at all. Spain, however, has chosen to introduce a general rule on the immunity of international organizations, which operates only in the absence of a conventional regulation.

The immunities of international organizations may result in a breach of the right to effective judicial protection, insofar as they deprive individuals of the possibility of obtaining a judicial resolution of disputes with such organizations. This violation, however, does not arise where an alternative dispute-resolution mechanism exists. Spain should therefore revise its agreements with international organizations so that all of them comply with this requirement, which stems not only from Article 24 of the Spanish Constitution, but also from Article 6 of the ECHR.

[37] This is a line of reasoning on which the Constitutional Court has insisted, shifting the problem of the relationship between international norms and domestic legislation to the terrain of applicability – an issue to be resolved by the ordinary courts, not by the Constitutional Court, vid. the references collected in A. Villaseca Ballescá, "La compleja relación entre la ley nacional y el tratado internacional", *Revista de Derecho, Empresa y Sociedad*, 2019, núm. 15, pp. 278-296, pp. 289-290.

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Book's review

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ADROHER BIOSCA, Salomé, CAMPUZANO DÍAZ, Beatriz, PALAO MORENO, G. (Dirs.), *Un Derecho Internacional Privado centrado en los derechos de las personas*, Tirant Lo Blanch, Valencia, 2025.

The book *Un Derecho Internacional Privado Centrado en los Derechos de las Personas* (A Private International Law Focused on People's Rights) brings together the twenty-two insightful contributions from the VII AEPDIRI Seminar on current issues in Private International Law, held in Madrid in March 2024. Edited by the distinguished Professors Salomé Adroher Biosca, Beatriz Campuzano Díaz, and Guillermo Palao Moreno, this collective work presents a rich and diverse analysis of pressing topics where the individual and their rights serve as the central frame of reference. The volume is the valuable outcome of a seminar that successfully gathered a significant number of specialists, including professors from national and foreign universities, as well as professionals from outside academia who are engaged in the practical application of Private International Law

The structure of the work is aptly divided into three thematic sections, mirroring the seminar's program: "Rights of Vulnerable Persons", "Due Diligence: Companies, Environment and Human Rights", and "Immigration from a Rights Perspective". This organization provides a coherent framework for a wide array of topics, all unified by a person-centric approach. As Ana Salinas de Frías notes in the prologue, this focus on the individual has regained prominence in the discipline after a period dominated by issues of international trade and investment. The book is a clear testament to the urgent need to restore the importance of a discipline centered on people in a constantly changing world.

The collection opens with an insightful transversal, critical, and prospective analysis by Nicolas Nord, who traces the evolution of Private International Law from a traditional balance of interests to its contemporary focus on individual rights. Nord identifies key drivers for this shift, including the development of fundamental rights, particularly through the case law of the European Court of Human Rights, and the principle of free movement of persons within the European Union. He also discusses the growing importance of habitual residence and party autonomy, which have further empowered individuals in cross-border legal scenarios. This introductory chapter masterfully guides the reader, setting the conceptual stage for the more specialized contributions that follow.

The first part of the book, dedicated to vulnerable persons, offers a profound examination of the mechanisms for their protection. Laura Martínez-Mora Charlebois explores the pivotal role of the Hague Conventions in safeguarding children, analyzing instruments on child abduction (1980), intercountry adoption (1993), and child protection (1996). Her contribution also provides a valuable look into the future, discussing the ongoing legislative project at the Hague Conference on parentage and surrogacy, a topic of immense contemporary relevance. Following this, Mónica Herranz Ballesteros focuses on the EU's Private International Law framework for protecting minors and vulnerable adults, delving into theoretical elements that condition its application, such as the

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interpretation of "cross-border" situations and its complex relationship with the Hague Conventions. This section is further enriched by a series of specialized communications that address specific, pressing challenges. These include analyses of the proposed EU Regulation on the protection of adults, the data protection rights of individuals in transfers to the US, the convergence of public and private international law in this field, and the ethically complex issue of post-mortem reproduction in cross-border contexts.

The second part addresses the highly topical issue of due diligence, human rights, and the environment. Francisco Zamora Cabot offers a compelling analysis of access to justice against corporations for human rights violations, revisiting the role of the U.S. Alien Tort Statute (ATS) and exploring other federal acts that continue to provide remedies for victims of corporate misconduct abroad. Antonia Durán Ayago discusses the shift towards a "materially sustainability-oriented Commercial Law," analyzing the far-reaching implications of the new EU Directive on corporate sustainability due diligence for European Private International Law. This core section is masterfully complemented by communications that tackle crucial related issues, such as the extraterritorial scope of the due diligence Directive, the new regulation on non-financial reporting as a tool for transparency, and the Private International Law aspects of the anti-SLAPP Directive. This cluster of contributions provides a comprehensive and multifaceted view of a rapidly evolving legal field.

The third and final part centers on immigration from a rights-based perspective, an area fraught with human and legal challenges. Isabel Lázaro González profoundly examines the right to identity of foreigners, with a particular focus on the complex and sensitive issue of age determination for unaccompanied minors, a topic that sits at the intersection of immigration law and child protection. Carmen Azcárraga Monzonís provides a critical analysis of Article 31 bis of Spain's Immigration Law, discussing the advances and pending issues in the protection of foreign women who are victims of gender-based violence. Lucas Andrés Pérez Martín proposes a comprehensive reform of the state management system for unaccompanied migrant children, following the migratory routes that have placed immense pressure on regions like the Canary Islands. This section is further strengthened by a diverse set of communications exploring topics such as "invisible children" and the recognition of their legal personality, the persistent problem of child marriage in European and international private law, the new EU Blue Card for highly qualified immigrants, protective coordination for children seeking asylum, and the practical problems of foster care for unaccompanied migrant minors in Spain.

In conclusion, *Un Derecho Internacional Privado Centrado en los Derechos de las Personas* is a collective work of undeniable interest and a significant, timely contribution to legal scholarship. By placing the individual and their rights at the core of the analysis, the book addresses some of the most complex and socially relevant challenges of our time. The editors are to be commended for compiling a cohesive and thought-provoking collection that successfully combines theoretical knowledge with practical experience. The breadth of topics covered, the depth of the analyses, and the diverse perspectives offered by the authors make this volume an indispensable reference for academics, practitioners, and anyone interested in the human dimension of cross-border legal relations. The exemplary systematization of the content allows chapters to be read

either continuously or independently, making it accessible to both experts and a general audience. This work will undoubtedly serve as a crucial theoretical and practical tool for anyone wishing to delve into a Private International Law that is, as the title promises, truly centered on people's rights.

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ARENAS HIDALGO, Nuria, *La reubicación y el principio de solidaridad y reparto equitativo de la responsabilidad en la política europea de asilo*, Aranzadi, Madrid, 2025.

'*Solidaridad para la acogida*'/'Solidarity for reception' by Nuria Arenas Hidalgo aims to address one of the major issues that remained unregulated in the first and second phases of the Common European Asylum System (CEAS), namely solidarity and the fair sharing of responsibility in European asylum policy. Similarly the universal system of international protection, whose pillars are the 1951 Geneva Convention on the Status of Refugees at the regulatory level; and the United Nations High Commissioner for Refugees (UNHCR) at the operational level, has not yet managed to resolve this issue in a fair and equitable manner for all stakeholders in its more than 75 years of history. Alongside with the routes of entry to a safe place and the relationship between asylum and refuge, these are the most significant outstanding issues in the field of international protection.

The CEAS is the regulatory part of European asylum policy that contributes to the achievement of the final major objective of European integration, namely the Area of Freedom, Security and Justice (AFSJ). Since its inception, the policies designed to make this a reality have been developed on the basis of security, which has been reinforced over the last ten years by various crises caused mainly by international terrorism and migratory pressure on Europe's eastern and southern borders. From the outset, the CEAS resolved the issue of asylum as an instrument of territorial protection to which only refugees were entitled (formally disregarding asylum on humanitarian grounds for other persons in need of protection), but it did not resolve the absence of regular entry routes for asylum seekers or the sharing of responsibility among Member States. The latter issue has proved particularly problematic in recent years because the Dublin system is a component of the CEAS whose operation increases the unequal distribution of refugees among European states and the unequal treatment of applicants, which sometimes leads to violations of European human rights standards.

Professor Arenas therefore devotes her monograph to the study of a pressing issue that has only recently been addressed in two regulatory instruments that will come into force in June 2026 and are based on the New Pact on Migration and Asylum adopted by the European Council in December 2023. Nuria Arenas identifies in the title the central element of the problem, which is solidarity 'for reception', although this principle and the principle of equitable sharing of responsibility are projected across the whole of European asylum policy. The main title of the study, as well as the titles of the chapters and sections, show particular care in accurately expressing the content and thus establishing a clear structure.

In her monograph, Dr Arenas revisits, two decades later, the subject of the last chapter of the volume that brings together the main contributions of her doctoral thesis. In it, she considered that the statute of rights of the Temporary Protection Directive was due 'largely to its temporary nature and the solidarity mechanism' and that its viability

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depended 'heavily on the agreement of the States on the distribution of responsibility (it could be said that the greater the willingness of States to accept refugees, the greater the chances of the mechanism being activated)'[1]. Indeed, the Temporary Protection Directive was never activated in its twenty years of existence until Russia's armed aggression against Ukraine led to a large-scale flight of people from that country to safe European neighbouring countries, being four of which EU members (Poland, Slovakia, Hungary and Romania). The willingness of these Eastern European states to take in the Ukrainian diaspora caused by the conflict facilitated the unanimous activation of the Directive, although it was not necessary to establish a specific distribution mechanism. This monograph is the result of a calm, measured and contrasted analysis, which is welcome in times of hasty bibliographic overproduction. The author offers a mature and profound reflection, which is only possible when one has a broad, solid and long-term view of the subject matter.

Two lengthy quotes (from Elianor Sharpston in the conclusions of the *Commission v. Poland, Czech Republic and Hungary* case; and from Ursula von der Leyen in the 2022 State of the Union Address) at the beginning of the book set the tone: the European project involves assuming responsibilities that go beyond a time-bound analysis of costs and benefits; and since border controls are carried out on behalf of everyone, states should be consistent with the value of solidarity that lies at the heart of the Union.

The monograph is rigorous, precise and concise, yet provides an appropriate level of detail for each issue, and is structured in three chapters, with an introduction and final conclusions. It also includes a section on abbreviations and, at the end, references to the bibliography used.

The first few pages provide interesting clarifications on the evolution of the discourse on burden-sharing or responsibility-sharing, as well as on the notion of solidarity as a combination of common but differentiated commitments. From the outset, the book takes as its starting point the EU's prolonged inability to collectively assume the mandate of solidarity enshrined in primary law, but its approach is not to dwell on the shortcomings of European asylum policy from the perspective of solidarity or the overcoming of particular interests. For the author, solidarity is not an abstract ideal but 'an operational principle essential to the viability of the CEAS and to the cohesion of the European project as a whole' (at 25) and therefore focuses on relocation as an instrument of solidarity for reception, which involves sharing the care of forced migrants among states.

The first two chapters are devoted to a comprehensive overview of the state of the art with regard to the subject of the monograph. Thus, the first chapter explains the meaning of the principle of solidarity and the fair sharing of responsibility in European asylum policy, and how they are positioned in the TEU and the TFEU. This chapter devotes a fairly long section to examining Article 80 TFEU as a 'turning point', an expression of an 'island of solidarity', and a 'means of achieving the objectives of the Treaties' (at 41-63). This chapter demonstrates a great ability to identify, unravel and

[1] N. Arenas Hidalgo, *El sistema de protección temporal de desplazados en la Europa comunitaria* (Servicio de Publicaciones, Universidad de Huelva, 2005) at page 343.

offer useful comparisons of complex concepts that are often confused, such as the relationship between solidarity between states and fairness towards foreigners. It argues that, following the Treaty of Lisbon, the principle of solidarity is legally binding in terms of its meaning, scope and legal implications, even though there is a certain vagueness and indeterminacy and a high degree of controversy. The author lucidly describes the shift in the discussion on solidarity, which somewhat neglects the substantive dimension of people's rights; the unfair allocation of responsibility resulting from the Dublin system, which cannot be resolved with partial reactive mechanisms; and the need for solidarity to be made effective through an equitable distribution of responsibility which, taken together, implies specific obligations of result. The author's narrative style is particularly impeccable in this chapter, perhaps the most complex. The study in general, and this chapter in particular, are very rich in terms of the use of primary and secondary sources, with profuse use of quotations and footnotes (sometimes too long, which operate as an almost alternative text but which reflect an enormous task of documentation and analysis).

The second chapter analyses in detail the specific practical experience of fragmented and reactive solidarity (*ad hoc* and *ex post*), which has proved insufficient to address structural imbalances. First, it analyses the EUREMA experiences and the difficulties of implementing a voluntarist model. It then describes in great detail the relocation mechanism established after the 2015 crisis in the management of migration across the Mediterranean, which was provisional but binding. A clear diagnosis of the reasons for its limited success is provided, and the idea that the CEAS needs to recognise asylum seekers as subjects with agency in order to move towards a system that is equitable for states and fair for individuals is clearly developed. Thirdly and fourthly, the bilateral and multilateral intergovernmental approach to responding to recent crises is analysed, and it is argued that 'another approach to solidarity is possible' (at 141), such as the Temporary Protection Directive, which was activated a few days after the armed aggression in Ukraine and is based on the free choice of the host state.

Chapter Three examines the changes that will come with the New Pact on Migration and Asylum, following the approval of the legal instruments that transform it into rules already in force but with implementation dates deferred to June 2026. Despite the uncertainty surrounding how it will actually work, it appears to be a complex system of solidarity that depends on implementing acts by the Commission and the Council and on annual commitments by Member States. After almost ten years of negotiations since the first proposals for reform of the CEAS in 2016, the approved system results in mandatory but flexible solidarity that reflects the disagreements between states within a common framework, which applies to all migration management with a 'comprehensive approach to build trust in the system' (at 161). The author explains how, although solidarity is normalised, the responsibilities of first arrival states are increased, which means that solidarity can once again be analysed as compensating for imbalances in the system of responsibility attribution and does not fit with her interpretation of solidarity, permanent and ex ante, as set out in Article 80 of the TFEU.

The last part of the chapter is devoted to explaining solidarity governance and asymmetric contributions, and suggests that flexibility serves the purpose of avoiding relocations. This appears to have been confirmed by the Council's decision of 8

December 2025 regarding the solidarity reserve for the 2026 annual cycle. This decision concerns relocation figures and financial contributions that are below the minimum reference values set out in Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management (OJ L 22.5.2024, Article 12).

The monograph concludes with conclusions grouped into three sections. Of particular note are the criticisms regarding the loss of centrality of relocation as a means for achieving solidarity, which is due to the wide margins of discretion afforded to states; and the 'state-centric, bureaucratic and coercive' nature of solidarity in the European policy on asylum that continues to relegate applicants for protection to a passive role and fails to correct the structural deficiencies of the Dublin system.

Professor Arenas' monograph has the merit of analysing a slippery and malleable concept, which is as much a principle or value as it is a criterion for distributing responsibility among member states and ensuring equity towards third states. It also serves to protect assets of international public interest such as the protection of human beings. Undoubtedly, one of the study's greatest merits is that it manages to unravel a vague and widely controversial principle, offering its essential meaning and restoring its significance as a binding and potentially operational guiding principle in the field of European asylum policy. This field is characterised by its heterogeneity and the combination of technical and political elements, the latter of which tend to overshadow the former. This field is central to the Union's credibility as an internal and international benchmark for values such as the protection of universal human rights.

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CARRO PITARCH, María, *Los recursos genéticos marinos de las zonas fuera de la jurisdicción nacional: Un antes y un después en su régimen jurídico a la luz del Acuerdo BBNJ*, Tirant Lo Blanch, Valencia, 2025.

With the imminent entry into force of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ Agreement), this monograph becomes a necessary reference for approaching the complex subject outlined in its title, "*Marine genetic resources in areas beyond national jurisdiction: A turning point in their legal regime in light of the BBNJ Agreement*," from the multiple perspectives required to address it. Life in the oceans is in danger as a result of human activity, and this work addresses one of its most challenging problems: the legal regulation of marine genetic resources. The author, María Carro Pitarch, has been driven by her passion for this subject to embark on an epic journey through the oceans and the international regulatory framework that should preserve them in the face of so many threats that endanger their very existence. As an adaptation of her doctoral thesis, the work presented here involved choosing a topic of enormous complexity, because the debates on its scientific and legal contours are not over, but rather extend into the future. As a result, we have a work that is meticulous in its form and profound and accurate in its analysis of a complex regulatory framework, which is always fragmented and always growing, driven both by scientific knowledge and by the applications to which it has been put in order to exploit marine areas beyond national jurisdiction. The author's starting hypothesis is simply that "the current regulatory regime has significant regulatory gaps that the BBNJ Agreement aims to fill, albeit with some deficiencies inherent in the process of adopting international treaties" (p. 24). To verify this hypothesis, the author embarks on five major chapters.

The first chapter, on *Marine Genetic Resources in Areas Beyond National Jurisdiction*, sets out the parameters for the scientific study of its subject matter, anticipating all the terms that are or should have been introduced in Article 1 on the terms used in the new BBNJ Agreement. This Article 1, as was the case with the Convention on Biological Diversity whose article 2 replicates its successes and mistakes has brought us the result of an ongoing conflict that has provisionally ended with the vagueness of many of the terms used, notably that of marine genetic resources. Therefore, given the legal vagueness, it was necessary to present marine biodiversity, and in particular marine genetic resources, with great rigor and precision from a scientific point of view, because "the definition enshrined in the CBD and in the BBNJ Agreement fails to precisely delimit the scope of the notion of marine genetic resources. There are two realities whose integration into the definition of 'Marine Genetic Resources' still raises debates at the international level: derivatives and digital information on genetic resource sequences (IDS)." For this reason, the author presents in exquisite detail the controversial subject she addresses in the following chapters on the legal analysis of the negotiation process and the results achieved in the BBNJ Agreement.

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In the second chapter on *The international legal regime governing marine genetic resources in areas beyond national jurisdiction*, the author analyzes a sectoral and fragmented regulatory regime resulting from its not always harmonious composition based on the two major regimes of international law of the sea and international environmental law, with the United Nations Convention on the Law of the Sea (UNCLOS), the Convention on Biological Diversity (CBD) and its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, which are the pillars that, as she points out, "form the basic framework on which the process of negotiation and adoption of the BBNJ Agreement has been based" and which will enable her to evaluate the new regime of the BBNJ Agreement (p. 70). Of particular relevance is her analysis of the complex relationship between the principles of both regimes governing marine areas beyond national jurisdiction: that of the Common Heritage of Mankind and the principle of freedom of the seas and, in particular, the principle of universal use, which subsumes freedom of marine scientific research. Following her examination, this chapter concludes with a section on *The international legal limbo of marine genetic resources in areas beyond national jurisdiction*, which highlights the existing gaps and provides a necessary reference point for addressing the challenges of the BBNJ Agreement negotiation and adoption process in chapter 3.

A long road to the adoption of the BBNJ Agreement is the title of the third chapter, which documents and analyzes in great detail not only the negotiation process of the Agreement but also the institutions that made it possible with the mandate set out in Resolution 69/292 of the United Nations General Assembly (UNGA), which stipulated that the negotiation process should not "detriment to existing legal instruments and frameworks and competent global, regional, and sectoral bodies" nor should it "affect the legal situation of those who were not party to UNCLOS or other related agreements" (p. 135). The author presents the progress and outcome of the negotiation process with its various drafts, in which multiple solutions were considered. The diversity and number of these solutions are the subject of a detailed analysis through various tables that facilitate understanding of the process in which some were rejected and others accepted. Certainly, it is worth highlighting the author's view of the place of marine genetic resources as one of the most controversial points in the process for the adoption of the Agreement within the Package Deal formula that was adopted by the various intergovernmental conferences following the adoption of UNGA Resolution 72/249. The search for an elusive consensus is what emerges from a careful examination of the five IGCS, in which marine genetic resources are a major challenge.

Chapters four and five deal directly with marine genetic resources, and the author proposed in her thesis that they be read together because they move from the generic to the specific, so that the general nature of chapter four is concretized with regard to resources in chapter five. Thus, in the monograph, chapter four examines the general provisions of the BBNJ Agreement, its preamble, the overall objective, and the guiding principles that will serve to understand the regime outlined in chapter five.

Chapter four is much more than a study of the *Intersectoral Provisions of the BBNJ Agreement with a key impact on the marine genetic resources regime*. It contains several chapters in itself, insofar as, after presenting the Agreement and its general objective, it focuses on the major systemic and specific principles applicable to marine genetic

resources. First, it analyzes the general objective as the "ultimate safeguard against interpretative inconsistency." It then delves into the analysis of the specific objectives of Part II of the Agreement on Marine Genetic Resources to highlight the unresolved conflicts over "the alleged dichotomy between conservation and sustainable use" and also those raised by the specific objectives themselves insofar as they could "distort the overall objective" because "this division of objectives, which may have been useful when negotiating the different parts separately, has the potential to generate conflicts when implementing the Agreement, either because they contradict each other or because they create an order of priority among them" (p.199). These objectives, which are a) fair and equitable sharing of benefits, b) capacity building and marine technology development and transfer, and c) generation of knowledge, scientific understanding, and technological innovation, are analyzed before moving on to the study of the scope of the Agreement and its exceptions. The last three sections of Chapter four could have constituted a separate chapter on principles, divided into a first part on "The relationship of the Agreement with other instruments, frameworks, and bodies: The feared shall not undermine or prejudice"; a second on the principles applicable to "The dispute underlying the new regime: between the Common Heritage of Humanity and the Principle of Freedom"; and a third on the "General Approaches and Principles of the Agreement."

The fifth chapter on "The new regime for the sustainable use and conservation of marine genetic resources in areas beyond national jurisdiction" addresses the most critical part of the work by examining "The new regime in light of the legal loopholes found in Chapter II, taking into account not only the provisions of the legal instrument, but also what was eliminated in the context of the negotiations that gave rise to it." In this way, her reflection sheds light on the final result in which, as has already happened in other conventions, a high price is paid for consensus, that of "constructive ambiguity," which the author explores in all the chapters. As with the fourth chapter, this fifth chapter could have been several chapters, insofar as its sections are so substantial and its analysis so complex that they have their own identity. The first of these sections, on "The scope of application of the provisions relating to activities concerning marine genetic resources and digital sequence information," addresses precisely the geographical, temporal, and material analysis, allowing the reader to see the contributions made by the Agreement with respect to UNCLOS and the CBD and the other conventions with which it interacts. The second section refers to "Activities relating to marine genetic resources and digital information on their sequences" and, after defining them, studies the guiding principles for carrying out such activities, which are the Agreement's real contribution in the field of marine genetic resources. Their future application and enforcement will be the great challenge to be overcome by the Agreement and the institutions responsible for it. This is dealt with in particular in the third section on "The implementation of an access and benefit-sharing regime," which will undoubtedly be the subject of future reflection on its implementation or lack thereof, given the difficulties in identifying the "triggers" of the distribution mechanism. The fourth section characterizes "Notification and deposit as obligations associated with activities related to marine genetic resources." The fifth section analyzes what is perhaps the most prodigious achievement of the Agreement: "Fair and equitable sharing of the benefits arising from activities related to marine genetic resources," and her study leads us to consider not only its conception as "a component of the Common Heritage of Humanity within the framework of the new international

economic order" but also its translation into practice, which will test the strength of the commitments made and the mechanisms provided for this purpose, such as the Agreement's financing mechanism and the institutional arrangements for the benefit-sharing regime, with the Access and Benefit-Sharing Committee and the Conference of the Parties as the main protagonists. The sixth section addresses the complex system of oversight and transparency in great detail and raises issues that may be the subject of future work when the planned mechanisms are put into operation. The last two sections address topics that could themselves be the subject of a doctoral thesis or the embryo of new monographs. Thus, the seventh section studies "The traditional knowledge of Indigenous Peoples and Local Communities associated with marine genetic resources" and the eighth deals with "A notable absence: Intellectual property rights over marine genetic resources."

The lengthy process of adopting the *Agreement under the United Nations Convention on the Law of the Sea relating to the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction* has left States exhausted and unwilling to address new conventional solutions when new social needs arise. Perhaps this is one of the most unexpected side effects. Another is the certainty that what has not been agreed upon will define the future of the BBNJ Agreement, for example, in the case of IDS digital information on genetic resource sequences which has yet to be defined. Therefore, the final conclusions will serve as coordinates for anticipating the challenges of the imminent entry into force of the Agreement and its implementation. The author seems committed to this issue going forward, because it "presents and will continue to present complex and significant challenges" in each of its components and because of the links created between the regulatory regimes that have converged to establish the sustainable use of marine genetic resources as the main objective over the conservation one. We can only wish this BBNJ Agreement success and trust that States will honor their commitments to it and its principles, and that the author will maintain her passion for continuing to offer us her invaluable analysis.

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DÍAZ GALÁN, Elena C., *La contribución de la Organización de Estado Americanos (OEA) a la seguridad hemisférica*, Dykinson, Madrid, 2023.

In her book, Professor Elena C. Díaz Galán offers a well-structured study on the role of the Organization of American States (OAS) in shaping hemispheric security from a legal perspective. Her work is not merely a normative exposition, but rather an easy-to-follow combination of descriptive content and analytical insight that contributes to the study of regional international law in the Americas, with a focus on security.

Indeed, perhaps the main strength of this work lies in the author's ability to present a comprehensive view of the multifaceted issue of security in the Americas, which has its particular features when compared to its counterpart at the universal level. Throughout the book, Díaz Galán links each legal and political dimension to the broader goal of achieving comprehensive and multidimensional security, in line with the evolution of the inter-American system from its pan-American roots to the present.

The book is structured in four chapters. The first chapter traces the origins of regional security from the early days of pan-Americanism up to the Second World War, highlighting the region's enduring concern with security. The author thoroughly examines the role played by the Inter-American Conferences as precursors of the OAS and as key venues for affirming fundamental regional principles such as the peaceful settlement of disputes, the prohibition of the use of force, and non-intervention. The reader can appreciate how the author highlights the milestones that have influenced the notion of security in the Americas, identifying the principles that underpin regional security. It is noteworthy how some criteria that were relatively important in the early stages have since been marginalised.

The second chapter focuses on the development of a hemispheric legal framework for security led by the OAS, which the author describes as "the privileged ally" for integration in this field. We may conclude, based on the author's research, that there has not been a clear and linear pathway; rather, shifting national interests have shaped positions and outcomes in the negotiation processes on regional security. Here, the 2003 Declaration on Security in the Americas, also known as the Mexico Declaration, is presented as a "foundational document" marking the transition towards a modern and multidimensional concept of security. Despite its political nature, Díaz Galán rightly identifies its value as a normative reference point for more effective cooperation among Member States. She concludes that this "new" concept of security must be based not only on respect for international legal principles but also, crucially, on democratic values: "*Lo primero que se dice es que el concepto de seguridad en el hemisferio se basa en valores democráticos*" a particular feature when compared to the universal level.

The third chapter addresses the principal areas of hemispheric cooperation on security. The book thoroughly examines both traditional concerns, namely collective security, disarmament, and arms control, as well as confidence-building measures; and more recent challenges, such as the fight against terrorism and transnational organised

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crime. The author emphasises the need for a common yet flexible approach that considers national and subregional particularities while advancing regional standards and coordination mechanisms.

The fourth and final chapter deals with the institutional framework of hemispheric security. This section makes a particularly meaningful contribution by underscoring that legal norms and principles alone are insufficient. Without a robust institutional architecture capable of implementing and coordinating agreed directives, the system remains incomplete. The author examines existing institutional options, including the strengthening of OAS bodies or the creation of new mechanisms. Particular attention is paid to the Inter-American Defense Board, the Committee on Hemispheric Security, and the Conference of Defence Ministers of the Americas. The underlying message is clear: institutional coordination is essential for effective regional security.

Arguably, one of the book's most valuable contributions lies in its treatment of the relationship between security, democracy, and human rights; elements which, as the author shows, are increasingly present in OAS discourse and practice. She highlights how the fight against threats such as terrorism or human trafficking must be grounded in fundamental rights and the rule of law. This approach reinforces the idea that regional security cannot be built separately from democratic values if stability and legitimacy are to be achieved.

In addition to the above, the book stands out for its accessible and engaging style. Its relevance is evident in the context of today's rapidly evolving security threats. The book does not attempt to construct a multifaceted theoretical definition of security in the Americas. Instead, the author deliberately sets aside theoretical elaboration and succeeds in her mission to define the legal framework and institutional architecture of security in the region, offering a valuable historical overview.

Berta Alam Pérez

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FERNÁNDEZ PONS, Xavier, ABEGÓN NOVELLA, Marta, CAMPINS ERITJA, Mar, (Dirs.), *Cambio climático, biodiversidad y salud pública global en el derecho internacional: de la fragmentación a la integración sistémica*, Tirant lo Blanch, Valencia, 2025.

A stark reminder of the fragile planetary health is published on a daily basis, be it under the form of the first African swine fever detection in Spain since late 1994[1], through the disappearance of endangered galaxy frogs in India as a result of reckless human action[2] or with the warning about the limits of carbon capture to fight climate change impacts[3]. These, and many others, are not three isolated facts to the extent that they are integrated, respectively, within a wider impoverishment of global public health, an accelerated loss of biodiversity and a notoriously-felt dangerous climate change. Albeit the concrete manifestations of these three global crises can be linked to very particular causes and, hence, lead to short-sighted solutions , it can hardly be disputed that their shared origin lies in a structural destructive human-ecosystem interaction[4]. International law does not stay static in this unequal interaction, participating in many different ways.

Historically, international law has kept an uneasy relation with the environment. Early modern international law was largely a system of permissive and facultative norms with regards to (ultra) hazardous activates[5], inheriting a productive vision of the environment that was key to distinguish the degree of sovereignty of potential colonies[6]. In the 50s and 60s, as a response to growing environmental harms, a global and interrelated vision of the environment was very slowly trying to take shape in international law. It was with the Stockholm Declaration that new environmental principles governing the behaviour and relations of States were acknowledged[7]. However, this progressive birth of international environmental law (IEL) coincided with the spread of other regimes whose need was assumed by many international actors and the academic literature[8].

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1 "Catalonia closes park after swine fever outbreak", *Reuters*, 29 November 2025, available at https://www.reuters.com/business/healthcare-pharmaceuticals/catalonia-closes-park-after-swine-fever-outbreak-2025-11-29/

2 "'Magical' galaxy frogs disappear after reports of photographers destroying their habitats", *The Guardian*, 17 December 2025, available at https://www.theguardian.com/environment/2025/dec/17/galaxy-frogs-disappear-photographers-habitat-kerala

3 Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, "The imperative of defossilizing our economies", A/HRC/59/42, 15 May 2025, at paragraph 16.

4 *See*, among many works pointing in that direction, Jason W. Moore, "Nature and the Transition from Feudalism to Capitalism", Review (Fernand Braudel Center) 26, no. 2 (2003) .

5 L.F.E. Goldie, "Liability for Damage and the Progressive Development of International Law," *The International and Comparative Law Quarterly*, 14, no. 4 (1965): 1221.

6 Usah Natarajan and Kishan Khoday, "Locating Nature: Making and Unmaking International Law," in *Locating Nature: Making and Unmaking International Law* (Cambridge, Cambridge University Press, 2022): 37-38.

7 Dina Shelton, "Stockholm Declaration (1972) and Rio Declaration (1992)," *Max Planck Encyclopedia of Public International Law* (2008), at paragraphs 19 and 20.

8 Martti Koskenniemi, "Hegemonic Regimes", in *Regime Interaction in International Law: Facing Fragmentation*, ed. by Margaret. A. Young (Cambridge, Cambridge University Press, 2012): 315.

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Importantly, the practice of international law through these specialized regimes led, and still leads, to quite some regulatory dysfunctions[9], conceding considerable weight to non-environmental regimes in many domains. Nevertheless, this fragmentation of (at times competing) obligations does not only take place between IEL and other regimes, but also between different sub-regimes in IEL. The international law of climate change, biodiversity and global public health are no exceptions to this dysfunction[10]. Fully aware of the demand for normative integration that the conception of international law as a system entails[11], as well as the multifactorial problems that they deal with, these legal (sub)regimes have tried to deepen their degree of interaction.

It is precisely in this quest for systemic integration, spurred by a more than scientifically justified sense of urgency, that the book *Cambio climático, biodiversidad y salud pública global en el derecho internacional: de la fragmentación a la integración sistémica* (edited by Tirant lo Blanch, 2025) makes a significant contribution. Directed by professors Xavier Fernández Pons, Marta Abegón Novella and Mar Campins Eritja, this collective work adopts a doctrinal perspective to analyse a selection of pressing multifactorial problems, rather new legal concepts, institutions and negatively affected geographical areas where these (sub)regimes (could) enhance international law's overall integration. Along these lines, I contend that the relevance of this book is three-fold.

First, from a methodological standpoint, the systemic integration lenses used in each chapter do not over-stretch the formal foundations of international law. Avoiding such road, easily taken when law's siloes are adjudged against the threshold of current material complexities, does not imply a degree of conformism that impedes discerning structural limits from lower deficiencies and existent legal improvements. In other words, the devise of systemic integration brings to the fore a continuum of deficiencies and potentialities within international law's margin of manoeuvre. Second, the book does not only approach (the lack of) integration between the (sub)regimes of climate change, biodiversity and global public health (*see*, for example, pages 154 and 187); it is also attentive to their fragmentation and difficult interaction with other external regimes such as international trade law (*see* pages 53-54, 137-138 and 309). This way, by means of the different appearances that integration can be materialized into such as the omnipresent *One Health approach* (*see*, among many others, pages 51, 243 and 267) or the CBDfication of CITES[12] (*see* page 286) , the concept of systemic integration is not only an analytical tool but it is also fine-tuned. Third, this work offers a thorough guidance of many agreements and decisions that very recently were adopted, had entered into force or were issued. Taking into account that it was published on the 11th of February of 2025, the fact that there are chapters focused on the Agreement on Marine Biological Diversity

9 Usha Natarajan and Julia Dehm, "Where is the Environment? Locating Nature in International Law", *Third World Approaches to International Law Review, TWAILR: Reflections* 3 (2019): 4.

10 *See* Report of the United Nations Secretary-General, "Gaps in international environmental law and environment-related instruments: towards a global pact for the environment," UN Document A/73/419, 30 November 2018, at paragraph 7.

11 Ángel J. Rodrigo Hernández, "La integración normativa y la unidad del derecho internacional público," in *Unidad y pluralismo en el derecho internacional público y en la comunidad internacional,* ed. by Ángel J. Rodrigo and Caterina Garcia (Tecnos, 2011): 323-324.

12 Convention on International Trade in Endangered Species, adopted 3 March 1973, 993 UNTS 243.

of Areas beyond National Jurisdiction[13] (entering into force in early 2026 after the last ratifications in September 2025), the Pandemic Agreement[14] (adopted in May 2025) and the Inter-American Court of Human Rights (IACtHR) landmark advisory opinion on climate emergency[15] (released in May 2025) speaks greatly of its timely significance.

The twelve chapters' structure does not follow an identifiable order, but this does not stand in the way of a rather smooth transition from one chapter to another. In terms of their content, and acknowledging that it could be problematic to attribute a sole topic to each chapter because of the regime interactions analysed in each of them, the European Union (EU) is the centre of three chapters. In particular, its legislation is examined through the concept of climate resilience, its last regulation on deforestation and its strategy on international wildlife trafficking. The spread of infectious diseases is object of two chapters: one adopting a wide planetary health perspective and a second detailing international law's involvement with antimicrobial resistance (AMR). Water is also deemed as a key part of the biosphere with a chapter on the BBNJ Agreement and another on international river basin organizations. Two chapters share the legal relevance conferred to (different parts of) civil society in an integrated governance; while one analyses the islands of Caribbean Sea through its grassroots organizations, the other concedes priority to the local knowledge dialogues methodology. Finally, two chapters scrutinize different human rights regional systems: one looks at climate change litigation of the European Court of Human Rights (ECtHR) and the other at the rights of access in the Inter-American Human Rights System (IAHRS).

The first chapter represents very well the blueprint for integration that this book aims to draw. In *Health, climate change and biodiversity: mapping regime interactions for future planetary health*, Stephanie Switzer examines the interconnectedness that takes place in the international legal processes involving these three regimes. Adopting a planetary health perspective, she dissects two case studies the content of the binding World Healths Organizations's (WHO) International Health Regulations (IHR)[16] and the negotiation of the Pandemic Agreement related with the governance of pandemics to illustrate how regime interaction should bear in mind the underlying structural path-dependencies present in one regime that could be dragged to such interconnection. It is very illustrative of this danger the containment bias focused on preventing the spread of infectious diseases beyond borders, leaving aside the drivers that set in motion spillover events. Swtizer shows that, even with the advantage of an existent increasing cooperation with international environmental-related organizations (such as the United Nations Environmental Programme (UNEP)) and an interlinkage with IEL, this bias survived the IHR COVID amendment by prompting a surveillance-oriented prevention and made its way to the negotiation framing of the Pandemic Agreement. To sum up, and without disregarding its potentialities, Switzer uses these case studies to give notice

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13 Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, A/CONF.232/2023/4, adopted 19 June 2023.

14 The Agreement is not open for signature yet. *See* "Nations adopt historic pledge to guard against future pandemics", *UN News* 20 May 2025, available at https://news.un.org/en/story/2025/05/1163451

15 *Climate Emergency and Human Rights*, Advisory Opinion OC-32/17, Inter-American Court of Human Rights Series A No 32.

16 International Health Regulations, adopted 23 May 2005, 2509 UNTS 79.

about possible epistemic closures in the interconnection occurring between other regimes.

The second chapter is situated in a context of never-ending crises that has affected how the EU identifies and decides about next urgent events. In such scenario, Mar Campins holds that the concept of climate resistance has generated a good deal of interest that has not been translated in juridical terms. In *El concepto de resiliencia climática y su delimitación en el Derecho de la Unión Europea*, she fills that gap by gauging to what extent the evolution of climate resilience in the normative framework of the EU adds a substantive element to the juridical debate. In this sense, she describes how the EU has shaped and used (climate) resilience to incorporate uncertainty and risk in its policies, theoretically helping to face structural challenges with the capacity to abandon the *status quo* instead of just seeking for a classical recovery. Campins proposes in a detailed analysis that the main objective of the European Green Deal[17] and the European Climate Law[18], albeit not explicitly stated in any of both texts, is the reinforcement of climate resilience. This way, the basis of climate resilience is unfolded and strengthened through the application of (key principles of) EU environmental law (such as those of precaution, non-regression and just transition).

Continuing with the EU's legal framework, Xavier Fernández Pons looks into the last EU legal measure that tries to have an impact over global deforestation. In *La acción de la Unión Europea para la protección de los bosques del mundo mediante restricciones comerciales: el Reglamento sobre productos libres de deforestación,* he explores to what extent the EU Deforestation Regulation[19] (EUDR) has a wide and ambitious scope (compared to prior similar regulations) and the legal limits it can encounter. In this sense, he notes that the EUDR overcomes the traditional approach to deforestation given that it does not leave out of its purview the deforesting activities legally allowed by the State of origin. Significantly, Fernández Pons devotes a greater part of the chapter to assess its compatibility with WTO law; he warns that the appropriate juridical place to identify the legality of a regulation that imposes (environmental) restrictions to those products whose process and production methods are not physically traceable in them (npr-PPMs) is not found in the likeness test but in the exceptions under article XX of the General Agreement on Tariffs and Trade[20] (GATT). Finally, he analyses the compatibility of EUDR with the two-tier test of GATT's article XX. While he interprets that its sub-paragraphs containing exceptions that justify the violation of GATT's substantive obligations – that is, the first tier – would not be an impediment, its *chapeau* protecting against the lack of arbitrary discrimination – the second tier – would be more challenging due to EUDR's classification of countries in different levels of risks.

17 European Commission, COM (2019) 640 final.

18 Regulation (EU) 2021/119, 30 June 2021, establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), Official Journal of the European Union L243/1, 9 July 2021.

19 Regulation (EU) 2023/1115, 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, Official Journal of the European Union L150, 9 June 2023.

20 General Agreement on Tariffs and Trade, adopted 30 October 1947, 55 UNTS 187.

If forests are key to store CO_2, the High Seas and the Area even in an international agreement devised to preserve its biodiversity are equally important for the governance of climate change. In *El cambio climático y la salud humana en el nuevo Acuerdo sobre la Conservación y el Uso Sostenible de la Diversidad Biológica Marina de las Zonas Situadas Fuera de la Jurisdicción Nacional*, Marta Abegón Novella analyses the recent BBNJ Agreement through the lenses of climate change and human health concerns. In that regard, she first examines the Agreement's ambivalence: one the one hand, it pays limited attention to both concerns (explicitly mentioning climate change six times and human health only two); on the other, these references are inserted in the main substantive parts of the Agreement. However, Abegón Novella pinpoints that its potential for climate change and human health also lies in other articles which, albeit not containing these direct references, can implicitly integrate these concerns. Notoriously, among the articles and concepts that she explains (such as the ecosystem approach), its stands out the Environmental Impact Assessment (EIA) in so far as it can have effects beyond the Agreement's scope of application and elevate the standards, for example, of the EIA regulations adopted by the International Seabed Authority. Last but not least, she also nuances that the relation with other agreements also works in the opposite direction, having to factor them in and seek for cooperation in the application of the BBNJ Agreement.

While climate change is one of the main threats to global public health, the spread of AMR cannot be disregarded as a minor risk. The abuses of antimicrobials in many (economic) sectors, as well as the lack of access to health services in many parts of the world, are behind a growth of AMR that is projected to produce the death of 10 million people yearly by 2050. In *Resistencia antimicrobiana y Derecho internacional: paradigma de un enfoque de integración sistémica*, Xavier Pons Rafols advocates for strengthening the international legal response hinging upon a *One Health approach* instead of the traditional segmented answer. Conceiving AMR as a multifactorial phenomenon originated and accentuated by the triple planetary crisis, his chapter reviews different soft law instruments adopted in the last ten years mainly by the WHO, but also the World Organization for Animal Health (WOAH) and the Food and Agriculture Organization of the UN (FAO), and assesses the centrality they conferred to the *One Health approach*. Taking into account the limits of using non-binding law against the serious challenge posed by AMR, he explores the possibility of resorting to articles 19 and 21 of the Constitution of the WHO which habilitate the adoption of conventions and binding regulations, respectively. Noticing the lack of political will and technical complexity hampering the usage of any of these two options, Pons Rafols suggests that a reference could be found in IEL, for its diluted normative content paired with its evolution in stages could foster a progressive deepening of procedural and substantive obligations to tackle AMR. Finally, he reviews the experiences of institutional coordination initiated to address this multifactorial problem.

The *One Health approach* is also central in Pol Pallàs Secall's *Los organismos de cuenca international ante el enfoque de "Una sola salud"*. Bearing in mind the importance of watercourses as to the state of the environment, Pallàs Segall holds that international river basin organizations have a role to play to narrow down and implement a *One Health approach* which, at first sight, does not seem to fit in the legal regime governing such organizations. Conceiving health as an element cross-cutting the environment, economy

and social well-being, he contends that the principle of integration (of these three very same dimensions) is the appropriate mandatory norm of international law through which these organizations can identify and update their legal obligations as to health. Such conclusion is reached by first analysing in detail the most relevant global conventions on international watercourses. Through the mapping of their health obligations, he concludes that the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes[21] with its consideration of any significant adverse effect on health and its inclusion of the protection of human well-being by means of its 1999 Protocol[22] is the most equipped to link the environment with health along the *One Health approach*. In such operative field, also delimitated by specific basin agreements and by different mechanisms such as health and environmental impact assessments which he both breaks down thoroughly , he clearly sheds light on the legal landscape where the principle of integration can help to build a *One Health Approach* to be followed by international river basin organizations.

In the chapter *Intersection between climate change, biodiversity and human health in the Caribbean: an integrated and civil society approach*, Luis E. Rodríguez-Rivera analyses how the differentiated negative effects product of the interaction of climate change, biodiversity loss and human health problems in the islands located in the Caribbean Sea are insufficiently tackled compared to many other close geographical areas. Accentuated by a history of colonization and exploitation of their natural resources that helps to explain their current political and socio-economic challenges, Rodríguez-Rivera fleshes out how the historical (and present) institutional response is not implementing the integrative approaches and strategies devised by the WHO (One Health) and by the conferences of the Convention on Biological Diversity[23] (CBD) and the United Nations Framework Convention on Climate Change[24] (UNFCCC). Very interestingly, he emphasizes that the traditional practices and discourses of national and regional organizations neglect the capacities and successful impacts of a well-coordinated civil society (and the work of grassroots organizations), advocating for a close connection between them to overcome this deficit. With his chapter, therefore, he shows that the practice of these organizations can be imbued with a popular tinge that is already factored in, and hence has legal room within, the strategies adopted to fulfil the aforementioned IEL. Finally, he concludes with a list civil society projects that have produced positive results in the absence of sustained and organized institutional help.

Against the background of a worldwide expansion of illegal wildlife trade (IWT), CITES has integrated into the assessment and compliance of its obligations the perspectives of biodiversity conservation. In *The European Union's response to the new CITES Strategic Vision 2021-2030*, Teresa Fajardo analyses how this "CBDfication", operating in an international legal context lacking a definition of environmental crime besides some soft law attempts, is legally addressed by one of the main destinations of illegal trade: the EU. Namely, in her chapter it is clearly fleshed out how the EU is trying

[21] UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, adopted 17 March 1992, 1937 UNTS 269.

[22] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, adopted 17 June 1999, 2331 UNTS 202.

[23] Convention on Biological Diversity, adopted 5 June 1992, 1760 UNTS 79.

[24] United Nations Framework Convention on Climate Change, adopted 9 May 1992, 1771 UNTS 107.

to tackle the fragmentation of standards followed by States and how it has a limited role regarding zoonosis imported by IWT. As to the fragmentation of standards, it is emphasized how the EU Action Plan on Wildlife Trafficking 2022 aims to widen the use of criminal convictions, instead of administrative infractions, for the most serious violations of CITES in all national jurisdictions. Lastly, in relation to the danger of zoonosis and the ensuing demands listed in CITES Secretariat's Notification 2023/028, Fajardo explains the small margin of action enjoyed by the EU product of the almost exclusive competence of Member States and the governance of the trade and animal health regimes and the development of international cooperation within it.

The loss of biological diversity cannot only be explored through the relevant and dynamic regime of IWT, but also along the lines of its relation with an impoverishing global public health. In *Presupuestos jurídico-internacionales para la salvaguardia de las comunidades tradicionales: diálogo de saberes y enfermedades globales a causa de la pérdida de biodiversidad,* Márcia Rodrígues Bertoldi explores such relation through the lenses provided by the local knowledge dialogues methodology. Building on the premise that local knowledge is the cultural dimension of biodiversity, popular wisdom accumulated through generations has a key role to play in the governance of global public health. Along these lines, and without confronting local knowledge to science but emphasizing the value of their cooperation, Márcia analyses how the protection of local knowledge in the field of genetic resources is operationalized in international law. She holds that certain provisions of the Nagoya Protocol[25], and of CBD too, provide a legal avenue to guarantee the respect of a traditional community's vision to respect biodiversity. Specifically, she details how the access to such genetic resources (as well as the benefits they generate) and the process to reach a consent with traditional communities (by means of the free and prior informed consent *and* mutually agreed terms) place local knowledge in a position to dialogue with scientific and technological knowledges.

The ceaseless phenomenon of climate change litigation is the object of study in Jaume Saura's chapter *International strategic litigation for the protection of climate*. In particular, he analyses three cases decided by the ECtHR *Klimaseniorinnen*[26], *Carême*[27] and *Duarte Agostinho*[28] to gauge how realistic is to use international human rights' courts to litigate climate change. First of all, by paying attention to the findings in prior climate cases before the Human Rights Committee and the Committee on the Rights of the Child, he implicitly creates a sort of yardstick that he resorts, at times, to analyze the progress in the three aforementioned ECtHR cases. Expectedly, the bulk of the chapter is an overview of the most important elements in these judgments, separating those belonging to their admissibility from those related with their merits. Regarding admissibility, he notes that none of the individuals in any of the three cases are recognized as victims, strongly suggesting that the locus standi conferred to the KlimaSeniorinnen association equates to accepting an *actio popularis* complaint. On that front it should be pointed that while certainly the association did not represent people that met the "special" climate victim test, this does not mean that

[25] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, adopted 29 October 2010, 3008 UNTS 3.
[26] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, 9 April 2024.
[27] ECtHR, *Carême v. France*, no. 7189/21, 9 April 2024.
[28] ECtHR, *Duarte Agostinho v Portugal and 32 Others*, no. 39371/20, 9 April 2024.

they were not affected people under the usual victim status[29]. Lastly, as to the merits, Saura warns that the heavy innovation of the ECtHR to find a breach of the right to private and family life in the insufficient measures adopted by Switzerland hides a legal danger in the "forced" incorporation of the climate change legal regime.

The last individual chapter is not distant from climate litigation. Gastón Medici-Colombo analyses the interaction between the IAHRS with its asymmetry of obligations but its receptive *corpus iuris* and the Escazú Agreement[30] an international instrument combining many novelties in the field of rights of access with parts lacking ambition too. In *El Sistema Interamericano de Derechos Humanos y el Acuerdo de Escazú: sinergias para el cumplimiento del Derecho internacional ambiental*, Medici-Colombo fleshes out a synergy operating in both directions but without any notorious imbalance. Namely, by analysing their content and juridical application, he firstly describes the impact of the (standards previously identified by the) IAHRS over the (gaps of the) Escazú Agreement, such as the latter's regime of exceptions. Secondly, he describes the scenarios where Escazú complements the work carried out by the IACtHR in the context of the greening of human rights. Finally, he applies the lenses of such virtuous relation to the governance of climate change, predicting that the Advisory Opinion requested by Chile and Colombia to the IACtHR[31] would entail a catalyzing effect orbiting around the Escazú Agreement. The Advisory Opinion delivered has proven he was spot-on, for one of the three central axes that the Court decided to address that is, the consistency of States' procedural obligations with the Escazú Agreement broadened the scope of the rights of access[32].

To conclude, the directors of the book (Xavier Fernández Pons, Marta Abegón Novella and Mar Campins Eritja) outline the most important findings of the chapters by differentiating between an institutional, normative and jurisprudential integration. While they hold that fragmentation is slowly fading away, they also caution that a lot of work still has to be done to ensure an ambitious and fair integration. Sharing their diagnose, I contend that in the context of the uneasy relation that international law holds with the environment, *Cambio climático, biodiversidad y salud pública global en el derecho internacional: de la fragmentación a la integración sistémica* maps different roads to avert a reactive legal intervention waiting for the governance of already generated environmentally-detrimental externalities. All in all, the analytical-depth of each chapter, the use of (systemic) integration from different perspectives and the timely-relevance of the topics addressed make this book an indispensable reference for international legal scholars.

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29 Corina Heri, "The ECtHR's KlimaSeniorinnen Judgment: A Cautious Model for Climate Litigation", *Spanish Yearbook of International Law* 28 (2024): 319.

30 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 4 March 2018, 3388 UNTS.

31 Chile and Colombia, '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.

32 Susana Borràs-Pentinat, "The IACtHR Climate Emergency Advisory Opinion: A Legal Analysis of the State Obligations", *Environmental Policy and Law* 0, no. 0 (2025): 5 and 15.

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HORRACH ARMO, Josep Gunnar, *La competencia judicial internacional en el ámbito de las plataformas de criptoactivos*, Colex, A Coruña, 2025.

The exponential growth of crypto assets, together with their potential as a means of exchange or savings, has meant that their possible risks interconnected with the banking sector have demanded the attention of legal operators both nationally and internationally. In general terms, there is no doubt that this means of cryptographic exchange offers opportunities for the financial ecosystem that require a flexible response from the authorities in order to ensure an adequate level of protection without hindering development and innovation.

In this regard, in the first chapter, Dr Horrach highlights that Regulation (EU) 2023/1114 of 31 May 2023 — known by the acronym MICA — provides fertile ground for analysing the representative role of crypto-asset platforms in the Single Market. He also carries out a necessary conceptual analysis and examines the custody and administration of crypto-assets, platform management, their exchange for funds, their placement, receipt and transmission, portfolio advice, and their impact on private international law. In relation to this last issue, the author states that, de *lege ferenda*, it would be advisable to create an EU Regulation on crypto-assets that would be applicable to determine international jurisdiction, the applicable law and the enforcement of decisions in this field (pp. 68-69). The conclusion of the article aims to inform the reader about the different types of crypto-assets based on the classification made by the MICA Regulation.

The second chapter focuses on applicable sources and preliminary issues. In an initial approach, Prof. Horrach points out that the international private law analysis carried out does not cover any transaction involving crypto-assets, but rather focuses on determining international jurisdiction in cases where crypto-asset platforms incur or may incur contractual or non-contractual liability. Therefore, the author intelligently lists the main sources that could potentially be applicable to determine international jurisdiction in matters of contractual and non-contractual liability. Namely, Regulation (EU) 1215/2012, the 2007 Lugano Convention, the Hague Convention on Choice of Court Agreements and, at the domestic level, LO 6/1985.

Following on from this detailed study, in the third chapter, entitled *Cláusulas arbitrales insertas en las condiciones generales de las plataformas de criptoactivos*, Dr Horrach assesses the scenario in which the general terms and conditions of contract include an arbitration clause to resolve disputes arising from users of these platforms, bearing in mind that this is common practice. The law applicable to the validity of the arbitration agreement, its formal and material validity, as well as the effectiveness and analysis of arbitration clauses make up the list of aspects developed throughout the chapter. To conclude, it is worth highlighting the author's effort in establishing an interesting list of operators — Binance, Coinbase, Crypto.com, Kraken, etc. — and concludes that a large number of them are unfair to consumers and valid for professionals because they do not meet the legal criteria of transparency, clarity, specificity and simplicity.

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Next, the fourth chapter reviews the jurisdiction clauses included in cryptoasset platforms, following the same pattern as in the previous chapter. It addresses the assessment of the law applicable to jurisdiction agreements, as well as the evaluation of the civil and procedural aspects included in the corresponding general terms and conditions of the contract. It concludes with a list of providers Coinbase EU, EToro, Avatrade, among others stating that most of the clauses analysed are valid from a civil law perspective [material validity and content], but invalid in terms of the procedural aspects of the agreement insofar as they do not meet the admissibility criteria described in Article 19 of Regulation (EU) 1215/2012, as they do not allow consumers to bring claims before courts other than those provided for in the consumer section (p. 180).

Las anti-suit injunctions o medidas antiproceso en el ámbito de las plataformas de criptoactivos are addressed in the fifth chapter, which is supported by three insightful sections. It first presents a conceptual and teleological approach to anti-suit injunctions, then specifies the anti-suit *injunctions* issued by a court that affect the international jurisdiction of another court, and finally clarifies how anti-suit measures affecting arbitration proceedings should be treated.

One important issue that has not yet been addressed in the work is the Forum's approach to contractual matters (Chapter Six). Dr Horrach Armo begins by addressing the legal nature of the underlying contract, although he does maintain that, as a general rule, the most common contractual obligation is the contract for the provision of crypto-asset services. A matter of paramount importance is the assessment of the argument that not all activities carried out by the platform fit within the autonomous notion of "provision of services" set out in Article 7.1.b) of Regulation (EU) 1215/2012. For this reason, he analyses at length whether it is possible to classify them under the types of contracts provided for in the aforementioned article or whether, on the contrary, the general rule described in Article 7.1.a) of Regulation (EU) 1215/2012 should prevail. This aspect leads Prof. Horrach to verify how certain platforms, namely Kraken, Gate.io, Coinbase, etc., do not define the place of supply, unlike others, such as Robin Hood USA.

The seventh chapter deals with the forum for consumer matters. It begins by briefly introducing the autonomous conceptualisation of the consumer outlined by the CJEU, before delving into the application of Article 18 of Regulation (EU) 1215/2012 and concluding that this forum is ideal in the field of crypto-assets, as it is predictable for the parties and is applied without regard to the conceptualisations provided for in the MICA Regulation because, in the author's words, only the autonomous concepts of Regulation (EU) 1215/2012 are taken into consideration (p. 268).

The forum for criminal or quasi-criminal matters will be the focus of chapter eight, which perfectly showcases the author's expertise in this area, as it brilliantly defines the 'theory of ubiquity' regarding unfair acts, acts against personality rights, intellectual and industrial property offences, unjust enrichment and financial damages. In the final part of this chapter, he formulates a postulate based on the idea that most of the offences analysed are not carried out through a distributed network, but rather take place through the platform's IT infrastructure or are simply carried out online and target a specific platform. For this reason, he rightly advocates applying the general rules established by the CJEU to determine the place of the causal event and the place where the damage

occurred for offences committed via the internet, without losing sight of the special characteristics derived from the scope of such platforms.

Chapter Nine examines the general *forum* of the defendant's domicile. Dr Horrach concludes that the *forum domicilii* may be particularly useful when the injured party seeks to bring precautionary measures to avoid an imminent risk arising from possible unlawful conduct, as well as for preventive actions, cessation or prohibition of future repetition, as long as the proximity between the subject matter of the dispute and the court hearing the claim is evident. Obviously, the author reminds us that platforms must have a registered office in the EU in order to provide crypto-asset services and, in addition, must carry out actual management within the Union.

As a corollary to this work, the tenth chapter shows the *forums* that the claimant can use if they intend to bring an action against a number of parties in the field of platforms, either because they voluntarily wish to carry out a subjective joinder of actions or because, in view of the circumstances, the *lex fori* requires the constitution of the necessary joinder of defendants. Prof. Horrach astutely observes that resorting to subjective joinder of actions will depend on the claimant's procedural strategy and the circumstances, since it will sometimes be easier to obtain effective judicial protection by suing only some of the parties involved (p. 320).

It can be concluded that, as can be seen throughout the various chapters that make up the book under review, we are dealing with a work that is rich in content, which essentially addresses a highly topical issue from an international-private law perspective, providing a detailed analysis of the case law of the Court of Luxembourg with commendable clarity and precision. In addition, there are relevant proposals resulting from the practical exploration of crypto asset providers in the intra-European market, where the author detects certain problems in this area, due in large part to the profuse legislative activity that has taken place in recent years. This highly positive result was also shared by the members of the jury, who awarded this research work the *Primer Accésit Colex Colección de Derecho Internacional Privado*.

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LARA AGUADO, Ángeles, *La identidad de las personas transgénero, transexuales e intersex en situaciones de movilidad internacional*, Aranzadi La Ley, Madrid, 2025.

Published under the auspices of the Project I+D+I "El derecho al respeto a la vida familiar transfronteriza en una Europea compleja: cuestiones abiertas y problemas de la práctica", Project PID2020-113061GB-100, directed by Professor María Victoria Cuartero Rubio, a project that has also resulted in the magnificent and essential work *El derecho de familia a la luz del derecho fundamental europeo al respeto a la vida familiar,* published by Aranzadi (2025) and co-directed with José Manuel Velasco Retamosa, in which Professor Lara Aguado contributes "Identidad sexual y de género y derecho a la vida privada y familiar en la jurisprudencia del TEDH", the monograph we are reviewing is a very valuable result of this Research Project.

This is absolutely relevant, not only because the approval in Spain of *Law 4/2003, of February 28, for the real and effective equality of trans people and for the guarantee of the rights of LGBTI people*, the so-called "Trans Law", is recent, but also because the need to provide a response to the mobility situations of these people who need to have their personal identity recognized wherever they move is becoming increasingly urgent, without the recourse to international public order being used as a barrier on that recognition.

This has been demonstrated, for example, in the context of the European Union, by its Court of Justice, which in its judgment of 4 October 2024, Case C-4/23, *Mirin* [ECLI:EU:C:2024:845], held that it contravenes the right to free movement of persons within the European Union for Romania to require a new determination of gender identity under its legal system from a transgender man with dual Romanian-British nationality who had legally changed his name and gender identity in the United Kingdom. This represents an incipient development of the principle of mutual recognition as a premise for consolidating the European judicial area, which has been affected by other issues that impact on people's identity in a context of increasingly pronounced cross-border mobility. First came the names of the natural persons, which Professor Lara Aguado has worked on extensively (*see* judgments of 30 March 1993, Case C-168/91, *Konstantinidis* [ECLI:EU:C:1993:115]; of 2 October 2003, Case C-148/02, *García Avelló* [ECLI:EU:C:2003:539]; of 14 October 2008, Case C-353/06, *Grunkin-Paul* [ECLI:EU:C:2008:559]; of 22 December 2010, Case C-208/09, *Sayn-Wittgenstein* [ECLI:EU:C:2010:806]; of 12 May 2011, Case C-391/09, *Runevič Vardyn* [ECLI:EU:C:2011:291]; of 2 June 2016, Case C-438/14, *Bogendorff* [ECLI:EU:C:2016:401] and of 8 June 2017, Case C-541/15, *Freitag* [ECLI:EU:C:2017:432]), then the need *to* interpret the concept of spouse autonomously (*see* judgment of 5 June 2018, Case C-673/16, *Coman* [ECLI:EU:C:2018:385]), later came questions on parentage (*see* judgment of 14 December 2021, Case C-490/120, *Pancharevo* [ECLI:EU:C:2021:1008] and of 24 June 2022, Case C-2/21, *Rzecznik* [ECLI:EU:C:2022:502]) and, finally, gender identity has arrived with the *Mirin* case. The Case C-713/23, *Wojewoda Mazowiecki,* is currently pending, raising the question of whether it is contrary to EU law for a Member State, in this case Poland, to refuse to recognize and register in its national civil registry

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a marriage certificate for a marriage between a Polish national and another EU citizen (of the same sex) celebrated in another Member State (Germany) under the latter's law, thereby preventing the two individuals from residing in the first Member State with that civil status and the same surname, because the law of the host State does not recognize same-sex marriages. The Advocate General, Richard de la Tour, delivered his opinion on 3 April 2025 [ECLI:EU:C:2025:235], concluded that EU law obliges a Member State to recognize a same-sex marriage celebrated in another Member State, but not to register the marriage certificate in its civil registry.

Professor Lara Aguado's monograph is of great value, as it is the first work on the identity of transgender, transsexual, and intersex people from an international perspective published in Spain. Rigorously and with a rich analysis of all the issues and concepts involved some of which are not always used correctly in academic circles the work meticulously dissects the subject, offering the reader a clear narrative and a wealth of insightful ideas for approaching the topic.

Thus, the monograph is divided into four chapters, seasoned with a necessary introduction, which, as a contextualization, clarifies the concepts that will be used throughout the work, and ends with clear and precise conclusions that are very useful in order to fully appreciate this exceptional work.

Chapter I, entitled "Identity in the Context of Human Rights," addresses sexual identity and gender identity as emerging human rights, as the author describes them. She analyzes the distinction between sex and gender, referencing the controversial opinions of a certain sector of feminism that advocates a clear biological determinism and, consequently, denies the appropriateness of using the category of gender. This chapter also addresses the need to reconcile the continuity of sexual/gender identity with respect for human rights, which we consider one of the main goals and a unique challenge of our time.

Chapter II, entitled "Sexual and gender identity in the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union", provides a thorough and necessary analysis of the main jurisprudential milestones of these courts, highlighting the need to address them jointly, since although both base their premises of action on different realities, in the end, guaranteeing the unique identity of the person transcends and unifies the results of both judicial instances.

Chapter III begins the analysis of positive law, specifically from a comparative law perspective. This chapter is of paramount importance because it provides insights into the various models of recognition of sexual and gender identity in different countries in Latin America, Asia, Oceania, Africa, and Europe. It is undoubtedly one of the most significant chapters in the book.

Finally, Chapter IV, entitled "Sex, name and their changes linked to sexual identity and the subjective feeling of gender (gender identity) in Spanish private international law" represents an effort to draw consequences from the perspective of Spanish Private International Law of the "Trans Law", whose regulation in this sense is scarce, highlighting the shortcomings and proposals for integration in a very rich analytical exercise.

In short, this is a rigorous and solid work, well-documented, with a detailed analysis, typical of a top-level jurist such as Professor Lara Aguado. It is an essential book, whose mere existence deserves high praise, since until now, and in our country, this topic has not been extensively addressed. From now on, and for all who will come after, as is certain, this work will be required reading.

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LÓPEZ RODRÍGUEZ, Ana Mercedes, *Resolución de conflictos en el metaverso*, Tecnos, Madrid, 2025.

Exploring the metaverse means entering a space that remains invisible yet increasingly shapes our everyday interactions. Within this environment, individuals acquire goods with no physical substance, construct alternative identities, and engage in transactions that generate rights and obligations as real as those arising in the tangible world. It is a domain where avatars, tokens, virtual properties, and automated decision systems coexist in ways that challenge traditional legal logic. Yet despite its futuristic appearance, this digital universe raises profoundly contemporary questions: Which courts may exercise jurisdiction over disputes emerging within it? Which law governs these interactions? How is liability organised when conduct does not occur in any identifiable physical space? This comprehensive analysis unfolds across ten chapters, each addressing a different dimension of the metaverse and its legal implications.

In the opening chapters, López Rodríguez presents virtual worlds, their various types and the risks they entail. She makes a clear effort to delineate the object of study, distinguishing between social, educational, simulation-based, and commercial environments. This classification helps to reveal that not all virtual settings pose the same challenges. Moreover, the author identifies issues such as privacy, security, and cross-border interactions as central elements for understanding why Private International Law becomes a necessary point of reference. In this way, the reader understands from the outset that the law does not approach the metaverse as a marginal curiosity, but as a natural consequence of the digitalisation of human relations.

The metaverse is then distinguished from adjacent concepts such as augmented reality, virtual reality, and the evolving Web frameworks. The analysis avoids unnecessary technicalities and instead focuses on why these environments, despite their novelty, generate legal relationships that demand coherent responses in areas such as contracts, liability, property, identity, and cross-border disputes.

The book proceeds to examine the structural elements of the metaverse: blockchain technology, smart contracts and DAOs. These are presented with clarity, allowing even readers without technical background to understand why notions such as legal personality, domicile or liability take on new dimensions when applied within decentralised systems. These issues are legal in essence, yet they require reinterpretation in settings where interactions are not anchored to any fixed territory.

The figure of the avatar receives substantial attention. The author explains its various forms and functions, its connection to digital identity, and the privacy, security and data-protection issues that arise. She also examines the possible legal personality of avatars and the attribution of responsibility for their actions. Although no definitive conclusions are offered — because the area remains unsettled — she sets out the competing doctrinal positions clearly and demonstrates why these debates will be pivotal for the future development of the metaverse.

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The following chapters address more traditional fields of law: contracts concluded in virtual environments, consumer relations and employment relations that may arise from activities carried out within the metaverse. The author analyses how these categories must be adapted to digital settings, what specific features characterise transactions online, and what challenges arise concerning jurisdiction and applicable law when interactions occur between parties in different countries or when platforms operate without a clear territorial basis. This analysis underscores that, although the medium is new, the underlying legal structures remain recognisable, though affected by digital delocalisation.

The thematic breadth of the book is particularly evident in the chapters devoted to virtual goods and intellectual property. The author examines NFTs, their legal nature, the challenges posed by decentralisation, the rules governing their transfer and the jurisdictional questions they raise. She also explores virtual immovable property, movable property and intangible goods within the framework of Private International Law. These chapters illustrate how classical property-law concepts must be re-evaluated when the objects in question exist solely in virtual form.

All of this leads to what is arguably the book's most innovative and thought-provoking contribution: the reflection on the possible emergence of a *Lex Metaversi*. The author explains that the inadequacy of traditional connecting factors – anchored in territorial criteria – and the increasing complexity of digital interactions may encourage the development of a substantive body of rules created within the metaverse itself, akin to the historical evolution of the *Lex Mercatoria* or the more recent *Lex Cryptographia*. This *Lex Metaversi* is not presented as a substitute for state law but as a potential complement capable of addressing disputes that current legal systems are not yet prepared to manage. The author recognises that such developments will be controversial, raising questions of legitimacy and institutional control, but demonstrates how, in fully digital scenarios, they may offer practical and effective solutions.

The final reflections include concrete proposals, such as employing the *voie directe* approach in metaverse-related disputes, acknowledging the role of self-executing decisions within blockchain environments, and developing principles on virtual property, civil liability, and user protection. The author also highlights the role that organisations such as ELI and UNIDROIT may play in formulating guiding principles that could, over time, form part of a future *Lex Metaversi*. The book concludes by emphasising the need for cooperation among legislators, platforms, academics, and users in constructing regulatory frameworks capable of addressing a world that, although intangible, produces fully real legal effects.

Beyond its analytical depth, the book stands out for the clarity with which it exposes the methodological challenges that Private International Law faces in digital environments. One of its most valuable contributions lies in showing how traditional connecting factors – domicile, habitual residence, place of performance, the place where the damage occurs – begin to lose descriptive force in spaces where geographical localisation is either irrelevant or technically indeterminable. Instead of framing this as a crisis of the discipline, the author presents it as an opportunity to reassess the conceptual tools that have historically structured cross-border legal reasoning. Her approach demonstrates that the metaverse functions not as an exception to legal theory, but as an accelerator that exposes pre-existing tensions within the field.

Moreover, the book succeeds in situating the metaverse within broader debates on digital governance. The discussions surrounding decentralisation, automated decision-making and self-executing mechanisms resonate with contemporary questions about legal authority, democratic legitimacy and institutional accountability. These concerns are not treated abstractly: they are grounded in concrete examples virtual property transactions, avatar-related disputes, decentralised organisations showing how these issues materialise in practice. The author does not offer prescriptive solutions; instead, she maps the conceptual terrain with care, inviting the reader to reflect upon the kinds of legal architectures that might be capable of responding to digital complexity.

Perhaps the most compelling aspect of the work is its insistence that the metaverse should not be viewed merely as a technological novelty but as a transformative environment whose legal significance is already manifest. By articulating the contours of this new domain with precision and analytical sobriety, the book offers a framework that will undoubtedly prove essential as legal systems increasingly confront disputes arising in virtual spaces.

Taken as a whole, *Resolución de conflictos en el metaverso* provides a comprehensive, clear and well-grounded analysis of a phenomenon already generating tangible legal consequences. The work combines traditional legal subjects with features intrinsic to virtual environments tokens, avatars, virtual real estate and shows that reading this book means confronting a legal reality that, although it may initially seem futuristic, is already unfolding. The reader is left with the impression that the metaverse is not a world yet to come but one already present, and one that demands and will continue to demand solid legal responses, especially from Private International Law.

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OANTA, OANTA, Gabriela A. (Ed.), *The Presence of International Organizations in the Evolution of the International Law of the Sea: Thirty Years since the Entry into Force of UNCLOS*, Brill/Nijhoff, Leiden/Boston, 2025.

Edited by Dr. Gabriela A. Oanta, Full Professor of public international law at the University of A Coruña (UDC), the book "The Presence of International Organizations in the Evolution of the International Law of the Sea: Thirty Years since the Entry into Force of UNCLOS" makes a substantial and opportune contribution to the understanding of the role played by international organizations in shaping the contemporary international Law of the Sea under the framework of the United Nations Convention on the Law of the Sea (UNCLOS). This volume represents a valuable insight, as it offers an in-depth analysis of how international organizations engage in decision-making processes concerning maritime governance, including the regulation of ocean-based activities, the management of marine natural resources, and the impact on affected communities. This study is also particularly timely, as the adoption of UNCLOS on 16 November 1994 marks three decades since its entry into force — an opportune moment to reflect on its implementation and assess the emerging challenges it faces.

Widely recognized as the "constitution of the oceans", UNCLOS has long provided a comprehensive legal framework for governing numerous aspects of the use and management of the world's oceans and seas — from the delimitation of maritime zones and the regulation of marine resources to the protection and preservation of the marine environment, the peaceful settlement of maritime disputes, and more. However, the international context has evolved, giving rise to new challenges such as climate change and ocean acidification, overexploitation of marine resources, and growing interest in new economic activities like seabed mining, among many others. Against such a backdrop, this book highlights the crucial role that international organizations have played — and continue to play — in the interpretation, application and development of UNCLOS provisions and rules within an increasingly dynamic and complex global context.

The book stems from the Conference of the same name, held at the UDC on 23 February 2024, organized within the framework of the Jean Monnet Chair European Union Law of the Sea, with additional support from the European Society of International Law (ESIL). That event brought together professors and researchers from 18 universities across eight European countries (Finland, France, Germany, Greece, Italy, Norway, Spain and the United Kingdom), many of whom now contribute to this collective work. Opened with a carefully crafted introduction by the editor, the resulting co-authored volume comprises 16 chapters that explore the influence of international organizations in the evolution of the international Law of the Sea. The book is thoughtfully structured into three main parts which systematise the analysis by differentiating between international organizations of universal scope and those operating at the regional level. A third part is specifically devoted to the European Union (EU), acknowledging its particular importance in this

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field. Each part is preceded by a brief and useful introduction, providing readers with a helpful overview of the chapters that follow.

The first part, comprising four chapters, examines the role of universal international organizations in the development of the international Law of the Sea. As the editor herself explains, numerous organizations of this kind have contributed to shaping this legal field. However, the book concentrates on those that have a universal vocation, being open to the participation of all States. Among them are some general-purpose organizations whose activities are not confined to a specific area of cooperation, as well as others that pursue more specific objectives and have been attributed competences related their particular mandates. Naturally, Chapter 1, authored by Gabriela Oanta (Universidade da Coruña), examines the role of the United Nations — an almost universal organization with 193 Member States and general purposes — to the adoption of UNCLOS and the evolution of the international Law of the Sea. As Dr. Oanta concludes, the United Nations — and its principal organs — has proved to be an important international actor on the maritime scene, facilitating cooperation between other international actors and contributing to reaching consensus and compromises between them.

The subsequent chapters focus on other universal international organizations which pursue specific aims: Chapter 2, by Laura Carballo Piñeiro (University of Vigo), examines the role of the International Maritime Organization (IMO); Chapter 3, by Ilias Plakokefalos (National and Kapodistrian University of Athens), addresses the contribution of the Food and Agriculture Organization of the United Nations (FAO); and Chapter 4, by Mitchell Lennan (University of Aberdeen) and Stephanie Switzer (University of Strathclyde), explores the influence of the World Trade Organization (WTO). Their analysis demonstrates how universal international organizations have played a key role in applying UNCLOS provisions and advancing the development and crystallization of the contemporary international Law of the Sea.

The second part of the book, in turn, examines the influence of regional international organizations and institutionalized cooperation mechanisms in this field. Unlike the universal international organizations discussed in the first part, these ones are closed or restricted international organizations, with a more limited membership composed of States that meet specific criteria established in their constitutive treaties or functioning rules. Such international organizations have been created in response to particular geographical considerations, as well as to recognise shared interests of a group of states in maritime-related matters. The seven chapters that comprise this part explore a diverse range of these international organizations, from those that recognise specific maritime areas of an economic, fishing or environmental nature, to those that respond to geographical proximity. In this regard, Chapters 5 to 8 analyse, respectively: the role of Regional Fisheries Management Organizations and Agreements (Chapter 5, by Youri van Logchem, Artic University of Norway); the Regional Seas Agreements (Chapter 6, by Miguel García García-Revillo, University of Córdoba); the Baltic Marine Environment Protection Commission (Chapter 7, by Viljam Engström, Abo Akademi University); and the Port State Control Detention Review Panels (Chapter 8, by Arron N. Honniball, Max Planck Foundation for International Peace and the Rule of Law). Building on this analysis, the following three chapters turn to regional international organizations established in response to geographical contiguity: Chapter 9 examines

the Council of Europe (by Susana Sanz Caballero, University CEU Cardenal Herrera); Chapter 10 explores international organizations in Asia and Oceania (by Géraldine Giraudeau, University of Paris-Saclay); and Chapter 11 focuses on regional international organizations and fora in Africa and Latin America (by Andrea Caligiuri, University of Macerata). They all illustrate how regional international organizations also contribute to the development and strengthening of the international Law of the Sea, within the framework of their competences and areas of activity.

Among the international organizations with the greatest influence on both the development and application of the Law of the Sea, the EU stands out. This prominent role justifies its dedicated analysis in the third and final part of the book, which comprises five chapters. The individualized treatment of the EU is also grounded by its unique nature as an international organization that not only promotes cooperation among its Member States but also pursues their integration in areas where sovereign competences have been transferred to EU institutions. This third part opens with and overall analysis of EU contribution to the development of the international Law of the Sea (Chapter 12, by Guillaume Le Floch, University of Rennes). The subsequent four chapters focus, then, on different manifestations of EU action in relation to the seas and oceans: Chapter 13 (by Eduardo Jiménez Pineda, University of Córdoba) addresses the EU's involvement in the pacific settlement of maritime disputes; Chapter 14 (by Mar Campins Eritja, University of Barcelona) examines the EU action regarding climate change in relation to the marine environment; Chapter 15 (by Jessica NM Schechinger, Artic University of Norway) explores EU's role in combating maritime piracy; and Chapter 16 (by Mercedes Rosello, University of Lincoln) analyses the EU's efforts to address the illegal, unreported and unregulated (IUU) fishing.

Together, the 16 chapters provide valuable insights into the essential role that international organizations have played in the evolution of the international Law of the Sea. They highlight how these organizations have been fundamental in the development and implementation of UNCLOS, also influencing soft law instruments that guide state practice in this field. The book clearly demonstrates that, without the proactive engagement and sustained efforts of these international organizations, the contemporary Law of the Sea would be significantly different and certainly less prepared to address emerging challenges in maritime governance.

In conclusion, this rigorous and carefully crafted volume is an indispensable reference for both scholars and practitioners seeking to deepen their understanding of the crucial role that international organizations play in the adoption, interpretation, and application of UNCLOS, as well as in the broader development of contemporary international Law of the Sea.

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PALLÀS SECALL, Pol, *The Principle of Integration in International Watercourse Cooperation Regimes*, Brill/Nijhoff, Leiden/Boston, 2025.

Whether considered a paradigm, goal, parameter, norm, principle or concept, sustainable development has undoubtedly become a key element of the international agenda and of international environmental law in recent decades, including international watercourses law. Integrating economic, social and environmental dimensions is essential for implementing sustainable development, a process which is extremely complex. Despite its practical importance, the author of this book rightly describes the principle of integration as 'poorly conceptualised compared to its theoretical relevance and the magnitude of its practical application.' (p. 2) At the same time, the vital and multidimensional nature of international watercourses makes it an interesting and relevant area in which to analyse the integration of their economic, social and environmental dimensions, with important mutual influences evident in the evolution of both sustainable development and international watercourses law. This analysis is even more crucial in the current context of ecological and climate crises.

This is precisely the research presented in this book, which is an abridged and revised version of the doctoral thesis written by Pol Pallàs Secall to obtain his PhD at the University of Barcelona (Spain). Though its pages, the author seeks to answer the following main research question: How the principle of integration is applied in current and potential practice in international watercourse cooperations frameworks?. The underlying hypothesis is that general international law, including international watercourse law, incorporates the objective of sustainable development by integrating economic, social, and environmental dimensions, which in turn requires the implementation of specific legal and institutional integration mechanisms.

The book is divided into three parts and thirteen chapters, in which the main research questions and background hypothesis are thoroughly explored. Part 1 introduces the concept of integrating economic, social and environmental factors to achieve the sustainable governance of international watercourses. To this end, Chapter 1 presents the legal basis for the principle of integration. Chapter 2 then analyses how the principle of integration interacts with international watercourse cooperation frameworks, providing specific analyses of its relationship with the main substantive and procedural obligations of international watercourse law as discussed in Chapters 3 and 4. Chapter 3 covers the analysis of this principle in the context of the substantive obligations of equitable and reasonable utilization, not causing significant harm, and protecting international watercourses. And Chapter 4 covers the analysis of the principle of integration in relation to the procedural obligations of prior notification of planned measures, conducting environmental impact assessments, consulting with other riparian states, and exchanging data and information.

Part 2 and 3 focus on the two dimensions of the principle of integration: legal integration and institutional integration, including their study thought the lens of existing cooperation regimes on a set of selected international watercourses, mainly: the

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Danube River, the Dniester River, the International Joint Commission between Canada and United States of America, the Mekong River, the Niger Basin, the Sava River and the Senegal River.

The study of the legal integration of economic, social and environmental dimensions in international watercourse regimes in Part II begins with an analysis of the inclusion of a legal integration mandate in selected international basin agreements (Chapter 5). The author then examines additional ways of legal integration in this context: a) the indirect application of other international agreements through inter-treaty, inter-regime, and inter-disciplinary references (Chapter 6); b) the utilization of norms that promote the consideration of economic, social and environmental values in the application of international basin agreements through intra-treaty integration, integrative principles guiding their implementation, and integrative approaches developed by soft law instruments; and c) the interpretation carried out by international watercourse dispute resolution mechanisms through teleological treaty interpretation, evolutionary terms interpretation, and open-textured obligations interpretation.

Part 3 is devoted to the mechanisms for the institutional integration of the economic, social and environmental dimensions in international watercourse regimes. It begins with an analysis of the institutional conditions for an integrated decision-making process, i.e. the practices and instruments that international river basin organisations use to implement this form of integration (Chapter 9). The subsequent chapters expand upon this analysis of institutional integration at various levels, from general to specific: in the development of an international basin policy (Chapter 10), the management of international river basins (Chapter 11), and the planning of projects affecting international watercourses (Chapter 12). The methods for making informed decisions and policies, stakeholder involvement, and other integrated policies and approaches are identified and studied at these three levels. This section and the book conclude with a final chapter containing final conclusions (Chapter 13).

The main conclusion reached by the author is that despite the analysed wide availability of instruments for the recognition and application of the principles of integration, they are still insufficiently utilized in international watercourse cooperation mechanisms. While practice show considerable flexibility by International Rivers Basin Organizations in the adoption of institutional integration mechanisms not foreseen in international basin agreements, mechanisms for legal interpretation are still widely underused, offering potential opportunities for improvement (p. 319).

Therefore, the book provides a comprehensive analysis of the theoretical and practical implications of applying the principle of integration to international watercourse law, as well as a review of how this principle is currently being implemented. In doing so, it enriches studies of both sustainability and international watercourse law and on mechanisms for legal and institutional integration by providing a detailed and extensive treatment of a research topic that was previously under-researched. At the same time, it provides practitioners and policymakers with an excellent tool to help them implement the principle of integration more effectively in specific transboundary river basins and at different levels. The book also showcases the author's profound legal expertise, demonstrating his mastery of international watercourse law, the principle of integration, and regulatory and institutional integration techniques. It also demonstrates the author's

extensive knowledge of other areas of international law, as evidenced by examples drawn from international diversity law, law of the sea, and European Union law.

In short, this book is essential reading for all those working in the field of international watercourses law, including scholars, policymakers, practitioners and other stakeholders. Given the broad applicability of the principle of integration, it is also highly relevant to other areas of international environmental law.

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PLA ALMENDROS, Rosa, *La solución extrajudicial de disputas transfronterizas en el Reglamento europeo de servicios digitales*, Colex, A Coruña, 2025.

The work that is the object of this review has the purpose of offering an exhaustive, orderly and systematic study of the European legal framework in the field of alternative online dispute resolution (ODR), contextualized in the growing relevance of the platform economy. Its author, Rosa Pla Almendros, addresses both the extrajudicial mechanisms provided for in Regulation (EU) 2022/2065, known as the Digital Services Regulation (DSR), and their relationship with the broader set of European instruments for the protection of users in digital conflicts. Through this analysis, the monograph diagnoses the fragmentation and lack of coherence of the current European system, while putting forward proposals for regulatory reform to strengthen it.

The monograph focuses on determining whether the extrajudicial resolution mechanisms provided for by the DSR — especially aimed at challenging content moderation decisions taken by platforms — constitute effective protection tools for digital users. However, the author does not limit her analysis to the regulation, but inserts it into the broader context of European regulations related to ADR-ODR, examining how these instruments interact with each other, where they overlap and what incoherences they generate.

The book is divided into two parts and conclusions.

In the first part, entitled "The legal framework of ODRs as a means of protecting the digital user in the European Union", the European legal framework of ODRs and their evolution is presented. A historical, conceptual and structural analysis of extrajudicial resolution mechanisms in Europe is carried out, especially of those designed for cross-border conflicts arising from electronic commerce.

The nature of ODRs is first presented, distinguishing between heterocompositive mechanisms (decision by a third party) and autocompositive mechanisms (negotiation or mediation between parties), as well as their advantages compared with judicial proceedings: speed, simplicity, lower cost and adaptability to cross-border digital disputes. Their limitations are also examined. The expansion of electronic commerce and the need to protect the consumer in a borderless market have pushed the European legislator to develop efficient extrajudicial means as part of the Digital Single Market agenda.

The author divides the evolution of extrajudicial mechanisms into two stages: a first stage of lack of European legislative competence. In this phase the EU did not have regulatory authority to impose ADR/ODR mechanisms, which gave rise to soft law instruments, such as Recommendation 98/257/EC or Recommendation 2001/310/EC. Both sought to improve the quality of extrajudicial procedures, but without binding effects. Sectoral regulations were also approved which only encouraged the use of mechanisms already existing at national level.

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A second stage of consolidation through hard law. After the recognition of competences, the EU began to adopt binding legislation that harmoniously regulated ADR-ODR, such as Directive 2008/52/EC on civil and commercial mediation, Directive 2013/11/EU (ADR Directive/RAL) or Regulation 524/2013 on online dispute resolution (now repealed).

The value of the monograph lies precisely in the analysis demonstrating that these rules are poorly adapted to disputes arising in the digital environment. The Mediation Directive is insufficient for online conflicts; the ADR (RAL) Directive presents deficiencies in its material scope; Regulation 524/2013 failed in its single-window system by overlapping with the network of European Consumer Centres. Hence the European Commission has put forward reforms pending approval, which the author examines in detail.

In the final section of this first part, the author analyses how regulations on digital services have gradually incorporated extrajudicial resolution mechanisms, although in a limited and uncoordinated manner. The E-Commerce Directive is presented as a direct precedent of the DSR, but its limited development of ODR mechanisms and the lack of regulatory unification in this field is highlighted.

The second part of the work, entitled "An individualized and contextualized study of the ODRs of the Digital Services Regulation", presents the detailed study of the DSR's ODR services and constitutes the core of the book. The author analyses the origin and structure of the DSR; the regulation of internal complaint-handling systems and the extrajudicial resolution mechanism of Article 21, as well as the coordination between these mechanisms and other European sectoral regulations.

The Digital Services Regulation represents a profound change in the conception of digital services regulation. The EU abandons the paradigm of digital liberalism and self-regulation to adopt a model of strong normative control over intermediaries, especially over large platforms. The author examines the origin of the DSR within the European "Digital Laws", its scope of application, and the regime of responsibility and due diligence obligations of intermediary service providers.

The definition of an online platform, according to the author, is incomplete, because platforms not only intermediate, but also actively connect users, acting as electronic mediators. Additionally, the legal uncertainty generated by the criterion of "decisive influence" to differentiate intermediary providers from underlying providers is questioned, as it affects the applicability of the DSR.

On the user side, the relevance of the protective measures introduced by the regulation is highlighted, especially for consumers, who receive additional safeguards against decisions on content moderation.

On the other hand, the author examines Articles 20 and 21 of the DSR, pillars of the ODR system applied to content moderation. The emergence of mechanisms intended to detect and manage illegal content is analysed: good samaritan clause, notice-and-action systems, trusted flaggers, etc. Likewise, the measures that platforms may adopt are studied: removal of content, suspension of services or accounts, among others. The means for challenging content moderation decisions are analysed. The main mechanisms are two. The first is the internal complaint-handling system (art. 20), mandatory for platforms, which allows the user to challenge the moderation decision directly before the platform. The second refers to extrajudicial resolution mechanisms managed by certified bodies

(art. 21). The user may turn to them alternatively or subsidiarily. The extrajudicial bodies are certified by the digital service coordinators of the Member States. Furthermore, the role of codes of conduct and other voluntary measures to encourage the use of these mechanisms is studied. The author concludes that these articles are an important but "incomplete and insufficient" response to guarantee real protection for the digital user.

Finally, a section is presented in which the problems of coordination with other European ODRs are posed. This section reveals one of the main critical findings of the work: the European system is full of overlaps, incoherences and lack of coordination between mechanisms provided for by different regulations. The interactions between the DSR ODRs and Directive 2013/11 (ADR); Directive 2018/1808 on audiovisual media services; Directive 2019/790 on copyright; Regulation 2019/1150 (P2B) and Regulation 2021/784 on terrorist content online are analysed. The analysis shows that the integration of extrajudicial mechanisms has been unsystematic, generating superpositions that complicate the work of platforms, users and resolution bodies. The lex specialis criterion does not always favour the user and, in many cases, may reduce their level of protection.

After demonstrating the lack of coherence of the current regulatory framework, the author proposes a structural reform: replacing the logic of partial coordination with a unified two-tier model. In Tier 1, unified internal complaint systems are envisaged. All internal mechanisms provided for in different regulations should be integrated into a single harmonized system based on the standards of Article 20 of the DSR. On the other hand, in Tier 2, unique extrajudicial bodies under Article 21 DSR are envisaged. The bodies of Article 21 should be responsible for all disputes between users and platforms provided for in sectoral regulations, avoiding duplications. The author understands that this centralized system would strengthen coherence, improve efficiency, allow users to clearly identify avenues of redress, and avoid burdens and confusion for platforms and Member States.

The work ends with general conclusions. The work constitutes a rigorous and enlightening analysis of the complex European architecture of extrajudicial resolution of disputes in the digital field. Its main contribution lies in adequately contextualizing the DSR ODRs within the set of applicable European regulations, revealing their fragmentary, unsystematic and inefficient nature, and proposing a unified and well-reasoned regulatory model for the future of the Digital Single Market. It is, ultimately, a courageous study for denouncing a fragmented regulation, insufficiently coordinated and poorly adapted to the particularities of the digital environment, and for formulating proposals de lege ferenda aimed at unifying and rationalizing these mechanisms.

We can only add that a global work on the European regime of extrajudicial dispute resolution in the platform economy, and specifically on the European Digital Services Regulation, was necessary. The author, Rosa Pla Almendros, succeeds in presenting it coherently in the present monograph that we have had the pleasure of reviewing. Precisely, the need to research these novel matters with critical capacity are qualities that Professor Guillermo Palao Moreno highlights in his magnificent prologue, about the author and her work.

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RODRIGUEZ BENOT, Andrés, *Le régime économique des couples en droit international privé*, The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne, Brill/Nijhoff, Leiden/Boston, 2025.

The delivery of a course at the Hague Academy of International Law represents a form of recognition for the selected person. When the Academy chooses a Spanish representative, it is also a source of collective satisfaction, as it reflects the quality of international law studies in our country. The selection of Professor Rodríguez Benot to deliver a course at the Hague Academy in completely justified from a twofold perspective: on the one hand, the bibliographical note preceding this course highlights the numerous and important academic achievements that mark his career; and on the other, the content of the course, which we review here, is a clear example of the quality and depth of his work, which has made him an important figure in the field of private international law.

The subject chosen by Professor Rodríguez Benot for his course, "*Le régime économique des couples en droit international privé*", is closely linked to one of his main lines of research. International family law, as well as international succession law, has always been among the areas to which he has devoted the greatest attention. Moreover, he has had the opportunity to approach these matters not only from the viewpoint of the academic researcher, but also as an adviser in the processes of normative harmonization carried out within the European Union, which has greatly enriched his analytical perspective.

As for the content, Chapter I, of an introductory nature, is intended to present the whole structure of the course. Chapter II is particularly important, as it serves to frame the rich and complex issues surrounding the subject of the course. As the title of the course indicates, with the reference to "couples", the treatment of the economic regime is not limited to marriages, as has traditionally been the case, but goes further, also encompassing registered partnerships. In this regard, the course begins by raising a particularly significant issue: the existence of a marriage or a registered partnership as a preliminary question, on which depends the applicability of the solutions provided to regulate the economic regime. Following this, an interesting and comprehensive comparative law analysis of the couple's economic regime is offered, in which Professor Rodríguez Benot clearly and systematically presents the main solutions in Western countries, and subsequently refers to the particularities of Anglo-Saxon or common-law systems and Muslim countries. In this context of diversity, it becomes clear that private international law solutions take on great significance. Chapter II also examines another crucial issue, which will be reflected in later chapters: the relationship between the couple's economic regime and the possibility of a crisis in the relationship or the death of one of its members. The chapter concludes with further reflections that highlight the complexity of the subject, since alongside the economic effects of the couple's relationship, personal effects also arise.

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Chapter III is devoted to the analysis of the various initiatives undertaken to unify private international law rules in this area. Following a logical structure, the chapter begins with the work of the Hague Conference on Private International Law, due to its intended universal scope, which has adopted two conventions in this field, limited to marriage (1905 and 1978), both of which have had very limited success. In the context of regional codification, the first section is dedicated to Europe, where, after a brief reference to the International Commission on Civil Status, which has adopted a Convention on the recognition of registered partnerships, the course delves into Regulations 2016/1103 and 2016/1104 concerning matrimonial property regimes and the property consequences of registered partnerships. These regulations are carefully examined in relation to their drafting process, scope of application and definitions provided in their initial provisions to facilitate their implementation. The overview of regional unification processes is completed with a brief reference to the Convention binding the Nordic countries, followed by a presentation of the initiatives developed in the Americas. Moreover, an originality within the international unification landscape is the bilateral convention signed in 2010 by Germany and France, which establishes a marital property regime based on participation in acquisitions, applicable on an optional basis. The exhaustive analysis offered in Chapter III concludes with reference to doctrinal unification efforts, where a distinction is also made between the universal and regional level.

From this point onward, Professor Rodríguez Benot focuses on analyzing private international law solutions, distinguishing between procedural matters and applicable law. In his analysis, Regulations 2016/1103 and 2016/1104 play a central role, though other international instruments and national rules are also referenced. Chapter IV, which addresses procedural issues, examines international jurisdiction following the model of the aforementioned Regulations, distinguishing between rules whose application depends on whether the economic issue arises in connection with the succession, the couple's crisis, or in disputes between the partners themselves. The procedural analysis is accompanied by a study of the extraterritorial effectiveness of judicial decisions, authentic documents and court settlements. Subsequently, Chapters V and VI are dedicated to applicable law issues from two perspectives: *ad intra* and *ad extra*. In Chapter V, addressing the *ad intra* perspective, a distinction is made depending on whether the partners have entered into an agreement governing their economic relations, with detailed analysis of the private international law issues arising from such an agreement. In cases where no such agreement exists, the determination of the applicable law is examined, with particular reference to party autonomy and the law applicable in the absence of choice, highlighting the differences that arise in this regard. The chapter also delves into other aspects related to determining the applicable law, such as problems in applying conflict-of-laws rules, including reference to multi-legislative systems and the difficulties this may create in some countries, as it is the case of Spain. Chapter VI, devoted to the *ad extra* perspective, focuses on the protection of third parties through publicity of the couple's economic regime, leading Professor Rodríguez Benot to reflect on existing publicity systems, the law applicable to registration, and its effects.

As can be concluded from all that has been said, this course is developed with a very clear and comprehensive structure regarding the couple's economic regime. An

additional merit is the rich doctrinal foundation on which it is based. Our most sincere congratulations to Professor Rodríguez Benot, whose work enriches the content of the *Recueil des Cours* by offering a rigorous and updated perspective on the couple's economic regime, which is not limited to marriage.

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RODRÍGUEZ RODRIGO, Juliana, *El matrimonio y la pareja de hecho internacionales: regulación y jurisprudencia, europea y de producción interna española. Problemas y soluciones*, Atelier, Barcelona, 2025.

This review refers to a monograph written by Professor Juliana Rodríguez Rodrigo, Professor of Private International Law at Carlos III University in Madrid, entitled "International marriage and partnerships: European and Spanish domestic laws and case law. Problems and solutions," published by Atelier Libros Jurídicos and consisting of 241 pages. The book is available in two formats: a paper version and a free electronic version, which can be accessed via the *atelieropenaccess* website. This is the second review written by the author of these lines on a monograph by the aforementioned author, so as I stated on the first occasion, it is a task that I accept with great pleasure, because reading her inquiries never leaves one indifferent, but always teaches something that invites reflection. It is therefore no coincidence that the dedication of her book refers to the culture of effort, a characteristic that precisely defines the author herself.

This monograph is structured in two distinct parts, without prejudice to the synergies and connections between them. On the one hand, it addresses the concept of marriage and, in this regard, contains three sections that comprehensively cover all current and essential aspects of its subject matter, such as the European context in which it operates, Spanish domestic legislation, and, thirdly, proposed solutions to the existing situation. The part is consequently organized into three chapters, which can be described as coherent, appropriate, and intuitive, something that all readers of the work will appreciate. Together with this, Professor Juliana Rodríguez Rodrigo addresses the phenomenon of partnerships in the second part, by a division of three chapters as well. The following lines will be aimed at a critical-analytical review of each of its parts, trying to find an adequate balance between highlighting the main conclusions reached in them and not "revealing" too much in order to avoid any hint of spoilers.

The first part stems from an indisputable reality: marriage continues to be the most common choice for people who wish to constitute a family. If we add to this the increasing number of cross border elements in legal relationships, there is no doubt about the current need to study "international marriage," as this first part is in fact titled. This is where the first of the paradoxes that the author rightly points out throughout her work arises: we have a wide range of European regulations on family and succession law Regulations (EU) No. 2019/1111, 1259/2010, 4/2009, 2016/1103, and 650/2012 but, curiously, there is no institutional instrument regulating marriage as such. In other words, the current legal context refers to the existence of European regulations based on the premise of the existence of marriage, when in fact there is no consensus on this preliminary issue: Member States, because they are in fact the ones who continue having jurisdiction over substantive family law which includes the institution of marriage understand marriage in different ways, particularly with regard to the sex of its members. Nevertheless, as Professor Juliana Rodríguez Rodrigo herself points out,

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"...we are not calling for substantive regulation of marriage at the European level, but rather for regulation under private international law...".

The current situation gives rise to various legal problems, all of which are clearly explained and also resolved by the author. The first one is the relativity of solutions: depending on the competent forum dealing with a particular case, the response offered will differ within the European Union. Clearly, this is neither convenient nor desirable in an apparently common and integrated space. This leads to the possible undermining of the free movement of persons (Article 21 TFEU), in accordance with European Union law. Underlying this, once again, is one of the perversions of the current system of sources and jurisdiction: the concept of marriage, broadly speaking, is part of public policy in the Member States, but an indiscriminate use of it can hinder the exercise of the free movement of persons, particularly with regard to rights derived from such a legal relationship, such as the right to obtain a permission of residence or the recognition of a parent-child relationship. Professor Juliana Rodríguez Rodrigo points out that the collision of such issues has been addressed by the CJEU in the *Coman* and *Pancharevo* cases, in which it concludes, jointly, that "...national legislation should give way to European legislation and, therefore, should not be applied if it contradicts the latter." Another right explored by the author as potentially affected by the absence of compatible treatment among Member States with regard to marriage is that relating to the respect for private and family life (Art. 7 CFREU and Art. 8 ECHR). Professor Juliana Rodríguez Rodrigo, referring the most relevant case law of the European Court of Human Rights, points out that this right may be affected if a marriage validly celebrated under the law of any country regardless of the sex of its members is not recognized under the ECHR, which includes EU member states.

Against this backdrop, the second chapter of the first part contains an analysis of Spanish domestic conflict of law rules. The author first reviews articles 9.1, 49, and 50 of the Spanish Civil Code, which refer to the capacity and consent of spouses and the validity of marriage, respectively. This section highlights the different scenarios arising from the impact of international public policy, including matrimonial capacity, the impediments to marriage regulated by Spanish law and the fundamental principles/rights protected by the Spanish Constitution that exist therein, as well as, in the case of consent, the impact of marriages of convenience or arranged marriages. The four scenarios that arise from a combined reading of articles 49 and 50 of the Spanish Civil Code with regard to the valid form of celebration are also reviewed.

The third chapter of the first part is very interesting, because Professor Juliana Rodríguez Rodrigo sets out, in a reasoned manner, her proposed solutions to the current situation. Here, the author discusses the limits and possibilities of the recognition method, as well as the adoption of an autonomous concept of marriage for the purposes of applying European regulations and, as a more ambitious proposal, the drafting of a European regulation on matrimonial matters, regulating the three sectors with the necessary adaptations of our discipline. In the area of international jurisdiction, she proposes that spouses should be allowed to choose the Member State in which they wish to marry. Nevertheless, she acknowledges the difficulty of this proposal, since in the case of the nullity of a marriage, it should be remembered that choice of court agreements are not permitted under the Brussels IIter Regulation. In the area of

applicable law, Professor Juliana Rodríguez Rodrigo indicates that the law applicable will be determined by the officiating authority, which will apply its own law to this issue, so that the conflict of law rules will then be referred to issues such as capacity and consent, for which the preferred connection should be the habitual residence. Thirdly, the extraterritorial validity of decisions is addressed, referring in this case to public documents recording the celebration of marriage. The chapter concludes with solutions proposed beyond the context of the European Union, with particular emphasis on the reality of polygamous marriages.

It is now time to address the second part of the work, which deals with international partnerships. As mentioned above, Professor Juliana Rodríguez Rodrigo uses the same structure as for marriages, in the sense that the overall content, including the title of each chapter, addresses the same types of issues, obviously with the necessary adaptations. We would like to emphasize that we consider this methodology to be very appropriate.

As a result, is begins by analyzing the current situation of this legal institution in the context of the European Union. It should be remembered that diversity is the main characteristic among Member States, although today most of them, in one way or another, already allow or regulate it. At the regulatory level, there is a significant global gap in the regulation of this concept, with two important exceptions. The first is Regulation (EU) No. 2016/1104 on the property consequences of registered partnerships, which we note does offer a definition of registered partnership, at least for the purposes of applying the institutional instrument in question. The second is (EU) Directive 2004/38, which, as it is well known, includes as a family member the member of a registered partnership created in accordance with the legislation of a Member State, provided that the requirements established by the host Member State are met. For its part, as the author points out, there is also case law from the CJEU, from which it can be inferred that partnerships cannot be treated in a discriminatory manner with respect to marriages, as well as case law from the ECHR in favor of the importance of protecting them. Professor Juliana Rodríguez Rodrigo concludes this first chapter of the second part by warning of the consequences of the lack of regulation at a European level.

Chapter V of the work starts from the reality of the Spanish legal system with regard to partnerships: there is a lack of both substantive and conflict of law rules in a national level. In Spain, it has been the Autonomous Communities that have dealt with their regulation in their regional regulations, in accordance with the powers they can constitutionally assume, giving rise to a varied landscape around them. Based on this reality, Professor Juliana Rodríguez Rodrigo addresses several problems, two of which will be highlighted in this review.

The first refers to the applicable laws for determining whether a foreign partnership can be recognized as valid in Spain, for which it correctly distinguishes between intra-European partnerships (created in accordance with the legislation of a Member State) and extra-European partnerships (the opposite scenario). With regard to the former, the author considers that, based on the case law of the CJEU and the ECHR, there can be no doubt that they must be recognized in the other Member States. With regard to the latter, and based on Article 12.1 of the Civil Code in the sense of using the categories of the forum in order to select the applicable law, it is assumed that a partnership constitutes a family relationship outside of marriage, and therefore the

most appropriate provision for its regulation is article 9.1 of the Spanish Civil Code and, failing that, article 9.10 of the Spanish Civil Code, adapting them to the fact that it is not one member, but two, who are affected by the applicable law.

The second issue addressed concerns the application of Spanish law to international partnerships, with the difficulty that our legal system is a multi-legislative one in matters related to this area. Professor Juliana Rodríguez Rodrigo first addresses the issue of succession, explaining the problems posed by the general conflict rules of Regulation (EU) No. 650/2012 and article 36.1, which is responsible for determining the specific Spanish legislation applicable. The second effect selected by the author is the post-separation maintenance, for which she refers to the 2007 Hague Convention. Thirdly, the property effects are addressed, analyzing the aforementioned Regulation (EU) No. 206/1104, including in particular its Article 33.1 and the reference it makes as a first rule to the internal conflict of law rules of the law designated, i.e., Spanish law. With regard to these three effects, the author takes into account that there will be many Autonomous Communities that lack regulation on these matters — those that lack powers of legislating in civil matters by virtue of Article 149.1.8 of the Spanish Constitution — for which it will be necessary to consult Spanish case law regarding the possibility of the surviving partner having any inheritance rights; whether any type of compensatory pension can be applied, as well as the specific effects on the couple's assets. Here, Professor Juliana Rodríguez Rodrigo rigorously addresses the most recent case law of the Supreme Court and, when necessary, of the Constitutional Court.

The limited protection offered by Spanish law to partnerships, and the legal uncertainty that this entails, gives the author the opportunity to make a series of proposals for improvement. In general, she recommends the enactment of a national law on partnerships, similar to the French PACS, thus offering people who wish to form a union two clearly defined legal alternatives — without prejudice, of course, to those who wish to live completely outside any regulation —: marriage, on the one hand, and partnership, on the other. In relation to the latter, Professor Juliana Rodríguez Rodrigo refers to the fact that this national legislation would regulate not only the effects of the partnership as such, but also its validity and existence, as well as the incorporation of a national registry of them. From a conflict of law perspective, and referring particularly to property effects, the author also considers the need for regulation, both to resolve cases not included in the scope of Regulation (EU) No. 2016/1104 and those that are, but in which the model of reference to multi-unit States leads to the application of Spanish conflict of law rules — which, we emphasize, do not exist today —. In general, it is recommended that the national conflict of law rule should be inspired by the European one, i.e., the use of limited party autonomy will be offered first — choosing between nationality or habitual residence or the law of the State of creation of the partnership — and, in the absence of choice, opting as an objective connecting factor for the law of the State under whose law the partnership was created.

The author concludes with some findings that truly demonstrate the quality of her work. She reminds us that the institution of marriage and partnerships deserve to be studied and regulated, as both are necessary prerequisites for subsequently addressing related family law issues, such as property regimes and maintenance obligations. The same can be said of the inheritance rights of the surviving spouse/member of a

partnership. The author calls for attention in two aspects: both material — obviously focusing on partnerships, as there is a lack of general state law in Spain — and private international law ones, in this latter case with solutions from both international (particularly European) and domestic sources.

All of the above leads us to invite those interested in studying both legal institutions to read the work of Professor Juliana Rodríguez Rodrigo. We can guarantee that her work will provide many of the answers to the questions raised and, where appropriate, will also provide a starting point for the new challenges that she raises with soundness and expertise.

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SYbIL | Spanish Yearbook of International Law

SCHREINMOSER, Cristoph R., *Salvaguardar lo intangible: el Derecho Internacional ante la destrucción intencional del patrimonio cultural inmaterial*, Bosch Editor, Barcelona, 2025.

Can anyone imagine being prohibited from speaking their mother tongue with their family? From practicing their religion or visiting their places of worship, from going to the cemetery to honor their dead, from singing their traditional songs or listening to their music? From enjoying the theatre of their own culture, practicing their art or craftsmanship, celebrating their local festivals and rites, cooking their traditional dishes, or producing their customary herbal remedies? And, moreover, from transmitting their ancestral knowledge and wisdom to their children or to future generations? Provided that the rights of others are not violated and that no one's physical or moral integrity is endangered, one must ask: What is the problem with all of this?

When we speak of values in Europe, we usually think of those enshrined in Article 2 of the Treaty on European Union: human dignity, freedom, equality, democracy, the rule of law, and respect for human rights, which are principles intended to promote pluralism, non-discrimination, tolerance, justice, and solidarity. However, these values should by no means be confined to the European continent, as they are genuinely universal values, applicable in times of both peace and war. Nevertheless, we rarely associate these values with intangible cultural heritage: the practices, uses, traditions, celebrations, artistic expressions, or worldviews that shape the cultural identity of a people and provide their members with a deep sense of belonging and security. While it is already uncommon to link values to tangible cultural heritage, namely, physical assets such as monuments, works of art, or places of worship, it is even less frequent to relate them to the intangible. Yet it is precisely this intangible heritage that gives meaning to communal life and to the way in which a human group understands and experiences the world. Intangible cultural heritage ultimately constitutes the legacy that a family, a community, or a people transmits to future generations once those who embodied it are no longer present.

In his work *Safeguarding the Intangible: International Law in the Face of the Intentional Destruction of Intangible Cultural Heritage*, published by Bosch Editor with the sponsorship of the Salvador de Madariaga University Institute of European Studies of the University of A Coruña and the Xunta de Galicia, Christoph R. Schreinmoser addresses this essential aspect of social life through a cartesian and rigorously logical approach. Intangible cultural heritage, the author argues, helps define a group as a people and enables individuals to identify with their community and to relate to it with confidence and stability. This is a field that is often ignored or undervalued, whose importance becomes fully apparent only when it is lost or denied, at which point it reveals itself as fundamental to personal existence, to having points of reference, and to social interaction. Schreinmoser further demonstrates that intangible cultural heritage is directly connected to human dignity and, by extension, to human rights, making its protection and preservation a key issue for the future of peoples and for preventing their forced assimilation into dominant majorities.

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The book raises and analyzes fundamental questions: how do International Humanitarian Law, International Human Rights Law, and International Criminal Law protect intangible cultural heritage against its intentional destruction? Do international treaties and soft law instruments provide sufficient protection? Is a clear distinction made between tangible and intangible cultural heritage? Have the Geneva Conventions and their Additional Protocols addressed this issue? Has UNESCO done enough in this field? Can the International Criminal Court prosecute the intentional destruction of intangible heritage as an international crime? Could such destruction be considered a form of cultural genocide? Have United Nations human rights bodies and committees addressed intangible heritage, or have they focused exclusively on tangible heritage? Is protection more effective at the regional level than at the universal one?

Schreinmoser offers far more than is usually expected from a scholarly work. Academic books are generally expected to be formative, analytical, and clarifying, and this work undoubtedly fulfils those expectations. But, in addition, it proves to be surprisingly engaging, perhaps due to its close connection with the world of culture. Although it is a legal study, it is also a cultural and anthropological work. The author presents his arguments in an objective and neutral manner, without emotional excess, yet with a clear, orderly and highly readable style. Through solid and well-structured reasoning, he demonstrates that intangible cultural heritage is a matter of International Law and that its intentional destruction entails legally relevant consequences within this field. The numerous and carefully selected examples included in the book help to grasp the true scope of the problem and allow the conclusions to emerge logically from the cases examined.

The author operates in a relatively novel field, in which he acts as something of a pioneer and in which he has also had to rely on legal imagination to identify practices that lead to the destruction of intangible cultural heritage, such as removing children from their communities to prevent the intergenerational transmission of their own culture. Schreinmoser also demonstrates considerable cultural expertise by identifying practices in highly diverse contexts, ranging from Afghanistan to China, Timbuktu, and Indigenous peoples of the Americas or Australia. Another merit of the work lies in its creative character, as a substantial part of the analysis is based on the author's own observation and personal interpretation of the provisions of international conventions that are directly or indirectly applicable. His interpretation of fundamental legal concepts and principles for safeguarding intangible heritage is autonomous, rigorous and persuasive.

In conclusion, the author reviews, selects, identifies, analyses, argues, and interprets, ultimately reaching conclusions that are both reasonable and well substantiated. While he shows that intangible cultural heritage does not currently enjoy the level of protection it deserves under International Law in general, nor within any of its specific branches, he also convinces the reader that a distinct branch of International Law devoted to cultural heritage already exists, one whose ultimate foundation lies in human dignity. Above all, Cristoph R. Schreinmoser makes clear that this is not a secondary or expendable issue, but rather a central one for preserving the rights, idiosyncrasy, and way of life of human groups: the cultural heritage transmitted from parents to children, in which cultural rights are manifested in both tangible and intangible forms.

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TORRES CAZORLA, María Isabel, and GARCÍA RICO, Elena del Mar (Dirs.); BAUTISTA HERNÁEZ, Andrés, and PASTOR GARCÍA, Alicia María (Coords.), *Medio ambiente, seguridad y salud: Grandes retos del Derecho en el Siglo XXI*, Tirant lo Blanch, Valencia, 2024.

The relationship between the environment, safety and health is no longer questioned today. It is an unequivocal, close, complex and multidimensional correlation between three areas that were once analysed separately, but are now interconnected with a common system of risks, policies and human rights protection that shapes the current international stage. Contemporary international law reflects and regulates this interconnectedness.

Environmental and health challenges are no longer merely technical or sector-specific issues; they constitute challenges to (human) security. Protecting health and safety necessarily requires safeguarding ecosystems, just as environmental protection demands safe and healthy conditions for people.

As is well known, the consequences of environmental degradation — such as air, water and soil pollution, biodiversity loss, deforestation and climate change — have direct effect on human health, leading, for instance, to respiratory, cardiovascular and infectious diseases or illnesses resulting from extreme weather events. Environmental degradation also generates food, water and energy insecurity, which can result in diverse tensions and conflicts and therefore pose risks to international peace and security. The COVID-19 pandemic made clear, among other things, that health issues have direct implications for both national and international security, while also raising awareness of the relevance of the concept of "health security", widely used in recent times by the United Nations and the World Health Organisation (WHO). This concept requires strengthened public health systems, epidemiological surveillance and enhanced cooperation among international subjects and actors involved.

For all these reasons, I consider that this relationship between the environment, safety and health must be studied jointly, without losing sight of the framework provided by international law as a whole. This relationship also presents major regulatory challenges for contemporary international law. The approach adopted by the co-directors of this collective volume — Professors María Isabel Torres Cazorla and Elena del Mar García Rico — is therefore particularly appropriate. They have selected seven major themes, grouped into three overarching areas — environment, security and health — which are analysed in light of the challenges they pose in the current international context.

Thus, the first part of the book is devoted to the environment and is composed of two chapters. In Chapter 1, *María Isabel Torrez Cazorla* (University of Malaga) examines whether the International Court of Justice (ICJ) has devoted too little or too slow attention to environmental protection. To address this question, the author reviews how the environmental protection considerations have appeared in the ICJ case law and pays particular attention to the recent work of various principal organs of the United Nations

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concerning States' possible obligations regarding climate change, which led to a request for an advisory opinion from the ICJ on this complex issue.

In Chapter 2, *Nicolás Carrillo Santarelli* and *Francesco Seatzu* (University of Cagliari) introduce the protection of future generations as a transformative element of international law within the broader discussion of environmental, security and health challenges. This issue is also explored as a guarantee of the environment for future generations. In this regard, future generations are studied from the perspective of the possible international subjectivity of the legal order that protects their interests, and it is analysed whether those who have not yet been born may be afforded legal protection. The authors advance that they consider a novel hypothesis, namely that safeguarding future generations is both a legitimate aspiration and consistent with the recognising rights for future generations and corresponding obligations to preserve and respect them.

The second part of the volume focuses on various issues related to security, which are addressed in three chapters. Thus, in Chapter 3, *Javier Roldán Barbero* (University of Granada) examines the relationship between environment and international conflict. The author considers internal conflicts through a geostrategic lens and places environmental protection among global public goods. He then analyses the interplay between the environment, peace and security, concluding that a green dimension of the international humanitarian law has emerged on the international scene.

The following two chapters explore topics linking security with health. In Chapter 4, *Daniel García San José* (University of Seville) analyses the responses of international law to the risks and challenges posed by neurotechnologies to human dignity and the protection of fundamental rights and freedoms. Special attention is given to the interaction between artificial intelligence and neurotechnologies, which have undergone significant recent developments. In Chapter 5, *Elena del Mar García Rico* (University of Malaga) examines the interactions between security and health from the perspective of unilateral sanctions, which have become particularly relevant in contexts of health vulnerability such as the COVID-19 pandemic. This author raises the legality of such sanctions and the extent to which countermeasures may affect the protection of human rights in general and the right to health in particular.

Health is the third major topic addressed in this volume through two chapters. In Chapter 6, *José Manuel Sánchez Patrón* (University of Valencia) analyses the declaration of a "public health emergency of national concern" made by the WHO Director-General in during the COVID-19 pandemic. The analysis is carried out from a normative point of view, with particular emphasis on its shortcomings revealed in practice and offering proposals for reform to ensure better and more appropriate responses to future pandemics.

Finally, Chapter 7, by *Jorge Antonio Climent Gallart* (University of Valencia), provides a detailed study of the case law of the European Court of Human Rights (ECtHR) concerning the forced sterilisation of Roma women. The analysis focuses primarily on the ECtHR's jurisprudence on Articles 3 and 8 of the European Convention on Human Rights (ECHR), which refer to the right to protection of private and family life, and the right not to be subjected to inhuman or degrading treatment, respectively. This chapter

also offers a critical assessment of the ECtHR's failure to rule on Article 14 of the ECHR which provides for the right not to be discriminated against in relation to the situation of Roma women subjected to forced sterilisation.

In my view, this book deals with highly topical issues and is an essential reading for understanding the complex triad of "environment, security and health". Beyond the *Introduction*, the volume might have benefited from a chapter specifically devoted to analysing the points of convergence and interaction among these three thematic areas which would have provided ever greater contextualization. Nevertheless, the scholarly contribution of this collective book is unquestionable, particularly in a doctrinal field where academic studies in Spanish remain scarce.

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